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7.1 (autumn):
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If you would like to contribute an Article or short Note to a future issue, please visit the *Amicus Curiae* webpages to view the Style Guide and submission information.

Note: submission dates in the box on page iii are for final submissions. Earlier submissions are most welcome.

Editor's Introduction

Maria Federica Moscati

University of Sussex

Welcome to the second issue of the sixth volume of the new series of *Amicus Curiae*.

This is my first issue as joint editor of the journal,[1] and I thank the Consultant Editor, Professor Michael Palmer, and the Director of IALS, Professor Carl Stychin, for offering my co-editors and I this opportunity.

Academic publishing is a tool for knowledge production, but it is also about relations and collaboration; these two aspects of academic publishing are distinctive in *Amicus Curiae*. My previous experience with the journal was as guest editor on a special section on Children's Rights: Contemporary Issues in Law and Society (*Amicus Curiae* 5(2), 5(3), 6(1)). During that endeavour, the collaboration, between authors, editors and production team was a process that was relational, dynamic and creative. The relational approach was made possible to accommodate more creative contributions than the usual traditional legal publication. Conscious that the law is the product of culture, the already well-established Visual Law section of the journal has been and still is inspirational in accommodating a variety of other creative outputs, including videos on the journal's YouTube channel and poems. Opening up to artworks, videos and poems does not, however, restrict the space for more traditional legal analysis and more practical contributions from practitioners. Thus, *Amicus Curiae* will continue to serve as a bridge between legal academia and legal practitioners, but it is also a journal that offers a space to all the different ways in which law is perceived, understood, designed and practised.

The issue starts with a special section on Surrogacy Beyond the Carceral: Culture, Law and Lived Experience, guest-edited by Maya Unnithan and myself. It starts with a brief "Introduction" from the guest editors that also includes a summary of the articles, and then

[1] My co-editors are Professor Pablo Cortes, University of Leicester, and Dr Amy Kellam, School of Advanced Study University of London.

moves on to showcase a selection of papers that were presented during a workshop at the Centre for Cultures of Reproduction, Technologies and Health at the University of Sussex.

This issue then presents two articles. The first is by Canan Çetin, Senanur Uysal, Kumru Isli and Ceren Öcalan. This discusses the findings of the research project "All the Same with Dance", which investigated how cultural activities, particularly dance, contribute to migrant integration. Adopting qualitative methods, including semi-structured interviews, content analysis and focus group discussions, the study explored how dance fosters perceptions of commonality and helps reduce biases. The findings, presented in the article, show the transformative role of dance in enhancing cultural integration.

The second article by Yang LIN explores the growth and implementation of online dispute resolution (ODR) within China's e-commerce sector, with a focus on the self-regulatory measures adopted by Alibaba's Taobao platform. It outlines the development of ODR in China, uses Taobao's crowdsourced jury system as a case study and reviews the platform's rules and dispute resolution processes. The analysis, while showing Taobao's influence on China's e-commerce governance, highlights Taobao's effectiveness in handling disputes while confronting key issues such as transparency, data privacy and legal accountability.

This issue then moves on to a note by Chris Thorpe that focuses on limited liability partnerships (LLPs) and the related tax regime. The author considers the concerns about confusion between employment and partnership statuses, highlighting the need for specific anti-avoidance regulations for LLPs.

After that, the issue presents six book reviews. Michael Palmer leads with a review of *Facing China: The Prospect for War and Peace* by Jean-Pierre Cabestan, a work that focuses on the growing tensions between the People's Republic of China (PRC) and the United States of America and analyses the strategic, political and ideological dynamics and the historical context shaping this relationship. This is followed by Ling Zhou's examination of *Consumer Protection in Asia* edited by Geraint Howells, Hans-W Micklitz, Mateja Durovic and André Janssen, a collection of essays which taken together offer a comparative overview of consumer protection laws across various Asian jurisdictions.

Johannes San Miguel Giralt reviews *Constitutional Change in the Contemporary Socialist World* by Ngoc Son Bui. The book adopts a comparative approach to explore the constitutional identity of the PRC, Lao, Vietnam, the Democratic People's Republic of Korea (North Korea) and Cuba, showing how the socialist constitutional frameworks are refined through the tension between adoption and resistance to Western values. Then, Patricia Ng reviews *Lawyers*

for the Poor: Legal Advice, Voluntary Action, and Citizenship in England, 1890-1990 by Kate Bradley. This book investigates the development of free legal advice and assistance in the late 19th century and onwards. It looks at the manner in which access to these services has changed from 1890 to 1990, a period during which legislative developments were introduced to support and protect citizens from barriers they could face within housing, health and/or work.

In her book review, Marian Roberts discusses *Children's Voices, Family Disputes and Child Inclusive Mediation: The Right to be Heard* by Anne Barlow and Jan Ewing. The book intervenes in the current debates concerning family justice and draws on empirical data from a research project in which the key participants were children who had experienced child inclusive mediation that gives children the opportunity to have their voices heard in family mediation. Finally, in a second review for this issue, Professor Palmer offers an evaluation of Albert Hung-yee Chen and Po Jen Yap's *The Constitutional System of the Hong Kong SAR: A Contextual Analysis*. This examines the changing constitutional position of Hong Kong as the former colony becomes increasingly incorporated into the mainland PRC.

In honour of the work of Tony Whatling, who sadly passed away recently, Mohamed M Keshavjee offers a heartfelt tribute in his obituary celebrating the dedication Tony gave to the theory and practice of mediation in the United Kingdom and abroad. Allow me also to offer a personal memory of Tony who, through guest lectures, generously shared his knowledge with several of my students who took the alternative dispute resolution module which I used to teach at SOAS. His classes were lively, engaging and full of passionate personal recollections of his lived experience of mediation practice.

The following section, Visual Law, presents two contributions. The first, by Salvatore Fasciana, investigates the practical use of visual law and legal design in consumer protection within the video game industry. It focuses on the Pan European Game Information (PEGI) system and its limitations in game classification. While PEGI successfully conveys regulatory concerns through a standardized and accessible visual format, its content-based approach is shown to oversimplify the complex nature of video games and to neglect the dynamics of human–machine interaction. To address these shortcomings, the article advocates a PEGI model grounded in a classification system based on "gameplay bricks"—the rules and mechanics that define the gaming experience. By incorporating principles from visual law and legal design, this approach seeks to improve clarity, accessibility and comprehension of the legal messages conveyed through icons and indicators. Legal design plays a

crucial role in translating rule and mechanic structures into visual elements that empower consumers to make informed choices, aligning with PEGI's foundational policy goals.

In the second Visual Law piece, Lucy Finchett-Maddock, Daniel Hignell-Tully and Anders Hultqvist bring the reader into the experience of "A Royal Dis-Sent: Re-Writing and Re-Imagining a Series of Repetitive Beats CJA 1994", an event held at House of Annetta on London's Brick Lane on Sunday 2 November 2024. The gathering marked the 30th anniversary of the Criminal Justice and Public Order Act (CJA) 1994 receiving royal assent, which notoriously criminalized raves and banned music "characterised by the emission of a succession of repetitive beats" (section 63(1)(B)). The event explored the intersections of sound, law and aesthetics, unravelling themes of prohibition, nomadism, repetition and property. Organised by Dr Dann Hignell-Tully (London Guildhall) and Dr Lucy Finchett-Maddock (Bangor University) as part of the transdisciplinary project Instrumenting(s), the workshop investigated the relationships between sound, property and law. It examined how legalities and their resistances shape the history of land, employing legal, scientific and artistic research to develop a "geosocial instrument."

The Editor thanks Eliza Boudier, Narayana Harave, Michael Palmer and Marie Selwood for contributing to the production of this issue.

Enjoy your reading.

Addendum

For the article "The Need to Update the Equality Act 2010. Artificial Intelligence Widens Existing Gaps in Protection from Discrimination", published in *Amicus Curiae* 6(1) (2024): 142-168, the author Dr Tetyana (Tanya) Krupiy would like to make the following small addition to her text. "I would like to thank Njeri Njaggah and Jason Highfield for their valuable research assistance. Additionally, I would like to thank members of the Bonavero Institute of Human Rights (University of Oxford) and individuals who were visiting researchers at the Bonavero Institute of Human Rights in June 2024 for providing feedback on a draft of a concept paper for this article."

Corrigendum

In Maria Federica Moscati. "Diversity, Inclusion and Equality in Mediation for Family Relations." *Amicus Curiae* 5(1) (2023): 126-143, the word "eight" at page 130 in footnote 3 and at page 135, line 3, should read "nine".

Special Section:
Surrogacy Beyond the Carceral: Culture, Law and Lived Experience, edited by Maya Unnithan and Maria Federica Moscati, pages 229-334

Introduction to Surrogacy Beyond the Carceral: Culture, Law and Lived Experience

Maya Unnithan

and

Maria Federica Moscati
University of Sussex

This special section presents some of the papers and reflections that were delivered during the "Surrogacy Beyond the Carceral: Culture, Law and Lived Experience" Workshop organized by the Centre for Cultures of Reproduction, Technologies and Health (CORTH) and the Department of Liberal Arts, Indian Institute of Technology, Hyderabad, and held at the University of Sussex in June 2024.[1]

CORTH has enabled stimulating and open discussion amongst all its members to create interdisciplinary academic and policy fora and collaboration on sexual and reproductive rights, health and human reproduction. The idea of the special section developed through several conversations and a previous workshop that we had on how anthropology and law could collaborate specifically on surrogacy and on how combined strategies could be developed to influence current legislation and policy beyond the lens of criminalization.[2]

As an area that inherently requires interdisciplinary and transdisciplinary liaison, surrogacy has posed challenges to the law,

[1] See full report by Aishwarya Chandran. We wish to thank Dr Anindita Majumdar for her invaluable contribution to the organization of the workshop and all presenters for generously sharing their research.

[2] The literature on the relation between law and anthropology and on how they can collaborate on several aspects of life is vast, and it is outside the scope of this brief introduction to review it. Thus, we signpost the reader to other sources. See, for instance, Vetters & Margaria and the literature they review (2024); and Mundy (2002); Moore (2005); Pirie (2013); Moscati (2014); Foster & Ors (2016); Foblets & Ors (2022).

demanding in-depth renewed reflections on legal frameworks concerning the family, reproduction, human rights (including child rights) and ethics (Trimmings & Ors 2024). However, legal developments do not keep up with the changes in society and in technology. The law is not only slower but also, in certain legal systems, it is resistant to adaptation. Reasons for such resistance are several, including stigma, a politicized use of law in matters of reproduction, and the possible application of law to limit the rights of specific social groups and their involvement in public life. At the same time, surrogacy encourages rethinking of traditional notions of kinship, parenthood and bodily autonomy while raising profound questions about power, exploitation and agency (Unnithan 2018). Interdisciplinary collaboration is thus necessary to throw a spotlight on such limitations, to protect and enhance the rights and interests of those involved in the surrogacy journey. Attention to historical, contextual, social and cultural detail can inform legislative developments enabling laws and their interpretation to be less influenced by stigma and stereotypes concerning the family, procreation, gender roles and social relations.

Legal systems worldwide take diverse approaches to regulating surrogacy, reflecting differences in societal values, political priorities and ethical norms (Horsey 2024; Fenton-Glynn & Scherpe 2019). Some countries, such as India, have banned commercial surrogacy outright, citing concerns about exploitation and commodification (see in this special section Jana & Kotiswaran; Unnithan & Kothari). Others, like the United States (US), have varying regulations depending on state jurisdictions, with some states allowing commercial surrogacy and others prohibiting it entirely (see Jacobson in this special section). Some others like Ukraine and Russia have become hubs for international surrogacy due to their permissive legal frameworks, attracting intended parents from jurisdictions with stricter laws (Weis 2021). Similarly, surrogacy poses several legal challenges to parental rights, contract enforcement, human rights and nationality issues. For instance, cross-border surrogacy arrangements frequently lead to children being stateless or lacking clear citizenship, as countries differ in their recognition of parental rights (Iliadou 2024).

The acceptability of surrogacy varies widely across cultures. For example, in some societies, surrogacy is seen as an act of altruism within extended families, while, in others, it is viewed as taboo or unethical (Teman 2010; Pande 2014). These perceptions are further shaped by the power dynamics between intended parents and surrogates, coming from different social groups and diverse race, class and nationality

backgrounds. As discussed during the workshop at CORTH, cross-cultural analysis such as that provided by anthropology can offer illuminating comparative insights on family, kinship and motherhood in contexts such as surrogacy where there is a separation between genetic, gestational and social parenthood. In addition, alongside ethnographic insights into the lived experiences of surrogates, intended parents and children born through surrogacy, these narratives question legal generalizations and shed light on the nuanced realities of surrogacy arrangements.

Critical cross-disciplinary feminist perspectives can ensure that ethical considerations, such as informed consent and surrogate autonomy, are integrated into legal frameworks. At the same time, contextually sensitive research can inform policies that address the socio-economic conditions of surrogates, guaranteeing fair compensation and adequate healthcare. Policy-makers can use ethnographically produced empirical data to understand the impact of surrogacy laws on families and communities, creating more inclusive and effective regulations, to develop awareness-raising initiatives that address misconceptions and empower surrogates and intended parents to make informed decisions within the legal and cultural contexts of their arrangements.

Legal systems struggle to address disputes over parental rights, citizenship and the commercialization of surrogacy, while ethical concerns about exploitation, commodification and cultural appropriateness persist. Thus, a collaboration between feminist ethicists, anthropologists and the law can also positively impact on the resolution of disputes that arise during the surrogacy journey, where their insights can help courts, mediators, arbitrators and lawyers to resolve conflicts by considering the cultural values and social norms of all parties involved. By showing that families take different shapes and procreation occurs in diverse ways, including through surrogacy, our collaborative research helps to dispel the moral panic felt by many legislators and judges of going against nature and encourages legal developments towards protection (Moscati 2010).

[A] BEYOND THE CARCERAL

Over the past decades, the regulation of surrogacy has largely been shaped by a carceral logic—a reliance on restrictive laws, criminalization and punitive frameworks aimed at controlling surrogates, intended parents and the surrogacy sphere itself. As demonstrated by the participants at the CORTH workshop, and by the articles in this special section, while

such approaches are often justified as mechanisms to protect vulnerable parties, they frequently reproduce inequalities and reinforce systems of surveillance and coercion.

Critical social science insights reveal that law is not neutral or universal; it is the product of specific cultural, political and economic forces (Palmer 2024). This is true for surrogacy too. For example, as suggested by the contributors to this special section, carceral regulation often assumes a nuclear, heteronormative family ideal while marginalizing or stigmatizing alternative family structures, such as those embraced by queer couples or communities with collective approaches to child-rearing or single women. Thus, academic disciplines which emphasize and celebrate cultural difference and see value in the lived experiences of individuals can provide the law with complementary tools to navigate on-the-ground complexities.

Feminist and anthropological literatures have long illuminated the manner in which laws surrounding reproduction reflect and reinforce societal norms about family, gender and economic value (Browner & Sargeant 2011). Similarly, at the heart of carceral approaches to surrogacy lies a complex interplay between legal frameworks and the cultural constructions of kinship, labour and morality. In fact, in many jurisdictions, surrogacy laws are shaped by anxieties about commodification, exploitation and morality that are deeply rooted in cultural and historical contexts (see Unnithan & Kothari in this special section), and, in such circumstances, nuanced interpretations of kinship and motherhood would equip law with the necessary sensitive and ethically robust approaches necessary to address the diverse realities of surrogacy.

The workshop "Surrogacy Beyond the Carceral" brought together legal scholars, practitioners, feminists, anthropologists and sociologists working on surrogacy who discussed the social and cultural ideas that underpin the concepts, language and practice of surrogacy legislation in a variety of legal systems and their legal cultures. Drawing on notions of reproductive governance, access to justice, human rights and critiques of the carceral propensity of the law, the workshop addressed the following questions:

1 What are the ways in which cultural and religious ideologies shape what is illegal/legal regarding surrogacy in the law?
2 How is altruism configured in this discourse?
3 What are the alignments/misalignments between surrogacy law and human rights?

4 How does this play out in the context of arguments regarding the best interests of the child in queer reproduction?

5 What forms of existing legal interventions inspire laws on surrogacy?

The workshop moved beyond the narrow frameworks of prohibition and punishment to explore alternative, transformative approaches to surrogacy. By examining surrogacy through critical, interdisciplinary and decolonial lenses, the participants in the workshop interrogated the assumptions underpinning carceral approaches to imagine more equitable and inclusive ways to understand and govern this practice. To move beyond the carceral, the participants raised additional questions for further investigation such as: how can legal frameworks better account for the diverse cultural practices and values that inform surrogacy? What role can ethnographic research play in shaping policies that prioritize the well-being, autonomy and dignity of all parties involved? How can social science perspectives challenge and transform legal narratives that perpetuate inequalities?

Integrating legal and cross-disciplinary perspectives, a new path toward rethinking surrogacy governance, policy and practice can be drawn. Community-based, contextual and feminist models of surrogacy regulation that emphasize mutual aid (Bailey 2011), collective decision-making and shared responsibility emerge as viable alternatives to punitive approaches. These models draw on anthropological and other insights into the importance of social networks, cultural reciprocity and care economies in shaping reproductive labour. Through such a lens, decriminalizing and destigmatizing surrogacy becomes not just a legal project but a cultural one, and above all we are encouraged to face the challenge to think beyond static legal categories and to envision surrogacy as a dynamic practice embedded in relationships of trust, solidarity and shared meaning.

This introduction to "Surrogacy Beyond the Carceral" calls for a fundamental rethinking of how we understand and engage with surrogacy. Rather than relying on punitive measures that criminalize and constrain, we advocate for approaches that promote reproductive freedom, equity and justice. Such an agenda requires us to confront uncomfortable truths about privilege, power and exploitation, while also envisioning new possibilities for care, connection and collaboration in reproductive practices.

We hope this special section inspires critical dialogue and collective action toward a future where surrogacy is no longer a site of contestation and control but a realm of possibility and empowerment. Collaboration

between our disciplines can lead to more inclusive, just and culturally sensitive approaches to surrogacy, addressing the diverse realities of this practice in a globalized world. Future efforts should focus on joint research, cross-disciplinary education and the integration of contextually informed insights into legal reforms, ensuring that surrogacy arrangements respect the rights and dignity of all parties involved.

[B] THE SPECIAL SECTION

By adopting a comparative and interdisciplinary approach, the special section showcases five articles that address a variety of issues concerning social and legal developments of surrogacy regulations and their impact on a variety of legal systems and their cultures.

Heather Jacobson opens the special section with her analysis of commercial surrogacy in Texas. Drawing upon empirical data, Jacobson emphasizes how a neoliberal pro-industry stance in a state with a strong evangelical base enables legislative support for surrogacy and shapes the experience of Texas reproductive work. However, Jacobson rightly questions how the current precarity of abortion care in the US has the potential to disrupt the surrogacy industry in new ways.

Brian Tobin follows with an account of recent legal developments on domestic and international surrogacy in Ireland through the Health (Assisted Human Reproduction) Act 2024. In particular, Part 7 of the Act introduces a restrictive model of domestic surrogacy regulation, particularly surrounding the requirement for the surrogate's consent to a parental order. This model, Tobin argues, appears to be based on Irish policy-makers' misunderstanding of a judgment of the Supreme Court concerning surrogacy arrangements and the principle of *mater semper certa est* (ie motherhood is certain). In doing so, this model of surrogacy regulation undermines the rights and interests of the intended parents and their surrogate-born children, infringing upon children's rights, and familial rights and the state's concomitant obligations in relation to same, under the Constitution of Ireland.

With a focus on child rights, Lottie Park-Morton then examines the extent to which the best interests of the child, as protected under Article 3 of the United Nations Convention on the Rights of the Child 1989, has been adopted when developing legislative responses to surrogacy. By comparing the legal systems of Sweden, England and Wales, and California the author argues that the concept of the best interests carries a significant risk of being a term of empty rhetoric and

seeks to reinforce the value of using child's-rights impact assessments to ensure a child-centric approach to surrogacy regulation.

Two articles focusing on India then follow. Madhusree Jana and Prabha Kotiswaran analyse the legislative framework on women's reproductive labour in India and examine the Assisted Reproductive Technology (Regulation) Act 2021 and the Surrogacy (Regulation) Act 2021. By drawing on empirical data, the authors argue that such legal frameworks, by prohibiting commercial surrogacy and allowing only altruistic surrogacy, undermine the reproductive autonomy of the women involved. Their findings underscore the resilience of women involved in reproductive labour and reveal that the widening demand–supply gap as a result of the restrictive laws potentially fosters an underground economy where reproductive services are rendered with exploitative repercussions for the women, which demands urgent reworking of the law.

Maya Unnithan and Jayna Kothari close the special section with an account of the marginalization of "single", unmarried women in the Indian Surrogacy (Regulations) Act 2021. Analysing legal petitions filed in the Indian Supreme Court by single, unmarried women and by transgender persons and drawing on insights from legislative mobilization post-2021, the authors suggest that the current legislation in India limits the reproductive autonomy of single women. The reasons for these limits are to be found in gender biases and patriarchal concepts of marriage and personhood which frame the contexts in which the law is enacted.

[C] A VISUAL NOTE ON OUR COLLABORATION: A FEMINIST ENDEAVOUR!

To conclude this Introduction, we wish to share some final thoughts on how, in practice, our collaboration across the law and anthropology departments at Sussex has unfolded over the past 10 years, greatly facilitated through CORTH.

It has been a feminist endeavour; preserving relations, creating space for all voices involved, nurturing collaboration by addressing power imbalances and being adaptable to change were the terms of this project. We supported each other, we cheered each other on; of course, we made mistakes throughout, but we were able to overcome those by honestly and gently telling the truth to each other. We put ourselves fully into this project, overcoming limited funding, illness and logistic issues—the

picture above, where we together climbed up on the table to adjust the blinds to set up the room for the workshop, is an apt reflection of this. Drawing upon *Dance in Law, Politics and Sociology*, a dance-practice initiative developed by Maria Moscati, we are further planning to have a CORTH dance workshop on the theme of surrogacy. We approached our project with the curiosity and eagerness to learn from each other and from all the amazing colleagues that contributed to the workshop and the special section. Thanks to them for the joy they brought.

Enjoy your reading and we look forward to seeing you at CORTH!

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Maya Unnithan—*see page 332.*

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Legislation, Regulations and Rules

Assisted Reproductive Technology (Regulation) Act 2021 (India)

Health (Assisted Human Reproduction) Act 2024 (Ireland)

Surrogacy (Regulation) Act 2021 (India)

United Nations Convention on the Rights of the Child 1989

This *Is* Texas: Third-Party Reproduction in the Lone Star State

Heather Jacobson*
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Abstract

Using Centers for Disease Control and Prevention and interview data, the history and experience of commercial surrogacy in the state of Texas—one of the first in the United States (US) to permit third-party pregnancy and legislate for the surrogacy contract enforcement—is examined. Findings reveal a neoliberal pro-industry stance in a state with a strong Evangelical base has enabled legislative support for surrogacy and strongly shapes the experience of Texas reproductive work. While these state characteristics have enabled a robust surrogacy industry in Texas, the current precarity of abortion care in the US has the potential to disrupt the surrogacy industry in new ways.

Keywords: surrogacy; Texas; third-party pregnancy; assisted reproduction.

[A] INTRODUCTION

The United States (US) has a well-known, robust assisted reproduction industry which includes both traditional and gestational surrogacy arrangements. This market has developed with little national oversight, which is especially evident when examining surrogacy arrangements (Spar 2006). Any regulation of surrogacy in the US occurs not at the federal level as in many nation states, but at the state level with historic wide variation in legality, parental rights and enforceability of contracts across the country. This has resulted in well-known court cases and murky legal waters, as well as a maldistribution of precarity, access and cost across the country (Patton 2010; Jacobson 2018; Gonsenhauser 2023). This maldistribution mirrors that which is found in the international surrogacy market around the globe (König & Jacobson 2021).

* The author would like to thank Maya Unnithan, Maria Moscati, Anindita Majumdar and the participants of the Surrogacy Beyond the Carceral conference for feedback on this paper and the study participants for sharing their experiences and their expertise with her.

When I first began researching gestational surrogacy in the US in the early 2000s, I centred my inquiry on two states: California and Texas. When discussing my early work, I would frequently receive baffled questions about my selection of Texas. California? That was a well understood, as the state was known as the epicentre of assisted reproduction and the surrogacy industry in the US. People less familiar with Texas and the US surrogacy industry, however, were curious as to the relationship between Texas and the alternative family-formation route of third-party pregnancy. In the present article, I recall the historical journey of Texas, with its popular image of a deep-red Republican stronghold with a conservative populace, coming to be one of the first states in the US to not only regulate third-party pregnancy, but to be one of the few to legislate the enforcement of surrogacy contracts. I interrogate the curious history of surrogacy in the state of Texas and compare it to that of other states in the country. To contextualize the regulative history, I examine the local meanings ascribed to third-party reproduction through an analysis of interview and observation data collected from Texas surrogates and their family members, assisted reproductive technology (ART) clinicians, attorneys and surrogacy agency owners and workers. I ask, how does the state context of Texas, a state that has actively legislated against alternative family formation, such as same-sex marriage, shape the experiences of Texas surrogates? These questions are particularly timely today following the 2022 US Supreme Court decision, *Dobbs v Jackson Women's Health Organization*, which has triggered increased state regulation on abortion care and has impacted contraception and *in vitro* fertilization (IVF) access across the country, increasing precarity for reproductive healthcare.

The history of the surrogacy industry and regulation in the US

Unlike most of the industrialized world, the US historically has not (and currently does not) restrict third-party pregnancy. While three US federal agencies monitor and collect data on the medical procedures, laboratory testing, drugs and devices used in ART in the US (the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration and the Center for Medicare and Medicaid Services), they do not regulate or restrict surrogacy *per se* (Adamson 2002; Jacobson 2016). Virtually any ART procedure, including traditional and gestational surrogacy using donors/donor embryos, is currently *available* someplace in the US to any adult able to afford it. Though almost any current active procedure can be found in the US, that does not equate to it being available in any US clinic. There is wide variation across the country in terms of regulation,

restriction, enforcement and access to ART, especially surrogacy. Building on and reinforcing the variation in regulation is the fact that infertility services in the US cluster geographically, with California dominating the market and other states, as can be seen in Table 1 below, such as New Hampshire and Wyoming, having no fertility clinics. Similar to—and obviously related to—clinic maldistribution, is a maldistribution in terms of state "friendliness" to the surrogacy industry. Surrogacy in the US is a state-level legal issue, similar to other routes to family formation (such as adoption) and congruent with family law in the US. How various states became "surrogacy friendly" and others came to ban the arrangements is a curious and complicated history. The beginnings of commercial surrogacy in the US can be seen with attorneys acting as brokers between couples experiencing infertility and women willing to be artificially inseminated and turn over their parental rights, starting in the mid-1970s. This market was small with estimates of only one hundred or so arrangements by the early 1980s. Certain attorneys acted as brokers—most famously Noel Keane in Michigan. His activity in that state precipitated Michigan becoming one of the few states with outright bans on surrogacy (banning payments to surrogates and third parties and voiding paid contracts) (Markens 2007). Though the numbers remained small, public concern grew, especially following the closely watched *Baby M* case in 1986 and the *Johnson v Calvert* case in 1993. These concerns led to several attempts for national legislation on surrogacy, which were ultimately futile, and the issue remained—and continues to remain—a state-level one, even following the introduction of IVF and the ability to separate gestation from biological and social mothering, which resulted in the numbers of surrogacy arrangements beginning a dramatic climb.

Though efforts for national response were futile, some individual states began to respond following *Baby M* and *Johnson v Calvert*, and a patchwork of varying laws, bans and regulations began to develop around surrogacy in the US. Sreenivas and Campo-Engelstein (2010: 6) conceptualize these US state surrogacy laws at the time to be categorizable into three types: 1) state "laws that permit surrogacy contracts by outlining the criteria for the contracts to be lawful and enforceable"; 2) state laws "stating what is *not* legal with regards to surrogacy"; and 3) state "laws … that mention surrogacy in the context of other civil laws". The majority of states that had one (or more) of these surrogacy law types from the 1980s through the turn of the century were largely type two, restricting or prohibiting the practice, banning payments to surrogates, for example, or voiding paid contracts. Most states, however, had no formal position on the practice of surrogacy, which allowed the US surrogacy industry to grow but in

a legal context of relative uncertainty and instability (Hofman 2009). Surrogacy contracts were adjudicated at the local not at the state level, meaning there could be variations within states and even within local regions within states as to the practice.

Through the early aughts, the majority of states continued to have no legislation on surrogacy. In the last 15 years, however, the trend in state surrogacy legislation and policy in the US has been toward permission and away from prohibition (Rebouché 2019). It is important to note, however, that legal permissive statutes or restrictions do not map cleanly onto actual practice. In the absence of prohibitive laws that imposed criminal penalties for compensated contractual surrogacy, which were only ever in place in less than a handful of locations (such as in Michigan, New York, Nebraska, Washington and the District of Columbia), surrogacy arrangements continued across the country, legally untested (Berk 2024). In fact, Perkins and colleagues (2018: 4) found that though there was a much higher number of gestational surrogacy cycles in states "favourable to gestational surrogacy", "17.7% of all gestational cycles in the country" between 2010 and 2014 occurred in states that has "less favorable policy environments".

[B] METHODS

In the current article, I use two kinds of data to examine surrogacy in Texas. The first is annual data collected by the CDC on US fertility clinics. Since 1992, all fertility clinics in the US performing ART procedures are required by the Fertility Clinic Success Rate and Certification Act 1992 to submit annual data. Data sets from 1995 are publicly available on the CDC ART website (2023a). Using this data, I collated the number of fertility clinics in the state of Texas from 1995 to the most recent data available, which is currently 2020 (at the time of writing). I also collected the number of clinics that reported supporting surrogacy within their practice. I then compared this data to that from other states, especially California, the state with the largest number of clinics in the country, to garner a sense of surrogacy activity in Texas, how it varied over time, and how it compares to surrogacy in other states in the nation.

The second set of data used in the article is ethnographic data (interview and observational) collected from surrogates and surrogacy professionals (agency owners and workers, attorneys specializing in ART, clinic staff) based in Texas. Data were collected as part of several larger studies on gestational surrogacy and on ART in the US. I completed interviews with surrogates, intended parents, surrogates' family members, surrogacy

agency professionals, attorneys and clinic and medical professionals. The majority of data with surrogates, their family members and surrogacy agency professionals were collected from 2009-2013, with a small subset, including some follow-ups, collected from 2017-2020. Data with attorneys and clinic/medical professionals occurred during both time periods. Participants in both phases were recruited via contact with surrogacy agency directors, clinicians and attorneys followed by snowball sampling to surrogates, surrogates' family members and intended parents. In total, over the two phases of data collection, 109 people were interviewed with a number of people interviewed multiple times. I also spent time in surrogacy agencies and fertility clinics across five states. For this current article, I focus my analysis on 27 interviews (14 with Texas surrogates, 11 with Texas surrogacy professionals, and two with women who were both surrogates and surrogacy professionals) and observational data from surrogacy agencies, fertility clinics and professionals in Texas. The Texas surrogates in the study all self-identified as white non-Hispanic except for one woman who self-identified as Hispanic. At the time of the first interview, they ranged in age from 25 to 37 years. In terms of religious affiliation, one woman self-identified as Catholic/nondenominational, two as 'none' and 13 as Christian or a specific Protestant denomination (Baptist, Lutheran, Methodist). Pseudonyms are used throughout the article for study participants. My research was approved by the Institutional Review Board of The University of Texas at Arlington and followed all required procedures, including the obtainment of informed consent of all participants.

[C] FINDINGS

ART and surrogacy in Texas

According to the CDC, "the Federal Trade Commission intervened in a case of false advertising by a fertility clinic" which led to the Fertility Clinic Success Rate and Certification Act of 1992, "which mandated that CDC collect information yearly about ART cycles performed at clinics in the United States" (CDC 2023b). Comparing that data by state across years, one can see how ART and surrogacy developed in the state of Texas. In 1995, the first year for which data was published, there were 13 ART clinics in Texas that submitted information, with only four indicating that they allowed for surrogacy services within their practice.

Year	No of Texas clinics	% of Texas clinics allowing surrogacy	No of California clinics	% of California clinics Allowing surrogacy
1995	13	30 (N=4)	30	30 (N=24)
1996	17	29.4 (N=5)	33	66.6 (N=22)
1997	20	25 (N=5)	47	72.3 (N=34)
1998	23	47.8 (N=11)	51	80.3 (N=41)
1999	24	58.3 (N=14)	48	87.5 (N=42)
2000	24	54.1 (N=13)	56	87.5 (N=49)
2001	25	56 (N=14)	56	89.2 (N=50)
2002	29	89.6 (N=26)	57	91.2 (N=52)
2003	29	75.8 (N=22)	56	91 (N=51)
2004	30	83.3 (N=25)	55	85.4 (N=47)
2005	29	75.8 (N=22)	56	91 (N=51)
2006	29	86.2 (N=25)	63	92 (N=58)
2007	33	84.8 (N=28)	63	90.4 (N=57)
2008	35	88.5 (N=31)	59	91.5 (N=54)
2009	35	85.7 (N=30)	61	96.7 (N=59)
2010	34	88.2 (N=30)	62	95.1 (N=59)
2011	37	89.1 (N=33)	64	96.8 (N=62)
2012	41	85.3 (N=35)	68	97 (N=66)
2013	43	86 (N=37)	68	94 (N=64)
2014	42	90.4 (N=38)	65	100 (N=65)
2015	43	88.3 (N=38)	65	96.9 (N=63)
2016	43	88.3 (N=38)	68	98.5 (N=67)
2017	41	90.2 (N=37)	68	98.5 (N=67)
2018	42	85.7 (N=36)	71	98.5 (N=70)
2019	42	92.8 (N=39)	72	91.6 (N=66)
2020	42	90.4 (N=38)	72	100 (N=72)

Table 1: Numbers of clinics and percentage of clinics reporting surrogacy services in Texas and California. Source: author calculations from data available on the CDC ART website.

As can be seen in Table 1, the number of reporting clinics in both states grew steadily every year, reaching 42 in Texas and 72 in California for the most recent data available, which is for 2020. Table 1 also illuminates that, while surrogacy services grew more slowly in Texas than they did in California, by 1999 the majority of clinics in Texas reported surrogacy services being available in their practice and, by 2002, surrogacy was ubiquitous in the Lone Star State (as Texas is known). A couple of caveats: it is important to note that not all clinics report data, as is required by law. Additionally, not all those that report surrogacy as an available service actually perform surrogacy. They are only reporting that they allow for surrogacy services within their clinics. Also important to note is that there are wide variations in the size of fertility clinics in all states in the US. Size variations can be seen in the number of practitioners,

patient-clients, the number of various ART procedures performed and the percentages of those various procedures which result in live birth.

In addition to capturing the growth of clinics and surrogacy services within different states in the US, the CDC data allows for comparisons in the size of assisted reproduction care between states, making it clear that fertility care in the US tends to cluster geographically (Jacobson 2018). This can be seen quite dramatically when viewing the number of fertility clinics by state in Table 2.

The overwhelming majority of states in the country (N=24) have between one and five fertility clinics and two, New Hampshire and Wyoming, have no clinics. Only five states in the nation (Florida, Illinois, New York, Texas and California) have more than 20 clinics. Not surprisingly, the three states with the largest number of clinics, California (72), New York (45), and Texas (42), accounted for 31.4% of all ART procedures and 30.7% of all ART live births in the nation in 2020 (CDC 2023a).

As evidenced in Tables 1 and 2, Texas has been among the leaders in the number of ART procedures and clinics in the nation. In the most recent data available, Texas has the third largest number of clinics

Number of clinics	Number of corresponding states (by name)
0	2 states (New Hampshire, Wyoming)
1-5	24 states (Alabama, Alaska, Arkansas, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia) plus DC and Puerto Rico.
6-10	14 states (Colorado, Connecticut, Hawaii, Indiana, Georgia, Maryland, Massachusetts, Michigan, Missouri, Nevada, North Carolina, Ohio, Tennessee, Wisconsin)
11-15	4 states (Arizonia, Pennsylvania, Virginia, Washington)
16-20	1 state (New Jersey)
21-25	0
26-30	2 states (Florida and Illinois)
31-35	0
36-40	0
41-45	2 states (New York and Texas)
46-50	0
51-55	0
56-60	0
61-65	0
66-70	0
71-75	1 state (California)

Table 2: numbers of clinics located by state in 2020. Source: author calculations from data available on the CDC ART website.

(N=42) in the country, following California (N=72) and New York (N=45). Fertility services in Texas currently account for 7.8% of all annual ART procedures and 8.2% of all annual ART live births in the country. In the latest figures available, almost 9000 ART cycles in the US utilized a gestational surrogate, which represents a little more than 4% of all ART cycles. This is actually down slightly as, prior to the pandemic, it was more than 5%, which is more than double the amount from a decade ago (CDC 2023a). In an analysis of CDC data from 2010 to 2014, Perkins and colleagues (2018) found Texas having 844 births utilizing a gestational surrogate, second only to California with 2954 births.

The analysed CDC data evidences that surrogacy is big business in Texas—not as large an industry as it is in the state of California, but it plays an important role in third-party pregnancy in the nation. As can be seen in Tables 1 and 2, surrogacy became standardized in the state, with a large jump in 2002 to the majority of Texas clinics allowing for third-party reproduction. This jump in the early aughts tracks with legislative changes in the state.

Through the early aughts, Texas was among the 30 states with no statutes, policy, or legislation specifically addressing surrogacy. This changed in 2003 when Texas passed a subchapter to its Uniform Parentage Act Chapter of the Texas Family Code. Texas surrogacy legislation provides state legal procedures for intended parents to have their names on birth certificates and for contracts to be enforced. In order for those protections to be in place, however, surrogacy arrangements need to meet certain criteria. The statute only provides protection for gestational arrangements (not traditional surrogacy arrangements) which are filed in state court prior to the embryo transfer. Furthermore, the intended parents must be legally married. This legislation was passed prior to *Obergefell v Hodges*, the 2015 landmark US Supreme Court case which ruled that legal marriage was a fundamental right, extending to same-sex couples. That case overruled the then-in-place portion of the Texas Family Code which only recognized heterosexual marriage. Therefore, the original statute was determined under a context in which same-sex couples would not have had access to those protections.

Texas reproductive workers

The experiences of Texas surrogates in my study were similar to those of California surrogates along many metrics. The motivations to participate in surrogacy, the initial spark from which the idea of surrogacy entered their lives, the importance of a support system, their relationships with

intended parents, professionals and other surrogates were consistent across the two groups of women. These findings, which I outline in other publications (Jacobson 2016; 2021; 2022), articulate how US gestational surrogates are largely motivated by a desire to experience pregnancy and birth again, doing so within a context that helps others become parents without adding additional children to their own families. They emphasize the importance of a support system, primarily from spouses and other surrogates. These findings resonate with other studies on US gestational surrogates as well (Berend 2016; Ziff 2019). Most women in my research bristled at the idea of money being their primary motivator for surrogacy and, as I conceptualize in *Labor of Love* (Jacobson 2016), they join others in the surrogacy industry (agency owners/workers, clinicians, surrogates' family members) in engaging in obscuring their surrogate labour in order to make reproductive work more palatable by suppressing cultural anxieties around the commodification of reproductive labour that surrogacy in the US activates.

Surrogates in the US are not bound to their domicile state for their surrogacy journeys. They can contract with agencies in other states and the intended parents with whom they partner can be located in other states or nations. Some surrogates even plan and give birth across state lines (from their state of residence) in order to accommodate intended parent preference or to take advantage of more favourable state contexts. I have found all such situations in my data. However, most of the women I interviewed contracted with agencies located in the same state in which they resided. As such, the local context of surrogacy in Texas shaped Texas surrogates' experiences in several ways.

The first local contextualization of the experiences of Texas surrogates is the way that the requirements of the state for protected surrogacy arrangements limited women's choices as to local intended parents. While many surrogacy arrangements in the US are between surrogates and intended parents who are not local to one another, I did find a preference among many women for local intended parents with whom in-person interactions would be more plentiful, facilitating relationships. Many women also wanted intended parents who could attend at least some of their medical appointments.

The majority of the women I interviewed had completed surrogacy journeys after the change to the Texas surrogacy statute in 2003 but prior to *Obergefell v Hodges* in 2015. Therefore, these women were operating in a context where the state supported a streamlined process and enforcement capabilities only for gestational surrogacy arrangements

for heterosexually married couples. This limited potential matches. Kelly Russo, a white divorced mother of one and two-time surrogate with a master's degree who worked full-time outside of the home in a large metropolitan area in Texas, for example, let me know that she originally had wanted to match with a gay couple for her first surrogacy journey, sharing:

> I had originally thought it would be fun to do for, like, a same sex couple. Like, two men that obviously need a carrier. That was my original reason because I had gay friends who had talked about having kids. And I thought that would be something I would love to do. Unfortunately in Texas, it's not really—it's a little harder. You can't get both men on the birth certificate. So I called a few agencies just to see what their requirements were, what I needed to do and everything and all of them said in Texas that's probably not going to happen. So that's when I kind of shifted. At that point I had my heart set on doing it. I shifted to a heterosexual couple.

While Kelly's desire to work with a same-sex couple was squashed, it actually was not impossible to work with gay men in Texas at the time. It was challenging for same-sex intended parent couples in Texas in ways that it was not for heterosexually married couples who used their own gametes and thus fulfilled the requirements of the Texas surrogacy regulation. However, surrogates were partnered with gay men at the time. Texas regulation provided protection if the arrangements met certain criteria, including married intended parents (please recall that prior to 2015, the state of Texas only recognized heterosexual unions), but it did not outlaw surrogacy for same-sex couples. Those who did not meet the criteria were able to follow the common procedures that had been in place prior to the 2003 change in regulation. One of the Texas women I interviewed, for example, was matched with a gay Texas couple in the mid-aughts. Ann Beltran, a white married mother of four and three-time surrogate with a college degree who worked in management, let me know that her first intended parent couple was a local same-sex couple who, she told me, "I never thought I would have worked with" due to her religious beliefs. After meeting the men, however, "it was completely different. I really liked them a lot. They were a great couple." Though the embryo transfer was not successful, Ann remains in contact with the couple and shared with me the detailed story of their rematching with a California surrogate and the birth of their child.

Despite there being surrogates in Texas such as Ann who matched with local gay men, there was a common belief that it was rare. Kelly's first surrogacy journey, like those of many of the women I interviewed, was in the late aughts prior to the change in recognition of same-sex marriage in Texas that was brought about by the US Supreme Court case, *Obergefell*

v Hodges. At the time, it was well known among Texas surrogates that local intended parents partnered via Texas agencies would most likely be heterosexual couples. This common understanding can be seen in the comments of Amber Castillo, a married mother of two who runs a home day-care. Amber shared a story with me of meeting a woman locally at a party who was also pursuing surrogacy. The women told Amber that she was going to contract with an agency in California. Amber asked her, "Why do you want to do California so bad?" Amber reported:

> And she said she thought it would be really cool to help a gay couple have their own child. And I thought, "Oh okay, then you're definitely going to have to go to California to do that!" Because in the state of Texas the parents have to be married, and that's not an option here in Texas. So I just thought, "Well, if that's what you want to do, then you'll have to definitely go to California to do that!"

The fact that surrogacy regulation within the state of Texas did not support same-sex intended parent couples was not an issue for Amber. In fact, it aligned with the beliefs she and her husband shared about the ideal arrangement. Amber did not explicitly state that she would not work with a same-sex couple, but she did share that "we didn't want to do, like, an egg donor" (which would be mandatory for a gay male couple). She went on:

> We wanted it to truly be their baby because we felt like if it wasn't then maybe adoption could be an option for them because you're still not having your own kid together. Like if it's just the dads or just the moms, then it's like you could adopt and it would be the same deal. And so that was really important to us. That was one of those profile questions. And you have that option of who you'll select. So that was really big with us that it had to be their egg and their sperm, no matter what.

This sentiment—to assist intended parents via surrogacy who use both their own gametes in the creation of the embryos—was not uncommon among the women I interviewed. It also was not restricted to Texas surrogates, and neither was the position of avoiding same-sex couples. There were some women in my study who were explicit that they could not work with gay men. Molly Hughes, for example, a white married stay-at-home mother of two with a high school diploma and a two-time surrogate, let me know that due to her "personal beliefs" she "couldn't work with a gay couple". "I knew it was going to have to be a Christian, traditional family with or without kids", she told me, "didn't make any difference." Molly wanted intended parents who aligned with her religious beliefs as she thought "it would be kind of weird if [she was] praying to God for this baby and they're praying to Buddha". This was not a flippant remark. Molly was concerned that her religious objections to selective reduction

be shared by the intended parent couples with whom she matched. She needed that condition to be in place as she felt strongly that surrogates needed to follow the intentions of the intended parents. She elaborated on this idea, "it's your body but it's their child. And so you really need to be in the same place on [reduction]. Because in the long run I think you really have to do what they want to do. Anyway, that was very important to me." Additionally, Molly felt as though being matched with a "traditional" heterosexual couple who shared her religious beliefs would facilitate trust. Molly articulated the importance of trust when she shared:

> And then I also think it helps when I know that this baby I helped bring into the world I know is going to go off with a family that I trust. And I may not have any place saying that, but I feel within myself if I helped them have a baby that they're going to take care of that baby. And then the baby is going to be raised with good morals and a good family. So it just wasn't ever a question. It was just the way it was going to have to be!

All of the women I interviewed, regardless of state of residence, expressed a desire that the surro-babies they gestated and birthed were well cared for by their families. Some surrogates in both Texas and California aligned that desire with religious/moral convictions, such as Molly.

In addition to the way the Texas state requirements for surrogacy protection seemingly limited the options for intended parent matches, a second local contextualization of the experiences of Texas surrogates was the ways in which surrogacy is understood on the ground in Texas. Most of the women in my study—regardless of state of residence—shared experiences of interactions with either close friends and family or strangers in public in which people expressed their opinions about the practice. There were several strong reactions noted, from both Texas and California surrogates, coming from people who held negative beliefs. Jessica Klein, for example, a two-time white surrogate and mother of two, shared a story of being confronted by a stranger at a fast-food restaurant while pregnant with her "surro-twins". Her two children, Skyler and Clay, were with her at Chick-Fil-A. Jessica shared:

> So, we're in Chick-Fil-A and I'm huge pregnant and it had to have been July/August. We're due in September. And this woman started talking to me. And she was letting me know that she was a foster mother and she has all these kids with her. And that's wonderful that you do that. And she's adopting a lot of them and then tells me about it. So then Clay comes over and she goes, "Oh are you going to be a big brother?" That whole thing. And Clay goes, "No, I'm going to be a big friend." And the woman looks at me and I said, "I'm a surrogate. I'm actually carrying our friend's twins." She looked at me like, "Oh my gosh! I cannot believe." This look! I was in shock. And this was the

> first time in public by a stranger I had had this happen. And there's other moms around. And she just started going off on me about how people need to adopt. I'm part of this group that's just disgusting and we're out here spending all this money to make babies when there's all these children in the world we need to adopt. And I was so in awe and in shock that she was doing this, I could not think of any words to say. All of our kids are standing here and she's calling me cuss words. I'm just thinking, "I'm in Chick-Fil-A and she's doing this to me!" She grabbed all those kids and she left. She said, "You just make me SICK. I can't even be here anymore!"

Several other surrogates shared similar experiences of disturbing confrontations. However, most of the interactions they shared, even if they involved negative reactions, were much more benign. The majority of negative interactions were from people who held misconceptions about gestational surrogacy, most frequently the belief that surrogates were either artificially inseminated or that they had sexual relations with intended fathers in order to conceive. Tina Vargas, for example, a white two-time surrogate and stay-at-home mother to four children, laughingly explained these types of interactions to me, letting me know that:

> there's some people who, like the older people, like I said, who don't understand [gestational surrogacy] and feel like it's my child and I'm giving it up. And there's some who even feel like that I'm going and sleeping with this man to get pregnant. So it's funny when you explain, "No it was in a doctors office and it's very medical!"

Most surrogates—though not all—shared similar stories of having to educate others about surrogacy and, once they did so, receiving positive feedback. This was the case with Amber Castillo, who shared an interaction she had with several fellow congregants at church,

> And here's this little lady. This is after the delivery. I think it was two weeks ago. When I say a little old lady, she's got to be pushing 90 and she's little! She has a hunch in her back now. And we have to help her on and off the stage. There was a man who said, "You've lost some weight the quick way." And I said, "Yeah, I got rid of that weight pretty quick. It was nice and easy, but you can't use my method as a man!" So anyway, he was talking to me and I said, "I actually did a surrogacy." And he said, "Oh didn't realize that was you. I knew somebody was doing one in our church. I didn't know it was you." And that little lady said, "Now honey, you're going to have to tell me what this surrogacy is, I'm old." (with southern drawl accent) That's exactly how she was talking. And I said, "Well, they took her egg and his sperm and they implanted it into my uterus."And she says, "So you just kind of rented out your uterus for nine months!" I said, "That's a real good way to put it!" She said, 'Well, that's really nice! That was a great thing for you to do." I thought that was really noble of her at her age, she didn't understand it. She didn't even know what it was or that we could us now?

Amber's experience of explaining gestational surrogacy and receiving a positive response was by far the more common interaction noted by the Texas surrogates in my study. Erin Peters, a white, three-time surrogate and mother of two, captured a typical response when she shared:

> Luckily for me, I have not dealt with ridicule or people saying mean things or questioning me in a bad way. I've actually been lucky. All my family is SO supportive and they think it's awesome. They just are amazed. And most of the people I've met, they just are so curious. They're like, "Really? Wow!" And they have a lot of questions. But never really [has] anyone been negative.

By and large, Texas surrogates had positive interactions with others. Even Jessica Klein, who was verbally accosted at Chick-fil-A, let me know that in terms of most of her interactions with others about surrogacy, "It's always been good." Similar to Erin Peters quoted above, there was a particular quality to the positive interactions—an almost over-the-top support. This can be seen in the words of Gillian Dorsey, a white, two-time, married surrogate and stay-at-home mother to three, when she shared:

> Whenever I said anything about being a surrogate, I've gotten so much positive, "That's amazing! Wow! God bless you! You're a saint!" I just won a swing set. I won a $4,000 play structure off the internet. And everybody is like, "Oh you deserve that because you're a surrogate and because you're doing it again and you're a saint. That's karma because you're wonderful." I mean I've never had anybody say anything negative or anything towards me about it. So everything I've ever done with surrogacy has always been very positive. I don't know what I would do if somebody said something ugly to me. I'd probably just backhand them or something. "What are you talking about, you ignorant ass?" I've never had that. Everybody has always been really positive, so it's been nice. Every aspect of it has been positive. The doctors are always wonderful. Strangers on the street are wonderful. I get comments on my blog when I talk about surrogacy posts, about how wonderful that it. I mean I've never had anybody say anything negative. So that's nice. Makes me feel good that I'm being able to give back somehow to the cosmic universe! (laughing) Karma. Maybe I'll win another swing set!

While not all surrogates were called saints, the majority of Texas surrogates experienced strong support from family and friends and had positive interactions about surrogacy with others in their lives, including with strangers. Gestational surrogacy needed to be explained to many of these people, but once covered, the overwhelming majority of women in my study reported feeling supported and encouraged for their role in third-party pregnancy.

[D] DISCUSSION

As my analysis of CDC data demonstrates, there is historic wide variation in geographic access and state support for surrogacy across the US. The state of Texas became an early and robust supporter of both ART and surrogacy in the country. Joining the small handful of states that could be seen as "surrogacy friendly" through extending legal parental rights to intended parents, in 2003 Texas introduced surrogacy legislation that supported and allowed for the enforcement of gestational contracts by heterosexually married couples. During data collection for my project on surrogacy, I heard from a surrogacy professional in Texas that the surrogacy legislation was crafted in such a way that it would not raise conservative alarm bells, allowing for smooth passage. This conservative-alignment can be seen in the way the specifics of the Bill did not challenge the conservative ideas on the family that were popular at the time. With these conditions in place, surrogacy has not thus far been much of a political issue in the state, garnering little media or activist attention (Bandelli 2021).

In the present article, I found the landscape of surrogacy experiences during the aughts and 2010s shaped in two important ways. The first involves same-sex intended parents. Unlike California and other states, prior to *Obergefell v Hodges* the state of Texas itself explicitly supported only a particular type of family formation via surrogacy (again, not outlawing others but also not explicitly supporting them). In Texas (prior to *Obergefell v Hodges*) many women felt as though they could be guaranteed a heterosexual couple if they contracted through a Texas agency and matched with Texas intended parents.

A desire for compatibility and similar moral positioning is common within third-party pregnancy in the US agencies, and clinics in the US engage in an often detailed and extended matching processes between intended parents and potential surrogates in order to find a "good fit". Elsewhere, I argue this helps to smooth relations in order to hedge against potential issues arising in a legally precarious landscape for surrogacy (Jacobson 2016). For some Texas surrogates, such as Amber Castillo and Molly Hughes noted above, "fit" with intended parents aligned with religiously informed personal convictions against support for same-sex couples. For others, like Kelly Russo, this meant an acquiescing to being matched with a heterosexual couple in lieu of the same-sex couple originally desired. These matches in Texas which conformed to the state statute of gestational arrangements with heterosexually married couples did not challenge or offend conservative Evangelical sensibilities about the family

at the time. For, unlike Catholicism, there was not an active position against assisted reproduction, including surrogacy, within Evangelical/Protestant religious communities. This is reflected in the second local contextualization of the experiences of Texas surrogates: the ways in which surrogacy was understood on the ground in Texas. Most of the women in my study—regardless of state of residence—shared experiences of interactions with either close friends and family or strangers in public in which people expressed their opinions about the practice. While my interview data reveal that within the large state of Texas there is a range of experiences and moral palatability for surrogacy, the dominance of those Evangelical/Protestant sensibilities within the communities in which surrogates lived enabled positive support.

[E] CONCLUSION

The development of surrogacy legislation and a robust surrogacy industry in Texas can be understood within a particular local context. Industry—all kinds of industry—develop in Texas as the state is well known as being industry-friendly due to its lack of individual and corporate income tax, its large and diverse workforce, and a relatively thriving economy. Texas often appears in the top five on various US business rankings, such as CNBC's "America's Top States for Business" (CNBC.com 2024) and, according to the US Department of Commerce's Bureau of Economic Analysis (2024), the gross domestic product of Texas is second only to California. Much like other industries in the state, the revenue-rich "baby business" finds a welcoming environment in Texas (Spar 2006). It is also important to contextualize size in Texas. Texas is a large state, both in terms of land mass and population. It is the second largest state geographically (268,596 square miles, which is 7.07% of the US total area and larger than France) and in terms of population (2023 estimate is 30,503,301, which is 9.11% of the total US population) (US Census 2023; US Economic Development Administration 2024). The size of the state also helps to contextualize the size of the ART industry and the surrogacy market.

Another contextualization factor facilitating surrogacy in Texas is the historically strong Evangelical Christian base in the state and the historic lack of controversy among Evangelicals around ART-use by heterosexually married couples during the time that the surrogacy industry was establishing and growing in the state. While 14% of the adult US population identifies as Evangelical Protestant (Public Religion Research Institute 2021), in 2014, 31% of Texans identified as such, while all Protestants made up 50% of the Texas population (Pew Research

Center 2014). And while there have been both Evangelical/Protestant objections and Texas state legislation regarding other reproductive, family and healthcare issues such as abortion and gender-affirming healthcare, there is not a history of ART raising such opposition (Mohamed 2018; Czarnecki 2022). This is unlike Catholicism, which has a strong history of ethical objections to ART generally and surrogacy specifically, including Pope Francis's recent call for a global ban on surrogacy (Pope Francis 2024). In contrast, Protestant religions in the US have historically had "liberal attitudes toward infertility treatments" (Schenker 2005). A neoliberal pro-industry stance in the state of Texas facilitated ART industry growth, and a lack of cultural contention around surrogacy within a context of a strong Evangelical/Protestant base enabled community level support for surrogacy, as can be seen in my interview data with Texas surrogates.

Historic Evangelical Protestant tacit support for assisted reproduction, however, appears to be shifting, with anti-abortion sentiment extending in definitive ways to ART. While personhood for embryos initiatives have been around for decades, since the *Dobbs* decision both the traction of those proposals and the potential consequences of them has intensified. This shift can be seen in the 2024 Alabama Supreme Court ruling that embryos created through IVF should be considered children (*LePage v Center for Reproductive, PC* 2024). This led to several Alabama fertility clinics pausing ART services due to concerns about potential criminal liability. The strong public outcry—signalling support for those experiencing infertility and desiring to bring children into their lives through ART—led to an Alabama State Bill protecting patients-clients and IVF providers from criminal liability (Alabama Legislature 2024). Another example of the expanding reach of Evangelical anti-abortion activism to ART was the recent passage by the Southern Baptist Convention of a resolution that encourages congregants to "consider the ethical implications of assisted reproductive technologies" and to "only utilize infertility treatments and reproductive technologies in ways consistent with the dignity of the human embryo" (Southern Baptist Convention 2024).

The current precarity of abortion care in the US since *Dobbs*, coupled with historic variations in access to ART, has the potential to disrupt the ART industry in the US in new ways as seen in the Alabama case mentioned above. A disruption to the surrogacy industry might be most acute in Texas—a state with relatively "friendly" surrogacy legislation, many clinics providing services, and historic and current strong anti-abortion legislation. It will be interesting to see, however, how the context of the relatively robust ART industry in the Lone Star State, grounded

in a strong neoliberal support for industry and an Evangelical base traditionally supportive of assisted reproduction, shapes that potential disruption.

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Surrogacy and Consent under Irish Law: A Problematic Copy and Paste from the UK

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Abstract

In July 2024 Ireland enacted detailed legislation regulating both domestic and international surrogacy arrangements, in the form of the Health (Assisted Human Reproduction) Act 2024. This article will discuss the model for regulating domestic surrogacy in Part 7 of the 2024 Act and critique the court's inability to dispense with the surrogate's consent to a post-birth parental order except in the most unusual circumstances. The consent provisions in Part 7 of the 2024 Act are very similar to those in the UK's Human Fertilisation and Embryology Act 2008. The article demonstrates how the 2024 Act accords a gestational surrogate remarkable weight in determining a genetically unrelated child's legal parentage, and how this may be detrimental to intended parents and their surrogate-born children. Further, the approach in the 2024 Act may conflict with the provisions on children's rights, and familial rights, and the state's concomitant obligations in relation to same, in the Constitution of Ireland, and international surrogacy-related best practice in the Verona Principles. The article concludes by suggesting amendments to the 2024 Act to better balance the rights of all parties to a domestic surrogacy.

Keywords: surrogacy; consent; parentage; parental order; best practice; Verona Principles; Constitution of Ireland; law reform.

[A] INTRODUCTION

Following a process that commenced back in 2000, Ireland recently enacted detailed legislation regulating both domestic and international surrogacy, in the form of the Health (Assisted Human Reproduction) Act 2024 (the 2024 Act).[1] This article argues that the "hybrid" model for regulating domestic surrogacy arrangements in Part 7 of the 2024 Act appears to be based on Irish policy-makers' misunderstanding of the ramifications of a decade-old Supreme Court judgment concerning

[1] However, the provisions of the 2024 Act have not yet been commenced.

surrogacy arrangements and the principle of *mater semper certa est*. In particular, the article critiques the court's inability to dispense with the need for the surrogate's consent to a post-birth parental order except in the most unusual circumstances. The consent provisions in Part 7 of the 2024 Act are remarkably similar to those in the Human Fertilisation and Embryology Act 2008 (HFEA 2008) of the United Kingdom (UK). Despite only regulating gestational surrogacy arrangements, where the surrogate will have no genetic connection to the child she gives birth to, the provisions of Part 7 of the 2024 Act accord her remarkable weight in determining a genetically unrelated child's legal parentage. The upshot is that, in practice, this model of surrogacy regulation will in some cases operate to the detriment of intended parents and their surrogate-born children, and aspects of it are arguably contrary to the provisions concerning children's rights, and familial rights, and the state's concomitant obligations in relation to same under the Constitution of Ireland.

[B] A SURROGACY FRAMEWORK FOR IRELAND: IT'S BEEN A LONG ROAD …

In Ireland, the comprehensive statutory regulation of surrogacy arrangements has taken almost a quarter of a century to come to fruition, from the establishment of the Commission on Assisted Human Reproduction (CAHR) in early 2000 to the enactment in mid-2024 of the 2024 Act. In 2000, CAHR was established by the then Minister for Health and Children, Micheál Martin, to examine how assisted human reproduction, including surrogacy, might be regulated. The regulation of non-commercial surrogacy arrangements, where a surrogate would only receive reimbursement for expenses "directly related" to participation as a surrogate, was recommended by CAHR in its report in 2005 (CAHR 2005: 54).

However, the political will to act on the CAHR report only surfaced almost a decade later, when proposals to regulate donor conception procedures plus domestic non-commercial surrogacy *and* "pre-commencement" international surrogacy arrangements were included in the initial General Scheme of the Children and Family Relationships Bill 2014 (Tobin 2023: 87).

Ireland's premier surrogacy proposals were met with heavy criticism (Madden 2014; Tobin 2014) and by the time a revised version of the General Scheme was published later that year, in September 2014, the provisions

on surrogacy had been deleted in their entirety.[2] The surrogacy proposals were removed because the Oireachtas[3] did not to want to pre-empt the pending Supreme Court decision in the non-commercial, intrafamilial "surrogacy case" of *MR & Another v An tArd-Chláraitheoir* (2014).

As this author has stressed elsewhere (Tobin 2017: 142), it is ironic that the Oireachtas showed such deference to the Supreme Court's pending decision in *MR & Another v An tArd-Chláraitheoir* (2014) because, in its decision, released in November 2014, the Supreme Court *largely* deferred to the Oireachtas as regards the appropriate regulation of surrogacy and invited it to take "urgent action" on this matter. Subsequently, in February 2015, the then Fine Gael/Labour coalition Government approved the drafting by the Department of Health of the General Scheme of a Bill on Assisted Human Reproduction, with surrogacy one of the many complex areas to be included in this Scheme.

The General Scheme of the Assisted Human Reproduction Bill 2017 (the 2017 General Scheme) was approved by the subsequent Fine Gael/Fianna Fáil minority Government in October 2017, and, despite languishing in development hell for almost five years, it was finally succeeded in March 2022 by the Health (Assisted Human Reproduction) Bill 2022, which was then enacted in July 2024 as the Health (Assisted Human Reproduction) Act 2024. The 2024 Act will regulate many matters pertaining to assisted human reproduction, such as gamete and embryo donation and embryo and stem cell research, and will lead to the establishment of a regulatory body known as the Assisted Human Reproduction Regulatory Authority (AHRRA). Parts 7 and 8 of the 2024 Act regulate prospective, non-commercial domestic and international surrogacy arrangements, respectively, with Part 12 regulating past domestic and international surrogacy arrangements. This article focuses on the regulation of prospective domestic surrogacy arrangements in Part 7.

[2] Indeed, when signed into law by the President of Ireland on 6 April 2015, Parts 2 and 3 of the Children and Family Relationships Act 2015 regulated, *inter alia*, legal parentage in cases of clinical donor-assisted human reproduction (DAHR) *other than surrogacy*. Parts 2 and 3 of the 2015 Act were commenced on 4 May 2020.

[3] Oireachtas is the word for Parliament in the Irish language.

[C] IRELAND'S "HYBRID MODEL" FOR REGULATING DOMESTIC SURROGACY ARRANGEMENTS

Part 7 of the 2024 Act establishes a "hybrid model" for the regulation of prospective, non-commercial, gestational surrogacy agreements *in Ireland*. The regulatory model contains elements of both the "pre-conception state approval" and "post-birth parental order" models.[4] The AHRRA must, among its many functions, approve a surrogacy agreement prior to any treatment going ahead, and there are numerous "pre-surrogacy" safeguards in Part 7 that the parties must comply with in order to have their agreement approved by this state body. These include, *inter alia*, all of the parties receiving independent legal advice, AHR counselling and satisfying the AHRRA that they do not present a potential risk of significant harm or neglect to any child, whether such child is born as a result of the surrogacy or otherwise. This pre-surrogacy regulatory oversight is similar to that which exists in other jurisdictions, such as Greece, South Africa, Israel, New Zealand, and the Australian states of Victoria and Western Australia, which require "pre-authorisation" of a surrogacy agreement, either by a court or a state regulatory body. However, the AHRRA's "pre-authorisation" of the surrogacy agreement between the intended parents and the surrogate will be limited to the approval of treatment, because Part 7 of the 2024 Act does not sanction any "pre-conception State approval" of the child's legal parentage. Instead, the gestational surrogate will be the legal mother and guardian[5] of the child at birth and the intended parents must go through a "post-birth Parental Order" process in court to establish their legal parentage. Hence, Part 7 represents something of a "hybrid" model for regulating domestic surrogacy agreements, with both pre-conception and post-birth legal processes for all of the parties to adhere to.

[D] VERONA PRINCIPLES: ALTERNATIVE OPTIONS REFLECTING INTERNATIONAL BEST PRACTICE

The Verona Principles, a set of non-binding international principles which, in the words of the United Nations (UN) Committee on the Rights of the Child, are designed to contribute "to developing normative guidance for

4 For a discussion of these models, see generally Tobin (2017).

5 In Irish law, guardianship is the equivalent of the concepts of parental responsibility or parental authority.

the protection of the rights of children born through surrogacy" and "may serve as an important tool that will help identify appropriate legislative responses to the new challenge related to the protection of children's rights in the context of surrogacy" (Verona Principles: Statement of Support by UN Committee on the Rights of the Child) were published by the International Social Service (ISS) in 2021. The Principles contemplate two approaches to legal parentage at birth in a surrogacy context. The Irish approach is *largely* in sync with the first approach (Verona Principles 10.4), which provides that, where the surrogate mother is a legal parent at birth and wishes to relinquish and/or transfer legal parentage and parental responsibility, an expeditious post-birth legal mechanism should facilitate her in doing so. Indeed, the Principles acknowledge that "in the vast majority of States, a surrogate mother has legal parentage at birth" (Verona Principles 10.2).

However, an alternative approach to legal parentage was available to Irish policy-makers, for the Principles also envisage that for domestic, non-commercial surrogacies, "States may provide intending parents with exclusive legal parentage and parental responsibility by operation of law at birth" provided the surrogate has the right to confirm or revoke her consent to their exclusive legal parentage post-birth (Verona Principles 10.6). Thus, it would appear that the enactment of legislation in Ireland permitting the "pre-conception" authorization of domestic surrogacy arrangements *and* legal parentage by the AHRRA, coupled with a process that easily facilitates the surrogate's post-birth right to object to (or confirm) the earlier determination of parentage, would have been in compliance with international best practice in a surrogacy context, as contemplated by the Verona Principles.

Nonetheless, Irish policy-makers adopted the former approach when drafting the legislation because of their interpretation of a now decade-old decision of the Supreme Court of Ireland.

[E] *MR & ANOTHER v AN TARD-CHLÁRAITHEOIR*: A CONFUSING OR CONVENIENT PRONOUNCEMENT ON *MATER SEMPER CERTA EST*?

In the "surrogacy case" of *MR & Another v An tArd-Chláraitheoir* (2014), the Supreme Court established that it is for the Oireachtas to determine motherhood in surrogacy arrangements. The case involved an amicable, altruistic surrogacy arrangement between family members.

The gestational surrogate gave birth to twins on behalf of her sister and her sister's husband, the intended *and* genetic parents of the children. However, in line with existing legislation, the registrar of births would only allow the birth mother and the genetic father to be recorded as the parents on the twins' birth certificates. The genetic parents applied to the Registrar General to have the twins' birth certificates amended to reflect the genetic reality of their familial situation, but were denied this on the understanding that *mater semper certa est* (mother is always certain) required the birth mother to be registered on the birth certificates. The genetic parents then applied to the High Court on behalf of the twins for a declaration that the genetic mother was the legal mother pursuant to section 35 of the Status of Children Act 1987, which allows a person to apply to the court for a declaration that the person named in the application is their mother or father. In the High Court, on the basis of the evidence before him, Abbott J granted a declaration that the genetic mother was the legal mother of the twins and was therefore entitled to be recorded as such on their birth certificates (*MR & Another v An tArd-Chláraitheoir* 2013). However, the state appealed this finding to the Supreme Court, which reversed the High Court decision and quashed the declaration that the twins' genetic mother was entitled to be registered as their "mother" on their birth certificates.

The case has been interpreted by the Department of Health, the state body responsible for drafting the 2024 Act, as requiring the surrogate to be recognized as the legal mother of a surrogate-born child at the time of that child's birth. Indeed, when the predecessor to the 2024 Act, the 2017 General Scheme, was being drafted, the Department's officials were adamant that:

> The proposed legislation will take cognisance of the 2014 Supreme Court judgment in the *MR & Another v An tArd Chláraitheoir* (surrogacy) case, which found that the birth mother, rather than the genetic mother, is the legal mother.[6]

However, this appears to be a misreading by the Department of the judgment in the *MR* case. *The Supreme Court did not find that the birth mother must always be the legal mother at birth in the context of a surrogacy arrangement.* Denham CJ actually found that the principle of *mater semper certa est*, "mother is always certain", is not part of the common law of Ireland:

> It appears to me that in fact the maxim *mater semper certa est* was not part of the common law of Ireland. It was a statement which

[6] Email from Paul Ivory, Bioethics Unit, Department of Health, to Dr Brian Tobin (16 November 2016).

> recognised the medical and scientific fact that a birth mother was the mother of the child. The common law of Ireland has not addressed the issue of motherhood in a surrogacy situation (2014: paragraph 88).

More significantly, Denham CJ held that the legal definition of "mother" in the context of a surrogacy was actually a matter for the Oireachtas to determine via appropriate legislation:

> Such lacuna should be addressed in legislation and not by this Court … [u]nder the current legislative framework it is not possible to address issues arising on surrogacy, including the issue of who is the mother for the purpose of registration of the birth. *The issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas* (2014: paragraphs 116-118, emphasis added).

On this analysis, it would appear that it was entirely open to the Department of Health to draft legislation allowing for pre-conception approval of parentage in surrogacy situations, which would have allowed an intended mother to be recognized as a legal mother at birth, and which, as discussed, would have been fully in compliance with the Verona Principles. Given this, and the robust pre-surrogacy safeguards for all parties that are contained in the Irish legislation, as well as the fact that only non-commercial, gestational surrogacy is being regulated, it seems bizarre that intended parents, at least one of whom must have a genetic link to the surrogate-born child, are unable to avail of "pre-conception State approval" of their legal parentage under the provisions of the 2024 Act.

Although the Department of Health's basis for adopting an approach where the surrogate will be the legal mother at birth in both the 2017 General Scheme and the 2024 Act *possibly* emanated from the Supreme Court's 2014 decision in *MR & Another v An tArd-Chláraitheoir*, it is plausible that the case has been conveniently (and incorrectly) interpreted by the Department to pursue a rather restrictive approach to legislating for surrogacy arrangements. This is because the Supreme Court's decision in the *MR* case was only released in November 2014, yet an approach to legal parentage based on *mater semper certa est* had already been adopted by Part 3 of the General Scheme of the Children and Family Relationships Bill 2014, which contained Ireland's premier surrogacy proposals and was published in January 2014. Indeed, in the Notes accompanying Part 3 of that draft legislation it is stated that "the policy intention is that in a surrogacy case, the birth mother will be recorded as the child's mother". While Part 3 made provision for a post-birth parental order process, the Notes made it clear that "the consent of any surrogate is essential and

she will be the legal mother of the child if she does not consent"—all of this despite the fact that only the regulation of gestational surrogacy was being proposed under Part 3. In addition, the court's ability to dispense with the surrogate's consent was highly restricted to situations where she is "deceased or cannot be traced". While the 2014 General Scheme was drafted by the Department of Justice and not the Department of Health, the same restrictive approach to the practice of surrogacy is taken by both of these state departments in the pieces of legislation drafted by them, and it is difficult to see how the *MR* case had any real bearing on the strict policy positions taken.[7]

Indeed, in January 2018, when Department of Health officials were invited to the Houses of the Oireachtas to address the members of the Oireachtas Joint Committee on Health about the provisions in the 2017 General Scheme, they remained wedded to the principle of *mater semper certa est*, with the Department's Geraldine Luddy emphasizing to the Committee that:

> In this country, the birth mother is the mother. That is not changed in surrogacy cases in the scheme. The surrogate must transfer her right. If she does not do so, she remains the mother.[8]

The Department of Health's Dr Tony Holohan also reinforced this stance when questioned:

> The scheme clearly provides that at the point of birth, the Latin principle is *mater semper certa est*, or motherhood is always certain. The birth mother is the mother until such time as she goes through or consents to the parental order process through the courts.[9]

The Department of Health's reasons for opting for a post-birth determination of legal parentage for intended parents in a surrogacy context appear to be misguided and were possibly based on an entrenched moral viewpoint tied to traditional notions of motherhood.[10] Alternatively, the Department may simply have adopted the *mater semper certa est* principle for deciding motherhood at birth in a surrogacy context

[7] Indeed, commenting on the policy rationale to exclude traditional surrogacy from the 2014 General Scheme in the accompanying "Notes", Madden (2014: 54) states that: "This language displays a negative bias against surrogacy which is neither appropriate nor justified." Traditional surrogacy was similarly excluded from the 2017 General Scheme and the 2022 Bill, and it is not regulated under the 2024 Act.

[8] Committee Debates, Joint Committee on Health, 17 January 2018.

[9] Ibid.

[10] Indeed, wherever the gestational surrogate is referred to in the Health (Assisted Human Reproduction) Bill 2022 and, ultimately, the 2024 Act, she is referred to as a "surrogate mother". In the 2014 General Scheme, and also in the 2017 General Scheme, she was instead referred to as a "surrogate".

because it is a common way of establishing legal motherhood across the world (Iliadou 2024: 477), albeit not one required by the Irish Supreme Court in a surrogacy situation. In any event, Part 7 of the 2024 Act and, consequently, this somewhat prohibitive model of domestic surrogacy regulation, was enacted in July 2024 and now forms part of Irish law.

[F] THE SURROGATE'S CONSENT TO A POST-BIRTH PARENTAL ORDER

The requirement in Part 7 of the Act that, at birth, the surrogate will be the child's legal mother, is not unusual—it is replicated in, *inter alia*, the UK, New Zealand, Portugal and the Australian states of Victoria and Western Australia. However, despite the rather selfless, admirable role she undertakes, a gestational surrogate has no genetic connection to the child, and designating her the child's legal parent at birth does not accord with the evidence pertaining to a surrogate's intentions when entering into a surrogacy arrangement (Law Commission & Scottish Law Commission 2019: 182). Nonetheless, akin to the legislation in the UK,[11] Part 7 provides that the intended parents must go through a judicial "post-birth Parental Order" process to establish legal parentage. The intended parents will have to apply to the court for a parental order transferring legal parentage from the surrogate to them a minimum of 28 days after the birth of the child, with the surrogate consenting to the order.[12]

Mirroring the UK legislation, Part 7 affords remarkable post-birth leeway to the surrogate, which arguably makes more sense in the UK context where traditional surrogacy is permitted and the surrogate can be genetically related to the child, but makes little sense in an Irish context where only gestational surrogacy is regulated. Significantly, Part 7 of the 2024 Act mirrors the current UK law surrounding the surrogate's consent to a parental order, such that this can only be dispensed with by the court where she is either deceased, cannot be located after reasonable efforts have been made to find her, or lacks decision-making capacity.[13] This is a significant retrograde step when compared to the draft legislation from which the 2024 Act emanated, the 2017 General Scheme, because at least there was a provision in that draft legislation which provided

[11] See section 54 of the HFEA 2008.

[12] See sections 65(5) and 66(1)(a)(iii) of the 2024 Act.

[13] See section 66(2)(b) of the 2024 Act. The equivalent provision in the UK is section 54(7) of the Human Fertilisation and Embryology Act 2008, which provides that the surrogate's consent to a parental order is not required *only* when she cannot be found or is incapable of giving agreement. There is no opportunity for the court to otherwise dispense with the surrogate's consent, as observed by Theis J in *Re AB (Surrogacy: Consent)* (2016).

some potential relief for intended parents should the surrogate arbitrarily refuse to consent to the making of a parental order. Head 48 of the General Scheme enabled the court to waive the requirement for the surrogate's consent in a wider variety of circumstances, including where she is deceased; lacks the capacity to provide consent; cannot be located after reasonable efforts have been made to find her; or, importantly, "for any other reason the court considers to be relevant".[14]

This would have offered a potential remedy to intended parents in this particular predicament and might, in practice, prevent the kind of outcome that occurred in the case of *Re AB (Surrogacy: Consent)* (2016)[15] in the UK. Indeed, in 2018, during oral evidence sessions at Westminster to consider reform of the law on surrogacy in the UK, the All-Party Parliamentary Group on Surrogacy was impressed that, in Ireland, the General Scheme was "responding to some of the thorny issues that have arisen in the English courts, by planning to remove the aspect of the law that means the surrogate's consent could not be dispensed with if unreasonably withheld" (2021: 13).

Indeed, one wonders whether this provision was intentionally removed from the 2024 Act to make domestic surrogacy as perilous an undertaking as possible for Irish intended parents because, rather than adopt Head 48 of the General Scheme, Part 7 has reverted to a restrictive provision identical to that contained in Ireland's premier legislative proposals on surrogacy, which were scrapped back in 2014. As demonstrated, Part 3 of the General Scheme of the Children and Family Relationships Bill 2014 only allowed for the surrogate's consent to a parental order to be waived by the court if she was either deceased or untraceable.

Further, in the UK, the Law Commissions recommended in their report, *Building Families through Surrogacy: A New Law* (2023: volume 1, 47-48, *Core Report*) that, as regards the existing criteria for making parental orders under the law in that jurisdiction, a court should have the power to dispense with the requirement that the surrogate must consent to a parental order being made in circumstances where the welfare of the child requires it. This recommended approach to the surrogate's consent is very much in sync with the Verona Principles, which envisage that, where

[14] See Head 48 of the 2017 General Scheme. However, the ability of the court to dispense with consent "for any other reason [it] considers to be relevant" might have allowed for too much judicial discretion in these situations, if enacted.

[15] In this case the surrogate and her husband refused to consent to a parental order in favour of the intended parents, and there was no possibility for the court to waive their consent. See also Douglas (2017). See also *H v United Kingdom* (2022) where the same-sex intended parents did not even apply for a parental order once the surrogate and her husband refused to provide their consent to it.

states choose to make the surrogate the legal mother at birth, then, if she chooses to retain legal parentage, a court or "other competent authority" should expeditiously conduct a best interests of the child determination. On the contrary, the Irish approach to the surrogate's consent will not allow for this—once the surrogate refuses to consent, an application for a parental order simply cannot proceed, and a court has no authority to consider the best interests of the child.

The Oireachtas must amend the current legislative model for regulating domestic surrogacy as regards the surrogate's consent; it should reconsider its approach in light of the recommendation from the Law Commissions regarding very similar legal provisions in the UK, as well as international best practice for surrogacy, as contemplated by the Verona Principles.

[G] THE CONSEQUENCES OF THE SURROGATE'S BLANKET ABILITY TO REFUSE CONSENT

It should be strongly emphasized that surrogates rarely refuse to consent to a parental order. However, the surrogate's blanket ability to refuse consent has had real-world consequences in a number of significant cases in less than a decade. In *Re AB (Surrogacy: Consent)* (2016), relations between the gestational surrogate and the intended parents broke down during the pregnancy. Following the birth of twins, A and B, the gestational surrogate and her husband refused to consent to the making of a parental order in favour of the genetic intended parents. This refusal was despite the fact that A and B had no contact with the surrogate and her husband, who had also made it clear that they wished to play no active role in the children's lives. Theis J noted that the respondents' rationale for refusing their consent to a parental order was "due to their own feelings of injustice, rather than what is in the children's best interests" (paragraph 8). Nonetheless, Theis J held that the consent of the surrogate and her husband was essential to the making of the order:

> Without the respondents' consent the application for a parental order comes to a juddering halt, to the very great distress of the applicants. The result is that these children are left in a legal limbo, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives (paragraph 9).

Given the "very unusual" circumstances of the case, Theis J adjourned the application for a parental order and expressed the hope that the surrogate would in the future be able to "see the situation from the viewpoint of the young children" (paragraph 32).

Re AB represents judicial confirmation that an application for a parental order has no possibility of success under the current law in the UK where the surrogate refuses consent, and it demonstrates the notable imbalance between the surrogate's position and that of the intended parents, and the child, under the legislation. Indeed, it appears to have dissuaded intended parents from even applying for a parental order in situations where the surrogate has made it clear that she will not consent to one. In 2022, the case of *H v United Kingdom* was decided by the European Court of Human Rights (ECtHR).[16] Similar to *Re AB*, the case involved a domestic, gestational surrogacy arrangement in the UK, but this time one between a male same-sex couple and the surrogate and her husband. Similar to *Re AB*, relations between the parties broke down before the child's birth and, following the birth, the surrogate and her husband refused to consent to a parental order being made in favour of the intended parents. However, unlike the couple in *Re AB*, here the intended parents did not even apply for a parental order and, consequently, the surrogate and her husband remain the legal parents.[17]

Recently, *Re C (Surrogacy: Consent)* (2023) even established that a parental order can be overturned where the surrogate's consent to same was "neither free nor unconditional". Further, Jackson LJ held that section 54(6) of the HFEA 2008, which deals with the surrogate's consent, cannot be read in such a way as to confer on the court the power to dispense with the surrogate's consent and that "the right of a surrogate not to provide consent is a pillar of the legislation" (ibid paragraph 61). Given the striking similarity between section 54(6) of the HFEA 2008 and its Irish equivalent, section 66 of the 2024 Act, the decisions in *Re AB* and *Re C* are likely to be of highly persuasive value when cases surrounding

[16] The applicants were challenging the compatibility of UK birth registration laws with the child's right to respect for private life under Article 8 of the European Convention on Human Rights (ECHR) because such laws require the surrogate's husband to be registered as the surrogate-born child's "father" on their birth certificate, rather than the child's genetic intended father. The ECtHR found that this was within the UK's wide margin of appreciation in the context of assisted human reproduction, and the impugned laws had not resulted in the child being "wholly deprived of a legal relationship" with her intended parents, with whom the child was residing, and both of whom had been awarded parental responsibility together with the surrogate and her husband. The ECtHR declared the case inadmissible as being manifestly ill-founded under Article 35 of the ECHR. For a detailed analysis of this case, see Tobin (2023: 176-183).

[17] Tobin (ibid) argues that this "is completely understandable in light of the recent decision in *Re AB (Surrogacy: Consent)*".

the surrogate's consent to a parental order eventually come before the Irish courts, and knowledge of the outcomes in these UK cases may deter Irish intended parents who find themselves in conflict with the surrogate from even applying for a parental order.

[H] CONSTITUTIONALLY INFIRM?

In Ireland, the overly restrictive approach to the surrogate's consent to a parental order in the 2024 Act is arguably constitutionally infirm. In 2014, in *MR v An tArd-Chláraitheoir*, the Supreme Court did not give the Oireachtas free reign in relation to the regulation of surrogacy. In his judgment, Clarke J referred to "constitutionally permissible" legislation and cautioned that "[w]ithin constitutional bounds it is *largely* a question of policy for the Oireachtas to determine the precise parameters of [surrogacy] regulation" (paragraph 8.7, emphasis added). Clarke J made it quite clear that any future legislation concerning surrogacy would be "of doubtful constitutional validity" if it precluded surrogate-born children from becoming part of a *constitutional family* (ibid paragraph 9.6). The only "family" recognized by the Constitution of Ireland is the married family in Article 41, and a recent attempt by referendum to expand this constitutional definition of "the family" beyond married (opposite-sex and same-sex) families was rejected.[18] Indeed, in Article 41.3.1, "the State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack".

As demonstrated, section 66 of the 2024 Act allows a gestational surrogate to arbitrarily withhold her consent to a parental order being made in favour of intended parents, and this of course includes married intended parents (whether they are opposite-sex or same-sex).[19] As there is no possibility for the court to carry out a best interests of the child assessment and possibly dispense with the surrogate's consent where it is withheld to the detriment of married intended parents, this provision could very well be struck down as unconstitutional if challenged in court by married intended parents. It could be deemed by the judiciary to constitute a disproportionate "attack" on the constitutionally revered (and, according to the most recent referendum result, socially preferred)

[18] In March 2024, a constitutional referendum to extend the constitutional definition of "The Family" in Article 41 beyond marriage to also include "other durable relationships" was rejected by 67.69% of the Irish electorate.

[19] The institution of marriage was extended to same-sex couples following a successful constitutional referendum in 2015 that led to the insertion of Article 41.4, which provides: "marriage may be contracted in accordance with law by two persons without distinction as to their sex". Married couples are constitutionally protected family units under Article 41 of the Constitution of Ireland.

marital family unit, as it prevents surrogate-born children from becoming part of a constitutional family where they would be legally recognized as the children of their married parents.

In addition, the "natural and imprescriptible" rights of all children are expressly protected in Article 42A of the Constitution of Ireland.[20] Doyle and Feldman observe that Article 42A, known as the "Children's Amendment" and only inserted in 2015 following a referendum, places the constitutional rights of the child "front and centre" (Doyle & Feldman 2013: 130).

Shannon suggests that a child may enjoy a "natural constitutional right to family life pursuant to Article 42A.1" (Shannon 2010: 36). Thus, a child born via a gestational surrogacy might very well enjoy a constitutional right to family life with its intended parents, the very persons who are responsible for its birth by initiating the surrogacy arrangement in the first place. Therefore, by arbitrarily refusing to consent to the making of a parental order, a gestational surrogate could be denying the child its constitutional rights in relation to its intended parents. In these circumstances, a genetic intended father of the child would still be able to acquire parentage and guardianship of the child through the courts, but there would be no possibility for the intended mother or, in a same-sex relationship, the intended co-father, to acquire parentage, and under Irish law such persons would only be eligible to apply for guardianship of the child where they have shared with the parent responsibility for the child's day-to-day care for a period of more than two years.[21] Therefore, the legal consequences of a surrogate's refusal to consent to a parental order could indeed be quite significant for the child—this could materially affect its enjoyment of any right it might have to family life with its intended mother or intended co-father, particularly during the child's early years of life.

[I] DISPENSING WITH CONSENT IN THE CONTEXTS OF ADOPTION AND SURROGACY

I have suggested elsewhere that a child-centred reason for waiving the need for the surrogate's consent should have been included in the 2024 Act, and this could have taken the form of a provision equivalent to that

[20] Article 42A.1 of the Constitution of Ireland provides that: "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

[21] See section 6C of the Guardianship of Infants Act 1964, as inserted by section 49 of the Children and Family Relationships Act 2015.

contained in Irish adoption legislation (Tobin 2023: 96). In the context of an adoption, section 31 of the Adoption Act 2010, as amended, allows the High Court of Ireland to dispense with the need for the natural mother's consent where she fails, neglects or refuses to give her consent to the making of an adoption order.[22] However, before doing so the court must have regard to "the rights, whether under the Constitution or otherwise, of the persons concerned" (including the natural and imprescriptible rights of the child in Article 42A) and, in resolving the matter, the best interests of the child shall be the paramount consideration for the court. O'Mahony (2021: 24) also favours this child-centred approach to consent in surrogacy, and, in the UK, the Law Commissions' *Building Families through Surrogacy* (2023: 47) suggested approach to reforming the law there as regards dispensing with the surrogate's consent to a parental order is based on the provisions of adoption law.[23]

However, an examination of Irish case law concerning the *exercise* of the court's power to dispense with the need for the birth mother's consent to an adoption order is of little value because the circumstances leading to her refusal to consent are usually remarkably different. In an adoption context, birth mothers often refuse to consent to the final adoption order being made because they claim they did not give a full, free and informed consent to placing the child for adoption in the first place, and they seek to have the child returned to them from the prospective adoptive parents, who in turn seek a section 31 order from the High Court dispensing with the need for the birth mother's consent to the making of the adoption order. It is these difficult situations that most of the reported Irish case law is concerned with.[24]

In surrogacy, although surrogates consent to participating in the surrogacy arrangement in the first place, they sometimes later arbitrarily refuse to consent to the parental order because their relationship with the intended parents broke down during the pregnancy and, feeling

[22] Shannon notes that Ireland's initial adoption legislation, the Adoption Act 1952, did not allow for the possibility of a court dispensing with the need for the birth mother's consent—if she did not sign the consent form for the legal adoption of the child, the adoption could not go ahead: see Shannon (2020: 588). This is an interesting parallel with the consent requirements in Ireland's premier surrogacy provisions contained in the 2024 Act. The Adoption Act 1974 first gave the prospective adoptive parents the right to apply to the High Court to dispense with the need for the birth mother's consent to the adoption.

[23] Indeed, the Law Commissions note that their suggested test, that the court should be able to dispense with the surrogate's consent to a parental order where the welfare of the child requires it, "is the same as the one that applies to adoption" and was supported *by the majority* of consultees (Law Commission & Scottish Law Commission 2023: 47-48).

[24] See, *inter alia*, *EF & FF v An Bord Uchtála* (1996); *Northern Area Health Board v An Bord Uchtála* (2002); *G v An Bord Uchtála* (1980).

aggrieved, they wish to exercise their right of veto that allows them to wholly frustrate the intended parents from securing legal parentage.[25] Unlike the birth mother in an adoption context, the surrogate rarely wants to regain custody of the surrogate-born child.[26] Nonetheless, where she refuses to consent to a parental order, the issue for the intended parents is the same as that for prospective adopters where a birth mother refuses her consent—they need a legal option available to them to have her consent dispensed with by a court. However, unlike prospective adopters, the 2024 Act grants intended parents no such option. This is not to say that the surrogate's consent *should* be dispensed with by a court, for cases might arise where she is refusing it due to child protection concerns or other valid reasons. However, where she refuses to consent, the court should at least be empowered to engage in a best interests of the child determination in deciding whether or not to make the order. By not allowing for such a process where consent is refused, the 2024 Act is not in compliance with international surrogacy-related best practice, law reform suggestions from a jurisdiction with identical laws on surrogacy and consent, or the consent provisions of Irish adoption law. If legislation can allow a genetic mother's consent to an adoption order to be dispensed with, where justified, it should similarly allow for the possibility of a gestational surrogate's consent to be dispensed with by a court where this is deemed to be in the best interests of the child.

[J] THE BEST INTERESTS PRINCIPLE: A TRANSPARENT JUSTIFICATION FOR THE EXERCISE OF THE COURTS' POWER

If the 2024 Act was amended to provide the courts with the power to dispense with the need for the surrogate's consent to a parental order, in addition to a consideration of the constitutional rights of the parties concerned, as is the case under Irish adoption law, the guiding principle for the court in deciding the matter should be the "best interests" principle.[27]

[25] See *Re AB (Surrogacy: Consent)* (2016); *H v United Kingdom* (2022).

[26] Although *Re C* (2023) involved a parental order being set aside because the surrogate had not given a "free nor unconditional" consent, and the traditional surrogate, who had used her own egg in the arrangement, wanted contact with the child. However, this case is similar to many others involving consent issues surrounding parental orders in that, about halfway through the pregnancy, the relationship between the surrogate and intended parents had deteriorated.

[27] Legislation provides that, in the contexts of adoption, guardianship, custody and access, the best interests of the child "shall" be the paramount consideration for the court, and stipulates that the court "shall" decide the child's "best interests" by reference to a statutory checklist: see, respectively, section 19 of the Adoption Act 2010, as inserted by section 9 of the Adoption (Amendment) Act 2017, and section 3 of the Guardianship of Infants Act 1964, as inserted by section 45 of the Children and Family Relationships Act 2015.

Section 66 of the 2024 Act already provides the courts with a "best interests" checklist to assist them in deciding parental order applications in circumstances where the surrogate *consents*, so this same checklist could be extended to require the court to consider the same factors in its "best interests" assessment in those rare situations where the surrogate refuses to consent.

A statutory requirement for the courts to adhere to this "best interests" checklist in these situations would ensure that any decision of the court to dispense with the need for the surrogate's consent to a parental order is decided by reference to clear, child-centric factors.

This would ensure transparency in surrogacy-related judicial decision-making and, equally, serve as a child-centric justification for the exercise of judicial discretion in these cases.[28]

[K] CONCLUSION

Part 7 of the 2024 Act introduces a restrictive model of domestic surrogacy regulation into Irish law, particularly surrounding the requirement for the surrogate's consent to a parental order. The inability of a court to engage in a best interests of the child determination when faced with a non-consenting surrogate and have open to it the possibility of dispensing with the need for her consent to a parental order is not in compliance with international best practice as envisaged under the Verona Principles. Further, this restrictive statutory approach to the surrogate's consent is constitutionally suspect when the rights of the married family unit and children's rights in Articles 41 and 42A, respectively, and the state's constitutional obligations to protect such rights, are considered. As enacted, Part 7 will undoubtedly generate disputes surrounding the surrogate's consent, but UK case law concerning very similar provisions on consent in this context may have a chilling effect on many such disputes being litigated. Legislation which places the gestational surrogate in such an arbitrarily strong legal position is not in the best interests of the surrogate-born child, or its intended parents. In light of law reform recommendations from the UK concerning similar legislative provisions, and international surrogacy-related best practice as contemplated by the

[28] The factors the court "shall have regard to" under section 66 of the 2024 Act in determining the best interests of a child in respect of whom a parental order application has been made are:(a) the child's age and maturity; (b) the physical, psychological and emotional needs of the child; (c) the likely effect of the granting of the parental order on the child; (d) the child's social, intellectual and educational needs; (e) the child's upbringing and care; (f) the child's relationship with his or her intending parents (or, in the case of a single intending parent, that intending parent); and (g) any other particular circumstances pertaining to the child.

Verona Principles, as well as the approach to dispensing with a birth mother's consent under Irish adoption legislation, the Oireachtas should amend Part 7 of the 2024 Act to ensure that it is more family and child-centred and to avoid the possibility of certain of its provisions being declared unconstitutional.

About the author

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Best Interests as a Rule of Procedure: Reflection on Different Regulatory Responses to Surrogacy

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Abstract

This article examines the extent to which the best interests of the child, under Article 3 of the United Nations Convention on the Rights of the Child 1989, has been utilized as a rule of procedure when developing legislative responses to surrogacy. Three jurisdictions are examined which have adopted vastly different regulatory responses to surrogacy: Sweden, impliedly prohibiting surrogacy; England and Wales, permitting surrogacy on an unenforceable basis; and California, providing for enforceable surrogacy agreements. Through analysis of the development of the legislation in each jurisdiction, it is argued that the concept of best interests carries a significant risk of being a term of empty rhetoric and seeks to reinforce the value of using child's rights impact assessments to ensure a child-centric approach to surrogacy regulation.

Keywords: best interests; surrogacy; children's rights; UNCRC.

[A] INTRODUCTION

Surrogacy is a divisive topic, evident from the range of regulatory responses to the practice: whilst some jurisdictions aim to prevent surrogacy through prohibitive legislation, other countries accept surrogacy as a legitimate form of reproduction and expressly permit and regulate the practice. There are many rights and interests to consider when regulating surrogacy, including those of the surrogate and intended parents (IPs). As legislation is drafted by adults, these adult-centric concerns are often at the forefront of debates on the legitimacy, or otherwise, of surrogacy. This article considers the rights of the surrogate-born child, and in particular the right of the child to have their best interests (BI) as a primary consideration. Article 3 United Nations Convention on the Rights of the Child 1989 (UNCRC) dictates that in all actions concerning children, their BI must be a primary consideration: given that the purpose of a surrogacy arrangement is to bring about the birth of a child, implementing

a legislative response to surrogacy is an action concerning both potential and existing children.

The UNCRC is the most widely ratified human rights Convention in the world, with only the United States failing to ratify. Article 3 has been granted *jus cogens* status in international law, thus becoming customary international law (Supaat 2014). Therefore, non-ratification does not prevent a state being obliged to comply with Article 3, and its 'special status' means it must be applied in all aspects of a child's life (Kilkelly 2006: 41). However, BI is an inherently flexible notion and the application of the principle is vulnerable to manipulation by decision-makers. Particularly considering the divisive nature of surrogacy, it is possible for the concept of BI to be used to advance normative and prejudicial arguments under the guise of children's rights. This article examines how the BI principle has been used by decision-makers when legislating for surrogacy to examine whether the laws are truly child-centric.

The article begins by outlining the extent of a state's obligation under Article 3 UNCRC to guarantee the BI of a child as a primary consideration, before proceeding to interrogate how the concept of BI has been used to develop legislative responses to surrogacy across different regulatory approaches. The regulation of surrogacy includes both the ability for IPs to lawfully undertake surrogacy within their home country, as well as how the law attributes legal parenthood to the IPs. When considering Article 3 as a rule of procedure, it is not concerned with the individual decisions to be made by clinicians as to whether treatment should be provided (which has been subject to criticism: for example, see Jackson 2002). Instead, the obligation under Article 3 as a rule of procedure in determining the regulatory response to surrogacy is to consider the BI of children who have been, or may be, born of surrogacy generally.

England and Wales permit surrogacy on an unenforceable and altruistic basis, with the ability for IPs to establish legal parenthood. Sweden does not allow treatment for surrogacy domestically, although there are judicial mechanisms by which IPs who engage with surrogacy can become legal parents. California, often regarded as one of the most surrogacy-supportive states, adopts an intent-based model for parenthood, enabling IPs to obtain legal parenthood from birth following a gestational surrogacy arrangement. The article examines and critiques the development and rationale of these regulatory responses from a BI perspective, concluding that, unless a more consistent application of Article 3 is adopted across states, any BI justification for regulatory responses to surrogacy—whether permissive or prohibitive—fails from a child's rights perspective.

[B] BI AS A RULE OF PROCEDURE

Article 3(1) UNCRC states "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Although surrogacy arrangements are entered into by adults, how the law responds once a child has been born will inevitably concern the surrogate-born child. Therefore, the legislature is obliged to have the child's BI as a primary consideration when implementing surrogacy legislation. This obligation applies also to judicial bodies: this is significant because legislation can be informed by previous judicial decisions, and the courts will be left to interpret and apply the legislation once implemented.

There has been academic debate as to what is meant by a "primary" consideration: the wording of BI as being *a* primary consideration (as opposed to *the* primary consideration) acknowledges that Article 3 cannot "trump" other considerations that must be given equal attention and weight in decision-making (Hodgkin & Newell 2007: 35). However, where there are competing interests, the Committee on the Rights of the Child (CRC) expects Article 3 to have a "larger weight", demonstrating that BI must have priority when implementing legislation that will impact upon children (CRC 2013: 2). Therefore, Article 3 does not demand that a specific decision most supportive of the child's BI be made. If other competing rights or interests mean that ultimately a different regulatory response is adopted, less supportive of the child's BI, this remains within a state's discretion. The obligation under Article 3 does not require a certain outcome, but rather demands that BI are scrutinized, and prioritized, as part of the decision-making process.

The UNCRC does not define BI, and the CRC confirmed that the concept is "flexible and adaptable" and "should be adjusted and defined on an individual basis" (CRC 2013: 9). Given the vast cultural differences across signatory states, it is likely that the application of BI when developing legislation will vary considerably, something acknowledged shortly after the adoption of the UNCRC (McGoldrick 1991; Alston 1994). Further, there may be differing approaches to BI not only across different political and cultural spheres, but also within one jurisdiction (Sutherland 2016: 38), risking the concept being used in an inconsistent and subjective manner. As argued by Taylor (2016: 57), the vague definition of BI could undermine children's interests given the ability for decision-makers to manipulate the definition to serve their own agenda. Notwithstanding

this, Eekelaar and Tobin (2019: 95) have argued that the lack of a "precise formula" is beneficial because it ensures a genuine assessment of BI rather than decisions being based on a rule or presumption.

Therefore, the indeterminacy of BI could operate both in a positive and negative manner when regulating surrogacy. The flexibility of the concept allows the term to "expand and adapt to new developments over time" (Gerber & O'Byrne 2015: 89), meaning that a holistic understanding of BI could result in the legislative approach developing as societal norms and policy positions shift. However, the concept of BI risks, I argue later in this article, being used as a veil to advocate for a legal response to surrogacy that is not truly child-centric.

A rule of procedure

The CRC articulates Article 3 as a substantive right, a fundamental interpretative legal principle and a rule of procedure, ensuring that the BI of the child is at the centre of state authorities' decision-making at all stages (CRC 2013: 2). In examining how BI has factored into the development of regulatory responses to surrogacy, Article 3 as a rule of procedure is examined throughout this article. The CRC's General Comment provides a framework that allows for a substantive assessment of how BI was incorporated into legislative decision-making.

As to how BI can be guaranteed as a rule of procedure, the CRC states that "the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned" and further that states should explain "what has been considered to be in the child's BI; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases" (CRC 2013: 4).

The CRC advocates for the use of a child's rights impact assessment (CRIA) for all proposed policy and legislative decisions to support the implementation of Article 3 as a rule of procedure. CRIAs have been defined as "a tool for translating … Article 3 … into practice in a concrete, structured manner" (Sylwander 2001), through an "iterative process in which the impact of a proposal or policy is systematically evaluated in relation to children's rights" (Payne 2020). Although there is no prescribed approach to a CRIA, the European Network of Ombudspersons for Children (2020) has produced templates on the process that should be followed, including identifying positive, negative and neutral impacts of the proposed decision on children.

The use of CRIAs may result in different regulatory responses, depending upon the subjective value attributed to the separate factors going into the assessment, as has been discussed in relation to the domestic welfare standard in England and Wales (Reece 1996). It is therefore possible that various regulatory responses to surrogacy would be deemed as equally consistent with the BI of the child under Article 3. This is not necessarily problematic: BI under Article 3 cannot necessitate a certain regulatory response given that the standard must be flexible and adaptable, considering the cultural and social context. More problematic is where there is not transparency as to what has been factored into the decision-making process, devaluing Article 3 by enabling BI to be used as a cloak for advancing arguments that are not truly child-centric.

It is therefore possible to assess the extent to which domestic legislative bodies have followed Article 3 as a rule of procedure when developing surrogacy legislation. As the following sections will demonstrate, the BI concept has been used to justify legislation to varying extents across different jurisdictions, exposing the vulnerability of the principle as a substantive right of the child.

[C] ENGLAND AND WALES: A PERMISSIVE APPROACH

The law on surrogacy

In England and Wales, surrogacy has been regulated since 1985 with the enactment of the Surrogacy Arrangements Act (SAA) which aimed to prevent commercial surrogacy through making agreements unenforceable and limiting the ability to negotiate or advertise for surrogacy services. The SAA focuses on the regulation of the surrogacy arrangement itself, making no reference to the surrogate-born child. The Human Fertilisation and Embryology Act (HFE Act), introduced in 1990 and amended in 2008, deals with the effects of a surrogacy arrangement by providing a mechanism for IPs to obtain legal parenthood of the surrogate-born child. The *mater semper certa est* presumption applies in England and Wales, meaning the woman who gives birth is the child's legal mother: the surrogate will always be the child's legal mother at birth. If the surrogate is married, her spouse will be the legal father or second parent. To remove the surrogate's (and her spouse's, if applicable) parental status, IPs must apply for a parental order (PO) under section 54 or section 54A HFE Act 2008. The regulatory response to surrogacy is therefore permissive, but there are prohibitions on commercial aspects and surrogacy arrangements are

not enforceable meaning parenthood must be established via a judicial mechanism.

BI in the development of the HFE Acts

The HFE Act 1990 received royal assent on 1 November 1990, with the UK signing the UNCRC in April 1990 and ratifying it in December 1991, meaning the UNCRC was in its infancy. Nonetheless, the BI concept was invoked during the debates leading up to the implementation of the Act. However, the phrase, alongside the concept of the child's welfare, was principally used in conjunction with another proposition: that a child should be born into a traditional nuclear family with a mother and father. To take a few examples, "the provision of AID to single women, unmarried couples and lesbian couples … seems to me to be highly undesirable from the point of view of the resulting children" (HL Deb 7 December 1989, vol 513) and "in the BI of the child born, treatment should be given only to married couples or to a man and woman living together in a stable relationship" (HC Deb 2 Apr 1990, vol 170). This exemplifies how the BI or welfare of the child was used to advance arguments for inclusion (or exclusion) of provisions from the 1990 Bill without a systematic analysis of how the provisions would in fact impact on the BI of the child. There was a noticeable lack of authority or evidence upon which the suggestion that permitting single individuals or unmarried couples to access artificial reproduction would be contrary to the BI of children. This lack of objective consideration of BI allowed an allegedly child-centric approach to be used to advance arguments that often reaffirmed traditional normative family values.

There was limited consideration of the PO provisions to enable IPs to obtain legal parenthood. The amendment was introduced following a Member of Parliament advocating for parental responsibility to be granted to IPs following surrogacy (HC Deb 2 Apr 1990, vol 170). Other than this intervention on behalf of constituents, there was no discussion in the Commons as to the provision, and it passed without debate in the House. In the Lords, debates on the surrogacy provisions were equally limited. In response to a proposal to remove the surrogate's parental status, the Lord Chancellor stated that to remove the certainty in the law as to motherhood could not be in the BI of the child (HL Deb 20 March 1990, vol 517). However, there was no attempt to substantiate the claim that a different allocation of motherhood would be contrary to the child's BI.

Other than the Lord Chancellor's statement, there was a lack of consideration of the BI of the child in relation to surrogacy. As such,

it cannot be asserted that POs were implemented in accordance with Article 3 as a rule of procedure: there was no assessment of how enabling IPs to obtain a PO would accord with the BI of the child, and references to BI relating to the parenthood provisions more generally lacked an objective analysis of how this was being measured.

By the time the HFE Act 1990 came to be reviewed, resulting in the 2008 Act, the UNCRC had been ratified for over 15 years; it is therefore not surprising that the debates more explicitly referenced the rights of the child, both generally and in the context of the UNCRC. However, there continued to be unsubstantiated use of the BI concept.

As the Archbishop of York drew attention to at the early stages of the Bill, the Parliamentary Joint Committee had called for an ethical framework to ensure decisions were based on the welfare of the child, but this framework was missing throughout the Bill's passage (HL Deb 19 November 2007, vol 696). This would have aligned with the CRC's guidance of utilizing a CRIA when implementing legislation and would have enabled the legislature to more explicitly, and objectively, assess the BI of the child. During the House of Commons Committee stage, it was stated that, despite an acceptance that the rights of the child are paramount, "in all honesty, I have not seen that as a theme in our debates throughout our consideration of the Bill" (HC Public Bill Committee, 10 June 2008), demonstrating that the regular references to the welfare and BI of the child did not mean that those factors were indeed at the forefront when reflecting on the Bill. Instead, many individuals framed their arguments in the context of the child's welfare, BI and rights without any evidence to support their propositions. For example, repeated assertions that allowing same-sex individuals to become parents would be contrary to the BI of the child, without substantive evidence, clearly advances a personal belief or value, cloaked in more acceptable language. This demonstrates a limitation to the passage of the Act from an Article 3 perspective because it is not possible to ascertain the true extent to which the BI of the child was a factor in the decision-making process.

As regards POs, it was proposed that the eligibility requirements be retained, with one amendment to extend the category of applicants from spouses to include civil partners and unmarried couples. The definition of "enduring family relationship" for non-married applicants was subject to debate, but it was decided that it should be for the Family Court to determine the scope, in line with the BI of the child (HC Public Bill Committee, 12 June 2008). This acknowledged the view that the BI of the child should be the determining factor when deciding whether applicants

met the eligibility criteria for a PO, and that the judiciary would be best placed to make that determination.

As with the 1990 Act, the debates on POs were very limited in comparison with other elements of the Bill. One proposed amendment was to remove the attribution of legal parenthood to the surrogate's husband, allowing a male IP to be the legal parent from birth. During this debate, both those supporting and contesting the amendment based their arguments on the child's BI. In support of the amendment, it was said to be in the child's BI for the IPs to be able to make decisions relating to the child's welfare from birth, rather than vesting that decision-making in the surrogate and her husband who would not be the primary caregivers. In opposing the amendment, it was stated to be contrary to the child's interests for there to be complications in ascertaining who should be responsible for the child in the event of a dispute (HC Public Bill Committee, 10 June 2008). This again highlights the difficulty of arguments based on the child's BI when it is a broad term that can be manipulated to apply to a specific angle of an argument.

Due to the limited scrutiny and debate relating to surrogacy in the Bill and the complexity of the issues raised, it was stated that the practice of surrogacy should be dealt with elsewhere from the Bill and a commitment was given to do so upon the completion of the HFE Bill through Parliament (HC Public Bill Committee, 12 June 2008). However, the Government's commitment to review the regulation of surrogacy did not take place after the Act, with the issue only again being considered some 11 years later through the Law Commission and Scottish Law Commission's (2023) joint project on surrogacy.

Therefore, there was a lack of meaningful consideration as to how the parenthood provisions in the legislation would secure the BI of surrogate-born children, falling short of Article 3 as a rule of procedure. Where there was reference to the PO provisions, the parliamentary debates demonstrated the BI concept being used as empty rhetoric to advance arguments that were not child-centric or to enable paternalistic notions to be advanced. It is therefore difficult to assert that the BI of the child was a primary consideration during the passage of the Bills.

[D] SWEDEN: A PROHIBITIVE APPROACH

The law on surrogacy

Whilst there is no explicit prohibition on surrogacy in Sweden, the practice is not permitted within healthcare, meaning that IPs would need to act outside of a clinic setting (ie home insemination) or enter a cross-border arrangement. The *mater semper* presumption applies in Sweden and the surrogate's spouse, if applicable, will be the legal father. There are no specific provisions in Sweden to transfer legal parenthood following surrogacy, meaning that IPs are reliant upon adoption provisions.

Research undertaken by Arvidsson found that, despite the disruptive and timely nature of adoption proceedings, all participant IPs were able to secure legal parenthood following surrogacy (2019: 75). However, Supreme Court Case Ö 5151-04 (2006) demonstrates the precarity of adoption following surrogacy, where a genetic intended mother was unable to obtain parenthood due to the surrogate and intended father withdrawing consent to the adoption. As the legal mother, the surrogate's consent was an absolute requirement, without which the intended mother could not have any form of recognition with the child. This case "highlights a sense of unfairness between two equally-contributing parties" because the genetic intended father was able to become a legal parent, with no recognition of the genetic contribution of the intended mother (Stoll 2013: 139).

The dissenting judgment opined that consent should not have been an obstacle to the adoption which would have achieved "consistency between the genetic and actual parenthood and the legal parenthood", aligning with Article 3 UNCRC (Supreme Court Case Ö 5151-04: 7-8). Furthermore, the intended mother based her application on the BI of the child, but the majority decision did not consider this. By basing the judgment solely on the admissibility of the application, there was a failure to consider the BI of the child, and the judgment can be critiqued in light of Article 3.

By not regulating surrogacy or its consequences, Stoll (2013: 238) argues that the state is failing in its obligation to protect the interests of surrogate-born children.

BI in potential law reform

Despite criticisms of failing to legislate for surrogacy, opportunities to change the regulatory framework have not been taken. In 1985, the view of the Insemination Committee, and adopted in the legislation, was that

surrogacy was an "undesirable phenomenon" (1985). There have been various motions, proposals and reports relating to the permissibility, or otherwise, of surrogacy since 1985. However, the Inquiry into Increased Opportunities for the Treatment of Involuntary Childlessness (the Inquiry) had a wider remit and led to constitutional amendments, so it is the focus of this article. The 2016 report, "Different Paths to Parenthood" (SOU 2016: 11), concluded that surrogacy should continue to not be permitted domestically, and this was subsequently endorsed by the Law Council Referral in 2018 (Regeringen Ministry of Justice 2018).

The Inquiry stated that permitting commercial surrogacy would not be in the BI of the child, although there was no discussion as to how the child's interests would be risked by a commercial model. However, there was greater consideration of the child's BI in relation to altruistic surrogacy.

In favour of permitting altruistic surrogacy, it was posited that allowing the practice domestically would ensure children could benefit from the identifiable donor system in Sweden, minimizing the number of children born through overseas surrogacy who cannot access donor information. This ability to access origin information was equated with being in the BI of the child (SOU 2016: 11: 411). However, despite this positive BI consideration, the Inquiry was ultimately of the view that altruistic domestic surrogacy should not be permitted. There were various arguments framed around the BI of the child to support this conclusion.

First, it was stated that there remained too much of a knowledge gap to be sure that surrogacy is compatible with the BI of the child, in relation to both the surrogate-born child and the existing children of the surrogacy (SOU 2016: 11: 415). It was stated that, of the effects of surrogacy, "we know virtually nothing about this, while the risk of harm seems obvious" (SOU 2016: 11: 415). The conclusion that the "identity development and long-term family relationships" for the child were unclear, demonstrates that the Inquiry was considering BI in relation to family functioning and self-identity.

Without explicit consideration of what was meant by the "obvious" risk of harm, it is not possible to ascertain what was factored into the alleged BI assessment and highlights the inherent risk of BI being employed as empty rhetoric used to support a pre-existing bias against the practice. Furthermore, there is no empirical evidence that surrogate-born children suffer harm from the nature of their birth and, on the contrary, a longitudinal study has found that surrogate-born children are well adjusted (Golombok & Ors 2013). The Inquiry did acknowledge the

findings of the study, but stated that the small scale of the investigation meant that solid conclusions could not be drawn (SOU 2016: 11: 412). Whilst the study was small scale, it does fill the alleged knowledge gap as to the effect on surrogate-born children, meaning the argument for maintaining prohibition on this basis lacks support.

Another concern raised as to BI by the Inquiry related to the impact on the child should the arrangement go wrong and the surrogate change her mind. It was stated that, in such cases, it would not be in the BI of the child to have uncertainty as to parenthood, which would need to be resolved in court. There were two possible approaches discussed: that the surrogate be able to change her mind, or that the court determine who should be the child's parent. Both outcomes, in the view of the Inquiry, could operate against the BI of the child because adult interests would be taking priority over the BI of the child, or the court would be bound to decide in accordance with the BI of the child, undermining the surrogate's interests in being able to change her mind (SOU 2016: 11: 442).

However, this use of BI to justify a retained prohibition on surrogacy can be critiqued. Even without permitting surrogacy, such disputes can arise as seen in the Supreme Court Case Ö 5151-04 (2006): if consent to adoption is refused, the court cannot make an adoption order, and the BI of the child cannot be a primary consideration in the decision. Therefore, if the current prohibition on surrogacy can result in decisions that do not guarantee Article 3, the hypothetical situation of a disputed surrogacy arrangement should the practice be permitted would not be any worse in relation to the BI of the child than the present framework.

In addition to the maintained prohibition on domestic surrogacy, there was also consideration of the law following cross-border surrogacy. It was acknowledged that enabling IPs easier recognition of parenthood and entry into Sweden following a cross-border arrangement would provide greater security and certainty for the child, in accordance with their BI. However, the Inquiry also opined that the principle of the BI of the child could not require Sweden to implement constitutional amendments contrary to the policy stance that surrogacy should not be permitted. Whilst acknowledging that, based on the child's BI, it was arguably necessary to introduce special rules for when surrogacy has taken place overseas, the Inquiry decided not to legislate specifically on this matter due to concerns that it could encourage greater numbers of IPs to undertake cross-border surrogacy. The reference to BI in relation to cross-border arrangements therefore demonstrates the tension between the need to consider the BI

of children that have been born of surrogacy and the perceived BI of children generally in the maintained prohibition on the practice.

However, the approach of the Inquiry in this regard can be critiqued. The CRC's guidance on what BI as a rule of procedure requires states that BI needs to be *balanced* against broader issues of policy (CRC 2013: 4). By asserting that the BI of the child cannot take precedence over the public policy stance on surrogacy prevents any balancing exercise taking place. Subsequent case law since the Inquiry has seen a more liberal judicial approach being taken to recognition of parenthood following cross-border surrogacy, with the decisions justified on the BI of the child (Supreme Court Case Ö 3462-18 2019; Supreme Court Case Ö 3622-19 2019). These cases indicate that the continued prohibition of the practice, and attempts to restrict cross-border arrangements, are ineffective in light of the child's BI.

Therefore, despite attempts to justify the recommendations based on the BI of the child, the approach of the Inquiry can be seen as inadequate from an Article 3 perspective. Some of the BI arguments lacked substantive underpinning or failed to adequately acknowledge counter-arguments. This suggests that the concept was used to justify the continuation of an existing anti-surrogacy policy, without a holistic BI assessment being undertaken. By retaining a prohibition on surrogacy, there is a risk that, where arrangements take place across borders or outside of the regulated framework, the BI of the child will not be able to be a primary consideration in the determination of parenthood.

[E] CALIFORNIA: AN INTENT-BASED APPROACH

The law on surrogacy

Surrogacy law in California stems from case law, with the legislature codifying the existing judicial approach to the allocation of parenthood following surrogacy. Therefore, unlike England and Wales and Sweden, it is necessary to reflect on the judicial approach to BI before looking at the legislative response.

The first case to consider parenthood following gestational surrogacy was *Johnson v Calvert* (1993), where both the surrogate and genetic intended mother were seeking recognition as the child's mother. The court interpreted the parenthood rules under the Uniform Parentage Act 1975 to mean that maternity could be established both by giving birth

and being genetically related to the child. With two potential mothers, the court decided to "break the tie" by recognizing she who intended to create the child, and raise it as her own, as the legal mother. As stated by the majority, "but for [the IPs'] acted-on intention, the child would not exist … no reason appears why [the surrogate's] later change of heart should vitiate the determination that [the intended mother] is the child's natural mother" (*Johnson*: 93). This case established the intent-based approach to determining parenthood following gestational surrogacy, which has been said to reflect the child's BI because refusing to recognize the surrogate as a mother was an "attempt to eliminate confusion and uncertainty in the child's life" (Lawrence 1991: 555).

This intent-based approach was subsequently applied in the case of *Re Marriage of Buzzanca* (1998) which involved double gamete donation, thus differentiated from *Johnson* on the basis that the IPs could not rely on their genetic link as a claim to be legal parents. The appeal court held that the provisions of the Family Code whereby a husband is the legal father of a child unrelated to him when the wife undergoes fertility treatment were analogous with this case, stating "both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie" (*Buzzanca*: 1418). As such, given that the IPs initiated and consented to the procedure to procreate the child, they, and not the surrogate, were the legal parents.

Referring to *Johnson*, the court stated that the case was not limited to determining maternity between a surrogate and genetic mother, but to any situation where a child would not have been born without the intention of the IPs (*Buzzanca*: 1425). Therefore, *Buzzanca* demonstrated a departure from *Johnson*'s approach of intent being used to "break the tie" (given there was no tie to break) towards a test of intent alone. The decision of *Buzzanca* was subsequently applied to a surrogacy arrangement involving same-sex male IPs (O'Hara & Vorzimer 1998: 37).

The California Family Code was amended in 2012 through AB 1217, codifying the precedent of the *Johnson* and *Buzzanca* cases that "even without a genetic link or a link by virtue of giving birth, the parties who intended to bring the child into the world are the child's legal parents" (Assembly Committee on Health 2012: 3). Under section 7962, assisted reproduction agreements between IPs and gestational surrogates are presumptively valid and can be lodged with the court, rebutting any presumption that the surrogate and her spouse (if applicable) are the parents of the child.

BI in the case law and legislation

Whilst in *Johnson* and *Buzzanca*, the intent-based model can be argued to have aligned with the child's BI, the judgments demonstrate that the decisions were not based on a BI assessment. Given that the legislature amended the Family Code based on the judicial decisions, the use of BI in the judgments requires interrogation.

In the majority judgment of the *Johnson* appeal, very little reference was made to the child or their interests other than acknowledging that a rule recognizing the IP as the legal parent would "best promote certainty and stability for the child" (*Johnson*: 95). More so than merely failing to consider the child's BI, the majority were highly critical of the suggestion that the child's BI should be the standard for determining parenthood. It was stated that such an approach would be a "repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and [confused] concepts of parentage and custody". Further, "by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the BI of the child are not with her" (*Johnson*: footnote 10). By treating the determination of parenthood as a separate process to custody disputes, the court posited that the child's interests should not be a factor in the allocation of parenthood.

Kennard J dissented based on concerns that the decision would create a precedent preventing a BI assessment from taking place—in his view, whilst intent was relevant to the child's BI, it should not have been determinative (*Johnson*: 118). The case did indeed set such a precedent, and the concerns Kennard J cited came to be realized in the case of *CM v MC* (2017), discussed later in the article.

In *Buzzanca*, other than re-affirming the position in *Johnson* that intent would align with the BI of the child in ensuring stability and certainty (*Buzzanca*: 1428), the judgment itself had very limited reference to the BI of the child. The court held that, even if a BI approach had been adopted, the outcome would have been the same because the intended mother was the only parent the child had known (*Buzzanca*: footnote 21). This demonstrates the judicial view that an intent-based determination of parenthood aligns with the child's BI, albeit that this was not the basis for the decision.

When the legislature came to update the Family Code, it was stated that the amendments were to align the legislation with the case law (Senate Judiciary Committee 2012). By framing the provisions as aligning with the case law, and that case law explicitly stating that the basis

for parenthood should be intent and not BI, it cannot be asserted that there was consideration given to the surrogate-born children's BI in the development of the legislation. On the facts of *Johnson* and *Buzzanca*, the intent-based model may have aligned with the child's BI in providing legal certainty and ensuring their lived reality aligned with their legal status. However, the Article 3 right of the child to have their BI as a primary consideration as a rule of procedure was not met in the development of the case law or legislation. Instead, the intent-based model explicitly disregarded the BI of the child, favouring certainty for the IPs. Without articulation in the judgments as to how such a model would meet the BI of surrogate-born children, it is not possible to assess what factors would weigh in favour, or against, an intent-based model from the child's perspective.

Furthermore, by failing to consider the BI of surrogate-born children in determining parenthood, the concern of Kennard J in *Johnson* may be realized whereby parenthood is attributed to an IP in circumstances where this would not be in the child's BI. *CM v MC* (2017) is one such example, illustrating that, under Californian law, anyone can "contract for a child … regardless of their parental fitness" (Demopoulos 2018: 1768). MC, a gestational surrogate, attempted to challenge the allocation of parenthood to a single male IP after becoming aware of worrying personal and home circumstances (and an alleged request by the IP to abort one of the foetuses), seeking a declaration that she was the legal mother.

One of the bases for her appeal centred on the children's constitutional rights, claiming that section 7962 permitted a denial of the surrogate–child relationship based on intention, without any regard to the IP's fitness to parent or the BI of the child. However, the court rejected this argument on the basis that it would undermine surrogacy agreements generally and would be inconsistent with the principle in *Johnson*: the determination of parenthood is separate to custody disputes where decisions must be based on the child's BI, and as such section 7962 did not conflict with the children's rights (*CM v MC*: 31). The surrogacy agreement was upheld, and the IP was the legal parent.

This case demonstrates how section 7962 and the intent-based model can lead to circumstances where the child's BI are ignored (Richardson 2019: 178). Child Identity Protection and UNICEF (2020) are critical of pre-birth clauses allocating parenthood because appropriate BI determinations cannot take place. Although the Californian judiciary is of the view that intent should prevail, from an Article 3 perspective such an approach cannot be endorsed and should be avoided.

Therefore, the Californian approach to enforceable gestational surrogacy arrangements does not meet the standard required of Article 3 as a rule of procedure. The judiciary was explicit in its position that the BI of the child should not be the determining factor when allocating legal parenthood, and the legislature when codifying the law sought to re-affirm this judicial stance. This means there was no attempt to ensure that the BI of surrogate-born children was a primary consideration when deciding the best approach to regulating surrogacy. Although in many cases the intent-based model will align with the child's BI, *CM v MC* is a clear example of how intent alone cannot guarantee Article 3.

[F] CONCLUSION

Article 3 as a rule of procedure requires the BI of the child to be a primary consideration when developing regulatory responses to surrogacy. The concept of BI is an inherently flexible notion, evidenced in the jurisdictions examined in the article. This leads to concerns that legislation can be purported as ensuring the BI of the child without a substantive basis. It is imperative that BI remains a fluid concept, allowing for legislation to be developed that is culturally and contextually appropriate. However, this does not mean that BI can continue to be used in the unsubstantiated manner evidenced in this article. For example, Sweden has maintained a prohibitive stance to domestic surrogacy, justified by the BI principle, whilst, in England and Wales, the implementation of the current law, enabling IPs to secure legal parenthood by way of a PO, was similarly justified, and critiqued, on the child's BI.

Contrastingly, the intent-based model in California was not developed based on the child's BI, with the judiciary explicitly taking the view that BI is not relevant to the determination of parenthood. However, attributing legal parenthood is a decision directly affecting the child, meaning Article 3, with its *jus cogens* status, demands the BI of the child be a primary consideration. A model which allocates parenthood without the ability for an individualized BI assessment therefore cannot be advocated from a child rights perspective.

It is imperative that, when developing regulatory responses to surrogacy, there is a systematic and transparent assessment of proposals from a BI perspective, utilizing CRIAs. Without this, there is the risk that disparate practices can continue to be justified from an alleged child-centric perspective without a substantive basis. The BI of the child will not demand a certain regulatory response to surrogacy. However, a systematic approach to BI will ensure that states are more transparent as

to the competing interests or policy considerations that are truly driving the regulatory response to surrogacy, rather than cloaking their rationale in BI language. Therefore, consistent use of CRIAs would satisfy Article 3 as a rule of procedure and legitimize the legislative process, minimizing the extent to which the notion of BI is used as empty rhetoric to advance prejudicial or normative values.

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Legal (Dis)Orders: A Feminist Assessment of India's Assisted Reproductive Technology and Surrogacy Laws

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Abstract

This article critically examines India's legislative framework on women's reproductive labour, focusing on the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act 2021. It explores how these laws, with their prohibitionist approach, demand altruism on the part of women and undermine their reproductive autonomy. Our analysis combines constitutional arguments on reproductive rights, privacy and bodily autonomy with empirical research to assess the law's ramifications in a privatized labour market. The findings underscore the resilience of women involved in reproductive labour, who resist the unjust laws and assert their rights within a complex regulatory landscape. The research further reveals that the widening demand–supply gap as a result of the restrictive laws potentially fosters an underground economy where reproductive services are rendered with exploitative repercussions for the women, which demands urgent reworking of the law.

Keywords: assisted reproductive technology (ART); reproductive labour; surrogacy; egg donation; reproductive justice.

[A] INTRODUCTION

The law has long been a site of contestation for control over women's bodies. In India today we are at the crossroads of paradoxical moves to rework the law governing intimate relations. The increase in the age of consent has recast instances of consensual adolescent and pre-marital sex as rape while the proposed increase in the age of marriage

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threatens to weaponize criminal law against child marriages. A robust right to privacy jurisprudence has led to the decriminalization of adultery while, at the same time, other forms of consensual sex outside marriage, such as sex work, are effectively criminalized even while non-consensual sex within marriage is not criminalized. The rights of the LGBTQIA+ community to consensual relationships in private are upheld but not their right to marriage. India has some of the most generous laws on abortion and maternity benefits, yet the ability to form a family through the use of assisted reproductive technologies (ARTs) and surrogacy is heavily circumscribed.

These contradictory impulses of the law become particularly problematic when viewed through the lens of women's reproductive labour, often performed in intimate settings across the marriage–market continuum. Increasingly, the criminal law is being mobilized to recast women's decisions regarding their bodily autonomy as gendered violence, thus eliminating women's rights to livelihood. In some instances the prohibitionist impulse of the law is all too evident. Consider the case of sex work. For decades, sex workers have occupied the liminal space of illegality under a legal regime where the right to sell sexual services is not criminal *per se* but all activities required in order to perform sex work are criminalized. The threat of enforcement of the criminal law then rearranges bargaining entitlements within sex work in a way that leads to women's exploitation. Of late the transnational anti-trafficking juggernaut has resulted in a series of carceral anti-trafficking Bills, one more draconian than the other (Kotiswaran & Rajam 2023). In the name of preventing women's sexual exploitation, these laws conflate consensual sex work with trafficking, seeking to prosecute and punish not just traffickers but also sex workers through forced rehabilitation. In other instances, as with various forms of erotic dancing, the carceral move is disguised in the form of a permissive regime which is all but unworkable as became evident with the laws on dance bars in Maharashtra.

Similarly, in the case of domestic work, beneath the legislative indifference in acceding to a labour law for paid domestic workers is the extensive misuse of the criminal law by employers to discipline them. Yet, in no other instance of women's reproductive labour is the turn to carcerality more dramatic than in the case of surrogacy and egg donation. India has the dubious distinction of having experimented with literally every legal regime known to states over a 20-year period before settling on a particularly restrictive ART/surrogacy regime that mandates that surrogates and egg donors perform for free the labour required to sustain a highly lucrative privatized medical sector. Ostensibly passed to

protect women from exploitation, the Assisted Reproductive Technology (Regulation) Act 2021 (ARTA) and the Surrogacy (Regulation) Act 2021 (SRA) push surrogates and egg donors into the realm of precarious labour. This article offers an insight into how these laws came into being, how various stakeholders including surrogates and egg donors have responded to the passage of the new laws and how they can mobilize transformative traditions of Indian constitutional law to push back against hypercarceral laws that impinge on citizens' fundamental rights.

[B] THE LONG ROAD TO REFORM

In 2017, the President of the Federation of Obstetric and Gynaecological Societies of India reported that more than 22-33 million couples of reproductive age are suffering from infertility. While the number is quite worrying, only a small fraction chooses assisted reproductive services, with surrogacy accounting for merely 1% of the total number of *in vitro* fertilization (IVF) cycles in the country (Department-Related Parliamentary Standing Committee on Health and Family Welfare (Standing Committee) 2017).

Nonetheless, over the past two decades, India has experienced substantial growth in the ART and surrogacy sector, establishing itself as a global hub for these services. In response, the development of surrogacy and ART regulations in India has been marked by a persistent tension between the medicalization of the processes and the recognition of the distinct experiences and vulnerabilities faced by women in the sector. Surrogacy has provoked heated feminist debates around the world, with Indian scholars harbouring diverse perspectives that explore the conjunction of gender, capitalism and reproductive rights. Western feminist discussions on surrogacy underwent a normative phase with liberal, Marxist and radical feminists debating on the ethics of commercial surrogacy in the 1980s. In the mid-1990s, the conversations moved on to ethnographic investigations to understand the lived experiences in the face of biomedical breakthroughs (Bailey 2011).

In India, feminist engagement remains ambiguous in relation to the normative-ethnographic distinction and encompasses a spectrum of views. Liberal feminists advocate for regulated commercial surrogacy with robust safeguards and position it as a convenient option for women to exercise reproductive autonomy (Aravamudan 2014). On the other hand, radical feminists oppose commercial surrogacy as a form of exploitation similar to trafficking in reproductive body parts (Gupta 2012; DasGupta

& Das Dasgupta 2014). Marxist feminists hold a similar viewpoint on surrogacy, comparing it with reproductive trafficking (Rao 2012).

Under the paradigm of "biocapital", Kumkum Sangari demonstrates how commercial surrogacy commodifies women's reproductive labour, drawing comparisons from post-Fordist manufacturing, where women bear the weight of uncertainty and repeated failure (Sangari 2015). This perspective places surrogacy within a broader capitalist framework that exploits women's labour for profit, emphasizing the economic and gendered dimensions of the practice. The biocapitalist ordering of life leads to a competitive state that is interested in the deregulation and privatization of (re)production, attracting financial capital and depreciation of its labour force with a view to maintaining competitiveness in the international market (Waldby & Cooper 2006). Yet, time and again, we see it is not the technology that reshuffles the knowledge and practices of reproduction that are contested in society, but rather the asymmetry in power relations (Ginsburg & Rapp 1991). Lastly, ethnographic works by materialist feminist scholars like Pande (2014), Rudrappa (2015) and Vora (2015) give a vivid account of the social realities that Indian surrogates face. The studies show how reproductive labour perpetuates and intersects with underlying socio-economic realities that are evident in the lives of women who engage in it. The experiences of working-class surrogates and egg donors expose the unequal power relations in the sector, where choices are often determined by economic necessities and societal pressures.

Our analysis of the law aligns with the materialist approach, and we critique the shift towards prohibitionist policies that prioritize moralistic assumptions over empirical evidence. We conclude that the law does not address concerns regarding economic justice and agency, nor does it acknowledge women's contribution as a form of technologically mediated reproductive labour within capitalist patriarchy. The shift towards prohibitionism within a conservative framework reflects broader social anxieties over economic exploitation and ethical implications of reproductive technologies.

Surrogacy and ART in India have been the subject of various proposed regulatory frameworks from an initial phase of liberal permissiveness to a current prohibitionist phase, marked by legislative restructuring and evolving governance strategies. Permissive policies in the early stages sought to balance technological breakthroughs with ethical considerations. Until 2005, the ART sector in India witnessed the emergence of a burgeoning private healthcare sector with minimal state or central regulation and a *laissez-faire* approach. The Indian Council for

Medical Research and National Academy of Medical Sciences introduced a set of National Guidelines in 2005 to supervise and regulate the ART sector in India. The guidelines acknowledged the economic implications of reproductive labour and mandated compensation for surrogates and egg donors. The 2008 ART (Regulation) Bill (from the Ministry of Health and Family Welfare (MoHFW)), echoing the same sentiment, detailed standard compensation structures for egg donors and surrogates. The framing of ART and surrogacy as viable avenues for realizing parental ambitions and promoting women's economic agency were key interventions during the phase. The 2009 Law Commission of India report acknowledged the dual objective of supporting infertile couples while mitigating the risk of exploitation. The report advocated for the legalization of altruistic surrogacy, despite acknowledging its potential for exploitation. A subsequent 2010 draft ART Bill followed the path of its predecessors, by introducing structured regulations to balance the interests of all stakeholders, including compensation of surrogates and egg donors. The Bill outlined punitive measures against paid intermediaries. In 2012, the Ministry of Home Affairs introduced medical visas to regulate entry of foreigners seeking surrogacy services in India. A 2014 version of the ART Bill from the MoHFW expanded the compensation framework for surrogates to include coverage of medical expenses, insurance and financial compensation. The Bill also acknowledged long-term health risks associated with egg donation and surrogacy by expanding the insurance coverage. Similarly, the National Commission on Women (NCW) in 2017 advocated for a formulaic approach to calculate compensation for surrogates and gamete donors and the need to recognize surrogates as "skilled employees" (Standing Committee 2017).

Subsequent legislative developments mirrored growing concerns about potential exploitation, and this led to a shift towards more stringent regulations. This is evident in the withdrawal of medical visas for foreigners seeking surrogacy in India and a ban on importing human embryos in 2015. The MoHFW's Surrogacy (Regulation) Bill 2016 was another decisive turn towards prohibitionism by restricting surrogacy to altruistic arrangements involving only close relatives. The Bill only allowed reimbursement for medical expenses and prohibited reimbursing the surrogate monetarily. The requirement that the surrogate be the close relative of the intending/commissioning parties (clause 2(z)) was criticized by the Standing Committee (2017) as potentially coercive rather than genuinely altruistic. The Standing Committee raised concerns that the altruistic surrogacy model envisioned in the Bill was driven by moralistic assumptions rather than empirical evidence. The committee

recommended replacing the altruistic framework with a compensated model that includes reasonable monetary compensation for surrogates.

We argue that prohibitionist policies, articulated through legislative reforms like the 2016 and 2019 draft Surrogacy (Regulation) Bills, prioritized moralistic imperatives and patriarchal protections. This shift also marginalized feminist concerns over potential economic exploitation of surrogates and egg donors. It also replaced nuanced regulatory frameworks with paternalistic altruism, underscoring the contingent and politically charged nature of Indian reproductive labour laws. Subsequent amendments and policy shifts further entrenched prohibitionist ideals, culminating in the Surrogacy (Regulation) Bill 2021 and the ART (Regulation) Bill 2021, passed by the Indian Parliament on 8 December 2021. Both Acts formalized the prohibition of compensated surrogacy and egg donation and allow for the payment of medical expenses and insurance coverage only.

If observed carefully, one could trace a shift from medical pragmatism to policy-driven control in the way the Indian state has regulated the ART and surrogacy sector. The progressive tightening of the laws gives away the state's inclination towards heavier regulation. This increasing restrictiveness mirrors a policy shift driven by ethical considerations and concerns about exploitation, but also raises queries about the underlying motivations. Below, we present detailed discussions of the two Acts.

The Assisted Reproductive Technology (Regulation) Act 2021

The ARTA seeks to regulate and monitor ART clinics and banks in India. This includes ensuring safe and ethical practices and preventing misuse of the services. The ARTA also regulates the use of ARTs for individuals who need assistance conceiving or need to freeze gametes or embryos for future use. The Act lays out a range of provisions on age registrations for donors and intending parties, frequency of donation and prohibition and sale of reproductive materials. Under the ARTA, a woman aged between 23 and 35 years can donate eggs while a man has to be between 21 and 55 years of age to donate sperm. An oocyte donor can donate only once in her lifetime and no more than seven oocytes can be retrieved from her. On the other hand, only an infertile married couple are allowed to seek ART services, where the man should be between 21 and 55 years old and the woman between 21 and 50 years old. Additionally, any woman above the age of 21 years is also permitted to avail ART services under the ARTA, which includes unmarried women, divorcees or widows.

Section 22 lays out the requirement of informed consent and insurance. Rule 12 of the ART (Regulation) Rules 2022 mandates a 12-month general insurance coverage to cover all expenses for complications arising from oocyte retrieval. The ARTA allows the commissioning couple to withdraw their consent prior to the embryo transfer, however, the egg donors are not granted the same right. Additionally, the ARTA and the Rules are silent on the importance of counselling of the donors.

Section 29 of the ARTA prohibits any sale, transfer, or use of gametes, zygotes and embryos except for one's personal use with the permission of the National Assisted Reproductive Technology and Surrogacy Board, effectively putting a stop to compensated egg donation in the country. Any person who sells human embryos or gametes faces a hefty fine in lakhs of rupees and a jail term of between three and eight years under section 33 of the Act. Section 33(1) outlines similar penalties for registered medical practitioners, gynaecologists, geneticists or any person who engages in unethical practices such as abandoning, disowning or exploiting a child born through ART, selling or importing human embryos and gametes, running illegal agencies, exploiting commissioning parties or donors, or using intermediaries to recruit donors.

Under the ARTA, only a registered ART clinic can carry out the medical procedures, which include ensuring the eligibility of intending parties and donors, and providing professional counselling to intending parties about implications, chances of success, advantages and disadvantages and risks of the procedures. The clinics are also responsible for ensuring safe ovarian stimulation of the oocyte donors to prevent ovarian hyperstimulation. The Act also outlines the functions and obligations of the ART banks, which are responsible for screening and registering the donors.

The Surrogacy (Regulation) Act 2021

Similar to the ARTA, the SRA lays out explicit guidelines on the access to surrogacy procedures in India and the eligibility of surrogates and intending parties. Access to surrogacy remains limited only to Indian married, heterosexual couples with "medical indication necessitating gestational surrogacy". The age of the intending woman must be between 23 and 50 years, and the man should be between 26 and 55 years. The Act mandates that the intending couple must use their own gametes for surrogacy unless a certified medical condition is verified by the District Medical Board. The couple must not have any surviving children, biological or adopted. In addition to that, the Act permits Indian women,

who are divorced or are widows and between the ages of 35 and 55 years to avail surrogacy. However, the intending woman must use her own eggs and donor sperm. Intending parties who are Persons of Indian Origin are also allowed, but with the permission of the National ART and Surrogacy Board. Single men, never-married women, cohabiting heterosexual couples, same-sex couples and persons from LGBTQIA+ communities are not allowed to have children through surrogacy services in India. The laws stipulate highly restrictive criteria for individuals who are and are not allowed to seek ART and surrogacy services based on physiological or social parameters (Banerjee & Kotiswaran 2020). The criteria set forth by the laws effectively exclude a significant population from exercising their reproductive choices based on their age, marital status and sexual orientations.

On the other hand, the SRA only allows 25 to 35-year-old ever-married women with at least one child of their own to act as surrogates. The surrogate must be certified as medically and psychologically fit by a registered medical practitioner, and she can be a surrogate only once in her lifetime and cannot provide her own gametes. The surrogate mother must be made aware of all known side effects and risks of surrogacy-related procedures and provide written informed consent, and the SRA allows her to withdraw her consent before the embryo implantation. The surrogate cannot be coerced to undergo an abortion at any stage of pregnancy; it must be done with her consent and the permission of the appropriate authority under the Medical Termination of Pregnancy Act 1971. The surrogates are entitled to a 36-month insurance coverage, which the law presumes is "sufficient enough to cover all expenses for all complications arising out of pregnancy and also covering post-partum delivery complications" (Surrogacy (Regulation) Rules 2022; rule 5(1)).

Once the cycle preparation starts, the surrogate is not allowed to engage in intercourse of any kind, use any drugs intravenously, or undergo blood transfusion except for blood obtained through a certified blood bank on medical advice. She relinquishes all her rights to the child and is responsible for handing over the child to a predetermined third party in case the intending parties are unavailable. Moreover, the SRA presumes that a surrogate mother was coerced into the arrangement in case of any challenge to surrogacy.

Section 2(g) of the SRA defines commercial surrogacy as the commercialization of surrogacy services and related procedures, including buying and selling of human embryos or gametes, and offering any compensation or rewards to surrogate mothers beyond medical expenses

and prescribed insurance coverage. Commercial surrogacy is prohibited under section 3(ii) of the SRA, and sections 4(ii)(b) and 4(ii)(c) permit surrogacy to be conducted only for altruistic purposes. Section 38(a) outlines punishments for any persons undertaking commercial surrogacy or providing commercial surrogacy services. Section 40 punishes the intending couples or women for seeking to avail of commercial surrogacy services with imprisonment and heavy penalties.

In March 2022, the MoHFW issued the Surrogacy (Regulation) Rules, which delineated specific expenses to which a surrogate is entitled. These expenses included medical costs, expenses related to complications arising from the surrogacy process, and coverage for maternal mortality (rule 3). Additionally, the rule included miscellaneous expenses including travel, follow-up charges and, notably, compensation for loss of wages. Interestingly, the MoHFW replaced the March Rules with a new set of notified Rules in June 2022, which excluded the coverage for the aforementioned expenses except for medical insurance.

[C] RESISTING THE LAW WITHIN AND OUTSIDE THE COURTS

Meanwhile, since the enactment of these two Acts, the medical community has been deeply disgruntled; the dissatisfaction was pervasive even before the Acts' implementation due to concerns about the potential criminalization of the medical community. The National ART and Surrogacy Board was set up soon after the laws were enacted, while the formation of State Boards took longer. Some states set up the Boards relatively quickly, others took nearly a year. Many doctors, particularly in smaller clinics, were largely unaware of the status of these Boards and expressed frustration over the lack of communication from the state authorities. We conducted a Knowledge, Attitude and Practice (KAP) survey in October 2022 to delve deeper into their perspectives and to understand how they perceived the new legislative frameworks.

The survey was carried out as part of a broader study with 478 fertility experts, embryologists and gynaecologists (Tank & Ors 2023). The aim was to counteract the prevalent media sensationalism surrounding surrogacy and redirect some attention towards the ARTA. Therefore, the questions addressed both legislative Acts with a primary emphasis on the ARTA, as only a few clinics are engaged in surrogacy practices. The questions were open-ended, multiple choice and ranking, focusing on the Acts' different provisions on the definition of infertility, eligibility of commissioning parties, protection of gamete donors, provisions on gamete transfer and so

on. A majority of the participants agreed upon the prescribed age limit for commissioning parents (74%), and the duration of proven fertility (57%), indicating a broad acceptance of the eligibility criteria of the intending parties in the medical community. However, the study also revealed multiple areas of concern; 24% of the doctors thought the protection for egg donors, as stipulated in the Act, was not sufficient, and 30% felt the screening and recruiting processes of donors were unclear, stipulating the need for more robust and transparent mechanisms to safeguard the well-being of women.

Additionally, 30% thought the prohibition on the sale and transfer of gametes in section 29 of ARTA was unreasonable. The ARTA's provisions on gamete donation were an issue of grave concern in terms of scientific feasibility and ground-level implementation among fertility experts. A substantial 76% of the respondents disagreed with the feasibility of stimulating and retrieving only seven oocytes from the donor, indicating that this provision was impractical and misaligned with the realities of medical practice. Furthermore, 70% of the participants agreed that ovarian hyperstimulation can be avoided in the donor cycles with scientific advancements, something which the law needed to reflect. Similarly, 70% disagreed with the rule limiting egg donation to once in a lifetime; only 15% found it reasonable. There was also a consensus among 56% of participants about the lack of clarity in the current provisions regarding insurance and the unavailability of insurance products in the market (Tank & Ors 2023).

On offences and penalties in sections 32 and 33 of ARTA, a majority of 53% viewed the minimum mandatory sentence as unreasonable. While 47% of the respondents disagreed with section 34, which imposes a stringent fine of INR 5 to 10 lakhs for any contraventions of the Act, followed by imprisonment of from three to eight years for repeat offences (Tank & Ors 2023).

To sum up, the KAP survey indicated a decline in the number of available egg donors because of the law's provisions, with donor programmes becoming increasingly expensive for most persons suffering from infertility. Fertility experts indicated that the law is expected to increase the cost of fertility treatment by at least 125%. As a result, the percentage of donor cycles is also expected to go down, coupled with delayed access to donor gametes. The participants believed that the law effectively excludes persons suffering from infertility who cannot cover the high costs of infertility treatment.

In the second phase of the KAP survey, 128 infertility experts were invited to express their views on the Acts. The most significant concern among the respondents was the law's impact on the donor cycles and affordability of IVF. The ARTA's ban on compensated gamete donation and the mandate that a donor's gametes be used exclusively for one couple are anticipated to lead to a shortage of gametes. The shortage is exacerbated by the law's limitation on the number of times a gamete donor can donate, which will potentially reduce the overall availability of donor gametes. The respondents foresaw a significant increase in the costs of IVF cycles due to a diminished supply of donor gametes, and the scarcity would potentially triple the costs of donor cycles. Respondents argued that presuming that oocyte donors, be they third-parties or relatives, would undergo the inconvenience and risks involved with surgical procedures without compensation was unrealistic. In an environment where the law is seen as impractical and economically cumbersome, there is a heightened risk that individuals may circumvent the law to meet the demands of ART and surrogacy services. This concern was met with scepticism that hyper-regulation may lead to increasing bureaucratic hurdles and unwarranted interventions benefiting state officials and lawyers. Interviews reveal that strict regulation, high registration fees for ART banks and fertility clinics and the escalating costs of infertility treatment in India may disproportionately favour large corporate players and lead to the corporatization of the sector. The harsh regulations create a significant financial burden for smaller clinics, particularly those in tier two and three cities, which they will be unable to shoulder. As a consequence, these smaller clinics will likely be forced to discontinue their services, aggravating regional disparities in access to infertility treatments. As the market becomes increasingly dominated by well-heeled corporate entities, the accessibility of affordable reproductive healthcare will diminish, particularly for economically disadvantaged populations.

The SRA and ARTA currently face multiple legal challenges that are pending before the Supreme Court and various High Courts in India. The petitions challenge a broad spectrum of provisions within the two Acts, highlighting the restrictive and unscientific nature of the legal framework. The stakeholders perceive many of the restrictions outlined in the Acts as violations of constitutional rights to reproduction, privacy and bodily autonomy. For instance, the limitation of oocyte donation in ARTA is contended as unscientific and a hindrance to reproductive autonomy. The lack of compensation for donors and surrogates is seen as exploitative and as the law's failure to recognize the physical and emotional labour involved. Similarly, the blanket ban on commercial surrogacy is seen as

neither desirable nor effective, with the potential to drive the practice underground rather than eliminate it.

The public interest litigation suits have challenged the Acts' exclusion of same-sex couples and live-in couples, transgender individuals and single men from accessing ART and surrogacy, marking it to be discriminatory. The medical indications that necessitate gestational surrogacy have been challenged by several commissioning parties. The petitioners have also challenged the incongruent age criteria for widows and divorcees compared to married women. Further, the SRA's denial to allow individuals with existing children to undergo surrogacy is challenged as a violation of one's reproductive autonomy. Lastly, the harsh penalties on medical practitioners are labelled as draconian and likely to deter them from partaking in the sector.

During fieldwork, we found that the legal challenges created an atmosphere of uncertainty, leading the risk-averse stakeholders to halt donor cycles and surrogacy while others circumvented the law's provisions. The situation demands legislation that is clear, scientifically grounded and constitutionally sound and that addresses the rights of the stakeholders, especially the most vulnerable, namely, egg donors and surrogates. A notable absence in the public interest litigation is the voice of egg donors and surrogates, who are likely to bear the biggest brunt of these legislative changes. In an attempt to remedy that, we filed an intervention to the Supreme Court arguing that various provisions of the ARTA and SRA are unconstitutional for various reasons.

Next, we shed light on how the current laws violate reproductive rights, privacy and bodily autonomy guaranteed under the Constitution. We argue that the laws are unduly restrictive, exclusionary and reiterate patriarchal gender norms.

[D] REPRODUCTIVE RESISTANCE

Our written submission for the Intervener Application[1] presents an argument that the surrogate and oocyte donors' economic interests and rights guaranteed to them under the Constitution (Articles 14, 15(1), 19(1)(g), 21 and 23) are violated under the Acts. We make the case that providing reasonable and appropriate compensation to the surrogate or oocyte donor—who is likely to be an unrelated, consenting woman—is an acknowledgment of their reproductive labour. It aligns with constitutional

[1] The written submission was prepared by the Delhi law firm of Chakravorty, Samson and Munoth.

principles such as bodily autonomy and the right to make informed reproductive choice and is fundamentally different from unregulated commercialization. We present brief discussions on each constitutional right to justify why recognizing the physical, emotional and opportunity cost women incur is the pragmatic way to uphold their dignity and agency.

Articles 14 and 15(1)

Viewing women's reproductive labour as "divine" or "noble" and therefore undeserving of compensation reflects a paternalistic and patriarchal morality imposed by the state (Rudrappa 2015; Banerjee & Kotiswaran 2020). It is this patriarchal morality which forms the foundational basis of the ban on commercial surrogacy and egg donation. It diminishes the autonomy of women and disregards the value of their labour. We argue it is violative of Article 14 of the Constitution, considering the fact that the nature of reproductive labour performed by surrogates and egg donors is highly gendered and stigmatized and performed under structurally unequal conditions. Compelling them to provide their reproductive services on an altruistic basis violates women's right to equality and guarantee against non-discrimination. In Indian courts, constitutional morality has superseded social morality on multiple occasions. In *Navtej Singh Johar v Union of India* (2018), for example, the Supreme Court held that the law can be held to violate Article 14 when it is manifestly arbitrary. Similarly, in *Shayara Bano v Union of India* (2017), the court observed that:

> Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under article 14 (paragraph 101; cited in Banerjee & Kotiswaran 2020).

Our aim here is to present a critique of the social morality perspective that views reproduction as something "normal" or "natural" and, more importantly, devoid of labour. While the laws supposedly seek to prevent exploitation of economically vulnerable women engaged as surrogates and egg donors, paradoxically, these provisions end up perpetuating exploitation by putting aside women's interests under the guise of preventing commercialization of surrogacy and egg donation. The assumption that altruism is the only morally acceptable and non-exploitative way out is problematic. It is rooted in the patriarchal belief that women's reproductive roles are inherently noble and, at the same time, invisibilizes the immense physical and emotional labour that goes

into surrogacy and egg donation procedures. Our *pro bono* counsel in the Written Submission have argued that by failing to acknowledge the efforts and sacrifices of women, who endure physical and emotional burdens of oocyte retrieval, pregnancy and their impacts on health and livelihood, and dismissing their work as a "divine" responsibility perpetuates harmful gender stereotypes, which is prohibited under Article 15(1). Indeed, the 102nd report of the Parliamentary Standing Committee stated that: "Permitting women to provide reproductive labour for free to another person but preventing them from being paid for their reproductive labour is grossly unfair and arbitrary" (2017: 13). It further noted that "the altruistic surrogacy model as proposed in the Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner" (2017: 14).

In all likelihood, the state's prohibitionist stand against the compensated model of surrogacy stems from the fact that it challenges traditional gender roles by disconnecting the responsibilities of social motherhood from childbirth. Ironically, altruistic surrogacy perpetuates the same gender stereotypes by assuming that compassion and selflessness are the only ways to circumvent the social duties of motherhood.

Article 19(1)(g)

The second argument presented in the written submission is the violation of Article 19(1)(g), which is the fundamental right to practise and carry on any occupation, which cannot be restricted on the grounds of public or majoritarian morality. We argue that the provisions in the ARTA and SRA intrude on the right of surrogates and egg donors to carry out their profession on the grounds of public morality and the alleged exploitation of women. In the case of *Anuj Garg v Hotel Association of India* (2008), the Delhi High Court held that:

> we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without state protection as by the loss of freedom because of [the] impugned Act. The present law ends up victimizing its subject in the name of protection … State protection must not translate into censorship (paragraph 36).

A complete ban on compensated surrogacy and egg donation curtails women's right to practise their profession. The state has justified the ban from a protectionist lens and a public morality lens. The written submission argues that, in the guise of protecting surrogates and egg donors, the state has managed to propagate the notion that reproductive

labour performed by women is not compensation-worthy. The state must take note of the well-established research by feminist academics that argues that a ban on commercialization is more likely to push the activities underground instead of addressing the exploitation of women.

Article 21

The next constitutional argument challenges the ARTA and SRA on the grounds of Article 21, which protects the right to privacy. While a right to reproduction is not explicitly covered under the Constitution, at times (*BK Parthasarathi v Government of Andhra Pradesh* 2000) the courts have upheld the right to reproductive autonomy as a component of the right to privacy (Banerjee & Kotiswaran 2020).

In *Puttaswamy v Union of India* (2017), the court held that decisional autonomy to have or not to have a child falls under the right to privacy. Prior to the judgment of *Puttaswamy*, in S*uchita Srivastava & Another v Chandigarh Administration* (2009) the Supreme Court noted that:

> There is no doubt that a woman's right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected (paragraph 22).

In *X v The Principal Secretary, Health and Family Welfare Department, Government of the NCT of New Delhi* (2022), the Supreme Court noted that:

> The ambit of reproductive rights is not restricted to the right of women to have or not have children. It also includes the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproductive health. Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence (paragraph 96).

While these judgments were delivered in the context of abortion, we argue that this reproductive rights framework set out in the Indian jurisprudence aptly applies to reproductive labour such as surrogacy and egg donation. The principal tenets of these rulings are focused on

individuals' right to make decisions regarding their own bodies and reproductive health and therefore remain relevant in the situations of surrogacy and egg donation where issues of consent and autonomy are paramount. We do not discount the structural inequalities within which women make their choices, instead, we argue that constrained choices do not negate the ability to make choices altogether.

Article 23

The provisions of the ARTA and SRA banning compensated surrogacy and egg donation also violate Article 23 which prohibits the "traffic in human beings and beggar and other similar forms of forced labour" to ensure that individuals are not coerced into working without compensation. It emphasizes the importance of "protecting individual freedom and dignity, ensuring that no person is subjected to exploitation or degrading conditions of work. It safeguards the right to receive fair and reasonable remuneration for work done."

In the landmark judgment of *PUDR v Union of India* (1982), the interpretation of forced labour was expanded beyond "bonded labour" or "servitude" to include forms of labour performed under other compulsions, including economic compulsion. Building on this jurisprudence, the economic and social structures that often coerce individuals to engage in the labour market are recognized by the courts. This legal recognition, we argue, is crucial in evaluating the regulatory framework on reproductive labour, namely egg donation and surrogacy. The rulings of *PUDR v Union of India* extend the definition of forced labour to rope in economic compulsion and unpaid labour. These are relevant to reproductive labour as well. If labour extracted without minimum wage is deemed forced labour, then laws mandating altruistic surrogacy and egg donation effectively sanction forced labour.

Indian courts have acknowledged that domestic labour, performed predominantly by women, should be considered as labour that deserves compensation. In *National Insurance Co v Minor Deepika* (2009) the Madras High Court emphasized the economic value of women's unpaid domestic work and argued for its recognition in contexts such as compensation in motor vehicle accident cases (Kotiswaran 2021). Similarly, the Supreme Court in *Kirti v Oriental Insurance Co* (2021) reiterated the economic value in household work, which is highly gendered in nature, and challenged the misconception that housework involves no labour. In this context, one could argue that reproductive labour, such as egg donation and surrogacy, which includes donating oocytes and carrying a foetus to

term, should similarly be treated as *labour*, with corresponding rights to compensation and dignity.

Societies have historically devalued women's reproductive labour within the private sphere of the home; brought to attention by feminist movements worldwide, such as the "Wages for Housework" campaign (Federici 2012). While a lot has changed in terms of recognizing women's reproductive work, still much remains to be achieved. Reproductive labour, which is also intimate in nature, is devalued under the capitalist framework because historically it is seen as unskilled and has been unpaid (Jana 2020). The state's refusal to recognize surrogacy and egg donation as labour lays bare a glaring gap in the legal recognition of gendered labour, which, we argue, is imperative in addressing the historical gender disparities. It is only logical that Indian jurisprudence embraces a broader definition of labour, to align with its progressive trajectory, which has surpassed outdated understandings of gendered work and social reproduction.

[E] THE PROBLEM WITH ALTRUISM: SOME UNINTENDED CONSEQUENCES

The mandated altruism and lack of compensation under ARTA and SRA will likely reduce egg donors' and surrogates' willingness to participate in the sector, leading to a shortage in supply and driving up the costs of infertility treatments, as backed by the KAP survey results (Tank & Ors 2023). Individuals seeking those treatments will face heightened financial burdens, restricting the treatment to those who can afford the exorbitant fees. The social and emotional toll on women engaged in the processes will intensify, as they navigate a system that increasingly marginalizes their needs and contributions. Furthermore, the selfless altruistic Indian surrogate cannot extend her benevolence to the same-sex couple, unmarried couples or single men, who are cast outside of the law. The state sees commercial surrogacy and egg donation as a critical nonconformity of the cultural norm, while altruism is considered a more tolerable solution. Sharyn Roach Anleu (1992) argues that commercial surrogacy is not considered inappropriate because it incorporates women into the competitive market economy, but its criticism lies in the fact that it infringes the patriarchal norms that assign women's place within family. If women are to be exploited in the capitalist reproductive market, the traditional institution of family can pose similar challenges to some women. The law needs to take into account the exploitative potential of social controls within families that operate through manipulation and exploitation of emotions (Anleu 1992).

Secondly, the Acts' emphasis on altruism fails to acknowledge the inherent power asymmetries and socio-economic pressure that push working-class women into surrogacy and egg donation. We argue that the mandate of altruism not only obfuscates the tangible economic and emotional cost borne by women but, more importantly, denies them the right to make autonomous decisions about their bodies and reproductive capabilities. That is why it is important to draw out the shortcomings of an altruistic framework to unveil the exploitative potential of the current regulations and their disproportionate impact on the most vulnerable stakeholders in the sector, namely, the egg donors and surrogates. The insistence on altruism disregards women's realities, such as lack of employment opportunities, lack of state support and the necessity to provide for their families. By reframing reproductive labour as selfless "generosity" or "acts of charity", the laws effectively run the risk of erasing the lived experience of surrogates and egg donors, for whom this work may be the last resort to secure financial stability.

In addition, in situations where gender-based inequalities are prevalent, the expectation that women render their reproductive services without compensation places an unrealistic expectation and undue burden on women. This argument is further substantiated by an overall lack of economically well-off women in egg donation and surrogacy. In reproductive work, women have not only navigated the financial aspects, but also the nature of involvement, anonymity and ethical consideration (Pande 2014; Rudrappa 2015). The law's stigmatization of compensation in exchange for women's reproductive services reinforces existing biases while perpetuating stereotypes about the morality of women engaged in reproductive labour (Pande 2014).

[F] CONCLUSION

As the laws on ARTs and surrogacy have become increasingly prohibitionist, the memories, practices and indeed social actors that populated the permissive phase of the ART sector in India have persisted to date. While commercial surrogacy in its transnational and domestic forms seems to be less visible and more likely to be reconfigured (including through displacement of various components of the process to other foreign jurisdictions), the same cannot be said of ARTs. The ARTA, through its mandates of gamete exclusivity between the commissioning couple and gamete donors and altruistic donations, has at once respectively necessitated a greater demand for gametes and a smaller supply pool of gamete donors. At the other end of the spectrum, high levels of inequality exacerbated by the Covid pandemic

are likely to produce a regular supply of women reliant on egg donation as a means of sustenance. Informal networks of intermediaries and agents will likely persist. Against this backdrop, certain clinics which are highly risk averse are obeying the laws strictly while waiting to see how the new laws will be implemented. Other less risk-averse actors have, despite the prohibition of the sale of gametes backed up by stringent penalties, been driven by the demand for and high supply of gametes to engage in practices that are only partially compliant with the ARTA.

Records are likely being maintained of egg donors, but these have not yet been cross-verified by the National ART and Surrogacy Registry which should be able to identify egg donors who have donated oocytes more than once in their lifetime. Insurance policies are being taken out as well. The failure of formal law to adapt to the dynamics of biotechnical advancements, as evident in the organ procurement market, serves as a cautionary tale here. Studies highlight a critical disjunction between law and the evolving biomedical landscape (Cohen 2005; Goodwin 2013; Fenton-Glynn & Scherpe 2019). Relying solely on altruistic transfers results in an evident shortfall, where demand significantly surpasses the available altruistic supply. The scarcity gives rise to clandestine transactions, with individuals resorting to black markets. Similar to organ transactions, the lack of robust legal enforcement mechanisms could yield analogous consequences. Additionally, banning commercial surrogacy and egg donation without addressing the underlying issues could potentially drive these practices into unregulated spaces. This not only risks the exploitation of vulnerable individuals but also hinders the overall safety and ethical standards of such procedures. This means that egg donors and surrogates will never be able to enforce obligations against the clinics, the banks or commissioning couples. The sharp edge of the ARTA's and SRA's prohibitionist provisions will therefore be borne by the reproductive foot soldiers of the ART sector.

A critical reform necessary to address the inequalities in the law lies in broadening access to ART and surrogacy beyond the affluent, heterosexual, married demographic that the current framework privileges. We argue that a more inclusive legal regime that recognizes diverse family structures and eliminates prohibitive barriers would better realize the egalitarian ideals of the Constitution. Indeed, arbitrary distinctions that the laws rely on to restrict access to ARTs and surrogacy are constitutionally suspect. To alleviate the disproportionate financial burden resulting from the restrictive laws that deprives individuals of their right to reproductive health and autonomy, greater state intervention in regulating costs and subsidizing ART services through public healthcare is imperative.

Current laws, with their prohibitionist and altruistic frameworks, fail to acknowledge the labour, risks and sacrifices involved in the process, thereby undermining the women's autonomy and economic rights. This article advocates for a legal framework that balances ethical concerns with the economic realities of reproductive labour. Specific legislative changes could include (a) defining surrogacy and egg donation as legitimate forms of labour, (b) permitting fair and transparent compensation that accounts for medical risks, lost income and associated costs, and (c) establishing clear regulatory mechanisms to ensure informed consent to prevent exploitation. What remains to be seen is whether advocates for the interests of reproductive labourers like egg donors can successfully challenge the constitutionality of the ARTA and SRA on the basis of the constitutional guarantees of the right to privacy, bodily autonomy, right to livelihood and prohibition against forced labour. There is precedence for such recognition of the right to livelihood of bar dancers in the absence of the provision by the state of economic alternatives after the imposition of the ban on bar dancing. It is this hope for transformative constitutionalism that we aspire to.

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The Undue Importance of Marriage in India's Current Surrogacy Legislation: Why Single Women Cannot Aspire to Motherhood

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Abstract

Focusing specifically on the marginalization of "single", unmarried women in the Indian Surrogacy (Regulation) Act 2021, we highlight the socio-cultural biases that centre on the notion of marriage in the legislation. Drawing on insights from legislative mobilization (Kothari 2024) post 2021, we suggest that the current surrogacy legislation in India only selectively empowers certain women's reproductive autonomy. This defies the constitutional "right to family" of especially single women and discriminates against their equality of citizenship. The barriers presented by patriarchal concepts which frame the contexts in which the law is enacted must be recognized to remove the intentional and unintentional gender biases through which the law is implemented and experienced.

Keywords: surrogacy; marriage; singlism; gender bias; discrimination.

[A] INTRODUCTION

Surrogacy legislation globally continues to play catch-up with the rapid advances in technologies of assisted reproduction and the social, economic and ethical dilemmas that emerge in their wake. While there are similar issues of reproductive inequity—access and vulnerability that arise across countries as infertile individuals and couples strive to create the families of their choosing, the cultural context (language, concepts) in which the laws are framed, experienced, practised and challenged differs.

This article reflects on the legal significance placed on "marriage" within Indian surrogacy legislation and follows on from previous work of Unnithan on the absence of legal recognition of the reproductive needs

(right to have a family) of poor, infertile Indian women in the assisted reproductive technology (ART) and surrogacy Bills up until 2016 (Unnithan 2013; Unnithan-Kumar 2019) and on the legal and advocacy expertise of Kothari. We draw on the writ petitions filed by single unmarried women and transgender persons in the Supreme Court of India, in 2023 and 2024, following the promulgation of the Surrogacy (Regulation) Act of 2021 and the amendment of the Surrogacy (Regulation) Rules in Form II (2022). The primary source of legal expertise that shapes the ideas in the article derives from the experiences of individual petitioners as intended parents seeking a child through surrogacy and of an established legal aid and advocacy organization seeking to redress the cause of single women as a ground for discrimination (Kothari 2024).

The Surrogacy (Regulation) Act was introduced in 2021 in India following over seven years of deliberation through different Bills since 2014. The Government of India further issued the Surrogacy (Regulation) Rules 2022, as an amendment to the Act in 2023. One of the main features of the Act is that it permits only married couples or only a woman who is a widow or divorcee between the age of 35 to 45 years to have children through surrogacy, thus excluding single unmarried women from availing of surrogacy. The exclusion of single unmarried women from accessing surrogacy would mean that all women who are single, and never married, or women in live-in relationships, women in same-sex relationships and queer women would be completely excluded from availing of surrogacy procedures. By contrast, in other jurisdictions where surrogacy is legally permitted, there is no restriction on the marital status of the person intending to have the child through surrogacy (see, for example, the United Kingdom (UK) Surrogacy Arrangements Act 1985).[1]

What do the restrictions and exclusions for unmarried single women under the law mean and how should one respond to such a law? It is with this question in mind that several interventions and legal petitions were filed in the Indian Supreme Court by single unmarried women and by transgender persons in *Aqsa Shaikh v Union of India* (2024). The broader reproductive rights question underlying these legal challenges is: are single women in India discriminated against in their right to have a family, and in their aspiration to motherhood? In the discussion below, we suggest that the presence of such discrimination is evident.

[1] Under the Surrogacy Arrangements Act 1985 of the UK, for example, all persons can avail of surrogacy arrangements, and there are no distinctions based on the marital or single status of a person.

By way of background, it is useful to first chart the landscape of surrogacy petitions more generally since the promulgation of the Act in 2021. We then examine the meaning of the term "single" in this context and the underlying connection with perceived stigma (Goffman 1963). In conclusion we argue that this stigma is perpetuated through an inherent discrimination against single women in the current surrogacy legislation.

[B] THE BROADER LEGAL CONTEXT: SURROGACY WRIT PETITIONS AND PUBLIC INTEREST LITIGATIONS POST 2021

Since the passing of the Surrogacy (Regulation) Act of 2021 in India and the closely related Assisted Reproductive Technology (Regulation) Act 2021 (ART Act), there have been a slew of writ petitions and interventions challenging the constitutionality of the Acts on a range of diverse aspects to do with marital status, age limits and gender orientation, for example. Most of the individual petitions challenging the Surrogacy Act between 2022 and 2024 have come from intended parents (approximately eight), who seek to have a child through surrogacy arrangements. It is interesting to note that no petitions have been filed by the surrogates themselves (showing how far removed they are in social, cultural and economic terms from an engagement with the law in India; see for example, Unnithan-Kumar 2019). A further three important petitions have been filed in the form of public interest litigations (PILs).

PILs are petitions where a challenge is made or a claim is sought in the common public interest (hence the term public interest litigation). In the context of the Surrogacy Act and the ART Act, the most overarching PIL has been brought by Chennai-based infertility specialist Dr Muthuvel in the *Arun Muthuvel v Union of India & Ors* (2022) case. The PIL (decision pending) challenges the definition of surrogacy, its impact on medical practitioners and its support for commercial surrogacy, as well questioning the exclusion of single and unmarried women. The two other PILs to date (decisions pending) are also led by medical associations and practitioners who seek to overturn the restrictions on sperm and oocyte donation and the costs of treatment (*Aniruddha Narayan Malpani v Union of India & Ors* 2022; and *The Indian Sperm Bank Association v Union of India* 2023).

Among the individual petitions by intending parents, there are an equal number of petitions submitted by petitioners who are single (four of the eight mentioned above), as compared to those who are married and physiologically unable to bear children. In the latter category, the key

issues faced by intending parents have to do with: a) medical complaints (relating to kidney deterioration, locomotor disability, hysterectomy due to myopathy); b) being past the age limit (including a case where the embryos of the intended mother were frozen prior to the Surrogacy Act) as well as where the intention is to have a second child through surrogacy; and c) petitions and interventions relating to an adequate compensation for the reproductive labour of surrogates, and the ban on commercial surrogacy.

We now turn to those petitions filed in the Supreme Court of India challenging the provision of the law as being discriminatory on the ground of women's single status. Under the Surrogacy (Regulation) Act 2021, section 2(s) defines the "intending woman" who is eligible to avail of surrogacy, and she is defined as "an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy". Thus, this section precludes a single unmarried woman from access to surrogacy. Of the four petitions filed which challenge the clause of singlehood in the Surrogacy (Regulation) Act 2021, and which concern us in this article, two are about medical and conception issues of single women and two are centrally concerned with prohibitions based on women's single status. We especially focus on the latter two cases.

In *Neeha Nagpal v Union of India* (2023), the petitioner, a single unmarried woman, a lawyer of 40 years, challenged the exclusion of single unmarried women from being able to avail of surrogacy under the Surrogacy (Regulation) Act 2021 as being arbitrary and violative of the right to family, privacy and reproductive choice and autonomy under Article 21 of the Constitution of India 1949. In this petition, a women's rights organization, Aweksha, also filed an intervention to support the challenge to exclusion of single women.

The other petition filed in this context is that by *Dr Aqsa Shaikh v Union of India* (2024): a medical doctor, trans person and activist. In this petition, the petitioner challenged the exclusion of single women and trans persons from the definition of "intending woman" under the Act on the ground that such exclusion is without any justifiable reasons either by way of any medical reason or for parental suitability. It argued that by excluding single unmarried women and trans persons from availing of surrogacy, the law discriminates against them based on their sex and gender identity. It thereby perpetuates harmful stereotypes by implying that they are incapable of becoming parents or are undeserving of parenthood and, unfairly, permanently forecloses a perfectly viable route to parenthood. Such an exclusion under the Surrogacy Act would

exclude women in live-in relationships, where they have partners but are unmarried and hence unable to avail of surrogacy, or queer women or women in same-sex relationships where they are unable to get married as the law does not permit same-sex marriages. In such situations, single unmarried women would be deprived of the right to a family life. This petition, as with the others mentioned above, is still pending in the Supreme Court and awaiting a final decision.

[C] SOCIAL REPRODUCTION AND THE STIGMA OF THE UNMARRIED/SINGLE PERSON

Bias against single women

In addressing the two petitions, the Supreme Court made several remarks that show bias against single women. The sitting judge in one of the hearings remarked that there were other ways in which the woman petitioner could have a child: she could get married or adopt. Further it was suggested that "she cannot have everything in life as she had chosen to remain single, and … that the institution of marriage was important in society as children need to know their fathers" (Wire 2024). In addition, one of the arguments to explain the exclusion of single women in availing of surrogacy draws upon the *best interests of the child*, which would include the need for the child to know the father.

Thus, it appears that the discrimination against single women as we see here stems from patri-focused notions of the family as comprising a heterosexual couple as parents. The requirement of a male figure similarly reflects customary notions that the presence of a father will ensure the best welfare of the child, thereby discriminating against single women who may have the financial and emotional facilities to cope with a child on their own or with other support systems that are not necessarily part of the notion of the "traditional" family.

The Surrogacy Act and Surrogacy Rules, in prohibiting single unmarried women from availing of surrogacy facilities, take away the reproductive rights of single unmarried women to be able to decide on the social arrangements through which they wish to have children. In the present law, as single women are excluded from the Act, the only option available to them to have children would be through adoption or through ART, which may not always be available, affordable or possible for them to access. *In vitro* fertilization (or IVF) treatments are often traumatic, expensive and extremely difficult as the experiences of women globally have shown (in the UK, for example, see Franklin 2022). Similarly, adoption may also not

always be an option of choice for women who would wish to have a child of their own, only possible through surrogacy, and hence the exclusion restricts their rights to reproductive autonomy.

More generally, the provisions of the Act and related comments in excluding single women from availing of surrogacy bring to the fore a whole range of important issues and the inherent biases that are embedded within wider Indian patriarchal ideology against women's reproductive rights and freedom, especially that of the single woman.

Sex-based legal inequality is still very much present when it comes to single women in India. Even women who are divorced or widowed, who hold less social status than married women, are seen in a more positive light than single unmarried women. It is marriage, closely followed by childbirth, that confers women full adult personhood in most Indian communities even today. This is despite the economic independence that working, middle-class women might be able to achieve through their employment.

In many caste-based communities, middle-class women who choose to be single or are never married are popularly regarded as deviating from social norms stipulated through patriarchy (resulting in their stigmatization), with negative stereotypes of wanting to "have it all" (social status outside the norm/control of men). Hence the remark of the judge which suggested that single women should not be permitted in the law to have biological children. The observation of the judge stems from popular discourse where single, never married women are assumed to be immature, maladjusted and self-centred (DePaulo & Morris 2005). Thus, compared to married women, single women are subject to an unfair disadvantage socially and in the law.

Legislation on reproductive rights and choices is especially discriminatory towards single women. This discrimination permeates institutions and is systemic, inbuilt within laws, regulations and policies. The Surrogacy Act, as we have seen, for example, benefits people who are, or were, legally married by permitting them to use surrogacy, and hence turns single persons, more notably single women, into second-class citizens, a disadvantaged class, by not allowing them to have children through surrogacy.

The discrimination on the ground of single/marital status against single women is often referred to as "singlism". Singlism has been defined as stereotyping and discrimination toward single adults, most often single women (De Paulo & Morris 2005). Single women are stereotyped as having

characteristics and behaviours that are predominantly negative and represent a deficit identity, in addition to being denied advantages and benefits that are available only to individuals based solely on their non-single (relationship) status. It is important to note that such stereotypes are not necessarily regarded within the formal context of law and policy as being discriminatory and wrong.

Other related exclusions of concern

An additional area of concern is that the exclusion of single unmarried women from the law also excludes lesbian and queer women from availing of surrogacy procedures, and hence their right to have a child through surrogacy. This ground of discrimination of singlism against lesbian and queer women needs to be recognized as a ground of discrimination and prohibited. This has not been recognized in India to date. Under Article 14 of the European Convention on Human Rights 1950, courts have now interpreted marital status to be one of the characteristics included in "other status" and thus a ground on which discrimination is prohibited. The European Court of Human Rights considers the absence of a marriage tie as one of the aspects of personal "status" which may be a source of discrimination prohibited by Article 14. Similarly, this ground needs to be seen as a ground of discrimination in the Indian context.

The notion of the central figure of the father as necessary in the best interests of the child (as discussed above) also discriminates against queer couples. Instead, we suggest that the "need for a father" be replaced with the "need for supported parenting" that can ensure a commitment to the health, well-being and development of the child. A change in assessment of the welfare of the child would also be in keeping with the Indian Supreme Court's recognition of legal rights for non-traditional or atypical families in *Deepika Singh v Central Administrative Tribunal* (2022), where the court held that:

> Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. Household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers (who traditionally occupy the roles of the "mother" and the "father") of children may change with the remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones. … (2022: paragraph 26).

Discrimination based on women's single status is not only present in the surrogacy law, but also prevalent in other reproductive rights legislation in India. The Medical Termination of Pregnancy Act 1971, for example, even after it was amended in 2021, did not contain any reference to single women, and only states in rule 3(B)(c) that abortions would be permitted within 24 weeks on the ground of change in marital status of the women to divorce or widowhood. It is completely silent on the single status of a woman, and, due to this, single women have been facing insurmountable barriers in getting access to safe abortions. The Supreme Court had to interpret this to include the right of single women to terminate their pregnancies as doctors were refusing to do so, unless they obtained consent from husbands or family members (*X v Principal Secretary, Health* 2022). Despite the positive interpretation from the Supreme Court, single women seeking termination of pregnancies are still facing hurdles.

[D] CONCLUSION

While there is an increasing concern for the recognition of non-traditional families, which include different family structures and live-in relationships which are recognized under the law for certain remedies, the exclusion of single unmarried women from the Surrogacy (Regulation) Act 2021 is contradictory to these rights. It stereotypes single women as not being capable of being parents and having the right to choose to have a child through surrogacy only based on their single status. Inequalities in reproductive rights including the right to access surrogacy, fertility treatment and other reproductive choices reveal the social and institutional stigma that single women face. It is time that the ground of singlism is seen as a form of discrimination. The current constitutional challenges to the Surrogacy Act hopefully will pave the way for such recognition of structural discrimination against single women in the law.

Popular community concepts of marriage and personhood arising from patriarchal contexts, although not given recognition in developing legislative frameworks, are critical to understand the case of current Indian surrogacy legislation, to ensure the dispensation of the law is free from discrimination. Similarly, surrogacy legislation which focuses on surrogates rather than intending parents, where there has been contention regarding remuneration for their reproductive labour (see Ragoné 1999; Rao 2012; Rudrappa 2012; Pande 2014; Unnithan-Kumar 2019; and Jana & Kotiswaran in this special section, for example, on the feminist debates regarding commercial versus altruistic surrogacy) needs to acknowledge the significant barriers placed by patriarchal ideas of reproductive labour (eg as taken for granted or "natural") to an

effective and just implementation of the law. When it comes to bodily based reproductive rights the law must enable the voices of women and single persons to be heard beyond the patriarchal structures that erase and simplify their individual, contextual circumstances. This should go some way towards moving the law beyond carceral solutions to what are fundamentally issues of gender equity amongst women irrespective of their social status, including as determined by conventional, patriarchal notions of marriage.

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Cultural Connections: How Dance Fosters Integration and Unity*

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Abstract

With increasing migration, integration has become a critical priority for host countries. This article discusses the findings of the research project titled "All the Same with Dance", which examines the role of cultural activities, specifically dance, in the integration process of migrants. Migration often involves challenges such as xenophobia, which hinder social cohesion. Employing qualitative methods, including semi-structured interviews, content analysis and focus group discussions, "All the Same with Dance" explored how dance influences perceptions of similarity and reduces prejudices. Findings reveal a shift from nationalistic sentiments before the event to a focus on shared experiences afterward, demonstrating the positive impact of dance. This article contributes to the academic discourse by highlighting the transformative role of cultural exchange in fostering migrant integration.

Keywords: dance; integration; xenophobia; cultural biases; migrants.

[A] INTRODUCTION

Migration has consistently shaped human history, driven by aspirations for improved opportunities and influenced by multifaceted economic, social and cultural factors. Migrants bring diverse experiences to host societies, yet their integration often faces challenges, including

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socio-cultural differences and deeply ingrained prejudices. Integration, as a process of adaptation and inclusion, has been extensively studied in academic and policy contexts. However, a significant gap remains in understanding the practical role of cultural activities, such as dance, in addressing barriers to integration and fostering social cohesion.

This article stems from "All the Same with Dance", a project aimed at exploring the transformative potential of culturally interactive dance events in the integration of migrants. By employing qualitative methods—including semi-structured interviews, content analysis and focus group discussions—the project offers empirical evidence on how dance acts as a medium for cultural exchange and social inclusion. Unlike theoretical explorations prevalent in the literature, this research focuses on the practical application of dance as a tool for integration and examines shifts in participants' discourse and attitudes. The findings reveal that participants transitioned from nationalistic and divisive sentiments to a discourse emphasizing shared experiences and cultural similarities after engaging in the event. This transformation underscores dance's ability to foster empathy, diminish stereotypes, and create a platform for mutual understanding. By situating dance within the broader discourse on migration and inclusion, this article presents applied insights into the project's role in reshaping perceptions and promoting integration, particularly in under-represented geographical contexts like Türkiye.

This article contributes to migration and cultural studies by discussing the applied potential of the research project, which highlights dance as a vehicle for promoting social integration. It demonstrates how cultural activities can drive discourse change, reduce prejudices and encourage shared values. By advancing practical and theoretical discussions on using embodied practices like dance to enhance social cohesion, this project offers fresh perspectives on addressing migration challenges in diverse societies.

The structure of the article is as follows: Section B presents the literature review, detailing prior research on migration, cultural activities and integration. Section C outlines the methodological framework of the research project, while Section D discusses the findings in detail.

[B] LITERATURE REVIEW

The role of cultural and physical activities in fostering integration has been widely acknowledged, yet the specific impact of dance remains under-explored. For instance, Li (2024) and Yang (2024) suggest that innovative and inclusive methods in dance education can promote

cultural exchange and enhance creative expression, while Afolaranmi and Afolaranmi (2024) emphasize the peacebuilding potential of dance. Similarly, Pace (2018) underscores dance's potential to reduce biases and build social bridges, particularly through innovative and interactive approaches. An and colleagues (2024) argue that dance initiatives such as "Dancing with Care" can increase social cohesion and provide avenues for social inclusion among marginalized groups. Furthermore, Makarova and Herzog (2014) highlight the role of sport in strengthening intercultural relations and social ties among migrant youth in Switzerland, while Smith and colleagues (2019) systematically analyse how physical activities, especially sport, contribute to the integration of culturally and linguistically diverse communities.

The psychological and social benefits of dance further reinforce its relevance. Zafeiroudi (2023) and Tao and colleagues (2022) demonstrate how dance strengthens social connections and enhances resilience. Şenel (2015) illustrates how Turkish diaspora youth in Germany used cultural expressions like hip-hop to foster mutual respect and acceptance. These studies collectively affirm the role of cultural activities in building cohesive societies, providing a foundational context for this article's focus.

However, limited attention has been given to the role of cultural activities in reshaping discourse and reducing xenophobia. In the context of xenophobia, Rivas-Drake and colleagues (2022) emphasize the role of ethnic and racial identity in reducing prejudices and stimulating cooperation. This aligns with the findings of Crush and Ramachandran (2010), who highlight the pressing need for interventions against xenophobia, particularly in regions with heightened humanitarian challenges. Unlike prior studies that focus predominantly on theoretical insights, this article provides applied evidence, demonstrating how participation in dance events can shift participants' perceptions from divisive to inclusive.

This article draws on findings from the "All the Same with Dance" project to highlight how dance can act as a peacebuilding mechanism, facilitating empathy, mutual respect and shared experiences. By situating dance within the discourse of migration and integration, this article provides practical and theoretical contributions, particularly in addressing underexplored contexts such as Türkiye.

[C] "ALL THE SAME WITH DANCE"

By creating shared spaces for cultural exchange, "All the Same with Dance" demonstrates the transformative potential of dance as a tool for social cohesion and mutual understanding (Smith & Ors 2019). Ethical approval was granted by Eskişehir Osmangazi University's Social and Human Sciences Human Research Ethics Committee,[1] and informed consent was obtained from all participants to maintain confidentiality.

The primary research question of the project was: "Is dance an effective tool in the integration of migrants into society, and to what extent does it influence xenophobia?" To address this question, the research has examined two interrelated concepts—integration and xenophobia.

Jiménez defines this phenomenon as follows:

> Integration is the process by which newly arrived immigrants and the communities they settle in (both individuals and institutions) mutually adapt to each other. Integration is also the endpoint reached when individuals perceive themselves and others ethnically, racially, and nationally to a minimal extent, and when these characteristics have the least trivial negative impact on opportunities and life chances. (Jiménez 2011).

With the increase in migration movements, the facilitation of transportation and the impact of globalization, integration has become increasingly important. This situation has led many countries to accelerate their efforts to integrate immigrants into society through various political practices. However, while these policies may assist in the integration process, the outcomes can vary significantly from one country to another.

Integration is defined differently according to context. When approached from a socio-cultural perspective, the integration process begins from the moment an individual joins a different society. This phenomenon is understood as individuals seeing themselves as part of the society they belong to, leading their lives in harmony and, ultimately, as an ongoing process (Aykaç & Karakaş 2022).

According to the International Organization for Migration (IOM), Integration is:

> The term "integration," which is used and understood differently in various countries and contexts, can be defined as the process in which migrants are recognized as both individuals and groups

[1] The research was conducted following the ethical guidelines and approval of the Scientific Research Ethics Committee of Eskişehir Osmangazi University (Approval Number: 2022-19).

> being part of the society. It often refers to a two-way process between migrants and host communities. The concrete conditions required for host communities to accept migrants vary from country to country. Integration does not necessarily imply permanent settlement. However, it points to issues related to the rights and obligations of migrants and host communities, access to various types of services and labour markets, identification of core values that bring migrants and host communities together for a common purpose and ensuring their observance (IOM 2014).

The concept of "xenophobia" implies an extreme fear of something. This typically refers to attitudes towards groups or minorities that differ from the majority society in terms of national origin, religion and racial characteristics (Kaya 2021). In this article, and previously in the research project, the definition of the term "xenophobia" is the one developed by the European Migration Network:

> Attitudes, prejudices, and behaviour that reject, exclude, and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society, or national identity (European Migration Network nd).

Data collection

The research design incorporated a Control Group of 10 participants and a central "dance event" held online on 17 February 2024 with 21 participants from 20 countries. For the dance event, participants contributed videos of traditional dances representing their cultures. These videos were collectively viewed, followed by interactive discussions examining cultural similarities and differences. The event fostered meaningful exchanges, lasting approximately three-and-a-half hours. During the event, observational notes were also recorded. In total, 162 statements from the Control Group and 878 statements from the Event Group (including 576 before the event, 36 during the event, and 266 after the event) were analysed. Semi-structured interviews were conducted with both groups to explore participants' perspectives on concepts like nationalism, cultural identity and stereotypes. These interviews provided insights into how participants' understanding of these concepts evolved, particularly as they interacted during the event.

All data were organized in Excel and subjected to an inductive thematic analysis. Following this, the data were further processed using SPSS software to identify patterns and correlations, providing a comprehensive framework for interpreting shifts in participants' attitudes and perceptions.

The *Control Group* comprised 10 participants from various nationalities, including Azerbaijan, Nigeria, Poland and Indonesia. This group consisted of six self-identified men and four self-identified women, aged between 21 and 30, from 10 different countries. They were interviewed exclusively prior to the culturally interactive dance event, part of the "All the Same with Dance" project, to establish baseline data on attitudes toward integration, cultural identity and xenophobia. These interviews[2] provided a critical reference point for comparing the results from the Event Group.

The *Event Group* consisted of 21 participants representing 20 different nationalities, including countries such as Tajikistan, Georgia, Italy and Indonesia. Participants ranged in age from 17 to over 30, with diverse educational backgrounds (16 holding bachelor's degrees and 5 holding master's degrees). This group participated in a series of *three structured interview phases*:

1 *Before the event*, participants shared their initial perspectives on integration, cultural identity and xenophobia, providing a baseline understanding of their attitudes.

2. *During the event*, participants engaged in the central activity and were interviewed in real time to capture immediate reactions and insights into how shared cultural practices influenced their experiences. The *central activity*, referred to as the "dance event", was conducted online on 17 February 2024, addressing logistical challenges while ensuring inclusivity. Participants contributed videos of traditional dances representing their respective cultures. These videos were

[2] The interview questions included:

1. What do you think is the definition of nationalism and racism?
2. What comes to your mind when you think of national identity?
3. Is national identity in need of protection, why?
4. What do you think are the elements that create or threaten a national identity?
5. Is your identity and culture similar to others, and why?
6. What are the elements that you associate as common values?
   - Are common values an advantage or disadvantage for you, why?
   - How do common values affect your life?
7. Do you have a stereotype in your mind against any identity or culture, why?
   - If no, do you think all humanity shares the same values, why?
   - If yes, to what extent does it affect your daily life?
   - Is there a stereotype you have been exposed to before, and if so, what is it?
8. Do you feel yourself as belonging to a country or as a citizen of the world, why?
   - Do you feel better in the country you are in now or in the country you are a citizen of, why?

collectively viewed, fostering discussions about their cultural significance and similarities with other practices. This interactive format aligns with existing research highlighting the potential of cultural activities, including dance, to foster co-existence, dismantle prejudices and create spaces for mutual respect (Afolaranmi & Afolaranmi 2024; Li 2024). This three-and-a-half-hour event served as a platform for participants to express their cultural identities while appreciating others' values, thus reducing stereotypes and promoting social cohesion (Şenel 2015). The emphasis on rhythmic and cultural exchange during the event allowed participants to establish deeper connections, thereby addressing xenophobia and promoting social inclusion. By creating shared experiences, the dance event operationally demonstrated the transformative role of dance in bridging cultural divides, enhancing mutual understanding and fostering co-existence.

3. *After the event*, follow-up interviews[3] were conducted to explore how participants' perceptions and attitudes evolved following the activity.

This *multi-phase interview design* provided a longitudinal lens through which the transformative effects of the dance event could be assessed. The three distinct stages of data collection allowed researchers to track shifts in discourse, moving from a focus on nationalistic identity and stereotypes to shared experiences, cultural similarities and mutual respect.

To analyse the collected data, a *thematic analysis* approach was employed. Responses were categorized into major themes or categories—such as Culture, Nation, Politics and Society—and minor themes, including tradition, identity, emotions and belonging.

Before the event, participants predominantly expressed sentiments related to nationalistic identity, cultural differences and stereotypes. During the event, discussions shifted to focus on collaborative engagement and shared cultural practices. After the event, participants

[3] The post-event interview questions included:

1. Did your definition of nationalism and racism change after the event, and why?
2. What changes occurred in your thoughts about national identity after the event?
3. To what extent did the event confirm your ideas about common values?
4. Do you still think the same about identity and culture, and why?
5. What are the changes in your thoughts about stereotypes?
6. How do you plan to deal with stereotypes in the future?
7. How did the behaviour of the people at the event change your thoughts?

emphasized mutual respect and cultural similarities, reflecting a significant transformation in discourse. The analysis revealed five main categories after the event: Culture, Nation, Common Values, Emotions and Behaviour. Subcategories, such as tradition under Culture and dance under Common Values, further illustrated the nuanced shifts in participants' attitudes.

The *content analysis* revealed additional insights through categorization. For instance, in the Culture category, subthemes such as tradition, religion and food were highlighted, while the Nation category included subthemes like language, history, identity, nationalism and belonging. Similarly, the Politics category focused on concepts such as democracy, freedom and citizenship, while the Society category emphasized family and humanity. During the event, the emergence of minor themes, such as dance and culture, indicated a shift toward exploring cultural similarities and fostering connections. Post-event interviews revealed further evolution, with participants highlighting themes of Common Values, Emotions, and Behaviour, reflecting a deeper appreciation for shared experiences.

The research faced several challenges, including logistical barriers, participant hesitations linked to socio-political conflicts and the absence of incentives, which affected recruitment. Conducting the event online addressed some obstacles but limited the depth of engagement compared to in-person interactions. These limitations underline the complexities of organizing such studies and suggest areas for refinement. Future studies should prioritize in-person activities to enhance the depth and quality of interactions. Expanding the participant pool and extending the research timeline will enable a richer understanding of how cultural practices influence attitudes across diverse contexts. Additionally, employing innovative strategies to encourage active participation will improve the overall reliability and impact of future research.

[D] RESULTS AND DISCUSSION

In this section of the article, the focus will first be on how the findings differ between self-identified men and women participants. Following this, the differentiation of major themes between the Control Group, who did not participate in the dance workshop, and the Event Group, who actively participated in the same event, will be explored in detail. Subsequently, the analysis will extend to the minor themes to explore any distinctions between the groups and whether more pronounced differences exist. After analysing the distinctions between the Control

and Event Groups, the discussion will move to how national differences influence the major themes. To evaluate the impact of the event, graphs illustrating the changes in both major and minor themes before, during and after the event will be presented.

The bar chart in Figure 1 highlights the distribution of major themes among self-identified men and women participants before and after the event. For self-identified men, themes such as Nation and Politics were the most dominant before the event, with a noticeable decline in Politics after the event. On the other hand, self-identified women demonstrated a strong focus on Nation and Discrimination themes before the event, with Nation remaining prominent, but a shift away from Discrimination after the event. Both groups exhibited a decrease in thematic diversity following the event, indicating that discussions became more concentrated around specific themes, particularly Nation and Religion.

Data suggests that the dance event facilitated a shift from divisive themes, such as Politics and Discrimination, to unifying ones like Nation and Religion, highlighting the association between dance and social cohesion. This points out the significance of dance in enhancing social interaction. Furthermore, the divergence of self-identified men from the Politics theme and self-identified women from the Discrimination theme underscores the role of interaction in addressing gender-related issues and reducing social disparities.

The analysis of the data revealed significant differences in the representation of major themes between the Control and Event Groups. As shown in the bar chart in Figure 2, the Nation theme was the most frequently mentioned across both groups, with 97 instances in the Event Group compared to 61 in the Control Group. This suggests that participation in the event heightened discussions around national identity and related concepts. The Culture theme also appeared prominently, with a slightly higher representation in the Event Group (44) compared to the Control Group (40). Interestingly, themes like Politics and Society were only present in the Control Group, with 47 and 13 mentions, respectively, while they were entirely absent in the Event Group. This shift could indicate that event participation shifted the focus away from political and societal issues to more experiential or emotional themes. For instance, the Common Values theme emerged with 61 mentions exclusively in the Event Group, highlighting a stronger emphasis on shared values during the event. Similarly, themes related to Discrimination and Emotions saw increased attention in the Event Group, with 13 mentions of Discrimination and 11 mentions of Emotions,

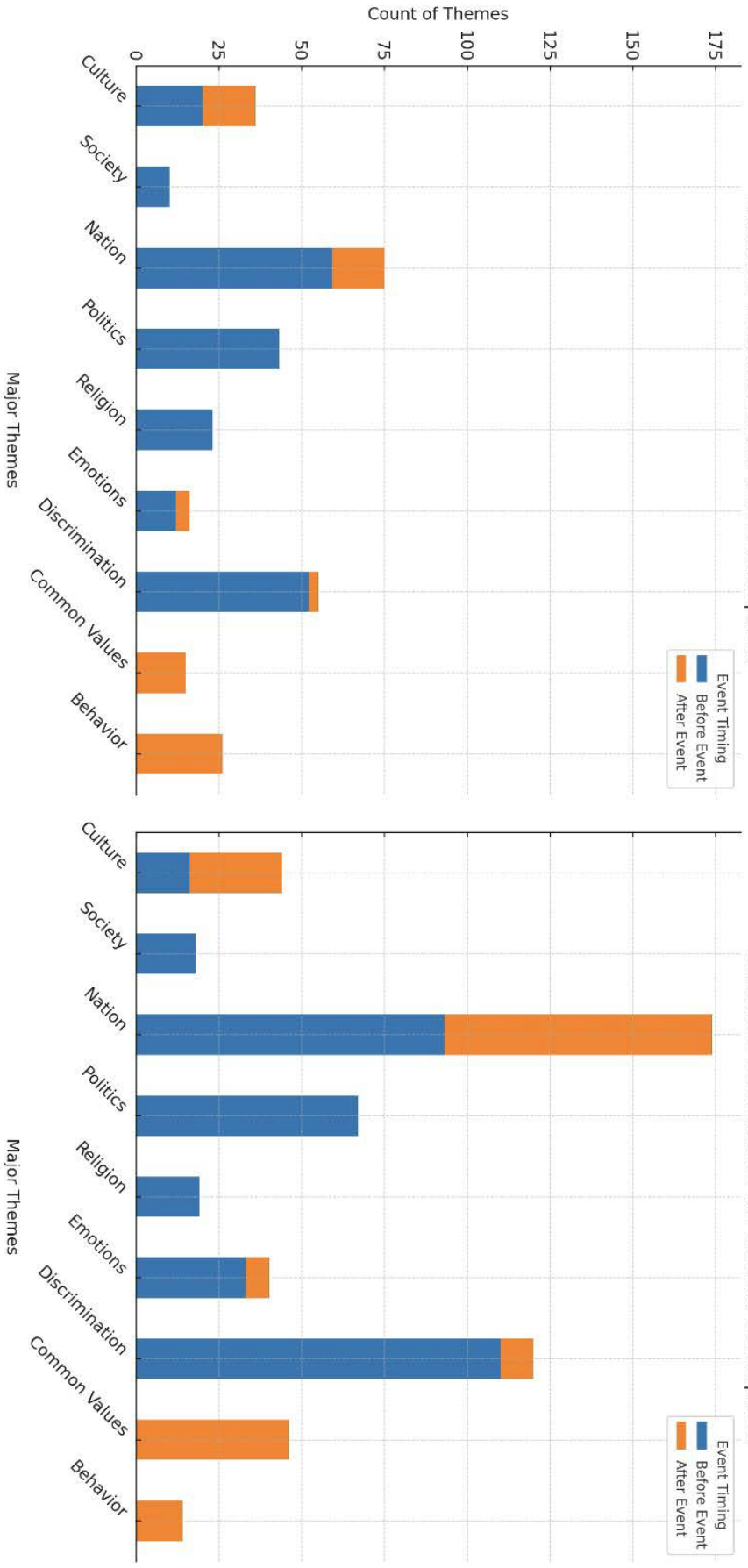

Figure 1: Thematic participation by gender

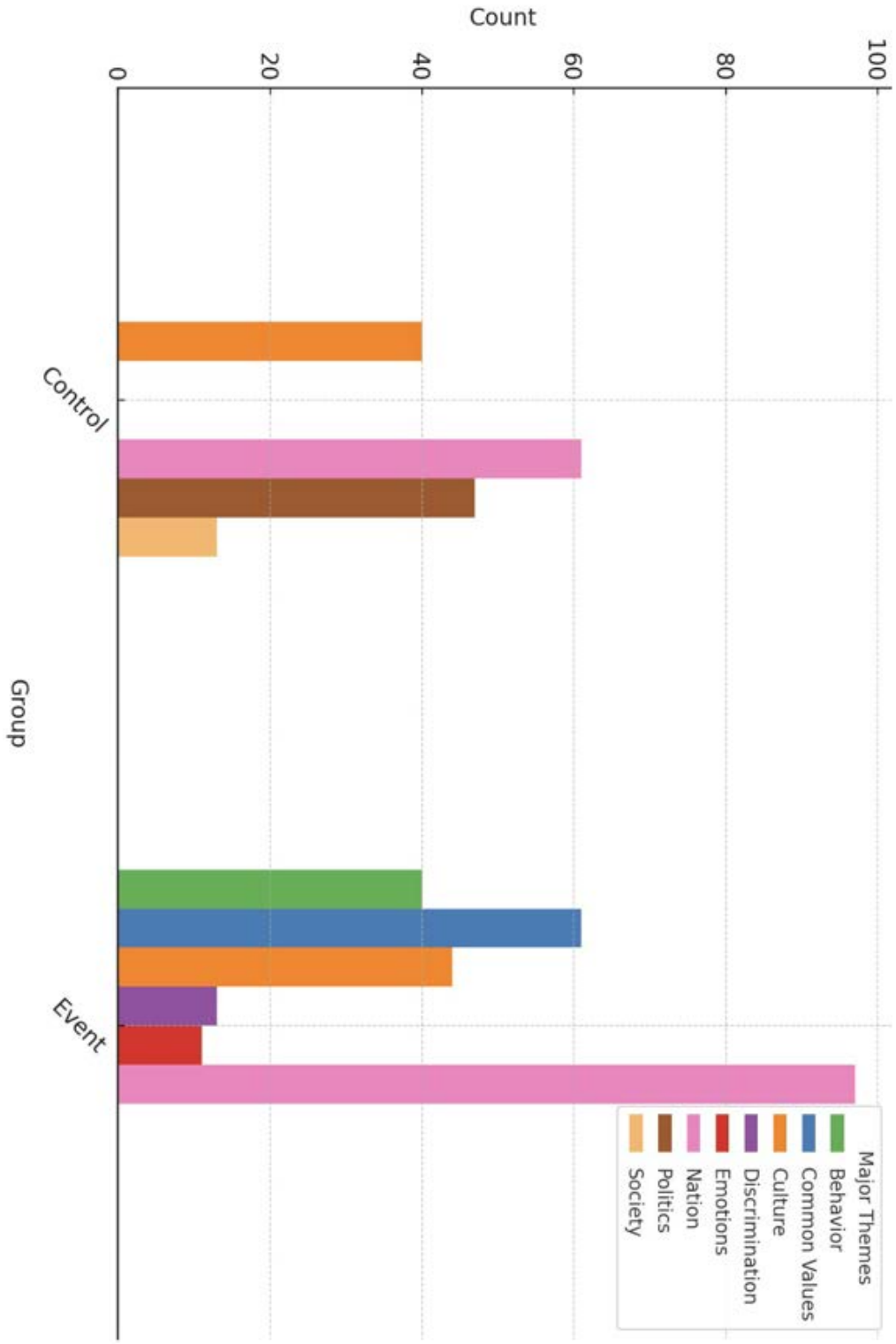

Figure 2: Impact of event participation on major themes

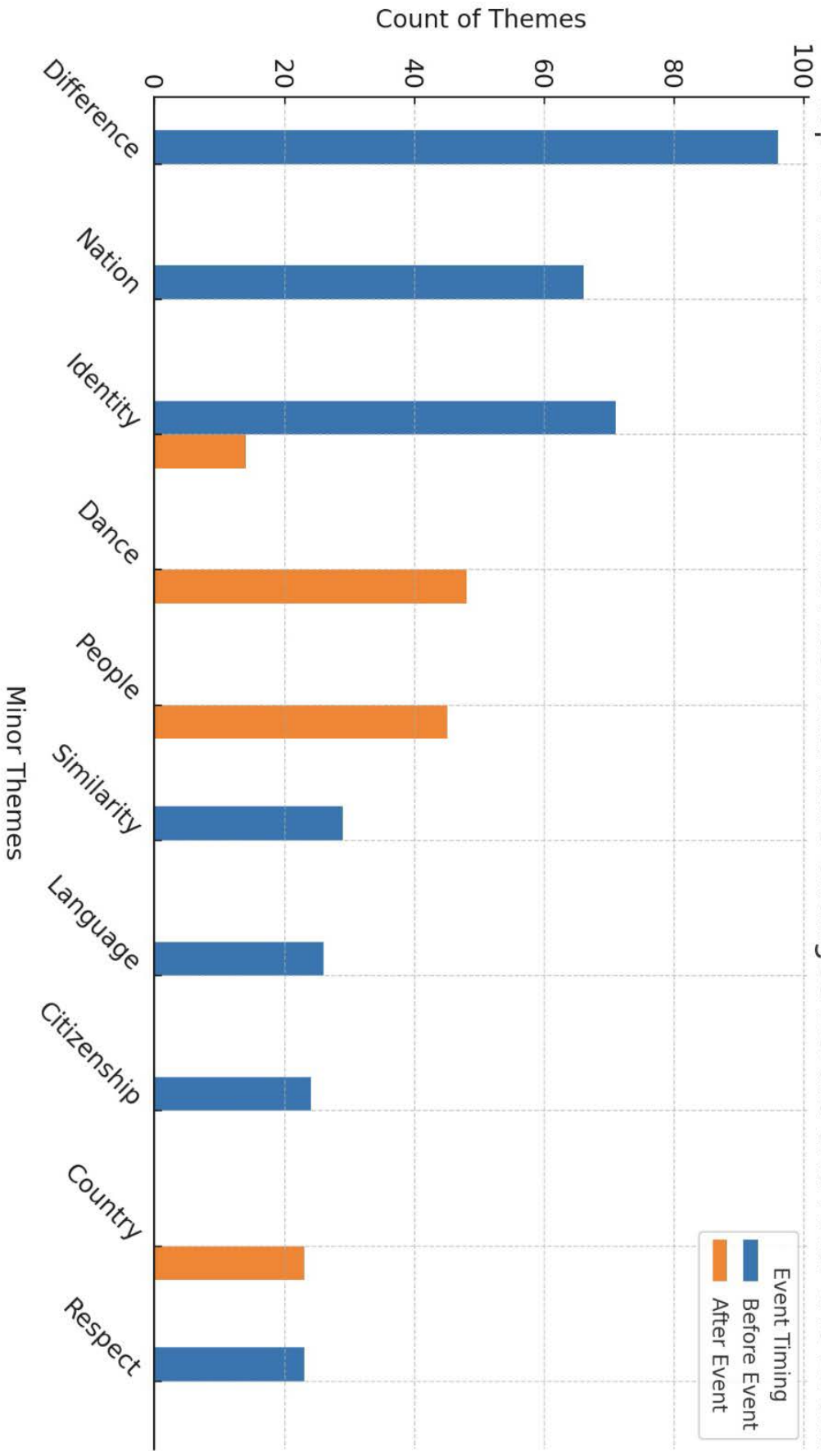

Figure 3: Top 10 most dramatic changes in minor themes in both Control and Event Groups

whereas they were not discussed in the Control Group. Participation in the event significantly shifted discussions toward cultural and nationalistic themes, emphasizing shared values and emotions.

The comparison between the Control and Event Groups in Figure 3 reveals significant differences in the distribution of minor themes, as illustrated in the bar chart. The analysis highlights the top 10 minor themes with the most dramatic changes between the two groups. Notably, the minor theme dance shows the largest increase in the Event Group, with 48 occurrences, while it was absent in the Control Group. Similarly, country and tradition also saw notable increases in the Event Group, suggesting that participation in the event heightened discussions around cultural expression and national identity. Conversely, minor themes like minority and family were more prevalent in the Control Group, with 34 and 9 mentions, respectively, and no representation in the Event Group. In this context, the participants shared the following statements:

> What we call a common value is of course the family, as in most Turkic countries. Family should be protected. Family is important. The other is commitment to relatives, like brothers and sisters … (Azerbaijan, Self-identified man from the Control Group)

> I think in Türkiye, um, I have and I will for a very long time be a minority. When I go out in public. I always have these eyes on me. This idea that I'm being, uh, that I'm under surveillance by the public. Uh, the public vigilante concept. Um, and since I'm a minority, since I'm not a national, I think, uh, at points at certain times, it can raise discomfort (Pakistan, Self-identified man from the Event Group).

These shifts show that participating in the dance event redirected focus toward more dynamic and experiential themes, such as dance and tradition, while reducing emphasis on social and familial themes. The data indicate that participation in the event significantly influenced the types of discussions participants engaged in, particularly encouraging more cultural and nationalistic discourse.

The analysis in Figure 4 identified three common minor themes between the Control and Event Groups: identity, tradition and value. These themes, sorted alphabetically, are presented in the bar chart comparing the two groups. The tradition subtheme had the highest overall mentions, with more emphasis in the Event Group (30 occurrences) compared to the Control Group (18 occurrences). The identity subtheme was discussed more in the Event Group as well, while value was mentioned more frequently by the Control Group. This suggests a shift in focus towards tradition and identity during the event, while values were more prominent in discussions within the Control Group. Furthermore, the

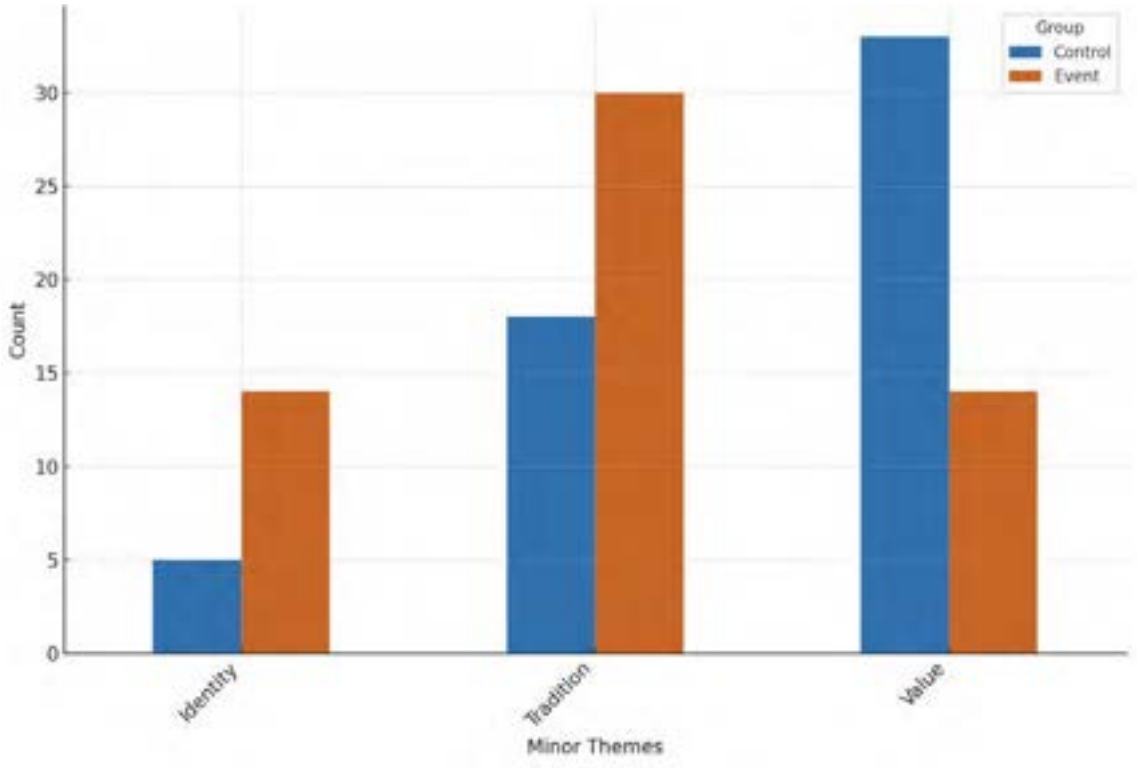

Figure 4: Common minor themes in both control and Event Groups

frequent discussion of the value subtheme in the Control Group and the increased focus on the subthemes of tradition and identity in the Event Group highlight dance's impact on bringing these themes to the forefront and its importance in facilitating intercultural interactions.

These findings indicate that the importance of the subthemes of tradition, value and identity serves as a significant indicator for understanding the role of dance in strengthening cultural ties and promoting social integration. This suggests that individuals can unite society around shared values, thereby reinforcing social cohesion. Dance fosters social cohesion by encouraging mutual understanding and strengthening social identities.

In Figure 5, the combined heatmap visual illustrates the distribution of major themes across countries both before and after the event. The "Before Event" heatmap shows that themes such as Politics, Society and Religion were moderately represented across countries like Hong Kong, India and Indonesia. After the event, we observed notable shifts, particularly in countries like India, Tajikistan and Russia, where themes like Politics lost their importance. The visual comparison highlights the evolving thematic focus, suggesting that the event influenced participants' perspectives, with increased emphasis on certain themes post-event. For example, the

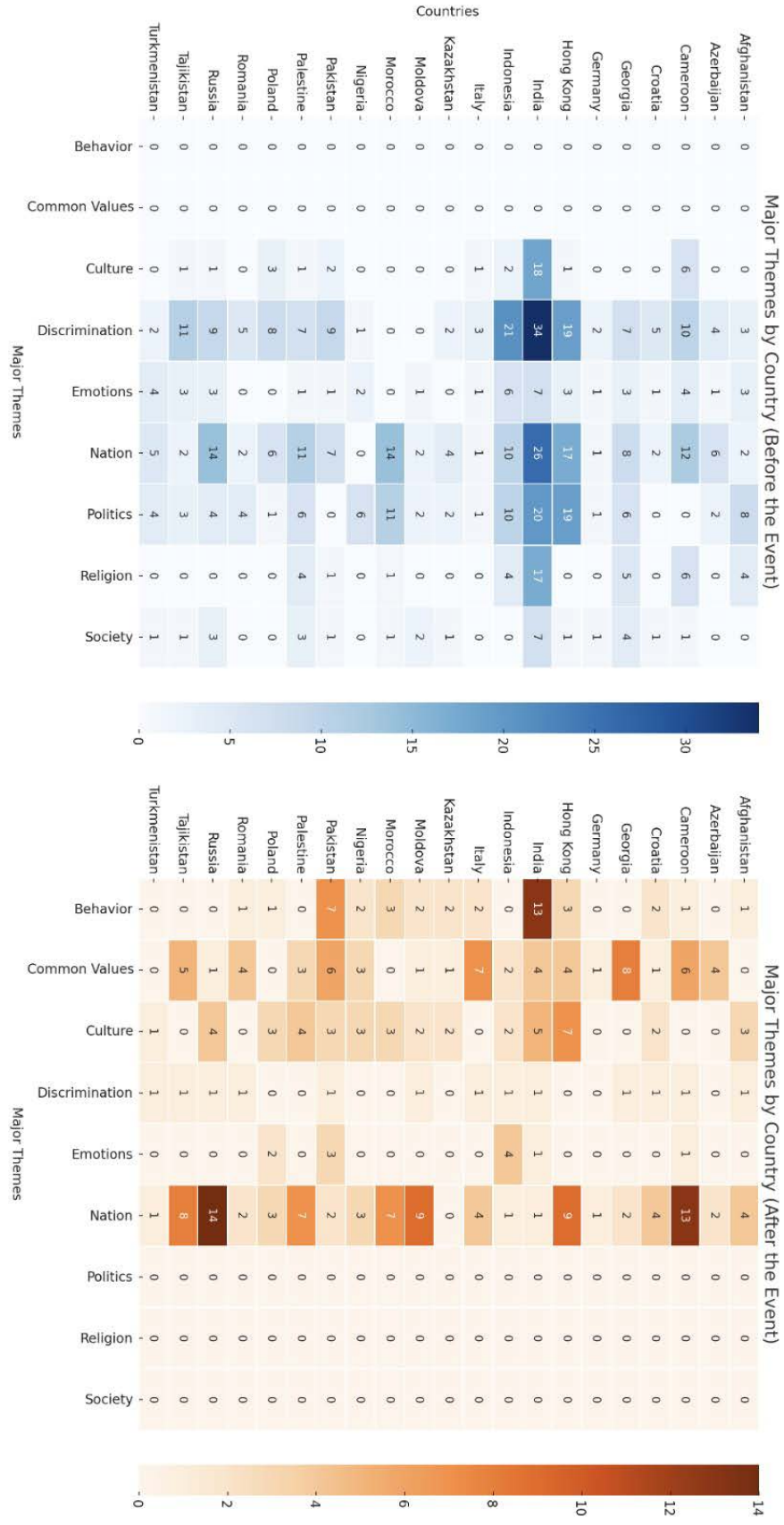

Figure 5: Major themes by country before and after the event

theme Discrimination has had an obvious shift by the event. Likewise, in the interviews with the Event Group after the event, it was found that they hardly mentioned the feelings of discrimination and politics. On the contrary, they emphasized minor themes such as positivity, holism and respect.

> I think that I don't feel any barriers with those people and I think I even can be friend or et cetera and their nations wouldn't be a Problem for me or something different. (Poland, Self-identified Woman from the Event Group).

> It was a positive vibe, Uh. When we were in the event, there were like a lot of nationalities and everyone was trying their best to come with the best of their culture, I think. I think, uh, this is the way it was and. I think uh. I don't know. Like, yeah, it was it was good. I like Ohh like if you get it in general I think about the. Was that good mode It was a good mood, uplifter even, and I think it should occur more to know each other. Maybe the next time I will be interested if there is a physical event where everyone can cook their meal or something and. Have an interaction between them so maybe they can know more about their cultures (India, Self-identified man from the Event Group).

However, at this point, it is seen that the concept of nation is emphasized again. Compared to data collected before the event, the concept of nation was mentioned in this context by emphasizing more integrative and similar characteristics after the event, while before the event, it was mostly evaluated on discrimination, identity and negative concepts. One participant offered the following response in relation to the topic:

> I live inside Israel. I have an Israeli passport. And trust me, as much as I have faced discrimination, I have faced racism, sexism, everything you can think of … Anyone who is displaced from their own country will say that about other countries that they have immigrated to or run away to because they lost the sense of warmth that they had back home like its chaos back home (Palestine, Self-identified Woman from the Event Group).

In light of these findings, it has been observed that participants from various countries shifted their focus towards shared emotional and cultural themes after the event, setting aside their diverse cultural and social backgrounds. Furthermore, the decline in divisive themes such as Politics highlights how dance creates a broader and more inclusive environment for interaction, transcending social differences. This underscores the significance of understanding how individuals with diverse perspectives contribute to social integration. Conversely, the concept of Nation, initially discussed in the context of differences and distinct identities, transitioned into a unifying theme that highlighted

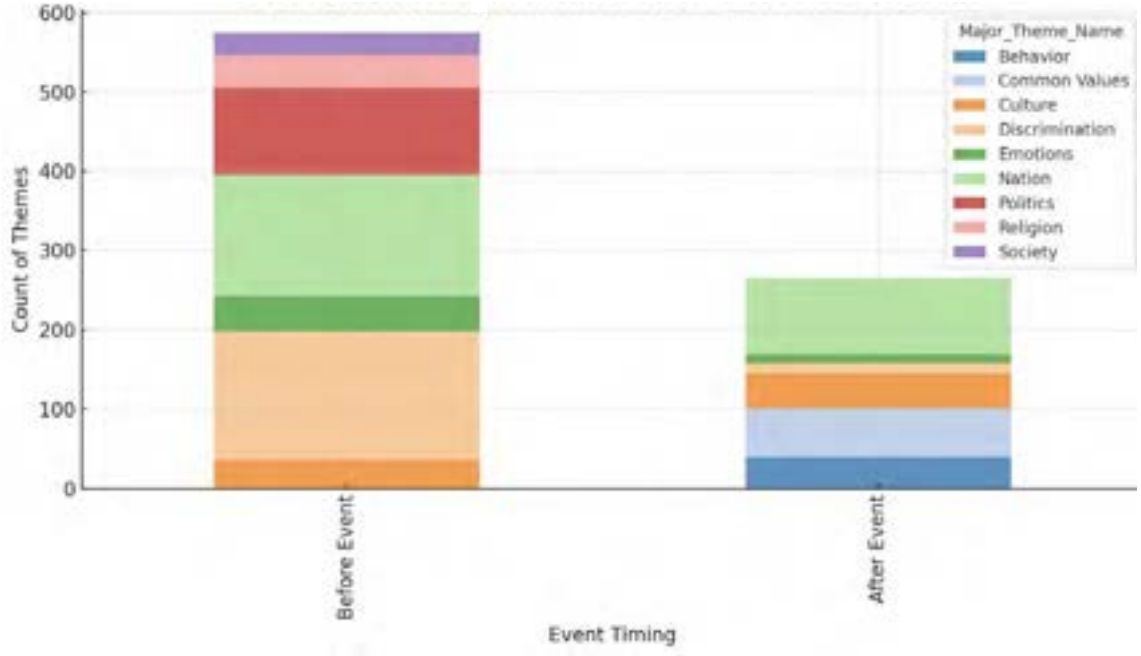

Figure 6: Distribution of major themes before and after the event

commonalities among participants. This evolution underscores how the event facilitated a reinterpretation of national identity as a shared value rather than a divisive boundary.

The analysis in Figure 6 shows a decline in divisive themes, such as Politics and Discrimination, and an increase in unifying ones like Nation and Religion post-event. Notably, themes related to Culture, Society and Nation dominate both time periods, though the prominence of certain themes, such as Politics and Religion, appears to shift slightly after the event. The most significant changes are observed in the Emotions and Discrimination categories, which show an increased presence following the event. These variations suggest that the event may have heightened awareness or influenced discussions around emotional responses and experiences of discrimination. To sum up, the chart highlights how different thematic focuses evolve across event timings, reflecting potential shifts in participant perspectives.

The bar chart in Figure 7 illustrates the top 10 minor themes with the most significant changes before and after the event. Subthemes such as difference, identity and dance showed notable shifts, with dance and people emerging predominantly after the event, while subthemes like difference and nation saw a substantial decrease. This indicates that the event had a marked impact on discussions surrounding cultural identity and social expressions, particularly with a rise in interest in activities

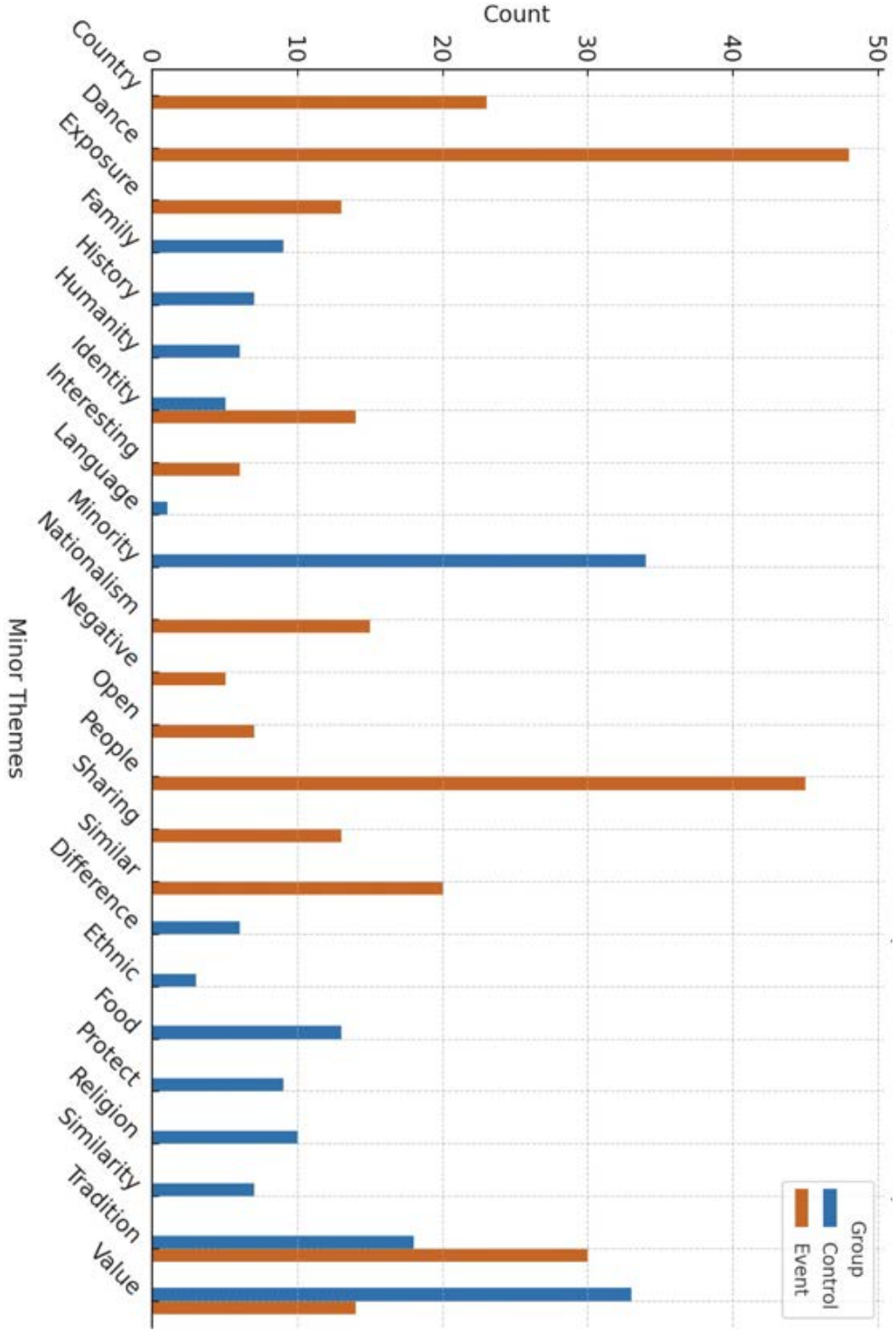

Figure 7: Top 10 minor themes with the most dramatic changes before and after the event (Control ∪ Event)

such as dance. The shift in minor themes suggests a transformation in participant focus, moving from more abstract concepts like Identity to more tangible expressions of culture and values.

The findings are crucial for understanding the impact of the event on participants' social expressions. Specifically, the reduction in the prominence of divisive minor themes such as difference and the emergence of shared values and traditions further emphasize the role of dance in promoting social integration. Furthermore, participants reported that comparing their own cultures with those of others during the event allowed them to recognize shared values and traditions. This process fostered cultural awareness and led them to confront and overcome their own prejudices. As part of the discussion, participants articulated these reflections, emphasizing the transformative role of dance in promoting understanding and reducing biases. For example, they noted:

> Intend to not see them as like a first impression. I tend to give people more than one chance or second chances to think who they are without the stereotype (Palestine, Self-identified Woman from the Event Group).

> In order to deal with stereotypes, I think to interact more with races that have stereotypes, I think interaction is more successful in the elimination of these stereotypes (Romania, Self-identified Woman from the Event Group).

The participants' understanding and conceptualization of notions such as "nationality" and "identity" showed significant positive development and transformation. The second finding of the research posits that: "Xenophobia will decrease in cases where rhythmic and choreographic similarities are observed." To evaluate this finding, the research project examined the change processes within both the Control and Event Groups. The findings revealed that the Control Group exhibited stronger prejudices and sharper distinctions between themselves and others. In contrast, the Event Group, while initially emphasizing differences, culture and identity in the context of xenophobia, transitioned toward a more moderate and inclusive perspective, highlighting similarities and shared values during and after the event.

Thus, the research findings provided robust confirmation of the positive effect of dance on decreasing xenophobia. Notably, the interview data aligned with this conclusion, illustrating consistent patterns of reduced prejudices and increased emphasis on commonalities among participants. Participants articulated their reflections, further supporting the transformative effect of dance on breaking down xenophobic attitudes and fostering intercultural understanding. For example, they noted:

> It's actually surprising that … Yeah, it does surprising because surprisingly, Indonesia have the most random common dance with South Africa, with Nigeria. So it's very interesting and I really love it, actually (Indonesia, Self-identified Woman from the Event Group).

> For example, everything felt different. I liked it, actually. Afghan dances, Afghan identity. It was like Asia, the culture of Asia, and what else was there? Central Asia, the Middle East, the Middle East. It was like a mixture of the West of the East, Asia, the West and the Middle East. It reflected the culture of Pakistan, India, which wasn't really there a bit, and the clothes and stuff. I'd never seen it before. I loved the Afghan dancing and stuff like that. I was like, 'Wow.' How many cultures does it have in itself like that? Iranian culture. India, Pakistan, etc. For example, I never imagined that an Afghan and an Indian would be so close. For example, I liked this. (Georgia, Self-identified Woman from the Event Group).

> I didn't know Georgian dances. How was it? That has changed my mind completely. And after the event I watched a few videos from Georgia, so I liked them because of their songs and how they dance and so on, and from my point of view I didn't know them. Yes, we are neighbours with Russia, but Georgia and Azerbaijan already have a lot of similarities, for example Azerbaijan. But for example, Azerbaijani dances are very popular, but in Georgia we usually know men's dances. But both men and women danced in the event and it was completely different, so it attracted my attention and after the meeting I started to research (Tajikistan, Self-identified Woman from the Event Group).

Overall, a comparative analysis between the Control and Event Groups revealed distinct differences in attitudes. While the Control Group maintained more rigid views, the Event Group demonstrated a notable shift in its discussions, emphasizing shared experiences and collective values. These results underscore the role of interactive cultural activities in encouraging dialogue and mutual understanding.

[E] CONCLUSION

This article has presented the findings of "All the Same with Dance", a research project that investigated the potential of dance to influence attitudes and perceptions, particularly in contexts involving cultural exchange and integration. The findings show that participants moved away from divisive themes, such as Nationality and Discrimination, toward more inclusive and positive concepts, reflecting a transformation in how they approached shared values and cultural similarities. This evolution highlights how shared experiences can create spaces for dialogue and understanding, bridging differences and contributing to social cohesion. Further, the findings show that dance can function not only as a tool for

integration but also as a potential antidote to cultural prejudice, making both theoretical and practical contributions to a broader discourse on migration and inclusion.

Thus, dance represents as a powerful tool for bringing individuals together in both cultural and emotional contexts.

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Self-Regulatory ODR in China's e-Commerce Market: An Examination of Alibaba's Taobao Platform and Crowdsourced ODR

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Abstract

This article explores the evolution and application of online dispute resolution (ODR) within China's e-commerce landscape, focusing on the self-regulatory mechanisms employed by Alibaba's Taobao platform. It provides an overview of China's ODR development, analyses Taobao's crowdsourced jury system as a case study, and examines the platform's rulemaking and dispute resolution procedures. The analysis highlights Taobao's ability to resolve disputes efficiently while addressing important challenges, such as transparency, data privacy and legal accountability. The study emphasizes Taobao's role in shaping China's e-commerce governance, underlining the need for balance between innovation and consumer trust in a rapidly expanding digital marketplace.

Keywords: online dispute resolution (ODR); e-commerce; Taobao; self-regulation platform; consumer protection; crowdsourced jury.

[A] INTRODUCTION

Over the past 20 years, online dispute resolution (ODR) in China has undergone remarkable growth, driven by the convergence of three important factors: the world's largest population of internet users; a booming e-commerce sector; and a legal tradition that prioritizes resolving disputes outside of court. This convergence of factors provides valuable insight into how ODR evolves and adapts within distinct cultural, economic and technological contexts.

The emergence of ODR marks a transformative evolution in dispute resolution that goes far beyond simply digitizing alternative dispute resolution (ADR) practices. While ADR arose primarily as an alternative to formal litigation, ODR represents a fundamental reimagining of how conflicts can be prevented, managed and resolved in an interconnected

world. The digital environment has enabled entirely new approaches to dispute resolution: automated negotiation systems that can handle thousands of cases simultaneously, crowdsourced decision-making that leverages collective wisdom, predictive analytics that help prevent disputes before they arise, and blockchain-based mechanisms that ensure automatic enforcement of agreements. These innovations address not only the volume and velocity of online disputes but also create new possibilities for achieving justice that would be impossible in traditional offline settings. Much as ADR expanded our conception of justice beyond adversarial courtroom proceedings, ODR is reshaping our understanding of what dispute resolution can be in the digital age.

This article explores one of China's most significant and innovative ODR systems: the dispute resolution platform developed by the e-commerce giant Alibaba for its Taobao (淘寶, literally, "search for treasure") marketplace. The Taobao platform provides valuable insights into the evolution of ODR principles and practices when applied on a massive scale, resolving millions of disputes each year. It also highlights how traditional Chinese preferences for extrajudicial dispute resolution can be effectively adapted to the online environment, leveraging advanced technological innovations. Specifically, it addresses the question: how does Taobao, China's largest C2C (consumer-to-consumer) e-commerce platform, establish and operate its own self-regulatory dispute resolution mechanism?

To answer this question, this article examines Taobao's operations, offering a case study of the self-regulatory approach in the context of the People's Republic of China (PRC), based on empirical work the author conducted in 2021. While Taobao's online dispute processing system effectively handles a high volume of cases, its practices warrant careful examination.

This analysis centres on Taobao's innovative crowdsourced jury system, a distinctive blend of traditional community-based dispute resolution and cutting-edge digital technology. The system prompts important questions regarding the role of public participation in ODR, the delicate balance between efficiency and fairness, and the potential of technology to democratize the dispute resolution process.

The article is divided into two substantive sections. Section B examines briefly the development of ODR in China, tracing its evolution from early government-sponsored initiatives to the emergence of platform-based private systems. This analysis situates Taobao's dispute resolution mechanism within China's broader legal culture, which has historically

favoured informal, community-based approaches to conflict resolution. Section C presents a detailed case study of Taobao's innovative ODR system, focusing particularly on its use of crowdsourced juries, probably transplanted from earlier efforts in this direction by eBay and others. This system represents a distinctive hybrid that combines traditional Chinese preferences for community-based dispute resolution with sophisticated digital technologies and contemporary e-commerce requirements. While Taobao's approach has proven remarkably successful in handling millions of disputes and fostering public participation in justice processes, it also highlights fundamental tensions in private ODR systems. These include balancing efficiency with procedural fairness, maintaining transparency while protecting user privacy, ensuring meaningful oversight without compromising platform autonomy, and building consumer trust in private justice systems. These challenges echo broader theoretical debates within ODR scholarship about the proper role of private entities in delivering justice, the legitimacy of platform-based dispute resolution, and the accountability of technological systems that increasingly shape access to justice in the digital age. This article primarily draws upon empirical research conducted by the author in 2021, forming the core of the regulatory discussion presented herein. It is important to acknowledge that certain provisions may have evolved in light of the rapid expansion and development of the e-commerce sector. However, despite these potential shifts, the discourse surrounding the formulation and structure of these rules and regulations retains its relevance and applicability.

Through its analysis of China's largest e-commerce platform, this study advances ODR scholarship in several key directions. First, it demonstrates how massive-scale ODR systems can effectively balance competing imperatives: the need for rapid, automated dispute-processing against demands for procedural fairness; the efficiencies of algorithmic decision-making against the nuanced judgement of human participants; and the autonomy of private platforms against broader public interest concerns. Secondly, the Taobao case reveals how ODR systems can successfully integrate local legal traditions—in this instance, China's preference for community-based dispute resolution—with innovative digital technologies. Finally, this article challenges assumptions about the universality of Western ODR models by showing how cultural context shapes both user expectations and system design. The findings suggest that the future of ODR lies not in a one-size-fits-all approach, but in thoughtfully adapted systems that reflect local legal cultures while leveraging the possibilities of digital technology. This has significant implications for the design and implementation of ODR systems globally,

particularly in emerging markets where e-commerce platforms are increasingly central to economic and social life.

[B] DEVELOPMENT OF ODR IN CHINA

In formal terms, the history of ODR in the PRC began in 2004 with the creation of the China ODR Center by the China International Economic and Trade Arbitration Commission (CIETAC, a government-sponsored arbitration body). This platform was designed to provide services such as online arbitration, online notarization and legal assistance for dispute resolution. Although no longer in operation today, it was the country's first ODR provider. CIETAC is an especially prominent arbitration institution in the PRC, specializing in international trade and investment disputes. Since its establishment in 2000, CIETAC's Online Dispute Resolution Centre (also known as the CIETAC Domain Name Dispute Resolution Centre) has successfully resolved many domain name disputes (CIETAC 2015). In 2009, CIETAC introduced its Online Arbitration Rules, which outlined the procedures for online arbitration and mediation. Despite its success in settling domain name disputes, CIETAC's Online Arbitration Platform overall appears to have been infrequently utilized before the Covid-19 pandemic (Cietacodr.org nd). The advent of the Covid-19 pandemic has catalysed a significant metamorphosis in the extant commercial environment, propelled by rapid strides in technology. Consequently, the realm of arbitration is vigorously exploring efficacious strategies to leverage digital resources and remedies in addressing prevailing complexities and forecasting forthcoming requirements in dispute resolution (Lu 2024).

In early 2018, the Supreme People's Court of the PRC launched an online mediation platform, Tiaojie.court.gov.cn, offering nationwide online mediation services (People's Court Mediation Platform nd). By the end of 2020, the platform had handled 13.6 million mediation cases (Supreme People's Court of the People's Republic of China 2021). It is now the largest official mediation platform in China and serves as an ODR platform for over 56,000 mediation organizations, including more than 36,000 people's mediation (that is local community or local institutional) groups and nearly 5000 industry-specific mediation groups. Additionally, it serves as a forum for more than 460,000 mediators and 3504 courts across China (ibid).

In addition, various other institutions in China provide ODR services. The China Consumers Association (CCA) offers online negotiation through its CCA Conciliation and Supervision Platform (China Consumers

Association nd). Similarly, the Shenzhen EBS (E-business Better Service) Centre provides online mediation services (EBS ODR nd),[1] while China 315online facilitates online complaint services (China 315online nd). The Guangzhou Arbitration Commission offers online arbitration (Guangzhou Arbitration Committee Online Arbitration nd) and the Hong Kong International Arbitration Centre (HKIAC) has a longstanding history in resolving domain name disputes (HKIAC nd). But within China's diverse ODR framework, the system known as Taobao developed by Alibaba is especially important. Set up in 2012, Alibaba's shopping platform Taobao introduced a User Dispute Resolution Center, so as to handle customer complaints about poor products or copyright infringement as well as complaints from users who feel they have been unfairly penalized by the platform. Taobao is not only China's largest online e-commerce platform, but its dispute resolution experience also played a crucial role in the design and operation of China's first Internet Court, also based in Hangzhou in central China (Yang 2021). The company provides identity verification through Alipay, automatically providing the online retailer Taobao (as well as its business to consumer spin-off, called T-mall) transaction records as evidence, data encryption, storage and monitoring through Alibaba Cloud, enforcing judgments across its ecosystem and more. Alibaba is notably also a defendant in over half of the cases tried in the Hangzhou Court.

When looking at the trajectory of development of internet platforms offering ODR services, we can see a major shift in government policy. Initially, the platforms which emerged were closely tied to the state sector, and institutionally linked therefore also to the Chinese Communist Party. Gradually, however, the Government adopted a relatively hands-off approach to internet platforms, including those offering ODR services. This significant change was influenced by several strategic factors. First, companies such as Alibaba, Tencent and ByteDance were key drivers of substantial economic growth and innovation. The Government prioritized this rapid digital economic development over stringent regulation. Secondly, these firms were seen as assisting China's drive to gain global competitive advantages in sectors such as e-commerce, mobile payments and social media, establishing the PRC as a global tech leader. In addition, the major tech companies constructed essential digital infrastructure and services, efficiently managing tasks that might otherwise have required government resources, such as digital payment

[1] "EBS" refers to the Shenzhen Zhongxin e-Commerce Transaction Assurance Promotion Centre. This is a third-party service agency responsible for building a trustworthy e-Commerce transaction environment. The EBS ODR is an online dispute resolution platform launched by Shenzhen Zhongxin.

systems. Fourthly, these platforms played a pivotal role in modernizing and digitizing the Chinese economy swiftly, extending services to previously under-served populations. Finally, the platforms' data collection capabilities aligned with government interests, as companies could gather and analyse vast amounts of consumer and social data. Since 2021, the general trend has been towards more centralized regulation and less self-regulation, though platforms still maintain much autonomy in implementing specific measures to comply with broader regulatory frameworks. The PRC Government began enforcing stricter regulations on internet platforms, reducing their ability to self-regulate in areas like algorithms, data governance, gaming and content moderation. New rules demand transparency, explicit user consent and increased responsibility for monitoring content. Broadly speaking, however, the Taobao dispute resolution systems described in this article continue to operate in the manner described here.

[C] TAOBAO'S INTERNAL ODR AND THE SELF-REGULATORY RULE-MAKING PROCESS

By the early 2020s, mainland China had developed numerous e-commerce platforms, with several dominant players controlling significant market shares. The Alibaba Group's platforms (Taobao and T-mall), along with JD.com and Pinduoduo, are the market leaders. The remaining market share is distributed among various platforms, including Suning, Gome, Vipshop, Yihaodian, Dangdang and Jumei (International Trade Administration 2021). These platforms are interesting in their own right. However, given the importance of the Alibaba Group's Taobao platform, and the availability of platform data, this article focuses on analysing Alibaba Group's Taobao system.

Launched in 2003, Taobao.com, owned by Alibaba Group, has since become China's largest C2C retail platform, dealing with numerous complaints and dominating the e-commerce market with 925 million active users by 2021 (Jiemian.com 2015). The rapid growth has presented new opportunities and challenges in digital economy governance. Initially, the Chinese Government did not impose direct regulation on the emerging e-commerce market, instead allowing for self-regulation by platforms like Taobao. As Liu and Weingast (2018) have highlighted, Chinese authorities have delegated legal responsibilities such as contract enforcement and dispute resolution to private entities, like Taobao, in order to manage areas where legal regulatory frameworks are weak.

In the PRC's e-commerce ecosystem, platforms such as Taobao act as intermediaries and not as direct transaction parties. Taobao facilitates transactions by connecting buyers with sellers, who use Alipay, a secured third-party payment platform, to enhance the safety of their transactions. Other enforcement tools include warnings, restriction of account operations, restriction of business operations, handling of non-compliant products or information (eg taking down products), deduction of store credits and closure of the store. Alipay holds funds until buyers confirm receipt and satisfaction with goods, enhancing trust in virtual dealings. Taobao also employs Alipay to manage and resolve disputes, using it to enforce rules and obligations. This system is generally thought to have minimized transaction risks and disputes, establishing Alipay as a crucial enforcement tool.[2] Some of the discussion below will address evolving legal challenges in this landscape.

The Taobao platform has created an institutionalized system of self-managed rules. This self-regulating management system consists of general provisions and specific rules for buyers and sellers, including transaction-specific regulations for second-hand sales and auctions. At the heart of the Taobao platform's self-regulating management system are the following normative provisions: the Taobao Platform Interactive Risk Information Management Rules 2021, the Taobao Marketplace Management and Violation Management Rules 2021 and the Taobao Platform Prohibitive Information Management Rules 2021. These rules are intended to ensure compliance and to address information publication and marketing violations and may be characterized by Sally Falk-Moore's concept as a "semi-autonomous field" (1973), given the manner in which Taobao generates and enforces rules within the platform. Taobao periodically updates its internal rules. The Taobao rules discussed in this article may have been updated or modified at the time of publication, with most changes typically involving only minor details.

The Taobao platform rules system comprises eight specific rule sets and occasional temporary announcements (ordinarily, issued with a rule as a result of special circumstances, such as epidemics or policy requirements). Overall, these form a structured hierarchy, similar to formal legislation. The Taobao Platform Rules General Provisions 2021 serve as the legal normative framework, with specific rules detailing implementation issues. When these provisions are insufficient, relevant

[2] Taobao Store Opening Specifications [淘寶店開店規範, *Taobao dian kaidian guifan*] require a real-name system for sellers to open a store online and require sellers to pay a deposit, the amount differing according to the degree of risk of violation of Taobao rules, within 180 days of opening. Details of these specifications can be found at Taobao Store Opening Specifications.

agreements or rules are applied (Article 5, Taobao Platform Rules General Provisions 2021). Rule modifications require public notice and, for trading rules, a public comment process and departmental reporting.

An analysis of rules and their amendments carried out in 2021 suggests several conclusions. The author opted to systematically collect data on the public activities pertaining to the formulation and amendment of Taobao's regulations, specifically those carried out in 2021, employing a comprehensive textual analysis approach. In the subsequent years, the rules of Taobao were further revised, but they largely continued to follow similar patterned regularities.

Thus, first, the analysis found that 86% of public comment periods lasted just eight days. The brevity of this consultation process most likely primarily reflects the need for swift responses in the e-commerce sector, as well as the platform's capacity to self-regulate effectively. Secondly, regarding the content of revisions, we may note that changes to the rules that require extended consultation periods often pertain to sellers' core interests. These include modifications to rules on advertising prohibition (30 days), adjustments to the rules concerning the use of others' intellectual property rights (24 days), alterations to rules for posting unadmitted goods (19 days), changes to regulations on failure to ship goods within the agreed timeframe (15 days) and penalties for "providing false evidence" (12 days). This suggests that the Taobao platform exercises considerable caution when amending rules governing sellers' conduct, allocating more time to gather feedback and refine the proposed revisions. However, there is no evidence to suggest that the platform has discontinued proposed rule modifications due to opposition.

Thirdly, regarding the outcomes of the call for comments, out of the 135 revisions published after collecting feedback, 132 revisions were approved following a single public comment period. However, only a limited number of the important Taobao Platform Dispute Handling Rules 2012 and the Description Discrepancy Rules 2021[3] underwent revision. Moreover, Taobao has employed rather loose terminology in characterizing outcomes—there are frequent references to "most users support" and "most support". although specific numerical percentages of support are sometimes also provided, such as "0 members opposed", "76% in support" and "100% gave approval". Moreover, the platform does not disclose records of unsuccessful proposed rule revisions. This suggests that, if Taobao chooses to amend its rules, such changes are

[3] Taobao's Implementation Rules Regarding Description or Quality Non-Compliance [淘寶網關於描述或品質不符實施細則 *Taobao wang guanyu miaoshu huo pinzhi bufu, shishi xize*].

indeed implemented, often without modification. But we may question the extent to which the platform actually values critical feedback.

Fourthly, regarding the number of comments made in response to a Taobao call, in only 15 cases of modified rules was the exact amount of feedback received actually specified. For over a hundred other revisions, Taobao did not disclose specific figures. Among the 15 revisions with disclosed feedback, 13 pertain to comments on modifications to the Flying Pig Hotel Travel Platform, with five comments opposing proposed modifications identified in these results. And while food safety is a particularly important public health issue in the PRC, when the Taobao Platform distributed 2273 questionnaires some 10 years ago to sellers concerning an amendment to China's Food Safety Law 2021, Taobao failed to provide specific feedback or comments. Similarly, Taobao received 16,000 comments on its proposed Temporary Goods Removal Rule, but no detailed analysis of responses was provided. Thus, it would seem that the Taobao platform does not actively disclose detailed feedback results. This may be seen as a lack of transparency, and that, rather than benefiting users, feedback is a process which primarily serves to support the platform's operations, aligning with the company's interests.

From the above-mentioned observations about the number of regulations and the modification of rules, we can observe that there is a significant difference in liability between sellers, buyers and the platform. Sellers are subject to a far higher level of liability than buyers. For example, sellers are responsible for a number of requirements, such as sales, quality assurance, warranty and after-sales service. The buyer, on the other hand, is responsible only for paying for the purchase and confirming receipt of the goods. For its part, the Taobao platform is primarily responsible for storing and publishing information online during the transaction process. Taobao Platform, as a third party, enables and facilitates the transactions of its users but does not involve itself as a contractual party in users' transactions (Hong 2015). This neutral status requires Taobao Platform to clearly differentiate itself from other third-party providers or individual businesses operating on Taobao to avoid consumer confusion (Article 29, Administrative Measures for Online Trading 2014).[4] This can also be seen through Taobao's rules in its response to compliance legal requirements. For example, section 9 of the Taobao Consumer Protection Services Agreement 2021 states:

[4] "Article 29 of the Administrative Measures for Online Trading (Order No 60 of the State Administration for Industry and Commerce) [網絡交易辦法(國家工商行政管理總局令第60號, *Wongluo jiaoyì Banfa* [*Guojia gongshang xíngzhèng guanli zongju lìng dì 60 hao*]. Gov.cn, 26 January 2014.

> You expressly understand and agree that you are the responsible party for the Consumer Protection Services and that Taobao and its affiliates will only provide you with technical support and services, and Taobao and its affiliates shall not be liable for the content of the Consumer Protection Services provided by you to buyers, except as provided by law.[5]

And Section 5 of the Taobao Terms of Use Agreement 2021 also indicates that:

> Through the Site, Taobao provides an electronic web-based platform for transactions between buyers and suppliers of products and services. Taobao does not represent the seller nor the buyer in specific transactions and does not charge any commissions from completing any transactions.

As a result, Taobao does not control and is not liable to or responsible for the quality, safety, lawfulness or availability of the products or services offered for sale on the website or the ability of the suppliers to complete a sale or the ability of buyers to complete a purchase.[6] These terms constitute a contractual agreement between the Taobao platform and the user and this has been recognized in practice by the judiciary.

Taobao employs a comprehensive set of protocols and privacy policies, managing its platform through self-regulation and internal corporate governance. As a private e-commerce platform, it has developed internal dispute resolution mechanisms to comply with legal obligations, such as mediating consumer disputes as required by the 2014 Administrative Measures for Online Trading:

> The operator of a third-party transaction platform shall establish a self-regulatory system for the settlement of consumer disputes and the protection of consumer rights. If a consumer purchases goods or accepts services within the platform and a consumer dispute occurs or his or her lawful rights and interests are harmed, the platform shall mediate if the consumer requires the platform to mediate; if the consumer seeks to defend his or her rights through other channels, the platform shall provide the consumer with the operator's authentic website registration information and actively assist the consumer in safeguarding his or her lawful rights and interests (Article 28).

Before the introduction of the PRC's Electronic Commerce Law in 2018, the Measures were one of the few guidelines for resolving disputes on e-commerce platforms, but nevertheless did help to ensure that Taobao had a legal responsibility to protect consumer rights.

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5 Taobao Consumer Protection Services Agreement 2021. [消費者保障服務協定: *Xiaofeizhe baozhang fuwu xieding*].

6 Taobao Terms of Use Agreement 2021 [淘寶網使用協議, *Taobao Wang shiyong xieyi*].

It should be added that the 2018 Electronic Commerce Law substantially enhances the dispute resolution framework, as outlined in Chapter IV on e-commerce disputes. Article 58 encourages e-commerce platforms to implement guarantee mechanisms, such as security bonds, to support compensation systems. Article 59 requires these platforms to establish a complaint-reporting system. Article 60 details various dispute resolution methods, including negotiation, conciliation, mediation by authorized organizations, administrative complaints, arbitration and legal proceedings. Further, Article 61 requires e-commerce platforms to assist consumers in protecting their rights, while Article 62 obliges operators to provide information about original contracts and transaction records. Article 63 permits platforms to create ODR mechanisms for voluntary conflict resolution between parties. The system developed by the Taobao platform operates within this more general legal framework.

The text which follows discusses Taobao's self-regulatory guidelines, and then examines Taobao's specific procedures for managing disputes.

Multi-tiered ODR in Taobao

Dispute system design (DSD) refers to the systematic process of creating effective dispute resolution mechanisms tailored to specific contexts and needs (Blomgren Amsler & Ors 2017). This process is particularly relevant in the context of Taobao, where understanding the nature and frequency of disputes—such as issues related to product descriptions or delivery delays—is essential. By emphasizing collaborative approaches that prioritize shared interests among disputants and engaging stakeholders in the design process, Taobao can create accessible and efficient ODR mechanisms that enhance user satisfaction and trust. The integration of DSD principles into Taobao's ODR processes allows for a nuanced understanding of user experiences while addressing common grievances effectively. Research indicates that successful ODR systems must be financially viable, technically feasible and desirable for users. Leveraging insights from DSD enables Taobao to accommodate the diverse perspectives of stakeholders—including buyers, sellers and platform operators—ensuring fairness and efficiency in dispute resolution. As highlighted by Colin Rule, applying DSD not only facilitates structured management of disputes but also contributes to a transparent e-commerce environment that fosters user engagement and trust in the platform (Rule 2012: 776). Since its establishment, Taobao has provided an online negotiation process in which sellers and buyers communicate directly to handle disputes in practice. The official regulatory framework of its internal dispute resolution mechanism dates back to January 2012 with

the release of the Taobao Platform Dispute Handling Rules.[7] These rules, as Taobao's basic ruleset for handling disputes, together with another Eleven Special Commodity Dispute Handling Rules (nd) for commodity dispute-handling and Four Special Transaction Dispute Handling Rules (nd) for handling transaction disputes, form the Taobao self-regulatory dispute resolution mechanism (includes the Taobao Consumer Protection Scheme: Taobao nd). These rules elaborate on the provisions for handling transaction disputes between buyers and sellers on the Taobao platform. The platform, as the intermediary that facilitates the transaction, typically responds to complaints filed by the disputing party in a passive manner. Under special circumstances, however, the Taobao platform will also take the initiative to intervene in a dispute before the complaint is initiated (Article 2 Taobao Platform Dispute Handling Rules).

Multi-tiered dispute resolution processes have in general become increasingly significant in consumer dispute resolution, with disputes being handled in various stages (Cortés 2015). "Mixed methods" or "hybrid" approaches are also prevalent in China, notably within the Taobao system, especially its Consumer Protection Scheme, which proceeds through several key stages (Taobao Consumer Protection Scheme: Taobao nd). Initially, when a disputant, either a buyer or seller, lodges a complaint with the platform, the dispute resolution process is initiated. The complainant must outline the cause of their dispute and provide supporting evidence, such as chat history, order details and screenshots, as well as requesting the platform to mediate as a neutral third party.

In standard online purchase scenarios, if buyers are unsatisfied with their goods, they have three main remedies: exchanging goods, returning goods for a refund, or receiving a refund without returning the goods. These options, offered by the Taobao platform, come with varying levels of dispute complexity and specific requirements for filing complaints. To simplify understanding, a flowchart (Figure 1) is provided to illustrate Taobao's dispute resolution mechanism under its consumer protection scheme.

As depicted in the flowchart, the initial step in resolving disputes is online negotiation between the involved parties via the Taobao app or webpage, or other communication methods like phone calls. Should negotiations fail, parties can seek Taobao's intervention. The platform's response to complaints unfolds in two stages. In the first stage, Taobao employs customer service staff to conduct online mediation, addressing both sides of the dispute. If this mediation is unsuccessful, Taobao

[7] These rules became effective on 1 January 2012 and were amended several times. The version discussed by the author in this article is the amendment from 27 July 2021.

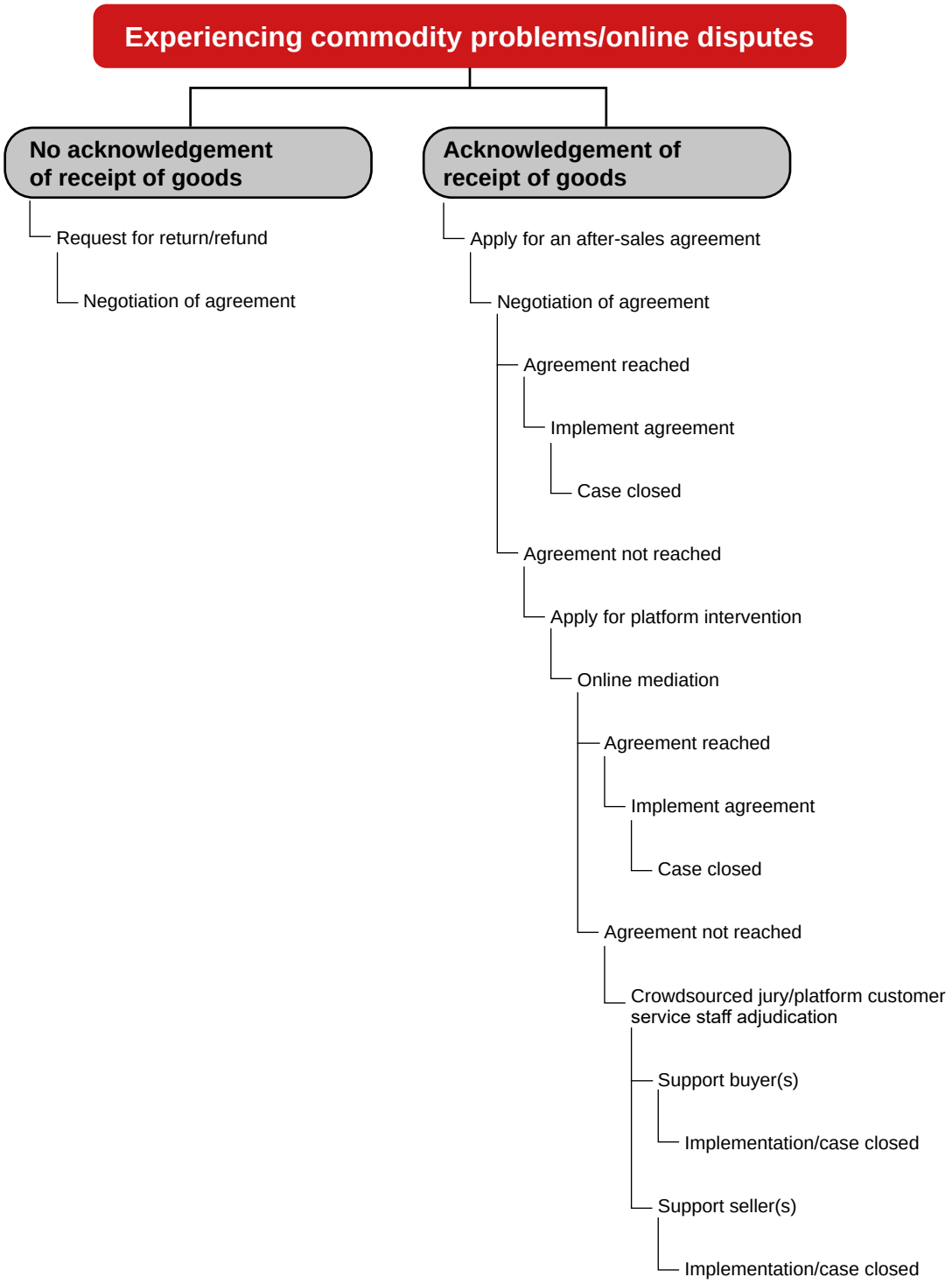

Figure 1: Dispute resolution flowchart under the Taobao Consumer Protection Scheme nd(c)

progresses to the second stage, using a crowdsourced jury mode (Public Review Dazhong Pingshen, 大眾評審) to vote on the successful claim (see Alibaba Public Jury nd).[8] For disputes stemming from technical issues involving the platform itself, customer service reviews and decides on the complaint. In cases where mediation fails, Taobao acts as a third-party adjudicator, with the crowdsourced jury making the final decision.

Between 2012 and the end of 2018, the "Dazhong Pingshen" crowdsourced online jury system on the Taobao platform managed over 15.87 million online disputes. Additionally, more than 6.36 million users registered as voluntary jurors, while 170 million users contributed to reviewing and making decisions on disputes. This is claimed by Taobao to have effectively resolved over 95% of the disputes, preventing them from becoming court cases (Public Review Mechanism 2019). Taobao's approach aligns with the dispute resolution initiative promoted by the United Nations Commission on International Trade Law (UNCITRAL). The UNICTRAL Working Group proposed a three-tiered ODR process, starting with negotiations and, if unsuccessful, followed by facilitated settlement proceedings with a neutral third-party mediator, and concluding with arbitration (Lederer 2018). Taobao has followed the design offered by UNCITRAL—in effect a legal transplant—and introduced and now operates its own private, self-regulated dispute resolution system, aiming to achieve prompt settlements between the disputing parties. Settlement agreements can then be enforced on the Taobao platform.

The Taobao Public Review Convention (Trial) 2021 has been in use on an experimental basis since 24 June 2013, and continues to serve as the experimental framework for resolving online disputes on the platform. According to Article 8 of the Convention, the Public Review Mechanism addresses three primary categories of case:

(a) sellers' appeals against penalties imposed by the platform for rule violations;
(b) disputes between buyers and sellers; and
(c) various other cases, which are gradually being incorporated into the mechanism as it evolves.

The online jury process consists of four key stages. First, there is case assignment, where disputes are randomly allocated to jurors (Article 9). Secondly, there is evaluation, during which jurors review cases within

[8] It might be added here that the Public Review mechanism of Taobao platform changed after 2018—from being accessible and operable from the web it became a process only accessible and operable from the mobile device app. Taobao did not provide a clear official explanation of the reason for this change.

Figure 2: Taobao's Public Review Jury has more functions than does that of eBay (Screenshot of Taobao official (English translation by the author)

a given timeframe (Article 9). Thirdly, there is verdict, where jurors cast their votes (Article 10), Finally, there is execution, where the platform enforces the outcomes (Article 11). Importantly, no fees are charged at any stage of this decision-making process (Article 12).

In contrast to the somewhat similar but ultimately unsuccessful Community Court initiative trialled by eBay India from 2008 to 2011, Taobao's model (see Figure 2) has flourished and expanded to other platforms like Xianyu[9] and Xianghubao.[10] Analysing these two models side by side may shed light on why Taobao's approach succeeded where eBay's did not (see Table 1). Given the discontinuation of the eBay Community Court several years ago, the comparison relies on records from eBay's online forums and academic studies on the project, as has been noted by Colin Rule and Chittu Nagarajan in their work on the Community Court (2010).[11]

[9] Idle Fish, also known as Xianyu, is the largest secondhand goods trading platform in the People's Republic of China, allowing users to buy or sell used items. The term (閑) 'Xian' refers to idle time, while (魚) 'Yu' refers to idle goods and space.

[10] Xianghubao, a critical illness mutual aid plan, was provided on the Alipay app, which is part of Alibaba Group. Members who joined and suffered a major illness (covering 99 major diseases, malignant tumors and specific rare diseases) could receive a maximum mutual aid fund of RMB300,000, with the costs shared among all members (Rules for Xianghubao 2021). It was launched on 16 October 2018 but ceased operations on 29 January 2022. See website for details.

[11] It might also be pointed out that eBay UK also experimented with a community court project to handle complaints on unfair negative feedback. This took place in 2007, a little earlier than the similar project conducted by eBay India between 2008 and 2011. However, eBay UK did not continue with its attempt, receiving many comments against it. See Dawson (2007).

Comparison	eBay Community Court	Taobao Public Review
Transparency	Not publicly available/inaccessible jury procedure rules	Publicly accessible jury procedure rules[12]
Neutrality	21 randomly selected juror-eligible members[13]	Before November 11, 2014: 31 randomly selected juror-eligible members[14] After November 11, 2014: 16 randomly selected juror-eligible members
Independence	No records of dealings with either party to the dispute	Specific provisions allow for juror recusal, and random anonymous juror selection[15]
Accessibility	Jurors by invitation only	Jurors open to members with qualification test
Effectiveness	No public official record released on the length of procedure[16]	48 hours to 168 hours[17]
Decision	Final and binding[18]	Final and binding[19]

Table 1: Comparison between eBay and Taobao on crowdsourced online juries

[12] As mentioned above, the Public Review mechanism of the Taobao platform changed after 2018 from being accessible and operable from the web to only being accessible and operable from the mobile device application. Most of the procedure rules can now be accessed through mobile device application rather than through the webpage.

[13] There were several qualification conditions for jurors set up by eBay, including: (1) members must have been registered on eBay for six months; (2) members must have participated in at least 10 transactions as a buyer or have 20 "feedback stars"; and (3) members' own overall rating feedback must be 97%, together with at least one transaction as a buyer. See Chris Dawson (2008).

[14] The qualification conditions for jurors requested by Taobao changed in 2014 so as to become stricter. Before 11 November 2014, the conditions were "sellers or buyers who have been registered on Taobao for more than 90 days, real name authenticated by Alipay and have a good credit history can apply to become jurors". Since 11 November 2014, the conditions are much tighter, and the number of users who are qualified has decreased. See Taobao (2014).

[15] It is technically possible also for the platform itself to automatically exclude members with records of direct transactions with disputants from participation in the case review.

[16] The community court project has ceased to operate, but the available evidence shows significant criticism of its operations made by past eBay users. These criticisms include an insufficiency of jurors to vote on the case causing the complaint to fail, or that there was a delay in processing the complaint, or that the outcome was biased in some way in favour of the buyer (eBay India Community nd(b)).

[17] The determination period of each case by jurors was changed from 48 hours to 168 hours, effective 20 March 2015. See Taobao (2014).

[18] If a majority (11) of (21) jurors agreed that the seller had received unjustified feedback, this feedback would be removed. No further appeal could be made. See Dawson (2008).

[19] If the number of jurors meets the requirements, a verdict is reached in favour of the party with more than 50% of panel jurors' support. The verdict is deemed valid and is non-appealable. Otherwise, the verdict is considered to be invalid, and the case will then be handled by consumer service staff of the platform. See Taobao (2014).

First, the functional scope of the crowdsourced online juries employed by eBay and Taobao differs considerably. eBay's Community Court, as a crowdsourced online jury initiative, is specifically designed to address sellers' grievances concerning negative reviews. Conversely, Taobao's online jury encompasses a broader range of functions. It not only manages review-related complaints but also resolves consumer transaction disputes, engages in discussions and voting on platform rule revisions, and addresses merchant complaints regarding penalties.

Secondly, beyond variations in functional scope, the two platforms also differ in transparency, juror selection and efficiency. To gain a clearer understanding of these differences, one can refer to Table 1 for a direct comparison. Despite their differences, however, both platforms are grounded in the fundamental regulatory principles of ODR and feature a similarly designed crowdsourced online jury.

Thirdly, the variations in participant composition and incentive structures help to explain the differing outcomes observed between Taobao and eBay. The selection of jurors, or participant composition, is a crucial element of a crowdsourced ODR system (Gao 2018). In its initial phases, eBay's Community Court experienced low participation due to stringent juror eligibility requirements and an invitation-based system, resulting in a juror shortage and unresolved seller complaints (eBay India Community nd(b)). Conversely, Taobao imposes fewer restrictions on juror eligibility, thereby expanding the pool of potential users. Moreover, Taobao actively encourages user participation in the juror system. Taobao offers four incentives: virtual medals, grade points, a record of contribution hours and a virtual certificate for passing the jury proficiency test (China.com 2017). Additionally, jurors who contribute significantly receive financial rewards and public recognition, fostering a sense of community and boosting participation (Gao 2018: 209). It is technically possible also for the platform itself to automatically exclude members with records of direct transactions with disputants from participation in the case review. Unlike eBay's Community Court, which operated only from October 2008 to 2011, Taobao's Public Review Mechanism has achieved remarkable popularity. Between 2013 and 2016, it registered 1.73 million users, with 920,000 actively participating in case reviews, casting 150 million votes and resolving 3.67 million disputes (Zjol.com 2016).

Several scholars have analysed the extent to which procedural fairness is found in platform ODR processes, arriving at similar conclusions: eBay (Herick & Dimov 2011) and Taobao's crowdsourced ODR systems (Gao 2018) provide a significant degree of fairness. Additionally, Taobao's Public

Review Mechanism functions not only as a dispute resolution tool but is also intended to contribute to the platform's self-regulatory management and rule-making processes. Public review jurors are engaged in online hearings which are held in order to consider possible amendments to Taobao's platform rules.

Taobao's dispute resolution mechanism, as suggested above, can be understood as a progression through several specific forms of ODR. Most disputes are initially handled via online negotiation. If unresolved, they proceed to online mediation and, finally, should mediation fail, to an online adjudication. This process resembles a funnel, where the majority of disputes are settled through negotiation, and then where that fails to resolve disagreement, mediation is used, followed by a public jury and, in a very small number of cases if necessary, platform intervention.

Dispute outcome implementation and enforcement occurs through three primary processes. First, the parties involved in the dispute are encouraged to resolve their differences themselves. Secondly, if a resolution is reached via a public jury and platform involvement, Alipay automatically allocates transaction funds to the winning party based on the verdict. If the buyer confirms receipt and the funds are released to the seller, the platform can also transfer the seller's deposit (held under the dispute resolution escrow program) to the winner (Taobao Escrow Program nd) The third method involves non-monetary penalties, such as point deductions and product takedowns, aimed at reducing the seller's competitiveness or limiting their store's commercial activity (Taobao.com 2021(a)).

The emergence of technology as a "fourth party" in dispute resolution signifies a transformative shift in how conflicts are managed, especially within ODR frameworks like Taobao's. These technological agents can perform multiple roles, from facilitating negotiations to rendering binding outcomes, thereby enhancing the efficiency and effectiveness of the dispute resolution process (Wing & Ors 2021). The integration of artificial intelligence and machine-learning into ODR systems not only streamlines communication and data analysis but also allows for more informed decision-making, ultimately improving user experience and trust in platforms such as Taobao (Fox & Ors 2015).

Online disputes and legal challenges in the Taobao context

This section introduces a selection of common online dispute issues dealt with by the Taobao system and examines whether Taobao's self-regulatory mechanisms are equipped to address and resolve these evolving challenges effectively. In the past decade, beyond typical consumer shopping and service disputes, a range of unique issues has emerged within China's e-commerce landscape, and these are also noted.

The leakage of personal information in online shopping has become a significant concern. Vast amounts of personal data are collected for purposes often unknown to users, which may include selling this information for commercial or advertising reasons, or even for illegal activities like fraud and extortion. A relatively new method contributing to large-scale data leaks is called "seckilling" (秒杀 *miao sha*) (Sun & Dong 2013).[20] Seckilling involves listing high-priced items, such as Nike shoes, branded clothing, or digital devices like iPhones, at exceptionally low prices. Originating from a popular online game called Legends, where a warrior swiftly defeats enemies, the term describes the rapid sell-out of newly promoted goods in the online shopping world. Merchants use seckilling as a marketing tactic to sell expensive items at minimal prices within a limited specified timeframe, thereby hoping to attract new customers. For example, an expensive computer might be offered for just $1, but only made available online for five seconds.

When thousands of buyers rush to order these products during a seckilling event, their personal information, including names, contact numbers and addresses, is collected by the seller. Often, these sellers cancel the orders or close their online stores without fulfilling the orders, sometimes only after a considerable delay. Although buyers ordinarily do receive full refunds, their personal information remains compromised, collected by sellers acting in bad faith. This practice leads to the illegal acquisition and often subsequent misuse of personal data. Due to the allure of the low prices offered, many consumers accept the risk of unfulfilled transactions and refunds, often unaware that their personal data has been leaked. This results in significant privacy breaches and risks, such as spam promotions and scams (Xinhuanet November 2019).

In addition, the growing prevalence of fake reviews has led to numerous adverse effects. These reviews mislead potential consumers,

[20] The term "秒 (*miao*)" denotes a unit of time, specifically a "second", whereas the verb "殺 (*sha*)" means "to kill". Consequently, "秒殺 (*miaosha*)" can be literally translated to mean a "one-second kill".

drive excessive consumption, create disputes and erode consumer trust. Online sellers often employ various tactics, such as paying for or giving away products, to garner positive reviews. This practice not only frequently violates platform terms of service but may also constitute unfair competition (Credit China 2017). As Chinese e-commerce rapidly expands into international markets, the incidence of fake reviews is also rising on overseas platforms (Deng & Qu 2021). Some scholars note that this malicious conduct extorts sellers and can lead to upward price distortions (Papanastasiou & Ors 2021: 16-17). In order to tackle fake reviews, one potential solution is decentralizing control by allowing sellers to remove reviews autonomously, subject to platform checks and penalties for unjust removals (Papanastasiou & Ors 2021: 23-24). A particularly severe consequence of fake reviewing is the potential for real-life harassment of buyers. When buyers express dissatisfaction through negative reviews, the evaluation scores of sellers' shops may decline. Instead of improving service and product quality, some sellers resort to sophisticated harassment tactics, such as sending anonymous messages and calls to critical buyers. For law enforcement, investigating such harassment is often time-consuming and costly. Without evidence of financial or significant loss, police typically lack grounds to pursue further investigation, forcing buyers to endure harassment, amend their feedback, or change their phone numbers.[21]

A third issue concerns the regulatory responsibility and joint liability of e-commerce platforms for products and services sold by third parties. In the PRC, the dispute resolution processes offered by e-commerce platforms are primarily outlined in the 2018 Electronic Commerce Law. As yet, however, there are limited provisions for determining legal liability where problems arise in these processes. In practice, numerous disputes have reached the courts, with Taobao frequently named as a defendant.

One notable case is *Huang Ziying v Chen Xuerou and Taobao* (2016), in which an important issue facing the court was Taobao's lack of action when it was discovered that a vendor sold counterfeit goods (Sohu.com 2016). Also the plaintiff sought an award of triple damages as stipulated by the Consumer Protection Law: Article 55 of the 2013 Consumer Protection Law of the PRC provides that:

> Unless otherwise prescribed by law, business operators that practice fraud in providing goods or services shall, on the demand of consumers, increase the compensation for their losses by an amount that is three times the payment made by the consumers for the goods

[21] Similar cases have been reported through newspapers and other media outlets: see People.com (2015) and Sina.com (2014).

> purchased or services received, or in the amount of RMB 500 if the increased compensation is less than RMB 500.

In this instance, plaintiff Huang Ziying purchased a Sony Z5 Model E5823 mobile phone from Chen Xuerou's online shop through the Taobao platform on 11 November 2015. After seeking verification of the provenance of the mobile phone, Huang discovered that the phone was counterfeit. The seller acknowledged the product's defects and agreed to a return and full refund, as requested by Huang on 26 November 2015 (China.com 2016).

On 17 December 2015, Huang Ziying's complaint to the Taobao platform regarding the sale of counterfeit goods by sellers was dismissed by Taobao. As a result, Huang named Taobao as a joint defendant, contending that the platform should be held accountable for allowing the sale of fraudulent products and failing to support his complaint according to the Consumer Protection Law. The Haidian District People's Court in Beijing ruled against Huang in the initial trial, citing insufficient evidence to support his claim (*Huang Ziying v Chen Xuerou and Taobao* 2016). Huang appealed, but in 2018, the Beijing People's Court affirmed the original verdict (*Huang Ziying v Chen Xuerou and Taobao* 2018).

In a related case involving the same defendants, the Susong People's Court partially upheld the buyer's claims, acknowledging that the plaintiff did not return the phone and subsequently provided more comprehensive evidence. The court ruled in favour of the plaintiff's request for triple damages from the defendant, Chen Xuerou, but did not hold Taobao to be jointly or severally liable. In several similar cases, plaintiffs have requested that Taobao, as a joint defendant, disclose the actual information of specific sellers, including names, addresses and contact details, to affected buyers (*Wukai v Chen Xuerou and Taobao* 2015). However, the courts typically do not hold Taobao accountable and refrain from finding the platform liable for such consumer rights infringements, as I have discussed elsewhere (Lin 2021, especially Chapter 6: 223-280).

Although every online shop on Taobao must pay a fee as a financial guarantee for its commercial activities, it remains rare for Taobao to directly compensate buyers who receive fraudulent products. Issues often arise concerning triple damages, which, as noted above, require compensation of three times the product's value. Taobao finds itself in a dual role: as a third party in the dispute between buyer and seller and as a referee determining whether a product is fraudulent and if the seller owes triple punitive damages. This dual role often results in inaction, allowing fraudulent products to persist on the platform and causing further

consumer losses. Despite being absolved of liability by the courts, Taobao has taken steps to hold sellers accountable to maintain its reputation and recover its losses. Taobao commonly uses internal self-regulation to manage the marketplace. For example, its internal management and violation-handling guidelines categorize various forms of user misconduct and outline corresponding penalties (Taobao.com 2021(a)). Additionally, Taobao has actively pursued litigation to defend its legal rights, especially concerning its reputation, as seen in notable cases like *Taobao v Xu Wenqiang* (2017), which was selected by the Supreme People's Court for publication in its first batch of "typical cases involving the Internet".[22]

Taobao dispute resolution model: online arbitration instead of mediation

The issues discussed above illustrate some of the most common issues on the Taobao platform. This raises the question: how is the existing system being utilized in order to address these problems? Taobao has established its own internal dispute resolution mechanism, encompassing the Taobao Service Agreement 2021, Taobao Dispute Resolution Regulation, and specific rules for both sellers and buyers. These regulations provide a comprehensive framework for resolving disputes on the platform.

According to the Taobao Service Agreement 2021, Taobao acts as an independent third party in the dispute resolution process, playing a role in "mediating" disputes. The agreement states:

> Article 3, Taobao Platform Services
>
> > Clause 2: When trade disputes arise on the Taobao platform, either party may request mediation. Taobao, as an independent third party, has the authority to decide mediation outcomes, and both parties agree to accept Taobao's decision.
>
> Article 5, Special Authorization
>
> > Clause 1: Users fully understand and irrevocably authorize Taobao, or a third party chosen by Taobao, to manage transactions and any resulting disputes. The decisions made by Taobao or the authorized third party are legally binding.

Furthermore, the Taobao Dispute Resolution Rules (2021) emphasize that once either party requests Taobao's intervention in a trade dispute, both parties authorize Taobao to function as an independent third party. Taobao will make decisions regarding financial compensation based on its principles of dispute-handling, and this authorization is irrevocable.

[22] The Supreme People's Court released the first batch of Internet-related "Typical Cases" on 16 August 2018. *Note: this link may not be accessible from some locations.*

The Taobao Dispute Resolution Rules for Sellers provide:

> Trade disputes are common. In such events, sellers can negotiate with buyers, request Taobao's intervention, or seek legal remedies. If negotiation fails and other remedies are not pursued, either party can request Taobao's assistance, leading to an irrevocable authorization for Taobao to make decisions.

The Taobao Dispute Resolution Rules for Buyers provide:

> Trade disputes frequently occur. Buyers can negotiate with sellers, request Taobao's intervention, or seek legal remedies. If negotiation fails and other remedies are not pursued, either party can request Taobao's assistance, leading to the same irrevocable authorization.

According to these rules, Taobao's consumer service staff are empowered to intervene in disputes. While the mediation style adopted in practice is evaluative rather than facilitative, in keeping with the general style of Chinese traditional mediation, Taobao has opted to employ a hybrid mediation–arbitration process as its internal mechanism to resolve transaction disputes that emerge on the platform. It would seem that the customer service of the Taobao platform plays the role of a proactive third-party intervenor or coordinator. When both parties cannot reach an agreement, the Taobao platform steps in as an authoritative adjudicator to determine the outcome. So, this is a sequential mixed process. If either party disagrees with the decision, they have the right to pursue a separate legal action, that is, to bring suit in a people's court.

In the initial stages of a dispute, the seller and buyer might engage in online negotiation to find a resolution. Negotiating styles, as elsewhere in the world, vary widely among individuals. Given China's cultural emphasis on consensual decision-making, many parties pursue what has been characterized as a problem-solving approach, emphasizing the importance of cooperation, shared interests, understanding values objectively, and using non-confrontational communication to persuade parties to reach a mutual agreement. But China also has its fair share of competitive negotiators who tend to focus on maximizing their returns in the current conflict, employing tactics like threats or confrontation to achieve their objectives. Gifford (1985) suggests that mismatched negotiation styles—such as competitive versus collaborative—can create misunderstandings and escalate conflicts. Palmer and Roberts further note that communication styles and emotional expressions significantly influence negotiation dynamics. When negotiators fail to adapt to each other's styles, frustration can arise, hindering progress towards a negotiated outcome (Palmer & Roberts 2020: 139-146). In addition to mismatches of style, which tend to limit the effectiveness of negotiation,

there are a number of factors that can influence the outcome of these negotiations, including power imbalances, cultural differences, gender, values and perceptions, sometimes causing negotiations to fail. Perhaps unsurprisingly, then, it remains common for parties to fail to reach an online agreement. When this occurs, they may choose to seek assistance from Taobao's customer service, which acts as an internal complaint mechanism which aims to resolve disputes.

When Taobao customer service staff become involved in a dispute at the invitation of the parties, the process transforms from simple negotiation into a combined mediation–arbitration procedure. Initially, customer service may encourage further communication between the parties to see if they can reach a mutually agreeable solution. If this encouragement does not succeed, a Taobao representative will instruct the parties to submit their claims through the website, including supporting evidence such as chat histories, parcel-tracking details, photos of the received items and original webpage descriptions. Taobao will then make a decision based on the evidence presented. This decision is binding on both parties, so that it is in effect more online arbitration than it is mediation.

Online arbitration, often referred to as cyber-arbitration, cyberspace arbitration, or arbitration through online methods, is an evolving field. Notable contributions to its understanding include works by Lanier (2000), Lynch (2003) and Hörnle (2003). This arbitration approach is exemplified in the Taobao Service Agreement 2021 and Taobao Dispute Resolution Regulations. Specifically, chapter 6 of the latter outlines the application conditions, Taobao's role, the burden of proof and the execution methods. However, these rules do not address the important issue of privacy protection. According to Taobao's "malicious harassment" policy, complaints must be filed within 15 days after transaction feedback (Taobao 2021(b)). Beyond this period, consumers may not involve Taobao directly and must resort to the Taobao customer service for complaints. Without concrete evidence or a police investigation, Taobao may not take action against a seller. If Taobao supports a complaint against a seller, the seller's online shop credit is penalized by 12 points, serving as a warning but not necessarily significantly impacting their online trading.

Even if Taobao deducts 48 points from a seller's online shop credit—potentially leading to the closure of their shop—the seller can evade this penalty by opening a new shop on the platform. These sanctions imposed by Taobao are thus not binding and primarily function as warnings against future misconduct. Furthermore, Taobao does not disclose the seller's information to victims. Such information, however, is necessary if the

police are to initiate a case against a deviant seller, making it a considerable challenge for consumers attempting to involve law enforcement. Taobao requires that the police provide case records before releasing the seller's information to the affected buyer, creating a paradox within the process. One potential solution is to enhance the credit score system through self-regulation. For example, better integrating the Sesame Credit score could address this issue by factoring in these harassing actions as elements impacting credit scores.[23] This approach would strengthen user management and increase consumer trust in the platform through an internal regulation and dispute resolution mechanism (Xu 2010: 266).

Moreover, misconduct such as seller harassment of dissatisfied buyers should not only be documented on the Taobao platform but also reported to the police when it constitutes unlawful conduct or a crime. Groups like "professional bad reviewers" (*zhiye chaping shi*, 職業差評師), who are paid to conduct fake transactions and leave negative reviews, should also be tracked and penalized to protect sellers' rights and maintain market stability (Procuratorate Daily 2013). By leveraging big data analytics, IT platforms can more effectively monitor and identify malicious reviewers, helping to address the issue of harmful reviews. These technical strategies will be instrumental in mitigating the impact of malicious reviews.

When comparing ODR systems found in jurisdictions elsewhere in the world to those of Taobao, eBay may be said to provide a useful comparator. As pointed out by Katsh (2005) eBay's dispute resolution provider, SquareTrade, organizes its process into several phases. Initially, the parties engage in e-negotiation. If needed, they can request a mediator, at which point a dedicated webpage is set up for communication with the mediator. Interactions facilitated by the mediator remain confidential. After gathering all pertinent information, the mediator proposes a non-binding resolution. Notably, SquareTrade utilizes web platforms instead of email for the communications between the parties, including the mediator. It has been observed that on eBay, those who settle their disputes tend to spend more money than those who won at the adjudication. This suggests that ODR, and in particular settlement, increases users' loyalty to the marketplace (Rule 2012: 776). In contrast, Taobao's internal dispute

[23] Zhima Credit (芝麻信用), also known as Sesame Credit, is a credit-scoring and loyalty program developed by Ant Group, a subsidiary of Alibaba Group. Launched in 2015, it compiles credit scores using data from Alibaba's services, particularly Alipay. The scoring system ranges from 350 to 950 and evaluates users based on five dimensions: credit history; fulfillment capacity; personal characteristics; behaviour and preferences; and interpersonal relationships. Although it provides various benefits such as deposit-free rentals and easier loan access, Zhima Credit operates independently from China's national social credit system. See its official website.

resolution approach appears to be much more actively managed by its staff, and results in outcomes that are binding for both parties.

The original development of ODR was primarily driven by the need to address conflicts arising from internet-based transactions and activities (Katsh & Rifkin 2001: 93). Taobao's ODR system represents one example of a platform-operated internal dispute resolution mechanism, and within China it has functioned as a model that has been adopted by various other e-commerce enterprises. In Beijing, there is a documented case in which staff from a major e-commerce platform collaborated with local industry and commerce bureau officials in a scheme to address consumer complaints. However, this type of cooperation between platforms and regulatory authorities is rare, and requires careful examination and regulation to prevent conflicts of interest where platforms effectively serve as both participants and adjudicators in dispute resolution processes (Xinhua News 2015).

ODR processes operate in terms of several fundamental principles. Foremost among these is accessibility—the system must be readily available and reliable for all parties seeking to resolve conflicts. Transparency is equally crucial, requiring that procedural information be both accessible and comprehensible to all stakeholders. The institutional framework responsible for dispute resolution must maintain strict standards of impartiality, neutrality and independence. Furthermore, the procedural framework must ensure equitable treatment in both domestic and cross-border disputes. These foundational principles broadly speaking are manifested in the Taobao dispute resolution infrastructure, which has played, and continues to play, a vital role in fostering the sustainable development of online commerce. The section which follows presents a detailed analysis of Taobao's implementation of crowdsourced dispute resolution, with particular emphasis on its public participation mechanisms.

Alibaba's online jury: a Chinese model of public participation in crowdsourced ODR processes

The Xianyu Online Jury System

This section examines how the platform called "Idle Fish" (*Xianyu*, 閑魚)—hereafter referred to as Xianyu—manages ODR within the context of the emerging "sharing economy".[24] Specifically, it explores the implementation and operation of the "Xianyu Online Jury System" (*Xianyu Xiaofating*, 閑魚小法庭, literally "Xianyu small courts") as a process for crowdsourced public participation in resolving disputes.

Xianyu, part of the Alibaba Group, is China's largest used-goods marketplace. First launched in July 2014, by the end of 2020, it had registered over 300 million users (He 2016; Li 2021). The platform fosters a C2C second-hand trading community characterized by decentralization, where users can act as both buyers and sellers. With its vast user base, Xianyu has evolved beyond buying and selling second-hand goods. It now offers a range of online and offline services, including a free goods marketplace, housekeeping, rental, errand and recycling services, thus transforming it into a "super app" (Chou 2019). The Xianyu app is integrated with Alibaba's e-commerce platform, allowing users to easily access their Taobao purchase history for reselling purposes. Additionally, Xianyu employs Alibaba's Sesame Credit system to assess user credit ratings, enhancing transaction trust. Users can link and share their Sesame Credit scores with others, and trade selectively based on credit filters. For payments, Xianyu uses Alipay, Alibaba Group's third-party online payment platform.

Although Xianyu is basically a second-hand trading platform—it was referred to initially as "Taobao Second-Hand"—it has implemented self-regulation and management processes, aiming thereby to enhance, in particular, transaction standardization. Initially launched in 2012 as a subsidiary of the Taobao platform in its first year, it adopted the Taobao Second-hand Market Management Rules, which were renamed the Xianyu Management Rules on 16 January 2015. These rules apply to all Xianyu users and transactions. To facilitate dispute resolution, Xianyu introduced an online jury mechanism in 2016. If any given content is not covered by Xianyu's rules, Taobao's dispute-handling rules are applied.

[24] According to the Chinese Government, the concept of sharing economy is defined as "an economic model where resource providers share resources with users through a platform". The "transaction only involves the time-sharing use rights of the traded resources, not their ownership". See "Sharing Economy—Guiding Principles and Fundamental Framework", 12 October 2022. See also Xiao & Ors (2019).

Xianyu's official service staff is sourced from Taobao's customer service centre.

The Xianyu online jury system is generally considered within China to provide an effective ODR process. As provided for in Xianyu's official rules, this platform allows users to vote on user violations and disputes. It invites 17 users with a minimum of 650 Sesame credits, a credit-scoring and loyalty program developed by Ant Group,[25] to decide on the winning party in a dispute, based on evidence and materials presented by disputants, within 24 hours of accepting the invitation. Data from 2018 reveals that approximately 5 million of the 200 million Xianyu users meet these criteria (*Beijing Evening News* 2018). This suggests that there are a sufficient number of eligible online jurors, preventing understaffing issues similar to those experienced by the eBay Community Court, which led to its eventual failure.

Both parties involved in the dispute file their case on the Xianyu platform, submitting evidence within a 72-hour period. The platform then randomly selects 17 Xianyu users with a Sesame credit score of 650 or higher to serve as a jury. These jurors are unaware of each other's identities and cannot communicate with one another. However, they can view the aggregated voting results in real time once they have cast their votes. The 17 jurors review the specific case and its related evidence and then cast their votes to determine that outcome. The party that receives a majority, with nine or more votes, is deemed the winner. Based on the jury's decision, the Xianyu platform will support the successful party.

In the Xianyu online jury system, members do not engage in group discussions before voting. Rather, each juror casts their vote independently and may subsequently share their thoughts in the discussion notes. The system allows jurors to have the freedom to express their opinions in the discussion notes.

A search on China Judgments Online (裁判文書網, *Caipan wenshu wang*) up to mid-2021 yielded 35 public judgments containing the keywords "Xianyu online jury".[26] After examining these cases, several conclusions emerge. First, when the Taobao (Xianyu) platform operator or the online jury handles mediation or decision-making for disputes submitted by platform members, neither the customer service team nor the online jury

[25] See Zhima Credit (n 23 above)

[26] China Judgments Online is an official online platform established by the Supreme People's Court of China in 2013. It serves as a comprehensive database of court judgments from various levels of the Chinese judiciary, allowing users to access and search through millions of legal decisions. See its official website.

of the Taobao (Xianyu) platform consist of professionals. They are limited to assessing the evidence provided by disputants using the knowledge accessible to ordinary individuals.[27] These limitations are explicitly mentioned in the Platform Service Agreement 2021. Further, the Taobao Platform Service Agreement and the Xianyu User Service Agreement 2021 both explicitly state that "mediation by Taobao is not conducted by professionals, and Taobao is not responsible for the dispute's outcome unless it acts intentionally or negligently during mediation". This clause is intended to protect the online transaction service provider, acting as an independent third party, in assisting the parties to resolve conflicts and disputes on the platform. Therefore, Taobao's customer service or public mediation review should not be held to overly demanding standards of care or professional expertise. It should also be pointed out that the Hangzhou Internet Court has affirmed this point in numerous cases.[28]

Secondly, regarding the validity of the dispute resolution guidelines set by the Taobao (Xianyu) platform, users are obligated to adhere to these terms and accept the platform's dispute resolution process as outlined in the agreement. Typically, courts respect these platform-formulated agreements and do not support claims against them by disputing parties (*Liu Hao v Taobao* 2019).

Thirdly, the decision of the Xianyu online jury is not only respected by the platform but also is given significant weight in legal judgments. In the case of *Wu Yancong v Zhang Jiemin*, the Huazhou People's Court characterized the Xianyu jury's decision as indicative of online consumer conduct and attitudes. The judge held that the jury's ruling accurately reflected the trading habits and attitudes of online consumers and accordingly rendered a verdict supportive of the jury's decision (*Wu Yancong v Zhang Jiemin* 2019).

The Xianyu platform is primarily used for buying and selling second-hand goods. These transactions usually occur between strangers, with the items being traded often priced on the lower end. Xianyu's online jury mechanism resolves more than half of the platform's disputes, handling thousands each day (*Beijing Evening News* 2018). This initiative

[27] That is more fully: "Their assessment is limited to using knowledge accessible to ordinary people for examining the evidence provided by the disputing parties [他們的評估僅限於利用普通人可獲得的知識來審視爭議方提供的證據, *Tamen de pinggu jin xian yu liyong putong ren ke huode de zhishi lai shenshi zhengyi fang suo tigong de zhengju*]."

[28] Other judgments with similar outcomes include: *Yan Zhongyan v Taobao* (2019), *He Lingwei v Taobao* (2019), *Lu Weizhong v Taobao* (2019), *Han Lei v Taobao* (2019), *Zhang Yunzhen v Taobao* (2019), *Jiang Min v Taobao* (2019), *Zhou Xinan v Taobao* (2020), *Jiang Chao v Taobao* (2019), *Wang Lingyu v Taobao* (2019).

effectively addresses the issue of lax oversight by market regulators, a problem rooted in the cost-benefit analysis of enforcement (Guo 2018).

The mechanism employed by Xianyu is not without its limitations. In practice, disputants have raised concerns about jurors who fail to thoroughly review the evidence before hastily casting their votes. Additionally, the random selection of jurors may result in individuals lacking the necessary expertise to competently evaluate certain disputes (Guo 2018). As a result, some jurors may rely on subjective notions of morality and fairness rather than an informed assessment of the evidence and the applicable law.[29] In order to address these issues, it has been suggested that the platform consider incorporating professional third-party evaluation or appraisal agencies to determine liability in disputes between transaction parties. Alternatively, intermediary mediation services could be introduced to facilitate resolution (Guo 2019). These recommendations are partially explored in the discussion below of Xianghubao's ODR mechanism, which integrates expert reports and the active participation of a large pool of online jurors.

Xianghubao health protection service online jury

Beyond public involvement via the Xianyu and Taobao platforms, as noted above, Alibaba has employed similar crowdsourced ODR processes for other services, such as Xianghubao. This community-driven health protection service actively engaged the public in handling and resolving insurance claims disputes, allowing public participation in the ODR process. However, since 29 January 2022 Xianghubao has no longer been in operation as its activities have been considered inconsistent with the tightened policy internet of the Chinese Government. Nevertheless, it has played an important role in China's ODR development and so is considered below.

Xianghubao was a mutual aid health initiative by Ant Financial, part of the Alibaba Group. Accessible for free to Alipay members under 60 with a Sesame score of 650 or higher, this service functioned as a collective fund. Members contribute equally to payouts of up to 300,000 Yuan RMB for critical illnesses, with no premiums or upfront costs. Covering 100 major illnesses, including malignant tumours, the programme's low cost (usually less than 1 Yuan RMB per participant monthly) attracted over 50 million users in just six months after its launch on 16 October 2018 (Wang 2019). Data from Ant Financial Services reveals that 31% of

[29] A continuing feature of other forms of mediation in the PRC today. See, for example, Zhou (2023).

Xianghubao's 50 million members hailed from rural areas and counties, while 47% were migrant workers. Of the 24 members who received aid, half were from low-tier cities and rural regions, predominantly children and migrant workers, with the youngest recipient being two years old (Economic Reference News 2019). By February 2020, this blockchain-based claims-sharing mechanism had provided basic health plans to its 104 million participants through Alipay (Lee 2020).

This mutual aid platform was designed for participants to collectively pool their resources through small contributions, enabling access to medical assistance when needed. Similar to insurance payouts, the pooled funds were allocated to members based on their medical claims (Stiefelmaier 2019). One advantage of this programme was that, as the membership grew, individual payments decreased. Additionally, the programme's operational costs were kept low, being fully online and operable via mobile devices.

Crowdsourced ODR was implemented for Xianghubao claim disputes. Members could engage in decision-making to determine case outcomes through the Online Jury Panel. Additionally, blockchain technology was utilized to protect evidential information from tampering.

If Xianghubao members disagreed with a review decision during the insurance claim process, they could present the eligible claim to the community for consideration. The community would then engage in discussions, vote and make a ruling on the case.

According to Xianghubao's rules, members who satisfy the following criteria were eligible to serve as jurors:

- ◊ be at least 18 years old and possess full civil capacity;
- ◊ successfully pass the qualification certification test;
- ◊ have not engaged in intentional deceit or fraud;
- ◊ have not harmed the interests of Xianghubao members;
- ◊ have not previously received a permanent ban from serving as a juror;
- ◊ commit to adhering to the above requirements (Alipay nd).

Xianghubao did not impose a high hurdle for juror eligibility, resulting in a substantial number of qualified jurors—more than half a million according to some estimates. This was evident in the practical operation of the online jury.

The internal dispute resolution process for Xianghubao members may be characterized, on the basis of the published rules (Alipay nd), as follows.

First, if an applicant disagreed with the initial outcome of a medical aid claim, they could initiate a jury petition. Case materials, including claims, details, evidence and the investigator's report, were organized and stored using blockchain technology, a decentralized and distributed digital ledger that records transactions across multiple computers in a secure, transparent and tamper-resistant manner, for review by other members. Secondly, when a case was advertised, other Xianghubao members were randomly selected to discuss and vote on the review of issues, including any compensation .

Thirdly, during the voting period, jurors were required to cast their votes and provide any comments they may have wished to make within 24 hours. Fourthly, at least 1000 votes were required to validate the result of a jury vote. If more than 50% of votes favour the applicant's request, the claim was deemed "in favour of the applicant's request". Otherwise, it was concluded as "not in favour of the applicant's request", and the platform upheld the original review. Finally, for cases where the outcome was "supporting the applicant's request" programme members collectively covered the aid fund once the case was publicized. If the outcome was "not supporting the applicant's request", the platform supported the original decision.

Xianghubao advanced this online jury system in several respects following its introduction, building upon the experiences of Taobao's public review and Xianyu's online jury in four principal areas. First, it established more stringent criteria for juror qualifications. Prospective jurors had to successfully answer six randomly selected questions on jury rules, crafted by the platform. Members could attempt the exam three times a month, and only those who answered all questions correctly could become jurors. Additionally, the platform enforced juror recusal, prohibited jurors with direct interests in a case from voting, and imposed specific conduct requirements to ensure fairness and integrity.

Secondly, when cases were presented to the online jury, they came with an investigator's statement of opinion—typically this would state the basis of the initial decision by the platform not to agree with the claim—and a basic description of the disputed illness issue. This advice aimed to enhance jurors' understanding of the case, which was important given the complexity and high volume of disputes (especially if compared to those handled on the Taobao and Xianyu platforms), necessitating very careful consideration.

Thirdly, Xianghubao developed an extensive online jury for its cases, often comprising 100,000 or more participants, who participated in reviewing and voting over a limited period.

Fourthly, the information on disputed cases was better presented, with greater openness and transparency. During the review, case details and evidence were shared with the jury, with the applicant's personal information encrypted. Voting records and outcomes were disclosed to members, and basic case details were displayed, such as the age of the patient (with encrypted personal information), treatment location, illness, mutual aid amount, claim of rights, reason for the claim and benefit outcomes, excluding evidentiary materials. Within 30 days of jury deliberation, Alipay members were allowed access to the basic content of the case, excluding evidence (Alipay nd).

An analysis of preliminary data from the released report and judicial documents sourced from China Judgments Online suggests that Xianghubao's online jury mechanism was highly effective in preventing and resolving disputes. By 5 March 2021, the platform had provided mutual aid funds to over 68,000 members (Caijing.com 2021). In contrast, the author found only 28 judicial documents related to Xianghubao on China Judgments Online, all of which were civil rulings. In these rulings, the courts consistently confirmed that the Xianghubao agreement falls under the jurisdiction of the Hangzhou Xihu District People's Court. However, there is a lack of publicly available decisions issued by the Xihu District People's Court concerning Xianghubao, so firm conclusions on outcomes are not possible.

[D] REFLECTIONS

An inevitable reality of having large numbers of users and high transaction volumes is the emergence of disputes. However, Taobao's internal dispute resolution mechanism, established through self-regulatory management, is apparently highly effective in resolving most of the disputes that come before it. The Taobao process may also be said to contribute to maintaining order in transactions and generally within China enjoys significant consumer trust and recognition. This has contributed to a strong business reputation for Taobao within China. As Sun Jungong, Vice President of Alibaba Group, notes:

> The Dazhong Pingshen mechanism transcends the simple buyer-seller relationship by engaging users in business activities not just as consumers or merchants, but as keepers of order within the online

> community, fostering user participation and enhancing network self-governance (Xinhuanet January 2019).

Crowdsourced ODR under a self-regulatory framework, exemplified by Taobao and other Alibaba affiliates like Xianyu and Xianghubao, offers substantial benefits and serves as a valuable model for ODR development. It fulfils four key functions as advocated by Cortés (2015): conflict prevention, online negotiation, case management, and monitoring and enforcement. This approach can be seen as an advancement of an informal online justice system or out-of-court settlement, as described by Roberts and Palmer (2007). Such systems are typically "non-bureaucratic", "avoid official law", "resolve disputes through means other than public application of published law", "rely on common-sense rules" and "promote harmony between parties and within local communities" (Moscati 2015: 38).

The Taobao experience suggests that a settlement mechanism based on corporate self-regulation can efficiently handle numerous small claims disputes. This approach to dispute resolution has not only gained widespread recognition and been referenced during legislative drafting (Chinacourt 2015) but also has influenced judicial practice through establishing and operating online litigation in China (Chinacourt 2017). Taobao has set a benchmark for other platforms in China and significantly influenced the legislative process of the Electronic Commerce Law. Currently, this self-regulatory system functions as an effective method for preventing and resolving disputes, and as an occasional participant in the system myself I feel that there is a significant degree of trust amongst the ordinary public in the system Taobao has created.

By having users voluntarily participate in the online jury case review process, the platform effectively reduces customer service costs, along with the time and effort required by staff to manage each case. The requirement for random juror selection—a Sesame credit score of 650 or above—significantly lowers the platform's cost of screening jurors while ensuring a sufficient degree of randomness, according to one Xianyu online jury designer (*Beijing Evening News* 2018). This ODR mechanism also helps to reduce the judiciary's burden of handling numerous small-claims civil disputes (Shen 2015). In 2014, Taobao resolved over 7.1 million disputes through ODR, with more than 730,000 settled via the online jury system (Fei nd). The impact of Taobao's ODR in resolving disputes in China has been and continues to be very significant.

In addition, the formation of juries and the enlistment of volunteer jurors broaden the social networks within similar groups. Users who acknowledge the terms of dispute resolution and the jury system's provisions, and

voluntarily agree to the charter, may apply to become jurors. This approach provides the e-commerce platform with a significantly larger pool of dispute resolution service providers. As this group comprises individuals from various ages, professions and backgrounds, it is relatively open and diverse. The intentional randomness in juror selection encourages this outcome.

The online jury system, moreover, offers a valuable opportunity for the general public to engage in dispute resolution. It serves as a significant means for individuals to participate in settling disputes online. By voluntarily joining a pool of users who review cases according to established terms and rules, internet users can assess evidence submitted by both parties and determine the outcomes. This process not only reinforces the platform's guidelines but also fosters the development of social capital—reciprocity, trust, loyalty and authority—within e-commerce platforms.

Third, the jury system offers a trustworthy mechanism for resolving disputes between parties. Unlike relying solely on an e-commerce platform's customer service for resolution, a jury review provides a more transparent and engaging experience. This approach not only enhances the clarity of the process but also may encourage mutual trust between sellers and consumers, strengthening confidence in the dispute resolution system.

Additionally, it is important to highlight that this model is both reusable and replicable. Volunteers acting as jurors may come across disputes during their regular online activities and can utilize the jury system to submit evidence supporting their claims. Even if they are not familiar with the jurors, their personal experience with jury decisions fosters trust in the jury's capability to resolve disputes effectively.

This reciprocal relationship can be extended to any user willing to engage with the ODR mechanism. Providing various incentives for volunteers to offer their services enhances public motivation to participate, thereby strengthening the credibility and sense of belonging for specific users, and also democratic legitimacy for ODR. This results in a virtuous cycle of dispute resolution participation. According to Zheng, reciprocity relies on the premise of the possibility of "repeated encounters" (engaging in transactions or bilateral/multilateral actions). The formation and expansion of a reputation, characterized by "good cooperation" and "high quality", lead to increased trust and potential cooperation with groups, including strangers (Zheng 2015: 47-50). In this sense, the crowdsourced online jury model, which involves volunteers in the adjudication process,

facilitates public participation in dispute resolution and promotes the resolution of disputes through public involvement.

The Taobao case provides an example that suggests Chinese e-commerce platforms, through their historical business practices, have independently initiated self-regulation to manage the market, gradually establishing a comprehensive set of rules, including dispute resolution mechanisms. The "integration of platform self-governance with diversified community participation" (平臺自治與多元化全民共同治理, *pingtai zizhi yu duoyuanhua quanmin gongtong zhili*) is a policy which has the potential to serve as a model for the future advancement of ODR more generally.

Creating an effective, convenient and transparent platform for releasing factual industry information is crucial for preventing the public, including merchants and consumers, from being misled by various awards and activities. This approach promotes mutual trust in business and is a common discussion topic in everyday life, in China and elsewhere. In the internet era, where online disputes are increasingly prevalent, enhancing mutual trust is vital for resolving conflicts. The author hopes to explore possible methods to bolster trust in ODR mechanisms, which hopefully will enhance both dispute prevention and resolution, in a future essay.

The Taobao platform's ODR system represents a significant innovation in dispute resolution for e-commerce, demonstrating both notable achievements and areas requiring further development. First, Taobao's crowdsourced ODR system has proven remarkably efficient at scale, successfully resolving millions of disputes while maintaining user engagement. The platform's ability to handle high volumes of cases quickly and at low cost represents a significant advance in access to justice for e-commerce participants in China. The integration of public participation through the jury system has not only distributed the workload but also has enhanced community involvement in governance. However, this efficiency comes with important trade-offs. The system's emphasis on speed and scale can sometimes result in superficial review of evidence by jurors. The random selection of jurors, while democratic, may not always ensure adequate expertise for complex cases. Additionally, the platform's limited transparency regarding rule modifications and feedback incorporation raises questions about accountability. In addition, Taobao's model demonstrates the potential of private platforms to develop effective self-regulatory mechanisms. The platform has created a comprehensive framework of rules and procedures that generally appears to maintain order and trust in transactions. The system's adoption by other platforms like Xianyu and Xianghubao suggests its broader applicability.

Yet, this self-regulatory approach also presents challenges. The platform's dual role as both facilitator and adjudicator of disputes creates potential conflicts of interest. The lack of external oversight and limited appeal mechanisms may leave some users vulnerable to unfair outcomes. In addition, the platform's reluctance to share detailed information about rule-making processes and dispute outcomes limits public scrutiny. Finally, Taobao's ODR system reflects and reinforces Chinese cultural preferences for extrajudicial dispute resolution while incorporating technological innovation. The emphasis on mediation and community participation aligns with traditional dispute resolution practices, while the use of digital tools and crowdsourcing represents a modern evolution of these principles.

Reforms that might strengthen the system include a number of possible changes. These include: enhanced transparency in rule-making processes and dispute outcomes;, greater integration of professional expertise for complex cases while maintaining public participation; stronger mechanisms for protecting user privacy and preventing harassment; clearer frameworks for platform accountability and external oversight; and more effective integration with formal legal institutions when needed.

The Taobao experience in China suggests that platform-based ODR systems can effectively manage large-scale dispute resolution while promoting community participation. However, their success depends on carefully balancing efficiency with fairness, automation with human judgement, and self-regulation with accountability. As e-commerce continues to grow globally, these lessons from Taobao's experience offer insights for developing effective ODR systems that serve both commercial and social justice objectives.

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How Do You Solve a Problem Like English Partnerships?

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Abstract

English partnerships are transparent for tax purposes, but there is no legislation outlining the tax rules besides a Statement of Practice (SP) (1975). Limited liability partnerships (LLPs) are treated the same for tax purposes but are bodies corporate. This has led to concerns over employment and partnership status being confused and highlights the necessity for specific anti-avoidance legislation for LLPs. Partnerships and LLPs can also be regarded as (bare) trusts for tax purposes, potentially leading to confusion and disputes as to beneficial ownership. These problems would largely disappear if members of LLPs chose to treat their partnership as a separate legal entity for tax purposes. If they did so, LLPs could be subject to corporation tax; otherwise, they and general partnerships should be subject to tailored, dedicated primary legislation governing the tax treatment—instead of that covering a mere SP.

Keywords: partnerships; Partnership Act 1890; SP D12; LLP; beneficial ownership; legal entity; employment.

[A] INTRODUCTION

Partnerships are a well-established vehicle through which to run a business—offering a closer working relationship with fellow partners in the spirit of common venture. However, as far as tax is concerned, anyone would think that the UK's tax laws considered them a mere afterthought; the tax rules are contained not in primary legislation as with personal and corporation tax but in a Statement of Practice (SP) (D12) from January 1975. This SP sets out the tax interaction between the partners, what happens to joiners and leavers, disposal of assets, and changes in profit ratios. The partnership itself pays neither income tax[1] nor corporation tax[2] on its profits, nor capital gains tax (CGT)

1 Per section 848 ITTOIA 2005.

2 Per section 1258 Corporation Taxes Act 2010.

on disposals[3]—rather the partners do pay tax on their own shares. A partnership is therefore effectively see-through as far as income tax and CGT is concerned, so the legislation concerning personal income tax and sole traders applies. Limited companies have legislation dedicated to their obligations and reliefs under corporation tax.

As far as partnership law is concerned, there is only one piece of legislation concerning the legal interaction of the partners with each other and the business: the Partnership Act (PA) 1890. The mechanics of this legislation can be quite harsh on partnerships which do not have a partnership agreement drawn up outlining their constitution and mutual intentions—for instance, if one partner dies or becomes bankrupt, the whole partnership dissolves, irrespective of anything else (section 33(1)).

The greatest issues, however, lie in a partnership's transparency—the fact that the partnership is not regarded in law as a separate entity from its partners begs the question as to what a partnership actually is—is it a trust? Is it a bare trust as far as His Majesty's Revenue and Customs (HMRC) is concerned, where the partners alone are taxed as beneficial owners? But for inheritance tax (IHT) purposes, partners own rights to the partnership assets, not the assets themselves (as with Limited Liability Partnership (LLP) members)—so that adds another complication. The Fourth and Fifth Anti-Money Laundering Directives would seem to assume that partnerships can act as trusts in certain instances and are subject to reporting requirements within HMRC's Trust Registration Service (TRS); the PA 1890 would also appear to consider a partnership as a form of trust. What about the employment status of the partners themselves? The tax law regards them as self-employed, as does employment law, but there will be as many grey areas for partners as there are for any worker.

The introduction of the LLP into Britain in April 2001[4] added an extra twist. The LLP is treated exactly the same as the "general" partnership for tax purposes but is a UK-wide separate legal entity from its partners (or "members"). Is treating the LLP as a separate legal entity the next step in this evolution? Four major problems must be addressed.

3 Per section 59 Taxation of Chargeable Gains Act 1992.

4 LLPs were introduced into Northern Ireland via the Limited Liability Partnerships Act (Northern Ireland) 2002.

[B] PROBLEM 1—THE LAW

When it comes to partnership law, the PA 1890 is primary legislation enforceable in the courts; but an SP is no such thing—SPs simply:

> explain HM Revenue and Customs interpretation of legislation and the way the Department applies the law in practice. They do not affect a taxpayer's right to argue for a different interpretation, if necessary in any appeal to an independent tribunal (HMRC Manual ADML5100).

In the same manual, some further explanation of the role of the SP is given:

> The main purpose of Statements of Practice is to explain the Department's view of the law where the statute is unclear and may have more than one interpretation or where HMRC considers it would assist taxpayers to have an explanation of HMRC's view of the law. They let taxpayers know which interpretation we will follow.
>
> Our interpretation should be that which most closely reflects the intention of the legislation. It must be one which HMRC can reasonably apply and defend if challenged in the courts. That does not mean it is the only possible interpretation; there may be another, or others, which we reject.

So why is this a problem? Simply because an SP is not the law, merely HMRC's interpretation of, and approach to, the law. Businesses operating through partnerships need a greater degree of certainty and objectivity over the law and its application, rather than just HMRC's view of it (useful though that is for practitioners).

This issue about the importance of legislation, SPs and Extra Statutory Concessions (ESCs) was well addressed by former Lord Chief Justice Tom Bingham in his book, *The Rule of Law*:

> all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts (2011: 8).

Also, whilst presiding over the case of *Vesty v IRC* (1979) in the High Court, Walton J famously stated (when referring to ESCs): "One should be taxed by law, and not be untaxed by concession" (1979: 197).

This sums up the reason why the rules surrounding partnership tax should be enshrined in primary legislation, so that rights and obligations can be upheld in court, rather than having to rely on HMRC's own interpretation.

The rules themselves essentially state that partnerships are transparent for tax purposes, that the partnership itself is not a separate entity and that the partners are subject to the same income tax, CGT and IHT liabilities on their profit and capital shares as any other individual; a limited company partner is subject to corporation tax on its share. The partners are the beneficial owners with some (not necessarily all) partners also being legal owners of the partnership assets, over all of which (or as much as the partnership agreement states) the proprietary ownership for tax purposes lies. This transparent arrangement essentially makes partnerships bare trusts—in that HMRC is only interested in the beneficial owners' profits and capital interests; the legal owners and the partnership itself are overlooked for direct and capital tax purposes. However, partnerships are a separate entity for value-added tax purposes, having their own number rather than the individual partners' being registered.

As well as the tax rules, partnerships will be concerned about the constituency of their business. Partnership agreements should, according to good practice, set out the partners' intentions which override some of the provisions of the PA 1890. However, many partners might not draw up these agreements—they may not be aware of the significance of countering the presumptions with PA 1890, or of the Act itself.

By having the contents of SP D12 within tailored, enforceable primary legislation, these structures' tax treatment will have the footing which their importance and popularity warrants.

[C] PROBLEM 2—BENEFICIAL OWNERSHIP

The issue of beneficial ownership has caused numerous problems—both legal and tax—because it is often hard to tell whether an asset belongs to the partnership or to the individual partner whose name it is in. As well as causing problems with tax, it can lead to problems with succession and inheritances—does the deceased's property belong to the other partners, or to the legatees in their will? The treatment of partnership assets is governed by a partnership agreement (or the terms of PA 1890), whereas personally owned assets (as well as their stake in the partnership) will follow the deceased's will (or intestacy).

The rules surrounding whether an asset belongs to the partnership or not is determined, in the first instance, by PA 1890 which states that

partnership assets are those bought with partnership funds (section 21) or introduced as partnership stock (section 20); but often it is difficult to establish whether either of these apply. One case which illustrates the nature of the problem is *Wild v Wild* (2018) whereby a dispute arose between two brothers as to whether farmland and buildings formed partnership property; the legal ownership was in the name of their father upon whose death the property was bequeathed by his will to their mother. The claimant brother claimed the assets belonged to the partnership by virtue of their being featured in the farm accounts which formed evidence of a common intention amongst the partners; the other brother claimed that the farm was not a partnership asset, that it was not mentioned in the accounts and—even if it was—that would not be sufficient to form an intention to make it so. The High Court agreed that the farm was not a partnership asset, that there had been no common intention to make it so and no agreement could be inferred without evidence. Following the case of *Ham v Bell* (2016), the court agreed that business efficacy was not enough to imply that the farm was a partnership asset. The legal ownership of the asset would be in the name of some partners (not necessarily all) but beneficial ownership, unless it is stated in a trust deed or partnership agreement, would have to be determined through evidence of common intention.

Due to the transparent nature of partnerships and LLPs, assets therein belong to the partners/members (for IHT purposes the partners own rights over the partnership's assets, see below, whereas members own a corresponding share of the assets themselves). However, identifying the beneficial ownership, when only the legal ownership is visible to all (eg through Land Registry entries), can prove difficult. Assets owned by separate legal entities such as limited companies will not pose such problems due to: a) the corporate veil keeping the owners away from the business's assets; and b) there being a footprint (usually concerning CGT or stamp duty land tax) showing assets being transferred into the company. Whilst the default position for partnerships is that each partner shall own a share of introduced assets[5] (thus a part-disposal for the new partner),[6] beneficial ownership can be ring-fenced through a partnership agreement, thus rebutting that presumption.

5 Section 22 Partnership Act 1890.

6 Paragraph 5.2, SP D12.

[D] PROBLEM 3—A TRUST IN DISGUISE?

The PA 1890, from the beginning in section 1(1), gives the definition of a partnership:

> Partnership is the relationship which subsists between persons carrying on a business in common with a view of profit.

However, this is a fairly broad definition and does not preclude the partnership from being a trust; indeed, there's some suggestion that this is precisely what a partnership is. Section 20(1) and (2) PA 1890 talk about legal owners holding the property for the beneficiary partners (my emphasis):

> (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and *must be held and applied by the partners exclusively for the purposes of the partnership* and in accordance with the partnership agreement.
>
> (2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but *in trust, so far as necessary, for the persons beneficially interested* in the land under this section.

The words "held and applied", "in trust" and "beneficially interested" all point toward to the partnership's being more of a trust, with partners owning a share of the right to the assets, rather than the assets themselves as with an LLP, which is more akin to a bare trust.

The fact that some partnerships have to register with the TRS would also indicate this possibility. There is no specific criterion for partnerships to register, but if the legal and beneficial owners of partnership assets are different people and the partnership agreement states that assets are being held under express trust by their owners, then there is no exemption for partnership registration—despite partners' already being registered with HMRC for self-assessment.

As well as being regarded as a trust, there are arguably some grey areas between the laws of partnership and agency. Partners are agents for their partnership, as they are joint and severally liable for their actions; sections 5-18 PA 1890 outline how partners act on behalf of and bind their "firm" as a form of mutual agency where "each partner is both an agent of her fellow partners and, as a member of the partnership,

a principal" (DeMott 1995: 109). However, partnership is very much an internal relationship between the individual and the partnership and other partners with whom they share profits and losses. Within an agency relationship, the principal will control the agent whereas partners (by default) have equal control and participation in the business. One distinction between (what may be called) a "pure" agency relationship and one of partnership will simply be the intention to create a partnership (as outlined in *Michigan Law Review* 1913). A partnership agreement is supposed to outline the partners' intentions with respect to the day-to-day running of the business, the capital ownership of the asset, the profit split and management roles—essentially overriding the presumptions contained within PA 1890.

Debate can be had as to whether a partnership is a trust or a bare trust—or whether an LLP is more akin to a bare trust with deemed direct ownership of the assets by the members; or whether it is an agency relationship. Problem 3 is less of a problem, more a potential clash of principles and entities—an identity crisis for partnerships, but what are they exactly?

[E] PROBLEM 4—A WORKER OR NOT?

This problem can not only be a quandary for the individual, but one which often highlights an issue for partnerships/LLPs as tax transparent entities and prompts the solution which I will be proposing now (just as I did in my Chartered Institute of Taxation (CIOT) Fellowship dissertation: Thorpe 2015). For general partnerships, the transparent nature means that a partner will be self-employed; however, such partners are not bodies corporate, but rather a collection of multiple sole traders coming together in a common venture. But, for LLPs, as separate legal entities, should the same presumption apply? The same tax rules apply, but we are not comparing like with like and this causes confusion with respect to the status of members.

Members as employees?

The problem of status was highlighted succinctly by Rimer LJ in *Tiffin v Lester Aldridge*:

> The drafting of s.4(4) raises problems. Whilst I suspect the average conscientious self-employed professional or businessperson commonly regards himself as his hardest master, such perception is inaccurate as a matter of legal principle. This is because in law an individual cannot be an employee of himself. Nor can a partner in a

> partnership be an employee of a partnership, because it is equally not possible for an individual to be an employee of himself and his co-partners. Unfortunately, the authors of s.4(4) were apparently unaware of this (2012: paragraph 31).

The section 4(4) referred to is that within the Limited Liability Partnerships Act (LLPA) 2000, which states:

> A member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership.

This section pretends that the LLP member is a partner in a general partnership and asks the courts to consider whether that partner would be employed when looking at their role and nature of their relationship in the business, using employment law precedent:

> It requires an assumption that the business of the LLP has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he would have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the LLP (*Tiffin* 2012: paragraph 32).

Rimer LJ was pointing out the fact that a genuine self-employed business owner (ie an equity partner) cannot also be an employee; however, this is based on the notion that the individual and business are one and the same. What if they were totally separate?

Limited Liability Partnerships

LLPs bring an interesting dimension to this question; for tax purposes they are treated in exactly the same way as general partnerships (ie are transparent), so Rimer LJ's points above still stand, but the legal–tax divide widens because they are bodies corporate (ie separate legal entities). It is an odd mix—applying the limited liability protections of a limited company to something which remains transparent and effectively non-existent as far as direct and capital taxes are concerned. As Morse points out: "it has no shareholders or share capital, no directors and no specific requirements as to meetings or resolutions" (2002: 465). Partners are called "members", and there is no joint and several liability for debts as there is with a traditional partnership—members are only liable for their own investments. Indeed, the LLP is more like a form of company rather than partnership—"despite its name, is not a modified form of partnership but a modified form of company—it was even

suggested by one MP[7] during the debates that it even fell foul of the Trades Description Act" (Morse 2002: 462). One reason why the LLP does not act like any partnership is because when the LLPA 2000 and Limited Liability Partnership Regulations 2000 were put together, they imported large parts of the Companies Act 1985, the Insolvency Act 1986 and the Company Directors Disqualification Act 1986. However, the PA 1890 was left out—something which Morse points out as being a reason why there is no "easily accessible corpus of legislation" (2002: 464) for LLPs. The summary document of the Law Commission and Scottish Law Commission's report on partnership law (see below) likewise points out that LLPs are more akin to companies, with much of the Companies Act 1985 applying to them (2003: 3). Also, and more decisive is section 1(5) LLPA 2000 which states: "except as far as otherwise provided by the Act or any other enactment, the law relating to partnerships does not apply to a limited liability partnership".

So, if the LLP is essentially a limited company in all but name, it seems an oddity both that it should be taxed as a transparent entity and that members cannot distance themselves from the business in the same way that a company director can.

From a tax perspective, a member is self-employed, per section 863 of the Income Tax (Trading and Other Income) Act (ITTOIA) 2005), but this is now tempered by sections 863A-G inserted by the Finance Act 2014. If conditions concerning the level of remuneration, the extent of their influence over the affairs of the LLP and of capital contributions are all met, then that member will be subject to PAYE and national insurance. It is an attempt to clear those waters which have been muddied between tax and employment law.

These new sections are designed to treat an LLP member as an employee for income tax purposes if all those conditions are met. The transparency of partnerships is causing the lines between the business and the individual to become blurred—and section 4(4) seems to be confusing partnership with employment. Besides the tax issue, this can be a minefield for employment law—can a partner/member claim employee protections/rights, such as unfair dismissal, sick pay and employer pension contributions? Could an LLP member not be treated as an employee for legal and tax purposes? According to the Supreme Court in the case of *Clyde & Co LLP v Bates van Winkelhof* (2014), an LLP member can be a "worker" for the purposes of section 230(3) Employment Rights Act 1998 with respect to "whistleblowers". This adds further confusion as

[7] Austin Mitchell MP (23 May 2000).

to the status of members and whether they can be employees or workers as far as employment law is concerned, despite their being self-employed for tax purposes.

This confusion could be removed altogether by separating an LLP from the individual—treating both LLPs as separate legal and tax entities, unless they vote to be treated as transparent. A member, as well as being an owner, could treat themself as an employee taking a salary—akin to a director of a limited company. Furthermore, the LLP could have its own liability for tax rather than relying on its being essentially a bare trust with the rules being contained within an SP.

[F] LEGAL ENTITIES

Problem 4 (A Worker or Not?) is caused by the fact that general partnerships are not separate legal entities, and, as Rimer LJ says, you cannot be an employee of yourself; however, an LLP is a separate entity so why does that also apply to a member? The Law Commissions' report recommended that general partnerships be separate legal personalities/"*sui generis*" entities in English law, as in Scots law—though not a body corporate; the Commission did not:

> wish to import the often-antiquated rules of the common law of corporations into partnership law. Partnership has its own rules relating to its formation, internal management, legal relations with third parties and termination (2003: paragraph 5.38).

So even within the UK we have a mismatch, with different treatment of partnerships but with LLP law being UK-wide. The report further stated:

> We believe that separate legal personality is the clearest way of explaining the nature of partnership, particularly if our recommendations for continuity of partnership are adopted (that a change in membership should not terminate the partnership) (paragraph 5.5).
>
> Partnerships often operate as though they were an entity. … Not only will [independent legal personality] bring the law into line with practice, it will make a legal reality of the relationship assumed by clients (2003: paragraph 5.6).

Their final recommendations with respect to the separate legal personality issue were that:

> (1) A partnership should have legal personality separate from the partners but should not be a body corporate.
>
> (2) A partnership should be viewed as a legal person whose characteristics are determined by

> (a) the draft Partnerships Bill except so far as varied by contract, (b) the terms of the partnership contract (if different from the default rules of the Bill) and
>
> (c) the rules of common law and equity so far as not being inconsistent with the express provisions of the draft Partnerships Bill (2003: paragraph 5.40).

However, there was no recommendation that partners should be treated as employees—indeed the specific recommendation was that "a partnership should not be capable of engaging a partner as an employee" (paragraph 13.43). In paragraph 13.42, the report pointed out that a dual role as a partner and as an employee could call into question the tax status of the partner and even the existence of the partnership. LLPs were not featured in the Law Commissions' report (2003) due to their being a new creation at the time.

It is the LLP's tax status, however, that I wish to call into question.

[G] A POSSIBLE SOLUTION

I would agree that general partnerships should retain the flexibility and transparency for tax purposes because that is part of their attraction; however, LLPs are different. If an LLP is not a partnership, should it be treated like a company instead? Cottrell gives detailed analysis between LLPs and limited companies with respect to "ownership, direction and management" (1967: 101), but, ultimately, they are not the same entity, and for tax purposes there is no similarity at all. We are left with an odd scenario whereby a member cannot be an employee of their LLP and (seemingly) has no legal protections afforded by employment law (though *Clyde v Van Winkelhof* (2014) has cast doubt on that); yet a company director can also be an employee and enjoy all those corresponding benefits. This is despite both the LLP and the company being separate legal entities. The LLP's tax transparency is the reason why not and the same reason why a general partner cannot be an employee.

If LLPs were treated as separate entities both legally and for tax purposes, the problems that I have highlighted in this note would likely be resolved. The obvious argument against such a proposal is that, if LLPs and limited companies were essentially the same, then surely one is obsolete—and given the limited company's history[8] and the number of

[8] Some of the oldest companies in England include: the Royal Mint being incorporated in 886, Cambridge University Press in 1534 and (until its closure in 2017) the Whitechapel Bell Foundry in 1570.

companies[9] active in the UK, the likely candidate for removal would be the LLP. However, the "inherent flexibility" of the partnership, as Morse calls it (2002: 460), is likely to be something that many businesses would want, along with the feeling of common enterprise which only partnerships have—as Jonathan Fox, former managing partner at accountancy firm Saffrey Champness (now Saffreys) points out to *Accountancy Age*:

> A partnership between like-minded individuals who recognise that they are all dependent on one another … promotes congeniality and a shared sense of direction that I know, having worked in much larger "corporate" and structured professional services firms, can be lacking (Huber 2012).

So, it is likely that there will always be demand for the LLP in its current form, even though it is transparent for tax purposes, with members unable to draw a salary or call upon the protection of employment law. But what if LLPs could elect whether to be treated as transparent or not, allowing for the collegiate character referred to by Mr Fox but also giving members the choice as to whether they wish to remain as a transparent partnership? That element of choice could make the LLP sufficiently distinct from a partnership for tax purposes. By electing to become a corporate, an LLP could be subject to corporation tax—covered by a certain and well-established body of laws contained in statute—with members taking out employment contracts, drawing a salary as well as their profit shares and having the security of employment law at the same time.

Something similar is available in the United States with limited liability companies (LLCs). These are partnerships which can elect for corporate treatment (by filing Form 8832—Entity Classification Election with the Internal Revenue Service) and become "opaque", namely a separate legal entity which owns the profits of a business. Owners of LLCs are also known as members and the LLC can be treated as either a partnership, corporation or as part of the member's own tax identity. If an LLC elects to be treated as a corporate, a member who actively works for the LLC can be treated as an employee.

[H] CONCLUSION

Partnerships in the UK are somewhat confused: they are legal entities in Scotland but nowhere else in the UK; they operate as separate entities from their owners as far as the realities of businesses are concerned but not according to the tax system. Also, LLPs are legal entities and bodies

[9] Over 4.7million, representing over 93% of all bodies corporate in 2021/2022 per Companies House official statistics (30 June 2022).

corporate but are not treated as such by the tax system so their members cannot be equated to company directors/employees; furthermore, despite the importance and prominence of partnerships and LLPs within the modern business landscape, there is no tailored legislation outlining their tax rules.

Most of these problems could be resolved by the following:

1 Place SP D12 onto a statutory footing.

2 As well as being bodies corporate in law, allow LLPs the option to be treated as such for tax purposes—choosing either to:

   a. be treated as a transparent entity so its members are subject to income tax on their share of LLP's profits, per the current rules; or

   b. be treated as a body corporate in all respects, akin to a limited company, subject the LLP itself to corporation tax and allow members to sign employment contracts and draw a salary.

Problem 1 (The Law)—the status, standing and importance of partnership tax law might be solved by having the PA 1890 and LLPA 2000 complemented by corresponding primary legislation, enforceable by the tribunals/courts.

Problem 2 (Beneficial Ownership)—the uncertainty surrounding beneficial ownership of assets might be resolved with respect to LLPs because, whilst they already hold business assets in their own name, it is the members who do so for tax purposes. If the LLP owned them in all respects, the legal and beneficial ownership would lie with the LLP, and there would be no confusion between business and individuals.

Problem 3 (A Trust in Disguise?)—the question as to what a partnership is exactly might be resolved to some degree (from a tax perspective at least) by both of my suggestions (1 and 2 above). If the law for partnership tax is contained within a tailored piece of legislation partnerships, then it would at least have its own tax identity within statute. The rights, obligations and interactions between the partners would still overlap the laws of trust and agency. However, from a tax perspective, if they had their own set of laws setting out the consequences of partnership business and partner interaction, they could then be taxable entities in their own right in law, rather than merely as an SP.

Removing the reporting obligations of a taxable partnership under the TRS (where any property is held in express trust) would also help remove any doubts as to what a partnership is. Partners within a taxable partnership are currently subject to self-assessment and are identified with a unique tax reference number—HMRC knows who they are and what

their income is from the partnership, so further anti-money-laundering reporting requirements are completely unnecessary. If LLPs were separate entities, they could potentially be taken out of the partnership sphere altogether, helping to simplify the process as to what LLPs are and resolve the confusion around their being one thing in law and another for tax.

Problem 4 (A Worker or Not?)—the interaction between the business and its owners and the employment issues arising may be resolved if members were no longer their own masters (to use Rimer LJ's phrase) nor treated as a collective of sole traders. Distance between the individual and the business for tax purposes would mean the master would be the LLP itself and the member an employee—if they chose to be.

There would be no need for general partnerships to be subject to these suggestions—most traders want a simple and transparent vehicle from which to operate; the recommendation from the Law Commissions that these partnerships should not be bodies corporate supports this assertion (2003). LLPs did not become subject to the Law Commissions' conclusion simply because of timing; had LLPs been created earlier (or the report made later), the conclusions might well have included a similar recommendation about a separate tax identity for LLPs. The LLP, as a body corporate already in law and more akin to a limited company in every respect except tax, is different; my suggestion would merely be extending the body corporate status to that of tax. The ability to choose whether that treatment applies or not would also distinguish the LLP further and help it rise above any confusion about partnerships and where they fit for tax purposes.

About the author

Christopher Thorpe *is a Fellow of CIOT, member of the Association of Tax Technicians and a full member of the Society of Trust and Estate Practitioners. He is a full-time technical officer at the CIOT but also works as a freelance lecturer and tax consultant and contributes to the trade press (*TaxInsider, Croner-I *and* Farm Tax Brief*). He has published one book,* Implied Trusts and Beneficial Ownership in Modern UK Tax Law *(Spiramus Press, 2021). He originally qualified as a barrister, though never practised, and has worked as a tax adviser in several accountancy firms.*

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Book Reviews: pages 420-458

Facing China: The Prospect for War and Peace by Jean-Pierre Cabestan

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Jean-Pierre Cabestan (2021) *Facing China: The Prospect for War and Peace* published by Lanham/ Rowman & Littlefield, New York & London ISBN 978-1-5381-6988-9: translated by N Jayaram from the French edition (2021) published as *Demain la Chine: Guerre ou Paix?* by Editions Gallimard, Paris

Professor Jean-Pierre Cabestan's *Facing China: The Prospect for War and Peace* examines the growing tensions between the People's Republic of China (PRC, or China) and the United States of America (US), providing an analysis of the strategic, political and ideological dynamics and the historical context shaping this intricate relationship. Overall, this study is a thoughtful and comprehensive examination of one of the most critical international security challenges at the present time. Its main contribution is arguably in providing a framework for understanding and managing US–PRC strategic competition which is balanced and avoids both alarmism and complacency about the risks of conflict. Professor Cabestan offers a thorough analysis of the US–China rivalry, emphasizing the impact of China's military modernization, nationalist fervour and regional aspirations. The book is structured around potential conflict settings involving China and its neighbours, and ultimately the US. The settings include Taiwan's claims to be an independent state, the South China Sea, the Senkaku/Diaoyutai Islands and Sino-Indian border disputes. Furthermore, the book probes internal discussions within Chinese society and its political leadership, assessing China's

internal motivations, particularly nationalism and the Communist Party's patriotic education, regarding the risks of war and the implications of grey zone warfare tactics that do not constitute traditional military conflict. While drawing on international relations theory, Cabestan grounds his arguments in realism, providing an empirical basis for evaluating potential war risks.

This book comprises seven substantive chapters, framed by an Introduction and a Conclusion. An examination of relevant international relations perspectives is offered in the Introduction. Chapter 1 then examines what the author describes as an "accumulation of passions and ammunition"—a potential pre-war scenario fuelled by China's growing nationalist fervour and military advancements, which heighten geopolitical tensions. It concludes at page 36 that "fuelled by an unquestionable rise of nationalisms, a rapid military modernization and also a deepening ideological rivalry between democracies and dictatorships, the current strategic configuration" does not bode well for the future. Chapter 2 examines the ongoing debates within China regarding the risks of war, and offers a perspective which suggests that the Chinese leadership and its military are aligned strategically more closely with Clausewitz than with Sun Zi. As a rising great power challenging the established order, China has unmistakably entered a strategic duel aimed at achieving national reunification and ultimately asserting dominance by pushing the US, the established power, out of the Western Pacific. Chapters 3, 4 and 5 explore the most plausible triggers for a Beijing–Washington conflict: disputes over Taiwan, tensions in the South China Sea, and clashes concerning the Senkaku Islands. In the chapter on Taiwan, by some distance the longest in the book, Professor Cabestan takes the view that "while it has increased the prospect of an armed conflict in the Taiwan Strait, the Ukraine war has also shown how different the geography, context, and strategies of the three actors involved may be, compelling all of them to think twice before starting a kinetic confrontation" but also that longer term "only China's democratization can change the balance" (page 110). Chapter 4 examines conflict over the South China Sea, a complex issue involving territorial claims by six nations—China, Brunei, Malaysia, the Philippines, Taiwan and Vietnam—as well as the strategic interests of countries including the US, Japan and Australia. The situation is further complicated by differing interpretations of international maritime law under UNCLOS (the United Nations Convention on the Law of the Sea), with China making significant reservations upon acceding to the Convention, and the US failing to ratify the treaty. The overlapping claims, legal ambiguities and competing interests make the dispute highly intricate. While the PRC is tempted to

use its military strength in order to resolve issues, war risks are limited in part by Beijing's desire to cultivate its image as a responsible great power eager to find common ground, if not with Washington, at least with Southeast Asian capitals. The dispute over the Senkaku Islands, discussed in chapter 5, is both more straightforward and more recent compared to the complexities of the South China Sea issue. This conflict is primarily a bilateral matter between Japan, which annexed and has maintained control of the islands since 1895, and the PRC, which began asserting its claim in the early 1970s. The war of attrition initiated by China over these seemingly insignificant islands is seen by Professor Cabestan as serving broader objectives. First, it acts as a strategic lever to exert pressure on Japan, aiming to divide and weaken its political class. Secondly, it aids in expanding China's claimed maritime domain and air defence identification zone, aiming gradually to consolidate control. This, in turn, increases the vulnerability of Japanese and US forward military deployments in the islands, particularly in the event of armed conflict over Taiwan. Chapter 6, entitled "Border Tensions and Risks of a China–India War", provides an analysis of the Sino–Indian border standoff that reignited in 2020. It investigates the potential for these tensions to escalate into a full-scale, violent conflict. Chapter 7 argues that large-scale wars are less likely to happen than targeted, swiftly carried-out operations aimed at securing borders or protecting Chinese immediate interests and nationals. Finally, in the Conclusion, the author contends that, while scenarios of overt warfare remain unlikely in the near future, the undeclared and ongoing cyber conflict reflects the emergence of a new kind of China–US Cold War—or "Cold Peace". This evolving dynamic, the author asserts, demands global awareness and preparedness to navigate its far-reaching consequences.

Overall, this fine study adds value by offering a nuanced and historically informed examination of the strategic and ideological factors driving China's rise and its implications for global security. In mapping out specific conflict scenarios, Cabestan provides a detailed framework for understanding the realistic possibilities of future conflicts and the strategic calculations of both Chinese and US leaderships. This framework is particularly relevant for policy-makers, international relations scholars and readers interested in Asia–Pacific security dynamics. The book also provides valuable context for legal scholars and practitioners—particularly those focused on international law, national security law and US–China relations—seeking to understand the manner in which the relevant legal frameworks both shape and are shaped by US–China strategic competition. It identifies areas where existing legal mechanisms

may be insufficient to manage tensions and where new legal approaches may be needed. In more general terms, this study may be said to aid our understanding of China's efforts to reshape international norms and institutions, and of competing visions of international order as between the US and the PRC.

The book is also useful in other more specific ways for lawyers seeking insights into what has been happening in the region, including territorial and maritime disputes in the South China Sea and East China Sea, which of course involve questions of international law, particularly UNCLOS, and China's rejection of the 2016 arbitration ruling on South China Sea claims. Security Treaty Obligations with allies including Japan, South Korea and the Philippines are also analysed, as is the legal status of Taiwan and the ambiguities in US commitment to Taiwan. Professor Cabestan's analysis may also assist lawyers and legal academics working on international trade and technology transfer issues in providing the context for the use of technology export controls and restrictions and of economic decoupling and its legal implications. The study also offers insights into the legal and diplomatic channels for managing military incidents, as well as (as noted above) discussion of "Gray Zone Operations"—competitive interactions that fall between traditional war and peace and the place of international law in this difficult context. Professor Cabestan's contribution is also relevant for human rights law scholars and practitioners seeking to understand better the context of human rights issues in Xinjiang, Hong Kong and other areas, and the discussion it offers of how human rights concerns intersect with strategic competition. On the other hand, arguably, the study may seem to some readers to perhaps under-emphasize—though it does not ignore—the roles of diplomacy and economic interdependence in mitigating conflict. The book primarily focuses on conflict scenarios and could perhaps have given greater attention to diplomatic solutions and cooperative mechanisms. While it critiques China's nationalism, the China focus means that the analysis is limited in scope in respect of US policy and actions and their implications.

Cabestan's study is important for its balanced and comprehensive analysis of one of the most critical geopolitical challenges of contemporary times. While recognizing the significant risks of conflict between the PRC and the US, particularly in relation to flashpoints such as Taiwan and the South China Sea, the author delivers a nuanced assessment that neither downplays these threats nor asserts that war is inevitable. The book's rigorous exploration of various conflict scenarios, alongside its indepth examination of China's internal dynamics and broader international relations theory, makes it an invaluable resource for scholars, policy-

makers and legal professionals focused on US–China relations. Given escalating global tensions, Cabestan's analysis of US–China strategic competition represents a significant contribution to both academic scholarship and practical policymaking.

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Consumer Protection in Asia, edited by Geraint Howells, Hans-W Micklitz, Mateja Durovic and André Janssen

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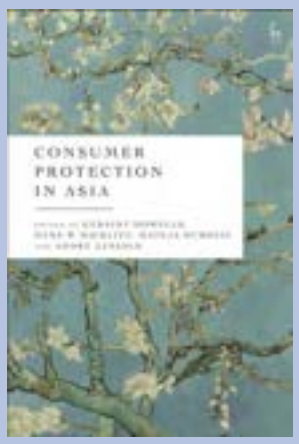

Geraint Howells, Hans-W Micklitz, Mateja Durovic and André Janssen (2022) *Consumer Protection in Asia* published by Hart, Oxford ISBN 9781509957538

Edited by Geraint Howells, Hans-W Micklitz, André Janssen and Mateja Durovic, this very substantial book—entitled *Consumer Protection in Asia*—analyses consumer protection laws across various Asian countries, assessing the distinctive situation in the jurisdictions covered and placing issues in broader comparative and international settings.[1]

The book is a foundational resource for understanding consumer law in Asia. It provides a comprehensive examination of the nature of consumer protection law within the region, offering practical insights and identifying areas for future research, legal reform and policy enhancement. The book considers fundamentally important topics such as sales law, right of withdrawal, unfair terms, product liability, commercial practices and digital adaptation. Another particularly important issue is enforcement mechanisms. The book acknowledges that enforcement remains under-developed across many Asian jurisdictions, characterized by weak consumer organizations and resource-constrained regulatory bodies,

[1] This project originated with a conference held in Hong Kong on "Consumer Protection in Asia", 13-14 January 2017, and was co-organized by the School of Law, City University of Hong Kong, and the Faculty of Law, University of Helsinki.

making this a particularly significant area for analysis. The effectiveness of consumer protection ultimately depends on enforcement capabilities, and this area of analysis is given significant attention in many of the contributions to the book.

The collection of essays also offers comparative insights, examining relevant aspects of consumer law across Asia as a whole and, also for comparative purposes, analysing consumer law in various regions, including the European Union (EU), the United States of America, Australasia, Latin America and Africa. It considers how international influences and Association of Southeast Asian Nations (ASEAN) integration shape consumer law in Asia. The impact of EU laws and ASEAN guidelines on consumer policy in Asia has been significant. In addition to its strengths as a comparative study, the edited book offers a comprehensive analysis, covering a wide range of topics and jurisdictions while providing insights into legal systems and specific consumer protection issues in Asia: public and private enforcement, legal design, enforcement challenges, and the roles of governments, courts, and consumer organizations, showing how consumer laws function in practice. Its coverage is truly impressive.

The book is divided into five parts, including the "bookending" parts of the Introduction and the Conclusion. The three substantive sections of the study each address a range of topics concerned with consumer protection. In the book's brief concluding chapter, two of the editors—Mateja Durovic and André Janssen, both distinguished scholars and contributors to the field of consumer law—explain the basis for this structure, namely the adoption of a "triple approach (national reports, comparative reports and … reports which put the Asian consumer law in a global perspective" in order to deliver a "proper critical overview over national consumer laws in Asia" (page 535). The book opens with a short essay "Introduction to Asian Consumer Law", authored by the other two editors, Geraint Howells and Hans-W Micklitz, also both distinguished scholars in the field of consumer law. This provides a broad analysis of Asian consumer law, explaining regional consumer issues, historical influences, the relevance of the public law/private law divide and the rise of consumerism across Asian markets. The essay advises that:

> We asked the rapporteurs to cover various topics: information and the right of withdrawal, sale of goods, unfair terms, product liability, product safety, adaptation to the digital age, unfair commercial practices and access to justice. The reports also typically explain the general structures for promoting consumer protection and its public enforcement. We considered adding consumer credit and financial

> services, but finally concluded the list was comprehensive enough and those topics deserved separate treatment in a future project (page 3).

The introductory contribution concludes with the observation that "to date, Asian consumer law largely reflects patterns from the Western world. Potentially in the digital sphere it can become a leading participant in the debates", adding that "consolidation of the values of consumer protection and their effective enforcement should also remain key goals in the region" (pages 15-16). In the Conclusion to the book as a whole, Durovic and Janssen emphasize that, while progress has been made in developing consumer protection frameworks across Asia, significant work remains in addressing challenges of globalization, digitalization and effective enforcement. There is also a need to balance consumer protection with technological innovation while ensuring consistent protection regardless of the technology used. Given the brevity of both the scene-setting essay by Howells and Micklitz and the project's concluding chapter authored by Durovic and Janssen, however, the substantive Parts (2, 3 and 4) are the core of the book and could well have been strengthened had each been given its own Introduction. In this sense, while the ambitious nature of this project is admirable, it tends to be insufficiently reflective on the material which it presents. This may be due to the fact that (to the best of my knowledge) none of the co-editors are specialists in law in Asia.

Part 2, entitled "National Reports", comprises nearly one half of the book and examines consumer protection laws and practices in 13 jurisdictions in Asia, but with a particular emphasis on Chinese experience—not only is Jin Jing's impressive essay on the People's Republic of China one of the longest essays in the section, but there are weighty chapters too on Hong Kong (although a common-law jurisdiction), Taiwan and Macau. The essays explain the general structures for promoting consumer protection and its public enforcement, applicable legislation, the development and structure of consumer protection laws (including those for product liability) and also analyse, among other key matters, information and the right of withdrawal, sale of goods, contractual (especially unfair) terms, product liability, product safety, access to justice, unfair commercial practices, conceptual and practical difficulties in defining the "consumer", food safety, penalties, administrative enforcement, enforcement problems and responses to the development of digital content, e-commerce and unfair commercial practices. Each area's approach to consumer law reflects its historical background and legal traditions, particularly in regions influenced by colonial powers. These contributions are very solid, insightful and commendable. Arguably, they could also benefit

from further exploration of how consumers and businesses perceive and engage with the regulatory framework.

Part 3 offers comparative analysis of key questions across the Asia region, especially those set out by the editors in their guidance to contributors as noted above.[2] This is also an impressive section, drawing on the detailed discussion of various jurisdictions' experiences and reform considered in Part 2, as well as other published research to provide a comprehensive and clear comparative analysis of consumer protection systems, regulatory frameworks and private law mechanisms for consumer redress across Asia. It also places developments in Asia in a broader international context (for example, examining EU influence). It is my personal view that perhaps greater discussion (even if necessarily speculative) of digital economy implications for consumer protection and dispute resolution would have been helpful.

Part 4, entitled "Asian Law in Comparative Perspective", features essays that explore consumer issues analysed in respect of Asia from a broader international and comparative viewpoint. The analysis shows that Asian consumer protection laws are evolving through a combination of international influences (particularly from the EU and United Nations (UN)), regional coordination (through ASEAN) and local adaptations, but significant work remains to be done to ensure effective consumer protection across the region—considerable challenges remain in terms of implementation, enforcement and adaptation to new technologies and business models. The regional approach through ASEAN provides opportunities for improvement but also faces challenges in harmonizing different legal systems and levels of development. This section covers a range of substantive topics, including EU consumer law, the regulation of unfair terms in consumer contracts from an American perspective, consumer protection in Australasia, Africa and Latin America, as well as ASEAN economic integration and consumer protection in Southeast Asia. It also examines the impact of the UN Guidelines on Consumer Protection. Regional integration and consumer protection in Asia face several significant challenges. One of the primary issues is striking an appropriate balance between promoting economic integration through ASEAN while maintaining adequate consumer protection standards across member states. This creates an inherent tension between harmonization efforts

[2] Specifically, an Asia-wide comparative perspective is used in chapters dedicated to analysis of "Information Duties and the Right of Withdrawal", "Sale of Goods", "Regulation of Unfair Terms", "Product Liability", "Adaptation of Asian Consumer Law to the Digital Age", "Commercial Practices", "Access to Justice" and "Consumer Product Liability and Safety Regulation: ASEAN in Asia".

and respect for national sovereignty and local conditions. Furthermore, there is a need to create better consumer protection frameworks to address the rapid growth of digital commerce and emerging technologies, which often transcend traditional regulatory boundaries. Enforcement challenges represent another continuing concern across the region. Many jurisdictions suffer from limited judicial application of consumer rights and remedies, with an over-reliance on administrative authorities rather than courts for dispute resolution. This is compounded by weak consumer advocacy organizations in many countries, which limits the ability of consumers to effectively assert their rights. Additionally, regulators and enforcement agencies often face significant resource constraints, hampering their ability to monitor compliance and enforce consumer protection laws effectively. The varying levels of development across Asian nations present another major challenge. There are significant disparities between developed and developing nations in the region, both in terms of economic capacity and regulatory sophistication. Different legal traditions and approaches to consumer protection further complicate efforts at harmonization. Moreover, substantial gaps in implementation capacity between countries mean that, even when similar laws are adopted, their practical effectiveness can vary considerably. This disparity in development and capacity creates challenges if consistent consumer protection standards are to be established across the region.

In a comprehensive comparative project of this (monumental) scale, focusing on consumer law frameworks and issues across a wide range of jurisdictions, some areas of analysis inevitably received less attention than they might have deserved. As we noted above, while the geographical coverage is extensive, encompassing jurisdictions across Southeast, East and South Asia, certain regions such as Central Asia are under-represented, as the editors expressly acknowledge, largely due to practical challenges in securing contributors from these areas. This is understandable, but it does detract from the value of Parts 3 and 4, where "Asia" is an important unit of comparison. Several other important aspects of the project might have benefited from more detailed examination. The editors, as noted above, took the view that the project would have become too large had it included examination of consumer credit and financial services, despite the importance of these aspects of financial consumer protection. As also pointed out above, although the Introduction recognizes the significant relationship between civil society and consumer welfare movements, this theme is not substantially developed in subsequent chapters.

This pioneering collection represents a landmark contribution to the study of consumer protection law in Asia. Through its "triple approach"

to the issues involved—combining detailed national reports, comparative regional analysis and global perspectives—the book provides an innovative and thorough examination of how consumer protection is evolving across the Asia region. The comprehensive coverage of jurisdictions, analysis of key issues, from product safety to digital commerce, and careful attention to both practical and theoretical dimensions make this an invaluable resource for scholars, policy-makers and practitioners alike. While acknowledging current challenges in enforcement and harmonization, the collected essays demonstrate how consumer law is developing in Asia through a distinctive combination of international influences, regional coordination and local adaptation. As consumer markets continue to evolve rapidly, particularly in the digital sphere, this authoritative work provides crucial insights for understanding current frameworks and shaping future reforms in consumer protection across the region.

About the author

Ling Zhou*'s profile is available on the Institute of Advanced Legal Studies website. Her published works include* Access to Justice for the Chinese Consumer: Handling Consumer Disputes in Contemporary China *(Civil Justice Systems Series, Hart Publishing, 2020).*

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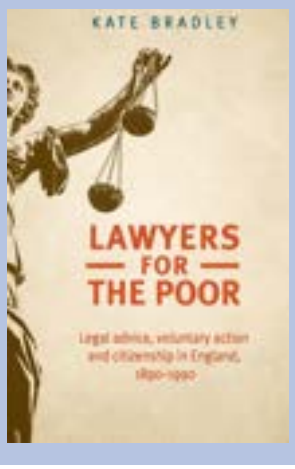
Lawyers for the Poor: Legal Advice, Voluntary Action, and Citizenship in England, 1890-1990 by Kate Bradley

Patricia Ng
Institute of Advanced Legal Studies



Kate Bradley (2019) *Lawyers for the Poor: Legal Advice, Voluntary Action, and Citizenship in England, 1890–1990*, published by Manchester University Press, Manchester ISBN 9781526136053

The access to justice issues experienced by people on a low income with everyday problems that involve the law are longstanding,[1] and Kate Bradley's excellent book offers a very useful investigation of what services were available, if any, for affordable or free legal advice and assistance in the late 19th century and onwards. Her fascinating historical study analyses the changing situation over the course of a century—from 1890 to 1990—a period of expanding legislation "much of which aimed to protect the citizen from the risks of the modern world, from health and safety at work to standards in housing" (page ix). The historical development that Bradley examines includes the various post-World War II developments, which Cappelletti and Garth also characterize as one where "'welfare state' reforms have increasingly sought to arm individuals with new substantive rights in their capacities as consumers, tenants, employees, and even citizens" (Cappelletti & Garth 1978: 8). This was therefore also

[1] "Everyday problems" can include many different kinds of trouble, including relationship breakdown with a partner, experiencing difficulties with a landlord or problems with rented accommodation, which could include disrepairs, struggles with money, products or services, as well as problems with employers or welfare benefits.

a period when addressing "legal poverty"[2] was beginning to be a serious concern for the state.

Increasing "access to justice" for people on low incomes was one reason why, from the 1890s, the Poor Man's Lawyer services were initially established. Bradley's book is a valuable contribution to the access to justice literature and to the discourses of legal history dealing with low-cost or *pro bono* legal advice as provided in England to "the poor". *Pro bono* services were established well before state provision of legal advice and representation, as Bradley's book demonstrates. Another point which Bradley's study emphasizes was the negative impact on people who needed legal advice following the enactment of the Legal Aid and Advice Act 1949. This legislation imposed very strict criteria for income and capital eligibility on those seeking to access such services. Readers who have followed the history of state provision of legal aid in England and Wales will be aware that well over a half-century later, the criteria applied to income and capital continue to be strictly applied, and scope for legal aid was further constrained by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Bradley's study reminds us that in most cases the services of the Poor Man's Lawyer were not entirely free. The availability of free advice was dependent upon two factors: first, the goodwill of solicitors and barristers who had the necessary expertise, and who were willing to "donate" their free time, as well as a willingness "to commit to doing [*pro bono* work] outside of their main, fee-incurring work" (page 59). Crucially, the services of the Poor Man's Lawyer (hereafter "*pro bono* lawyers") were available only in locations where charities could provide suitable "office-space" rather than the availability being driven by local needs. Second, the assistance from charities with suitable office-space that could be made available to the lawyers at the time needed meant that costs were therefore not incurred by the lawyers themselves who, in the main, were volunteering to deliver free legal advice. Bradley's study is based on both primary and secondary sources, which focus on the provision of free or low-cost legal advice and, in some cases, assistance, by the proto-voluntary sector, political parties

[2] Cappelletti and Garth (1978: 7) characterize legal poverty as "the incapacity of many people to make full use of the law and its institutions". The need was to avoid the mirage of "formal" equality and create instead a system that offered "effective" equality. The concept of legal poverty in my view should thus be seen in broad terms so as to include, for example, the circumstances of people whose earnings are just above the legal aid income eligibility rate. Those who are in this position cannot afford to hire a lawyer, pay court fees and, consequently, may not be able to engage effectively with the legal system, even though in formal terms they appear to have sufficient financial resources to use the law.

and their affiliate groups within the legal profession, trade unions and the media and, eventually, the state.

The work traces the progression from the *pro bono* and informal Poor Man's Lawyer initiatives in the late 19th century to the establishment of formal legal aid under government oversight by the 20th century. Bradley meticulously explores the contributions of legal professionals, trade unions and community organizations providing legal advice to those on a low income. She scrutinizes the impact of governmental policies, particularly the Legal Aid and Advice Act 1949 (noted above) and subsequent legislation, highlighting both state-funded activities and initiatives delivered by volunteers. The book also connects access to legal information and advice with broader citizenship issues, demonstrating how the provision of information about rights and legal advice has empowered individuals in vulnerable communities by reinforcing their rights and responsibilities. The book identifies four groups that contributed to greater access to justice in the first half of the 20th century: the proto-voluntary sector, political parties and their affiliate groups within the legal profession, trade unions and the media. Within that context, Bradley presents a critical analysis of the inception of legal aid, emphasizing the importance of accessible services in promoting justice, yet highlighting at the same time the continuing need for volunteers, including the voluntary sector, to deliver legal advice and in promoting social justice.

The Introduction establishes the context of the study by examining the development of voluntary legal advice from 1890 to 1990 and legal aid from inception via the Legal Aid and Advice Act 1949. This chapter highlights the challenges faced by citizens who are on a low income in accessing legal advice and assistance and describes attempts by activists, social workers and *pro bono* lawyers to address these inequalities.

Chapter 1 analyses state involvement, legal aid policies and the ongoing tensions between independent legal services and government control in supporting the rights of vulnerable citizens. Chapter 2 explores the contribution by *pro bono* lawyers from the late 19th century which contributed to the initiatives of services provided by charities for individuals and communities in need. Chapter 3 examines how the Labour Party and Conservative Party offered legal advisory services to connect with voters by addressing their legal problems. This chapter also reviews the broader role of lawyers within the Labour Party and the involvement of radical lawyer groups in advocating for workers as a key concern of the legal profession. Chapter 4 considers the trade unions'

role in shaping legal aid policy and providing legal services to members through subscription. Chapter Five focuses on the contribution by the media: broadcasting—radio programmes focusing on rights and advice as well as TV programmes, such as *That's Life!* and *Watchdog*, concentrating on consumer issues. The media encompassed print, by the provision of advice columns and features in newspapers. Chapter Five additionally explores the trade publishing of popular law guides, and also discusses the use of the then new telephone technologies to support those in need of advice who were unable to attend clinics due to distance, personal safety or other reasons, such as caring responsibilities. Chapter Six, "Advisory Services in the Post-war Welfare State" considers how voluntary legal advice providers continue to survive an unstable funding environment and the impact of changes in municipal, local and central government funding on these precarious institutions. In this chapter of the study, the author also discusses the ongoing challenges in providing accessible legal aid services due to limited resources, ideological differences and funding constraints. Despite the ground-breaking Legal Aid and Advice Act 1949, the funding needed to implement the Act was inadequate, and this meant that the services of the Poor Man's Lawyer continued to be needed. Such services also evolved over time to become the more recognizable legal advice centres of today (page 152). The socio-political position of the legal voluntary sector services was strengthened with the establishment of law centres in the 1970s—the first one being North Kensington Law Centre (page 160). The law centres were political in the sense that they provided legal advice and also campaigned on welfare law and rights (page 171). Finally, in the concluding chapter, Bradley notes that, although there was political will to provide support to citizens "through a system of legal advice and aid", in the end that political will was not strong enough to "radically rethink how a profession of private practitioners could operate in a welfare state" (page 186).

Anyone with an interest in access to justice issues would benefit from reading this book. The book documents the efforts of lawyers over the course of a century from 1890 to 1990 who cared enough to want to provide some kind of free or low-cost legal advice and sometimes advocacy in court. The study provides valuable insights into the collaboration between lawyers who were willing to volunteer in providing free or low-cost legal advice to assist those on a low income with legal problems and the settlement houses where the services were delivered. The book contributes to the access to justice literature through an analysis of the contributions made by the Poor Man's Lawyers, trade unions, political parties and their affiliate groups within the legal profession

and the media—the very areas where scholars have given less attention. Lawyers—law students, scholars, law teachers, campaigners or activists—sociologists and legal historians who are interested in access to justice issues from the perspective of *pro bono* services and state-funded initiatives will benefit from reading this book. This reviewer finds the study particularly inspiring because it seems that there will always be lawyers who want to volunteer or provide low-cost advice and who want to contribute to making a difference to people's lives.

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Legislation, Regulations and Rules

Legal Aid and Advice Act 1949

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Constitutional Change in the Contemporary Socialist World by Ngoc Son Bui

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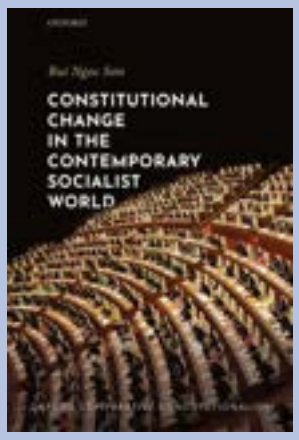

Ngoc Son Bui (2020) *Constitutional Change in the Contemporary Socialist World* published by Oxford University Press, Oxford ISBN 9780198851349

Ngoc Son Bui's book, *Constitutional Change in the Contemporary Socialist World,* sheds light on a neglected yet relevant area for constitutional studies worldwide. Almost 20% of the global demographics, around 34% of the global gross domestic product, *circa* 25% of the worldwide pool of monetary reserves in central banks, a relevant chunk in the total international trade volume and, needless to say, the geopolitical relevance; all of these data support the contention that this constitutional grey area deserves scholarly attention (*China Statistics and Facts* 2024; *Foreign Exchanges Reserves in Selected Countries and Territories across the World from April 2024 to September 2024* 2024). Given this, the book aims to depict the similarities, differences and evolutionary trends in the constitutional identity and framework shared by the five classic Marxist-styled socialist countries (hereinafter, the Five). The basic argument is that the socialist constitutional framework goes beyond a fixed set of principles as the establishment engages in an evolutionary constitutional discourse, pragmatically moving between two polarized positions related to liberal democratic Western values: adoption and resistance. This leads to contextual interpretation to bridge the axiological gap.

Consequently, the author lays down a structural exposition of ideas following a sound two-section system: first, the general conceptual overview concerning the socialist constitutional identity and history;

second, a detailed account of the features characterizing each and all of the Five countries under the classic Marxist-styled socialist constitutional framework: People's Republic of China (PRC) (mainland China), Lao, Vietnam, Democratic People's Republic of Korea (North Korea) and Cuba.

At this point, it is worth noticing that the author refers to these Five countries within the socialist category. Still, those should be categorized within the area of the *umbra*, the accurately limited region of shadow cast by the sun. In my opinion, the author could and should have made clear that there is an area of *penumbra*, neither in the dark side nor under the bright sunlight, which includes the socialist-leaning authoritarian legal systems (ie Venezuela, Nicaragua, Bolivia), to mention just a few of them.[1] A comparison between these two sets of domestic legal systems is worth trying to get an insightful approach on how liberal democracies and the rule of law take a slowly degrading turn without a violent revolutionary uprising.

The methodological proposition in the book leads the author to provide a theoretical account of constitutional identity for all socialist countries and the singularities of each one. This purpose is fulfilled to the full extent. The theoretical approach is the main methodological instrument to forward such purposes, as the empirical and other resources do not add significantly to the aims drawn by the author. According to the traditional constitutional content structure (axiological, dogmatic, organic and dynamic), the author focuses mainly on the dynamic content concerning constitutional change. However, the author pivots to other relevant constitutional issues to make his point. The title itself sparks curiosity given the many trends developing in the small and full sample formed by the Five socialist countries, and the global mainstream of legal knowledge is only giving them marginal attention, if any. The title itself and the table of contents announce the need for an overall systematic structured approach to the legal landscape and dynamics in the so-called socialist world, not only for academia but also for practitioners and law students. That is to say, an insightful approach to this constitutional setting requires both a general theorization and a detailed case-by-case analysis.

The author assigns a *nomen* consistent with the main feature depicting each one of the Five countries and their constitutional framework: the universal model (Vietnam), the integration model (Lao), the reservation

[1] The grey area (or pink, for a better colour selection in a map layout) between the classic Marxist-styled socialism and the classic liberal democratic states is not a narrow one but a very broad ecosystem with different shades, forms and attitudes. All of these borderline states should be categorized as authoritarian, and they are a particularly interesting research subject of their own.

model (Cuba), the exceptional model (PRC) and the personal model (North Korea). Modelling is essential in comparative law as it helps to structure the different legal solutions to similar social challenges. Whether the model outline involves only one element for each category, it is helpful to single out the main feature in every model and which elements best fit for such a category. This is a suitable form for doing research in comparative law. Thus, using models to describe, explain, organize and assess cases and realities in social sciences, in general, and comparative law in particular, is heavy-duty as it requires deep knowledge of every case involved. In addition, many abilities are needed to distinguish differences and similarities, identify the highlighted features and label the categories and parameters for description, distinction, assessment and so on.

For the first part, the author put together a short list of hot topics in socialist constitutional law: parliamentary constitution-making; constitutional ideology (or the ideological instrumentalization of constitutional provisions); the role of the Communist Party (or the role the Communist Party assigns to constitutional provisions); mobilization; regulation of the economy (or the Communist Party regulatory approach to the economy); and legislative constitutional enforcement. This is a very important feature in the book because this pretty much sums up the actual doctrine and theoretical framework in socialist constitutional law. This also puts rigour in the analysis and sets the author apart from the simplistic approach characterized by the mantra that there is no law in socialist countries. The author calls this “comparative constitutional law beyond juris–centrism” (page 8). I would prefer to call it “stepping away from socialist legal fetishism”.

Bui covers additional topics in his book. To abbreviate, let us mention the most controversial and remarkable ones. First, the author argues that the established evolutionary trend in constitutional law from strict theory to comparative studies compels academia to take a deep dive into the so-called “constitutional experience in unusual settings” (pages 2, 5). In this context, the description and analysis of the constitutional framework in the remaining socialist countries is relevant.

Relevant circumstances are twofold: pragmatist and methodological. Pragmatist circumstances refer to these countries’ participation in the global quota of demographics, industrial infrastructure, consumer markets, financial importance and geopolitical significance. Methodological circumstances of relevance concern the inclusion of a pluralistic legal research attitude involving the formalistic setting

and the surrounding relevant data and methods from social, political, economic and cultural backgrounds.

In the second part, the author lays down one of the most interesting topics in the book, referring to the conceptual framework of legal transplants applied to socialist constitutional change: diffusion mechanisms and the different behaviours constitutional framers or reformers may adopt in response to the epistemic transnational influence on the legal domestic landscape from scholars, academic institutions or non-governmental organizations. The author successfully classifies these different behaviours through self–explanatory labels: convergent, resistant, aversive and engaging, similar to the John Nash role-playing dynamics that the socialist political elite has adopted at the moment (pages 31, 62, 244, 277, 298, 336).

Other major contributions to theory are the author's references to the role played by external geopolitical events, regional and international integration, local pressure and the perceptions of seriousness and steadiness of constitutional reform towards liberalization and open markets within the socialist legal principles and identity by the global pool of trade partners and investors.

Further details and analysis are needed regarding the contention of rights as signals to defeat the still-standing simplistic argument that socialist constitutional law should not be taken seriously. The ever-growing participation, dependence and reliance of these socialist economies in the global net of supply chains, markets for products and services, and financial instruments also make them particularly sensitive to liability in international commercial and investment arbitration as well. Needless to say, foreign courts in countries under the rule of law are also in the mix, reading the constitutions, legislation, court reports and cases that come their way through publishing products or online.

It is refreshing to watch how the author focuses on the evolving force of economic globalization and its influence on socialist constitutional change. He puts forward the examples of the World Trade Organization (WTO) and the Association of Southeast Asian Nations as major forces driving constitutional amendments in socialist Asia (Part II, chapter 4, "Vietnam") and the controversial example of Latin American integration in the case of Cuba (Part II, chapter 6, "Cuba"). As per the last item mentioned, I differ from the author's point of view: the most important foreign driving force for constitutional change in Cuba is not Latin American integration (albeit it has actual importance, as recent constitutional trends of mutual feedback in the region testify). The most important foreign driving force

is the need to signal to the European business community that Cuba is a trustworthy partner for trade and investment. Any institutional environment is helpful for this purpose: WTO, the United Nations Commission on International Trade Law, the Paris Club, the European Union (EU) human rights oversight system, courts and the like.[2]

In my view, international and foreign adjudication under the rule of law and due process adds pressure to the Five countries and prevents them from playing the victim of an alleged international capitalistic conspiracy against the proletariat. Debts must be paid, contractual obligations must be performed, goods for sale must be shipped and delivered, and exceptions must be alleged in courts according to the due process requirements. We know this; businesspersons know this; investors know this, and the socialist political elites in the Five countries also know this.

Along the same lines, the author sheds light on the constitutional framework of the Five with a very mature, serious approach, which is particularly useful for legal practitioners worldwide. However, this book is a scholarly product intended for study, analysis and theoretical discussion rather than a handbook for legal practitioners. Although, the latter would not be a bad idea considering the huge market of law firms invested and willing to learn about these grey areas that are currently reduced to a limited number of well-connected legal boutiques. The business dynamics in the global pool of legal firms also play an important role in raising interest in these "unusual" legal systems.

Returning to constitutional law, through the book chapters the author provides an overall organized layout, kind of a map with instructions on how to split the main categories into small pieces or sections to get a better understanding. This is the case, for instance, with the idea behind the function of constitutional change. Having exposed socialist constitutionalism and its drastic differences to liberal constitutions, the author puts forward a description and an explanation of the main roles constitutional amendments and replacement can play (ie the foundation of a new political regime, construction of a path to liberalization, raw abuse of power and progression to open markets). The full list may not be definitive, but the approach is appropriate to get into the specifics of the internal constitutional dynamics in the Five countries.

[2] We should never downplay the importance of constitutional signalling and the particular European business expectations from a Socialist country. It is significant enough to make the entire EU jump into a trade showdown with the United States, as a famous WTO dispute revealed: DS–176 US – section 211 Omnibus Appropriations Act of 1998; all the fuss just for the disputed ownership of a brand of Cuban rhum.

Deep into the guts of the books, the author exposes a widespread conceptual polysemy around the term "new constitutionalism" (page 33). Bui refers to this as a concept stemming from contemporary law and development scholarship. However, in contemporary Hispanic constitutional scholarship, the idea of "new constitutionalism" refers to the new theoretical framework supporting constitutional change in Latin America for the new socialist-leaning wave of governments that has been taking place since the 2000s. This political movement, characterized by the return of the pendulum from the Chicago Boys' neoliberalism to a soft-militant, non-guerrilla, electoral-access-to-power, leftist trend was tagged with the label "XXIst century-Socialism" (Venezuela in 1999, Argentina in 2003, Bolivia in 2006, Ecuador in 2007, and almost the rest of all Latin American countries with some exceptions). All of these countries started their movements for constitutional change with the theoretical assistance of Spanish constitutional advisers from the Universitat de Valencia Law School, who conveniently spread the new label to the Hispanic audience and readers. More studies are required to clarify how this dissonance came about and continues; however, it is likely due to the language barrier in academia, as very few contributions have been published in English by Hispanic constitutional scholars to clarify this issue.

Yet, in another example of insightful analysis, Bui argues that for understandable reasons the theory of "unconstitutional constitutional amendments" has neglected the socialist area, although these governments are driven to incorporate the approach due to raising concerns by the global pool of investors and trade partners (page 48). A more detailed study on the subject is required because formal constitutional change in socialist countries (via amendment or replacement) is jumping out of the frying pan into the fire: the need to effectively signal major change versus the fear of unleashing the hell of an uncontrolled transitional process. Either way, survival instincts may play a part.

Let us also praise the author's efforts to single out the distinctive features of each one of the Five. An example of this is his characterization of constitutional change through the binary choice for the call to a constituent process following the distinction between *pouvoir constitué*, and *pouvoir constituent* (page 47). These valuable efforts also include the rightful assertion that popular participation in socialist constitutional change should be read as controlled participation, as "public engagement in the constitution-making process under the management of the Party–State" (page 51). However, there is always an entropy zone in the landscape of popular participation in the constitution-making process, and it depends on many circumstances, including artists, emigration,

political exile, domestic scholars, the civil society, even public opinion through official channels.

Overall, the author makes a sound contribution to the studies of constitutional experiences in "unusual settings", particularly in socialist countries. His experience, insightful approach, structured exposition and guts to dive into controversy deserve the detailed attention of scholars and practitioners. The reading of this volume was, without doubt, a rewarding experience.

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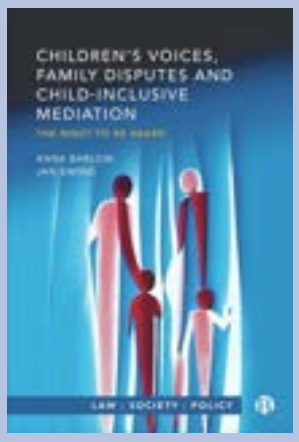
Children's Voices, Family Disputes and Child Inclusive Mediation: The Right to be Heard by Anne Barlow and Jan Ewing

Marian Roberts



Anne Barlow and Jan Ewing (2024) *Children's Voices, Family Disputes and Child Inclusive Mediation: The Right to be Heard* published by Bristol University Press ISBN 978-1529228915

Mediation as a practice intervention and as a theory richly informed by different disciplines (anthropology, law, psychology, social psychology and sociology) has been the subject of much scholarly research over decades. Research on family mediation in the West constitutes perhaps the largest body of empirical research of all mediation fields. Although the first services of family mediation in this country were established with their primary focus on the well-being of children, early research focused largely on settlement rates, cost-effectiveness, process benefits and client satisfaction. While research also covered mediation in relation to children and divorce, there has been a dearth of consumer evaluation of mediation and especially that relating to the views of children who themselves experience participation in the process. Children's views were first canvassed in a qualitative research study in Scotland (Garwood 1989). In the 1990s a Gulbenkian-funded study on the nature and purpose of the role of children in family mediation, carried out by National Family Mediation with researchers, addressed the central policy question: how can children's perspectives best inform a process in which the parents are the ultimate decision-makers? (National Family Mediation 1994) The answer lay in the concept of *consultation* which both resolved the

substantive question: namely, the nature of the mediation-specific role of children (compared to other child-related interventions); it also clarified precise language use, hitherto vague and varied (eg *seeing* children, *involving* children, *working with* children, etc). Consultation can happen indirectly by means of parents themselves consulting their children or by the direct consultation of children by the mediator. Whether children be directly consulted, how and at what stage were matters to be agreed jointly by the mediator, the parents and the child. Because the terminology of *child consultation* is now so routinely deployed, its conceptual origin and significance in this context have been erased—relevant here both for the record and because of the centrality of consultation as a recognized means of participation under Article 12 United Nations Convention of the Rights of the Child 1989 (UNCRC).

Children's Voices, Family Disputes and Child Inclusive Mediation: The Right to be Heard[1] is focused on children who experienced what is called child inclusive mediation (CIM) as the key research participants. The principle aim of this study was to "add a critical dimension to the recent debates about family justice in general … and CIM in particular, by exploring some of these issues from the perspective of children themselves" (page 4). The research objective was "to capture the experiences of CIM from the perspective of different actors, identify the benefits and risks of CIM as well as the barriers and the facilitators to achieving engagement in the CIM process by parents and children" (page 157). The qualitative empirical approach adopted involved a reflexive workshop, focus groups and interviews that included members of the Family Justice Young People's Board (10), relationship experts (10), family mediators (20), parents (12) and children (20, 18 of whom were interviewed) with 12 families represented (an account of the design of the project is set out in appendix 1). The study's findings are set out in chapters 2 to 5. Chapter 6 draws together the conclusions of the study within a children's rights framework.

This book is to be welcomed for its more up-to-date findings based on a similarly sized cohort of child respondents as the 1989 Garwood study. This study corroborates Garwood's findings of the positive value of giving children the opportunity of having their voices heard in mediation in appropriate cases. However, some aspects of the book require further examination. First, the authors' adoption of a neoliberal paradigm to inform both their hypotheses about family mediation and their radical

[1] This book is based on *The Healthy Relationship Transitions (HeaRT)* Research Study, conducted in 2020 and 2021 as a second strand of a wider Wellcome Trust Centre-funded interdisciplinary research project, *Transforming Relationships and Relationship Transitions with and for the Next Generation*.

proposals for changes for the future; second, the lack of definitions of basic terminological concepts such as "child inclusive mediation", "parental autonomy" and "relational family autonomy"; third, the adaptation of the Lundy model of child participation to the family mediation context; and fourth, a limited interpretation of the meaning of "participation" under Article 12 UNCRC.

The authors assert that "*the current norm* [of family mediation] … [is] … allowing parental autonomy to side-step the need to truly listen to children's voices", where children are treated as "passive objects" and where the needs and voices of children are "drowned out in the process" (see pages 21, 128, 102, emphasis added). Given that family mediation services were established with the express intention of focusing on the well-being of children, of taking their views into account, and of mitigating the harmful impact of parental conflict arising from family breakdown and where policies encouraging the consultation of children have been in place since 1994, these generalized negative characterizations become questionable.

A neoliberal paradigm with its free-market economic values and a methodological individualism that rejects notions of reciprocal obligations towards others may well throw light on attempts by the Ministry of Justice to co-opt mediation for diversionary and court cost-saving purposes.[2] Neoliberalism, however, sheds little light on understanding the history of the emergence of out-of-court family mediation in this country. A different intellectual paradigm, understood and experienced by those of us who have been directly involved over decades in the practice and development of family mediation and its regulatory framework, confronts neoliberalism precisely because of its failure to reflect the moral universe that informs the political and ethical origins of family mediation in Britain. These values and principles derive from the tradition of humanist ideas about equality and liberty as well as from the transatlantic *new consciousness* of the 1960s that informed the revival of alternative dispute resolution (ADR) approaches in the West in the late 20th century. That tradition exemplifies the values of respect, dignity, equity of exchange, reciprocity, fairness, voluntary participation and party control. This ethical framework countered the dominant prevailing value system of that time, that of adversarial approaches, impersonality, lawyer domination and rule-centred authoritarian command.

[2] See also analyses of court-sponsored settlement approaches in the context of the civil justice system by Genn & Ors (2007) and Palmer & Roberts (2020).

There is universal consensus on the definition of mediation as an ADR process. Mediation is distinguished from other dispute resolution processes by reference to the location of its decision-making authority. This lies with the participants themselves rather than with any third party such as a judge or arbitrator. In reformulating this defining characteristic of mediation in a neoliberal interpretation of "autonomy", analytic differences are submerged and analytic categories conflated. A neoliberal discourse creates negative polarities of interest so that, as applied to families, "parental autonomy" is posited in opposition to the rights of children where, as this study claims, "purely bilateral separated parent decision-making … ignores the wishes, feelings and growing agency of their children" (page 9). The assumption underlying "parental autonomy", of a united common parental interest, does not accurately reflect the actuality of the family mediation process—the complex, difficult negotiation of contentious issues, complicated by interpersonal conflict, powerful emotion, broken communication, disparities of power and vulnerability (practical, personal, financial and legal) and the impact of third-party influences (new partners, stepchildren, grandparents, etc). Is the achievement of that hard-won consensual parental agreement, an outcome that is the primary purpose of the process, what the authors frame as "parental autonomy"?

The institutional location of family mediation has long been contested in this country. Some appear to have difficulty in conceiving of family mediation as constituting an autonomous form of professional intervention with its own carefully circumscribed boundaries, a form of intervention that is not dominated by the dyad of "justice" and "welfare" that characterizes the formal family justice system. It is certainly not clear on what basis mediation can be classified by the authors as an "administrative process" (page 136).

"Child inclusive mediation" is a term imported from Australia where CIM there refers to a wide-ranging and sophisticated practice involving a variety of support services for parents and children going through separation and divorce and that include group work, family therapy, counselling and the option of direct consultation. Findings of research focusing on the Australian experience highlight the vital resource, expertise, qualifications, training and infrastructure implications of this model which involves an extra six to eight hours of worker time per case (McIntosh 2000; McIntosh & Ors 2008). In comparison, what is termed "CIM" in this country usually involves only a comparatively brief intervention, a maximum of one hour of direct consultation with the child by the mediator with prior parental preparation and subsequent

feedback. Therefore questions arise about the applicability of research findings, based on the Australian model of CIM, to what is also termed CIM in this country.

In one Australian study quoted on the outcomes of CIM, a comparison of two groups of children, one where children were consulted directly and the other comparison group where children were not consulted directly, the parents of children in both groups reported positive benefits from the mediation process (Bell & Ors 2013). CIM did not prove to be more beneficial in terms of improving the parental relationship or the likelihood of resolving the dispute. The best predictor of resolution overall was the level of conflict, acrimony and co-operation. The children's experience of direct consultation was found to be generally positive, though it could lead to disappointment when raised expectations were not fulfilled. The other Australian research study referenced (Brown & Campbell 2013) reveals two important findings which are worth highlighting: first, respondents were confused about which interventions they had experienced (including counselling and CIM) and were unable to attribute benefit to any particular intervention. Second, while all parents interviewed had agreed with the principle that children should be included in discussions about their future, they did not want their own children to be involved at all. Given the significance of this finding, it is surprising that no explanation for this extraordinary discrepancy was recorded by Brown and Campbell. Their recommendation was for the replacement of the parental consent requirement with the imposition of direct child participation as "normal practice", an approach supported by Barlow and Ewing.

The adoption of the four-staged Lundy model of child participation (it includes space, voice, audience and influence), with which the authors approach their rights-compliant approach to child participation under Article 12 UNCRC, was devised in the context of an educational institution for assessing "pupil voice" (see Lundy 2007). Its application to a quite different institutional context—the informal, confidential and private dispute resolution process of family mediation—becomes problematic, particularly in fulfilling the "influence" component of the Lundy model. The systemic structures and mechanisms for the participation of children within the public arena of educational, civil and political decision-making (procedural requirements for information, advice, follow-up and evaluation, appeals, complaints, remedies and redress) would not all be either applicable or appropriate in family mediation. In addition, how the Lundy model's central premise—the indivisibility of Article 12 with other

rights under the UNCRC (in particular Articles 2, 3 and 6)—would apply in family mediation is not examined in this book.

Article 12 provides the main foundational principle for the dominance of the rights approach by which the authors assess CIM. In accordance with the Lundy model, Article 12 needs to be understood both as a fundamental right and also as a general principle that must be taken into account in the realization of all other rights. The Resource Guide on the UN Committee on the Rights of the Child General Comment No 12 makes clear that there is no one construction of the meaning of participation of children and young persons in decision-making under Article 12 (Lansdown 2011). Participation can take several forms and be constructed at different levels:

- ◊ *consultative participation* (direct and indirect) where parents seek the views and perspectives of children in order to better inform adult decision-making; respecting the rights of the child in the family requires the creation of a "participatory environment" that supports and encourages parents to listen to their children when making decisions that affect them;
- ◊ *collaborative participation* where decision-making is shared between the adults and the children and where children influence both the process and outcomes of any given activity; and
- ◊ *child-led participation* where children initiate and advocate for themselves; the adult role is to act as facilitator providing resources, etc.

Barlow and Ewing introduce their preferred approach to the participation of children in mediation with the concept of "relational family autonomy": that is "collective decision-making" (page 131). This amounts to a neoliberal reformulation of *collaborative participation* where decision-making is shared between adults and children (see above). It is questionable why such a change is called for when the prevailing policy and professional practice guidelines under the Family Mediation Council (FMC) Code of Practice endorsing *consultative participation* in family mediation is already compliant with meeting international obligations under Article 12 (FMC 2024: paragraph 6.6). This Code of Practice affirms the importance of the consent requirements for all involved as well as respecting the professional discretion of the mediator in conducting the delicate and complex task of assessing the appropriateness of the direct consultation of the particular child in the particular case, with respect to the participants, the nature of the dispute and in all the circumstances.

What is perhaps remarkable is that so brief an intervention as child consultation and in so modest a process as family mediation can yield the benefits for children revealed in this and earlier research. Children do, however, need a much wider range of support services to meet their needs for well-being and resilience when families separate and divorce. The expectation placed on family mediation to meet those needs can be inappropriate.

There is no simplistic ideological prescription for better outcomes for children whose parents separate. Children need to be heard by their parents not only when they are in dispute. A balance has to be struck between respect for the privacy of a family's own decision-making environment and the need for protection of its members; between the rights and the obligations of the relevant Articles of the UNCRC; and between affirming parental authority for decision-making in mediation with acknowledgment of the rights of children to have their voices heard and respected. Clearly, more research is needed to identify approaches that best achieve the likelihood of improved outcomes for children in terms of their protection, welfare and autonomy.

The research in this book valuably updates understandings of children's direct experience of family mediation in this country and of where improvements can and should be made. However, the authors' "re-envisioned" CIM process, with their recommendations for fundamental changes to language use, policy and practice as well as to the law, goes much further than is evidenced by their research (page 136). If theory and research are to contribute to recent debates about the family justice system and also to be recognized to have significance for practitioners' understandings about their work, so too must relevance be accorded to the historical context of family mediation as well as to practitioners' considerable experiential knowledge. This currently informs collegiate consensus on the nature, purpose and the practice of family mediation in relation to children.

About the author

Marian Roberts *qualified as a social worker and as a barrister and has over 40 years' continuous practice experience as a family mediator focusing on high-conflict disputes over children. During the 1990s she was responsible for overseeing the creation and development of National Family Mediation's national training and professional practice framework. She is a former Governor and Chair of the Professional Standards Committee and is now a Fellow of the College of Mediators. She is an accredited mediator, trained in CIM, and professional practice consultant with the FMC.*

As a former Visiting Fellow and Guest Teacher at the London School of Economics and Political Science (LSE), she taught mediation modules on the London University Masters in Law (LLM) ADR course (since 1989), and on the LSE ADR LLM. She was Professorial Research Associate in the Department of Law at the School of Oriental and African Studies, teaching on its ADR LLM until 2015. Marian Roberts has published several books and many articles on the subject of mediation.

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Legislation, Regulations and Rules

United Nations Convention on the Rights of the Child 1989

The Constitutional System of the Hong Kong SAR: A Contextual Analysis by Albert Hung-yee Chen and Po Jen Yap

Michael Palmer
SOAS & IALS; HKU & CUHK

Albert Hung-yee Chen and Po Jen Yap (2023) *The Constitutional System of the Hong Kong SAR: A Contextual Analysis* published by Hart, Oxford ISBN 9781509956296[1]

This book provides a comprehensive and thoughtful analysis of Hong Kong's constitutional development, offering valuable insight into its governance, political challenges and the delicate balance between autonomy and central authority after colonial rule ended, and China resumed sovereignty, in 1997. In particular, the study considers the manner in which the constitutional framework of the Hong Kong Special Administrative Region (HKSAR) operates under the "one country, two systems" (OCTS) principle, a foundational dimension of the HKSAR's distinctive constitutional system. It seeks to explain the challenges facing that framework, and the implications of Hong Kong's constitutional system for the rule of law, separation of powers, constitutional review and more generally local political life, and how the framework is fraught with tensions, particularly between Hong Kong's aspirations for liberal democracy and the central Chinese Government's authoritarian culture and system of governance. The authors examine the evolving constitutional relationship

[1] The intriguing book cover by artist Putachad is intended as a pictorial expression of Hong Kong's "One Country, Two Systems" structure. Two red pyramids reflect this duality, featuring elements such as China's national symbols, Hong Kong's iconic skyscrapers and Hong Kong's colonial past.

between the mainland and Hong Kong, the concept of autonomy and its importance in the HKSAR's Basic Law, and the judiciary's difficult role in maintaining a delicate balance between autonomy and central authority while also safeguarding rights.

The book is organized into eight chapters, each exploring key aspects of Hong Kong's constitutional framework and its evolution. After a brief scene-setting Preface, chapter 1 offers a concise overview of Hong Kong's constitutional history, especially the transition from colonial governance to the HKSAR under Chinese sovereignty, through to 2022, which commemorated 25 years of Hong Kong's status as a Special Administrative Region (SAR) of the People's Republic of China (PRC). It thus considers Hong Kong's colonial past, the Sino-British Joint Declaration, and the Basic Law drafting. This chapter lays the groundwork for the discussions in subsequent chapters, which examine various dimensions of Hong Kong's constitutional system and its complex relationship with the central authorities in Beijing. Thus, chapter 2 examines the nature of the Hong Kong SAR as an autonomous region within the PRC. It focuses on the division of powers between the central authorities and the Hong Kong SAR Government and examines key events, including the enactment of the National Security Law in 2020—one of the most significant interventions by Beijing since the Basic Law came into effect in 1997—and their implications for autonomy. The passage of the National Security Law in 2020 and the 2021 electoral reforms in Hong Kong, initiated unilaterally by China's central authorities, significantly altered the constitutional order established by the Basic Law. Originally, the Basic Law intended for Hong Kong to legislate its own national security laws. These changes, which have been framed as necessary responses to national security concerns raised during the 2019 protests, have led to a notable transformation in Hong Kong's governance within the OCTS framework. Chapter 3 shifts focus to Hong Kong's internal political structure, pointing out that the political institutions established by the Basic Law were largely modelled on the pre-existing colonial system, and analysing the office of the Chief Executive, the executive branch and the legislature. It examines the executive-led government structure, and polarizing political forces within Hong Kong. Hong Kong has never been governed by democratically elected politicians. The political system of the HKSAR primarily consists of bureaucrats leading the executive branch, aiming to cooperate with a legislature made up of elected representatives. But since 1997, the legislature's capacity to initiate and implement public policies, as well as its effectiveness in overseeing and evaluating the administration, have been diminished. This examination transitions into chapter 4, which further

explores Hong Kong's political system. It covers the electoral framework, electoral reforms, the dynamics of political polarization, and the ongoing tensions between the "pro-democracy" and "pro-China" factions. More specifically, this chapter examines constitutional reforms and political crises over the last 25 years, including the anti-extradition Bill protests in 2019 and Beijing's sweeping overhaul of Hong Kong's electoral system in 2021. As the authors emphasize, a distinctive aspect of the OCTS policy for the HKSAR lies in the presence of an authoritarian party-state, led by the Chinese Communist Party (CCP) at the national level. However, the CCP does not directly or publicly participate in the electoral system or public affairs within the HKSAR. Instead, applying the principle of "patriots ruling Hong Kong (爱国者治港, *aiguozhe zhi gang*)", the Chinese central authorities, through their Liaison Office in the HKSAR, coordinate with and support pro-China political forces. This ensures they secure a majority in both the Legislative Council (LegCo) and Hong Kong's Election Committee (EC) (page 100).

Chapter 5 turns to the judiciary's role within the HKSAR. It provides an overview of the judicial structure and addresses significant issues concerning constitutional jurisdiction and the judiciary's relationship with Beijing's central authorities. The chapter also evaluates the interplay between the judiciary and other branches of Hong Kong's government, particularly through the lens of the "separation of powers" principle and Beijing's narrative of an "executive-led government". The judiciary's critical role in constitutional interpretation, protection of rights and maintaining judicial independence amidst pressures from Beijing are analysed. The authors conclude that the judiciary in Hong Kong to a significant degree engages in a form of constitutional dialogue with the other branches of government, collaborating on the interpretation of rights. This governance model embraces the concept of "judicial penultimacy", where courts actively participate in an ongoing exchange not only with political institutions but also society at large. Through this dynamic process, constitutional meanings evolve through conversation rather than being unilaterally defined or finalized (pages 141-142).

Chapter 6, the longest chapter in the book, explores the protection of constitutional rights in Hong Kong, emphasizing the safeguarding of fundamental rights and civil liberties as a cornerstone of constitutional governance. It discusses the protection of civil liberties and fundamental rights under the Basic Law and the challenges posed by political and legal changes. The chapter highlights the distinctive features of Hong Kong's rights protection system and examines its application during the tenures of successive Chief Justices. The authors point to the difficult

position of Hong Kong's Court of Final Appeal (CFA)—if it chooses to be oblivious to the political repercussions of its decisions, Interpretations by the mainland's National People's Congress Standing Committee are likely to become a routine mechanism for censuring the Court and curtailing its authority. As the branch of government most inherently aligned with protecting the autonomy of the HKSAR, the CFA can only effectively uphold the legal traditions it has inherited by adapting to the new political framework within which it now operates (page 186).

Chapter 7 focuses on the enforcement of constitutional rights through legal remedies. The chapter emphasizes the necessity of effective judicial mechanisms to uphold rights, arguing that declarations of rights are meaningless without the ability to grant practical and enforceable remedies. It reviews the mechanisms for enforcing constitutional rights in the HKSAR. It also highlights the innovative approaches, within constraints, adopted by Hong Kong's judiciary in this area. The authors take the view that, while active exercise of remedial discretion may present constitutional challenges for some legal scholars, if governance is framed as a "field of partnership" between the judiciary and the legislature, the innovative remedial strategies employed by the HKSAR courts—blending governance and adjudication—have the potential to enhance democratic deliberation and elevate governmental performance.

Finally, Chapter 8 offers concluding reflections on the constitutional experiment of OCTS as practised in the HKSAR. It also reflects on the global implications of Hong Kong's constitutional struggles for federalism, autonomy and democracy. Overall, this book provides a thorough and nuanced exploration of Hong Kong's constitutional framework, examining its historical evolution, political dynamics and legal structures. It situates Hong Kong's system within broader global discussions on devolution, federalism and the expanding influence of courts in political affairs. The analysis gains particular relevance through its examination of urgent contemporary issues, including an in-depth look at the National Security Law and recent electoral reforms, balancing academic rigour with sensitivity to these critical topics. A central concern is the judiciary's evolving role in safeguarding rights, documenting how courts have striven to protect individual liberties amid increasing institutional constraints. By highlighting the judiciary's efforts to navigate the delicate balance between rights protection and external pressures, the book offers valuable insights into the practical functioning of Hong Kong's constitutional system during a transformative period.

While presenting a thorough legal examination of Hong Kong's constitutional framework, and of course focusing on legal aspects of the issues involved, the book arguably would have benefited from a more contextualized exploration of the social and cultural forces that have shaped constitutional evolution. The analysis of movements such as Occupy Central and the anti-extradition protests could perhaps have been enriched by examining the underlying cultural and societal factors that drive public sentiment, particularly generational divisions, collective identity formation and local attitudes towards governance and autonomy. The book's treatment of Hong Kong's distinctive position as a post-colonial region, navigating between Chinese sovereignty and local autonomy, might be enhanced by exploring the manner in which cultural identity and historical narratives influence legal and political developments. Although the book effectively covers judicial and constitutional processes, it could further explore the manner in which societal values and cultural interpretations affect both the application and public perception of law, including constitutional norms, in Hong Kong.

This book is a valuable resource for scholars and practitioners interested in constitutional law, autonomy arrangements and the interplay between democracy and authoritarian governance. It provides a rigorous overview of the HKSAR's constitutional framework and the challenges of balancing autonomy with central oversight under the OCTS model through to 2020. This study represents a meaningful and significant contribution to the field of comparative constitutional studies, both in its achievements and its future potential. The Hong Kong case as explicated in this book by Professors Chen and Yap offers several rich avenues for comparative legal analysis. Its findings, for example, will likely have relevance for autonomous regions like Quebec or Catalonia, particularly regarding their handling of cultural and constitutional intersections. The HKSAR's ideas of liberal democracy and traditions of the common law and the PRC's authoritarian political–legal culture and adherence to the civil law tradition together inform its distinctive constitutional framework,[2] creating a complex arrangement that can be analysed in terms of various issues in comparative legal studies including, legal pluralism, mixed jurisdictions and legal transplants and hybridization,

[2] In their Preface, the authors point out that OCTS was initially envisioned by Chinese authorities as a constitutional framework that would enable the coexistence of "socialism" in mainland China and "capitalism" in Hong Kong. However, the political instability and periodic crises that have unfolded in Hong Kong since the 1997 handover cannot be attributed to an inherent conflict between these economic systems. Instead, they stem from the tension between China's authoritarian governance culture and practice and the widespread aspirations for liberal democracy among the majority of Hong Kong's population. The authors further point out that at the time of writing (February 2023) "the project of OCTS is facing more challenges than ever before" (page ix).

transitional justice and constitutional transformation (especially post-colonial constitutional transitions and how established legal institutions adapt when sovereignty shifts), constitutional design, interpretation of constitutional documents, comparative rights protection, especially by the courts (and including judicial review), and the intersection of international and constitutional law.

The very impressive study by Chen and Yap makes a significant contribution to our understanding of Hong Kong's distinctive constitutional arrangement and its broader implications for comparative constitutional law. While this reviewer suggests that the analysis might have benefited from deeper exploration of sociocultural dynamics, the book succeeds admirably in its core mission of explicating Hong Kong's complex constitutional framework under OCTS. Through its careful examination of the interplay between common law traditions and the PRC's political–legal culture, judicial independence and central authority, and autonomy and sovereignty, the work offers valuable insights not only for scholars of Hong Kong law but also for those studying comparative law more generally. The authors' thorough treatment of recent developments makes this an especially timely and valuable contribution to the field. These changes include the National Security Law introduced in June 2020, establishing new criminal offences including secession, subversion, terrorism and collusion with foreign forces, while creating special enforcement and prosecution mechanisms (that operate alongside Hong Kong's existing legal system). The authors have also analysed the major electoral reforms in 2021 that restructured the Legislative Council and introduced a new vetting system for candidates, substantially changing Hong Kong's electoral framework. The principle of "patriots administering Hong Kong" has become a central feature of governance, affecting political participation and representation. The courts have faced new challenges in balancing traditional common law principles with national security considerations, while the autonomy guaranteed under OCTS has in reality been redefined.

About the author

Professor Michael Palmer *was seconded from the Department of Law at SOAS (University of London) to serve in the Hong Kong Attorney-General's Chambers in the early nineties, a time of uncertainty and heightened tension on the mainland, advising mainly on cross-border and resumption of sovereignty issues as between Hong Kong and the mainland PRC. He has held teaching appointments at both leading universities in Hong Kong, and is currently Cheng Yu Tung Visiting Professor in the Faculty of Law in the University of Hong Kong and Senior Research Fellow in the China*

Law Programme, HKIAPS, Chinese University of Hong Kong. In 1999 he advised the UN High Commissioner for Human Rights on the legal reforms necessary for China's ratification of the International Covenant on Civil and Political Rights. Between 2012 and 2018 he was a serving member of the Social Sciences and Humanities Panel of the Hong Kong Research Grants Council. He was also (very likely) the first "western" Dean since 1949 of a mainland PRC Law School (Shantou University, 2011-2016). See also his current profile page.

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Legislation, Regulations and Rules

Basic Law 1997

National Security Law 2020

***In Memoriam*: pages 459-465**

Tony Whatling (1939–2024)

Mohamed M Keshavjee

Tony Whatling's death in November 2024 in Ely, Cambridge, of Kennedy's disease, a rare neuromuscular disorder, has left a major void in the field of family mediation in England where he was recognized as one of the leading trainers and practitioners as well as a pioneer in this field.

A protégé of John Haynes, the well-known North America-based trainer and practitioner, Tony, while embracing Haynes' theories, disagreed with him on the extent to which the past in a conflict needs to be addressed in order to bring about an effective closure. Tony's varied background in social work and its associated disciplines predisposed him to play this critique not only in the United Kingdom (UK), where he practised and trained mediators for over 35 years, but also in the many countries where he trained mediators from 2000–2012.

Born in Glasgow, Scotland, in 1939 and brought up in Suffolk where he spent his early childhood years attending a local school, Tony, the son of a builder father and a homemaker mother, attained his first job as a printer's assistant, after which he joined the Royal Air Force as a nurse

Tony Whatling in traditional dress in Salamieh, Syria, with trainee mediators. Photograph by Ray Virani.

CAB chairs and members from across India in Mumbai with trainers from Portugal, the UK and USA. Photograph by Ray Virani.

for nine years with a stint in Fontainebleau, France. On his return to England he was posted to Wiltshire as an Evacuation Clerk attending to injured returning airmen who needed to be allocated to suitable hospitals for treatment and rehabilitation therapy. It was there that he became interested in social care.

Building on his years of experience in this field, Tony engaged with child care, adult mental health, family therapy, psychotherapy and area team management, pursuing an MSc in the Sociology of Mental Health and working his way up to becoming the head of Social Work Education at the Anglia Ruskin University in Cambridge, a position he held for 10 years. During all this time, Tony worked as a mediator, consultant and trainer and went on to write three books—all practical, skills-imparting texts. These are: *Mediation Skills and Strategies—A Practical Guide*; *Mediation and Dispute Resolution—Contemporary Issues and Developments*; and *Dealing with Disputes and Conflicts—a Self Help Tool-Kit for Resolving Arguments in Everyday Life*.

In a discipline where some 45 years ago very little or nothing was known of mediation as a discrete tool of dispute resolution, Tony's contribution was seminal. Being aware of what the other professions entailed, Tony knew what mediation was not. It was not mentoring, it was not therapy, it was not counselling and, by reminding would-be mediators of what it was not, he was able to contribute to the definition of mediation's basic contours and its uncompromisable principles, which he saw as malleable and not immutable in the face of making mediation culturally adaptable. Tony also understood culture in its broadest sense and acknowledged its various dimensions such as rural versus urban, social economic, class, gender and so on.

Being so deeply involved in defining the shape of family mediation in England—and here it must be remembered that he was not alone

but was part of a pioneering group of people such as Lisa Parkinson, Henry Brown, Marian Roberts, Sonia Shah-Kazemi and others who were affiliated with various family mediation organizations in England—Tony distinguished himself as a trainer who was concerned about cultural sensibility and, more particularly, the appropriateness or otherwise of a model for training conceived in a predominantly Western, individualistic and atomized context. As time went by, Tony interrogated this model and, realizing that it was not even sufficient for a Western context, contributed to its adaptation through his practice and his training. It is in this area of reflection that Tony's contribution to the Ismaili Muslim community's pioneering effort in refurbishing a traditional system with modern principles of mediation provided him with a crucible to test his hypothesis.

In the summer of 2000, the Aga Khan—Imam (spiritual leader) of the global Shia Ismaili Muslim community—decided to establish a new mediation training programme that would combine the Islamic principle of negotiated settlement (which the Ismaili community had been practising for centuries) with the principles of modern mediation, which were then being refined in the Western world. The Aga Khan was explicit about the need to combine traditional systems with modern principles but always keeping in mind the ethical values that Islam enjoins such as compassion, care for the marginalized in society and the resolution of an issue in which there was neither a victor nor a vanquished. Some 14 years earlier the Aga Khan had promulgated a new global constitution

The East African National CAB members (from Kenya, Uganda and Tanzania) at a training session in Kampala, Uganda. Photograph by Ray Virani.

Tony Whatling receiving feedback from CAB trainees and Julgado de Paz at the Ismaili Centre, Lisbon. Photograph by Ray Virani.

that provided for special boards, entitled Conciliation and Arbitration Boards (CABs), which were staffed by well-qualified individuals, both men and women. These individuals were highly motivated volunteers and, while the system was working, it was the Aga Khan's wish that it should be informed by modern principles of dispute management which had emerged in the United States (US) following the Pound Conference in 1976 and were now being refined and applied in the UK. The task of co-ordinating this whole process devolved on me as I was just finishing my LLM at the School of Oriental and African Studies, University of London. The Aga Khan's Secretariat negotiated with two of Britain's leading institutions in this field: National Family Mediation (NFM) and the Centre for Effective Dispute Resolution (CEDR). It is here that Tony, designated by NFM to lead the family mediation part of the programme, established his credentials as being eminently suitable and well placed to deliver what the Aga Khan had envisioned. Admittedly, there was no model suited to the needs of a global Muslim community settled in over 25 countries of the world with a range of different legal systems operating within them. What we had was an "etic" (top-down) model and what was needed was an "emic" (bottom-up) one, but we could not wait till a new curriculum was developed. What we found to be practical was to adapt the existing curriculum which was available with each new

rollout. In colloquial terms, we were cutting a pathway while walking through the forest.

This task was further complicated by the fact that Tony as a trainer did not speak the languages of many of the Ismaili communities worldwide, and mediation as a discrete dispute resolution tool was not known in most of those languages. Tony's teaching materials had to be suitably adapted and translated into a number of Eastern languages for teaching purposes. Here, Tony's input and cultural understanding proved to be very valuable.

Fortunately, Tony understood change dynamics and the necessity of engendering change in a steady state. Also, the Ismaili community globally was most supportive, realizing that their Imam wished this for their well-being. Our internal team included two highly qualified volunteers—Rukhsana Abdulla, a child psychologist who worked in the CAB system in the UK with many years of practical dispute resolution hands-on experience, and Ray Virani, originally from Pakistan and based in Atlanta, who had years of experience with the community in the US.

The success of the programme was underwritten by two important factors which, looking back now, were critical. One was the Aga Khan's commitment to financing the whole training programme, but this was not unconditional. Each year I had to make a case for budgetary approval and, in characteristic fashion, the Aga Khan would raise critical questions such as in what period of time could we ensure full coverage of the demography, how did we cater for rural populations, how soon after appointment did CAB members get trained, what about training others, and so on. More importantly he would ask about case management and also how we evaluated success. How did we ensure that neither of the spouses or indeed the children in a dispute would become destitute? Something he referred to as "bandaging the wounds". He also wanted the institutions of the community to work synergistically through an effective feedback mechanism so that a good support structure could be in place to help disputants to recuperate after the dispute was formally settled.

In effect, the programme was adequately funded and the Aga Khan took a particular interest in its success. His feedback each year was communicated to Tony as part of the post-budget advisory, and here we worked very closely as a team. While Tony was the lead trainer, we also had the commercial mediation side to cover, and there we had two leading trainers globally, Lawrence Kershen QC of England and Rupert Watson of Kenya. In each programme Tony worked very closely with the commercial mediation trainers.

Tony Whatling in conversation with the Aga Khan for whose vision on mediation he had the greatest respect. Mohamed Keshavjee looks on: Lisbon 2008. Photograph AKDN.

Here, I need to highlight Tony's seminal contribution to the CAB programme. Tony was adept at listening. He listened not only with his eyes but also with his heart. He was able to pick up what was not said. He was emotionally very intelligent. He was good at conceptualizing role plays as he understood the value of appropriate pedagogy. He understood how to make learning an enjoyable activity. On this we presented a joint paper at the 5th International Conference of the World Mediation Forum in Crans-Montana, Switzerland, on 8 September 2005, entitled "Reflective Learnings from the Training Programmes of the Ismaili Muslim Conciliation and Arbitration Boards Globally".

The programme spawned two excellent training films where four CAB members produced a professional video in which Tony describes tools from the mediator's toolbox and explains how each tool can be used. These videos were dubbed in various languages such as Arabic, Urdu, Gujarati, Farsi and Portuguese.

In almost every country we visited we had an outreach component whereby we included participants from sister communities and trained them in the rudiments of mediation. This had a salutary effect in that other communities began to embrace mediation. In some cases, like

Syria, we included senior members of the judiciary. In Portugal our programme trained some 15 *Julgados da Paz* (Justices who staff local dispute resolution centres), and in Canada, at the request of the Canadian Foreign Ministry, the CAB programme trained three people, including a family court judge, on mediation principles for their work under the 1980 Hague Convention on International Interspousal Child Abduction.

During the Aga Khan's Golden Jubilee in 2007, Tony had the opportunity to personally meet the Aga Khan in Lisbon where he acknowledged his gratitude to Tony for his valuable contribution. Tony laid the foundation of the CAB training programme and as a lasting testimony to his memory this programme has now been running for the past 25 years and is fully self-sustaining with its own capability to train others. Tony always quoted the American philosopher and social critic, Eric Hoffer (who died in 1983): "In times of change, learners inherit the earth, while the learned find themselves beautifully equipped to deal with a world that no longer exists."

Till the end of his life Tony refused to stop learning and, in true form, taught others while he learned from them. He loved mediation and for him it was not only a skill, he actually perfected it into an art. Tony leaves behind him his widow, Carolyn (married 62 years), two sons, Steven and Stuart, and a grandson, Tony 2. True to his character he donated his body for medical research.

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Visual Law: pages 466-495

The Discontents of the Pan European Game Information (PEGI): A Visual Law Analysis

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Abstract

This article explores the practical application of visual law and legal design in the context of consumer protection and video games, and it examines the Pan European Game Information System (PEGI) and its limitations in the classification of video games. While PEGI effectively translates regulatory concerns into an accessible and standardized visual format, its content-based approach oversimplifies the complexity of the video game medium while also overlooking how the human–machine interaction takes place. With this in mind, this article proposes a shift towards a PEGI-grounded classification system that focuses on "gameplay bricks": the rules and mechanics that shape the game environment. By integrating principles and insight from visual law and legal design, this model aims to enhance clarity, accessibility and understanding of the legal message behind an icon or indicator. In this context, legal design ensures that the rule/mechanic structure is translated into visual indicators and icons that have the capacity to empower consumers to make informed decisions. This approach thus aligns with the policy objectives that constituted the cornerstones of the very existence of PEGI.

Keywords: video games; PEGI; video games rules; indicators; rating gameplay.

[A] INTRODUCTION

Over recent decades, video games have evolved from a niche media activity into a dominant cultural and economic force, reshaping the concept of interactive entertainment. Such growth has introduced complex dynamics, as video games not only entertain but also immerse players in interactive environments that challenge traditional media. Subsequently, video games have raised critical questions about their regulation, particularly concerning the exposure of children and young people to potentially harmful content, including violence, gambling and other explicit themes.

In Europe, the Pan-European Game Information (PEGI) system emerged as a response, providing age ratings and content descriptors designed to address regulatory challenges and guide consumer decisions (PEGI nd).

While PEGI has succeeded in translating regulatory concerns into accessible visual formats, its reliance on content-based classification oversimplifies the dynamic and interactive nature of video games. This article thus argues for a (VL) and legal design (LD) analysis that might trigger a rule-based classification system that accounts for the mechanics and rules governing gameplay, referred to here as "gameplay bricks". This analysis is structured into three sections: the first analyses the current PEGI framework, the second applies VL and LD to its visual elements while the third proposes a game rule-based classification model empowered by VL and LD insights. The analysis is supported by figures, including PEGI age indicators (Figure 1), content descriptors (Figure 2), a diagram illustrating the architecture of gameplay bricks (Figure 3), and newly proposed indicators for "Game" and "Play" bricks (Figure 4).

[B] VIDEO GAMES, CONTENT CLASSIFICATION AND AGE RATING

During recent decades, video games have transformed from a niche media entertainment activity into a global cultural and economic powerhouse worth more than video films and music combined (BBC News 2019). As a pure media practice, advancements in digital technology have enabled video games to offer increasingly immersive and interactive experiences, attracting a diversified audience ranging from children to adults. Furthermore, as cultural artifacts (Greenfield 1994), video games' narratives, mechanics and interactivity were—and still are—crucial in offering new forms of engagements characterized by social, economic, cultural and ethical significance (Muriel & Crawford 2018). However, such cultural significance has also brought some challenges, particularly concerning the interaction and related exposure of children and young people to controversial content such as violence, sex themes (Dill-Shackleford & Ors 2005) and other sensitive material. Subsequently, the alleged harm that previous content could have caused to minors (Przybylski 2019) has triggered the attention of governments and political institutions; officially declaring the entrance of video games into the

Figure 1: The PEGI Age Labels.

Figure 2: The PEGI Content Descriptors

media regulation agenda (Dogruel & Joeckel 2013). Indeed, in the early 1990s, probably prompted by the release of controversial games such as *Mortal Kombat* (Midway Games, 1992) and *Doom* (id Software, 1993), the US Congressional hearings initiated by Joseph Lieberman pressured the gaming industry to self-regulate (Crossley 2014), with the subsequent establishment of the Entertainment Software Rating Board (ESRB), a self-regulatory organization assigning age and content ratings for consumers in Canada, the United States and Mexico (Funk & Ors 1999).

In Europe, similar concerns led to the establishment of the PEGI system. PEGI is a voluntary, self-regulatory system that was introduced following consultation with industry stakeholders and civil society to unify information about and classification of video games within a standardized European framework (European Commission 2008). PEGI fulfils its mission through age rating, which provides guidance for consumers to help them to purchase the most appropriate video games for children and young people (PEGI nd). With such purpose, as of 2022,

PEGI operates with eight content descriptors (violence, bad language, fear/horror, gambling, sex, drugs, discrimination, in-game purchase/paid random items) resulting in up to five age ratings (3, 7, 12, 16 and 18) (Ezat Azam 2023).

PEGI ensures age classification for video games across both physical and digital distribution channels. For physical distribution, publishers complete a content assessment form detailing elements like violence or explicit language, generating a provisional rating reviewed by the Netherlands Institute for the Classification of Audiovisual Media for younger audiences and the Games Rating Authority for higher age categories. Administrators approve or adjust the rating, granting publishers a licence to display the appropriate PEGI icons and descriptors. On the other hand, for digital distribution, PEGI integrates with the International Age Rating Coalition, streamlining the rating process for developers by requiring them to complete a single questionnaire covering content and interactive elements, which instantly generates ratings compliant with local standards across participating territories.

PEGI's classification includes—in line with television content—both descriptive and evaluative aspects (Felini 2014). While the descriptive rating focuses on identifying the genre and content, including specific types of images or scenarios, the evaluative rating, in contrast, assesses whether the media content is appropriate for children within a specific age range (Felini 2014). In this sense, PEGI's ratings serve as a public declaration by the European Union (EU), aiming to translate regulatory concerns into accessible visual formats while also supporting parents or legal guardians in making informed decisions about the purchase of interactive audiovisual media (European Commission 2008). However, such twofold classification structures can be problematic.

First, based on the dual nature of PEGI's rating system, it seems possible to highlight a preference for descriptive ratings over evaluative ones (Price & Verhulst 2002). By providing information about the content, descriptive ratings empower parents and children and young people to assess video games based on their unique perspectives and needs, encouraging informed decision-making and promoting media literacy (Price & Verhulst 2002). Also, this approach recognizes parents' role in assessing their children's maturity while mediating their experiences. On the contrary, by simply indicating the targeted age-group of a video game, the evaluative rating seems to deprive parents of their role while denying opportunities to develop media literacy. Second,

the evaluative rating exclusively follows the outcome of the descriptive assessment (Felini 2014). By doing so, the evaluative rating (the recommended age label) is determined by the assessment and identification of potentially harmful content such as violence or sexual themes (the in-game content label). This might result in an oversimplified classification that does not account for the different ways players engage with and interpret interactive media, also undermining parents' capacity to make informed decisions. For instance, *Street Fighter* (see Figure 3 below) is rated 12 for its depiction of violence, bad language and inclusion of in-app purchase. The violence in *Street Fighter* is stylized, cartoonish and exaggerated, which might be perceived as less impactful due to its arcade nature. In contrast, *Among Us* (See Figure 4 below) is rated 7 for its depiction of violence and the inclusion of in-app purchase. The violence in *Among Us* involves themes of deception and betrayal, requiring players to lie and manipulate other players. Despite that, *Among Us* has a lower PEGI rating, even though it could have a more complex impact on players, particularly younger ones, due to the presence of manipulation themes.

The analysis of PEGI's system and its dual rating approach highlights how the system has managed to simplify regulatory concerns into accessible visual formats. However, its oversimplification and related undermining of parents' decision-making and media literacy might constitute a favourable breeding ground for an examination of PEGI's visual and structural design, exploring its capacity to effectively communicate legal concerns while empowering video game users.

[C] A VISUAL LAW ANALYSIS OF PEGI

Given these circumstances, a new perspective could enhance the effectiveness of PEGI. Indeed, VL and LD offer an opportunity to rethink how PEGI labels and indicators, as a form of legal information about consumer protection and age-appropriate content, are visually presented, thereby improving their accessibility and impact. Born as an initiative of Stanford University Law School, LD is focused on making the law more accessible to people, aiming to simplify legal communication while shifting its focus to recipients, such as consumers (Hagan 2017). While LD aims to make the legal system work better for people (Hagan 2020), VL represents its visual manifestation (Poto & Parola 2024). As a framework that seeks to explore visual legal communication practices (Brunschwig 2014), VL uses visual elements such as images, infographics and labels to make legal communication clearer

(Poto & Parola 2024). Together, VL and LD evolved from tools addressing law firms' clients' needs for broader approaches adapted to achieve important gaols such as legal education, research and society empowerment (Hagan 2019). Under these circumstances, PEGI offers an opportunity to apply principles of VL and LD to legal communication, addressing societal concerns about protection of children and youth and guiding consumers in the context of video games.

PEGI heavily relies on visual codes—delivered by age and content indicators—to communicate regulatory information. From an LD perspective, age indicators simplify the legal message to the end-user while pairing distinct colours (Figure 1) with numeric values. By doing so, PEGI encourages a user-centric approach because it enables a quick understanding of whether or not a video game is appropriate for a specific player. Through VL perspectives, age indicators transform consumer protection concerns into symbols. Specifically, the use of colour coding where green is perceived as "safe" and red is perceived as "restricted" make the age restrictions identifiable. On the other hand, content descriptors (Figure 2) serve a different purpose. Indeed, from an LD perspective, these descriptors serve to complete the legal message. Together, the two aspects form the visual bricks of a state–consumer legal communication where age and content indicators empower the user to make informed decisions. From a VL point of view, the use of black-and-white artworks ensures visual clarity while also reducing—as in the case of colours for age indicators—the cognitive effort required by the end-user to interpret the message. Moreover, clarity of content descriptors is enhanced by the use of symbols universally associated with a given theme (dice for gambling or a fist for violence).

As previously observed, PEGI aligns with some LD and VL principles. For instance, PEGI transforms regulatory concepts into tangible and actionable tools with the purpose of protecting consumers. By doing so, PEGI presents legal standards as public(consumer)-focused products (Brunschwig 2014). PEGI uses semiotic codes to translate legal information and make it accessible through recognizable symbols and colours (Kress & van Leeuwen 2006), thus reducing the cognitive effort while enabling quick decision-making (Hagan 2017). Also, by providing clear and transparent age and content ratings, PEGI empowers the recipients of a specific legal communication (Hagan 2017). Lastly, PEGI facilitates a co-operative relationship between the public and the law where consumers can directly engage

with legislators' concerns about access to video games.

If it is true that PEGI aligns with several principles of LD and VL, it is also true that PEGI reveals certain limitations. Indeed, as previously mentioned, static visuals and simplified classifications diminish consumer trust and informed decision-making. These challenges highlight opportunities for improvement, where the principles of VL and LD could shape a more dynamic, transparent and user-centric PEGI system.

[D] IMPROVING PEGI

To address PEGI limitations, video game classifications could move beyond the mere focus on their—negative—contents and consider other types of elements. Indeed, a new viable starting point might be represented by game rules, rather than game contents. In this sense, it is possible to identify "gameplay bricks" as elements whose different combinations address the different rules and goals of video games. They can help to classify video games in accordance with the very rules or goals of the game (Djaouti & Ors 2008). Gameplay bricks can be categorized into two elements. First, "game" bricks are those rules linked to the achievement of the game's objectives. These rules are defined by a trigger tied to specific game elements and influencing the game output. For instance, a game brick in *Street Fighter 6* may involve health bars of the two fighters as a trigger; when one fighter's bar reaches zero, the game triggers the victory condition associated with the bar reaching zero. Second, "play" bricks are more tied to the game environment, rather than game objectives. Therefore, these rules focus more on how the players' input can shape the game elements while enriching the game experience. In *Street Fighter 6*, an example of a "play" brick is player's input triggering a taunt animation. In this case, a player's input has no influence over the outcome of the game, but instead targets the game environment adding expression and creativity to the gameplay. Under these circumstances, it might be argued that rules and objectives can be useful tools for video game classification. Indeed, by addressing rules and objectives, the classification approach would reflect those core mechanics and experiences that feature in a game and suggest the right inter--actions for the right audience. On the contrary, content-based classification simplifies the complexity of interactive media while overlooking the different types of interactions between players and video games (Caroux & Ors 2015). Therefore, a rule-based classification aligns more with the inherent structure of games, where rules shape the boundaries, goals and possibilities of the in-game world (Suter & Ors 2018). By doing so, a ruled-based classification system

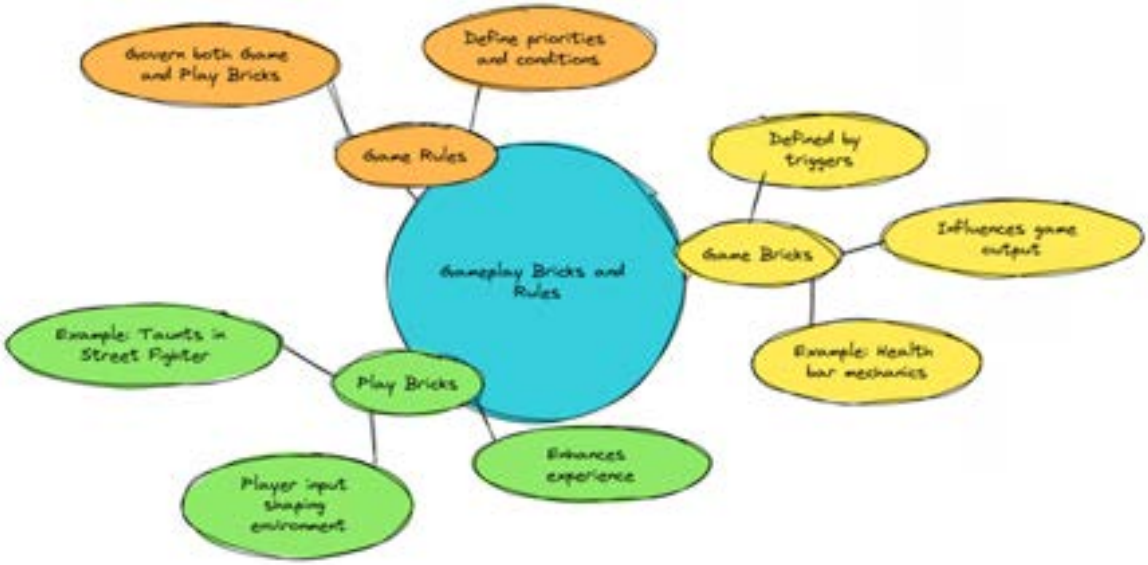

Figure 3: Gameplay Bricks diagram–Created with AI assistance, curated by the author.

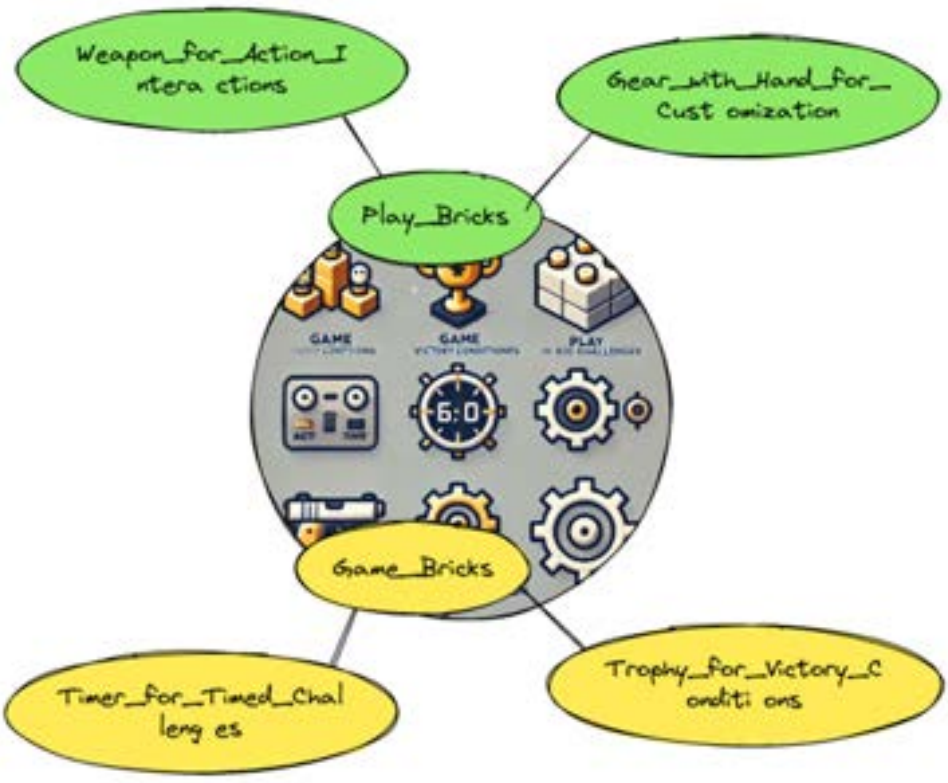

Figure 4: Gameplay Bricks indicators—created with AI assistance, curated by the author.

would improve rating accuracy while offering an understanding of video games as interactive and rule-driven systems (Siang Ang 2006). In this sense, Figure 3 aims to visualize the previous concept.

However, in the context of this article, a shift from content-based to rule-based classifications requires guidance from LD and VL insights. Since LD emphasizes a user-centred legal communication, a rule-based classification could be developed around visual indicators conveying the nature of gameplay bricks (see Figure 4). For instance, LD could help the recipient of the message to visualize how rules impact the interaction between the player and the game. In the case of the *Street Fighter 6* boxed game, indicators might show "game" bricks (eg a timer indicating timed rounds or a trophy indicating the victory condition) and "play" bricks (eg a weapon indicating shooting or a gear wheel with a hand indicating players' capacity to customize aspects of the game). Furthermore, these indicators might be colour-coded, such as gold for "game" bricks and blue for "play" bricks. Also, to enhance consumer's understanding of the label, a combined message (text and image) could be included, showing examples of how a player's interaction shapes the gameplay (eg "Victory is Achieved when the opponent's health bar is depleted—see gold trophy indicator"). From a VL perspective, the focus is translating the abstract concept of video game rules into concrete visual legal rules (Mik 2020). Subsequently, it would be crucial that previous gold and blue indicators were standardized to make them recognizable (Hagan 2017). Again, minimalistic design paired with multimodal explanation would ensure a high degree of user understanding (Compagnucci & Ors 2021). Finally, standardized and universally interpretable indicators might reduce risks of cultural misinterpretation of symbols, ensuring that the legal message is understood consistently across different jurisdictions (Dogruel & Joeckel 2013).

The revisitation of gaming classification under LD and VL by incorporating rules and mechanics might represent a viable evolution of the current PEGI system. Indeed, this approach aligns with scholars' proposals for a multifactorial video game classification (Felini 2014). In such a model, while VL and LD would shape the visual components and ensure the correct reception of their legal message, positive gaming content and players' skills would contribute to a clearer, more comprehensive classification system. This approach would not only guide informed decision-making and introduce children to video game consumption responsibly but also

prevent inconsistencies or double standards (Wutz 2024).

The proposed enhancement of PEGI through a rule/mechanics-based classification system, informed by VL and LD, also aligns closely with the policy objectives that underpin PEGI's mission. Indeed, the incorporation of rules and mechanics within a clear visual framework can protect children and young people while preserving developers' freedom of expression (European Commission 2008). Also, the standardized colour-coded indicators would support the objective of improving media literacy (European Commission 2008). In this case, the visual tools designed under LD principles would guide the public's attention towards games mechanics, rather than contents, enhancing the understanding of what a game really is (Filimowicz 2023). Finally, refining PEGI's visual (LD and VL) and structural (game and mechanics) indicators would ensure consistency and interpretability supporting the Pan-European Code of Conduct while developing a new—more diligent—video game verification system.

[E] CONCLUSION

This article has analysed the PEGI's history, functioning and limitations of its content-based classification system while proposing a rule/mechanics framework informed by LD and VL. While it is true that the current PEGI system visually standardized and addressed concerns towards video game consumption, it is also true that PEGI oversimplifies the elements of such consumption. The article has focused on "gameplay" bricks as rules and mechanics that shape the game environment in order to propose a more responsive classification system.

In the context of this proposal, the new PEGI would incorporate LD principles as clear indicators with a user-centred approach, making legal concerns accessible and intuitive while promoting informed decision-making. From a VL perspective, the system would ensure that the legal message is transparently and accurately delivered while minimizing cultural visual differences.

Such a rule-based approach also aligns with PEGI foundational objectives, such as the protection of children and young people, the improvement of media literacy and developers' freedom of expression. The integration of rules/mechanics into a visually oriented framework made by LD and VL would allow PEGI to address the interactive nature of video games while acting as a tool for consumer protection and responsible gaming consumption.

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Instrumenting(s): Accounting a Series of Repetitive Beats

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Abstract

This Visual Law article accounts an event "A Royal Dis-Sent – Re-Writing and Re-Imagining a Series of Repetitive Beats CJA 1994" held at House of Annetta, on London's Brick Lane, on Sunday 3 November 2024. On that day it was 30 years since the notorious Criminal Justice and Public Order Act (CJA) 1994 was given royal assent, illegalizing raves, banning music that "includes sounds wholly or predominantly characterized by the emission of a succession of repetitive beats" (section 63(1)(B)). Discussions as to the nature of sound and law are unravelled, considering prohibition, nomadism, repetition and property concerning the connections found between law, music and aesthetics that the CJA 1994 and the workshop highlighted. The summary relays the work of event organizers Dr Daniel Hignell-Tully and Dr Lucy Finchett-Maddock under the guise of transdisciplinary project "Instrumenting(s)", investigating the relations between sound, property and law, and how we may best understand the history of land within legalities and their resistances via a combination of legal, scientific and artistic research through the development of a "geosocial instrument".

Keywords: CJA 1994; sound; prohibition; nomadism; repetition; law and aesthetics.

To inquire as to the origins of sound, is that as the origin of law. What emanates from that moment onwards and forwards is a channel from whence time may receive itself. From when there may be a carrier of and for belonging. Yet, that very search for the origin being one that is not appealing nor possible. One that according to our most recursive of gestures within legal scholarship, is to trace back

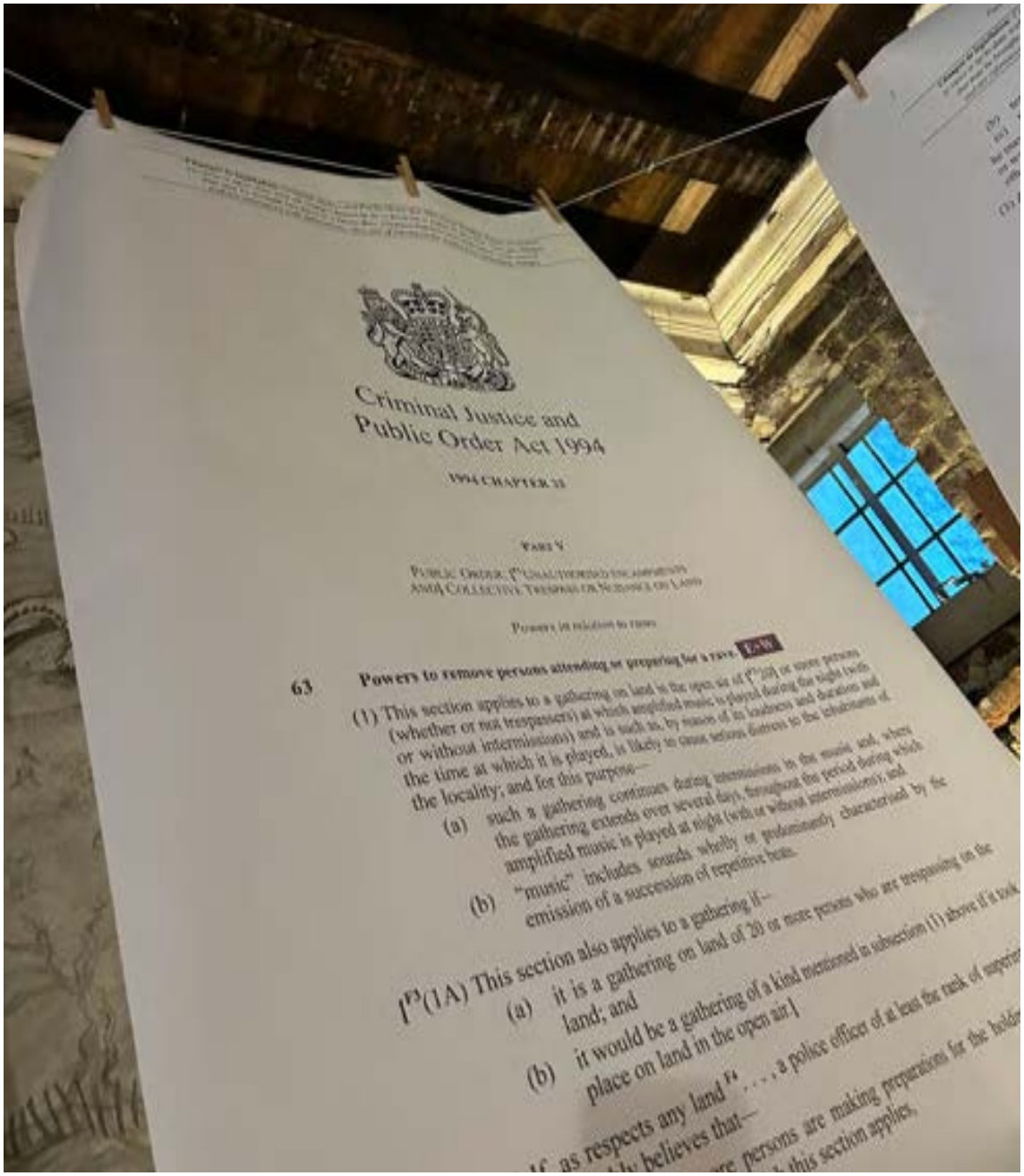

Figure 1: Printed CJA 1994, House of Annetta.

an eminence, a source of legitimacy. In François Bonnet's *The Order of Sounds: A Sonorous Archipelago*, he refers to the "impossibility of defining an origin, an impossibility resulting from the fleeting nature of the phenomenon, its dispersion into the distance and its inexplicable character, have always been the source of myths and beliefs" (Bonnet 2016: 19). Law is similarly at once here and always, where it moves back and forth between the very contemporary, the ancient and the primordial.

From whence there are origins we can only assume and sensate repeated acts, or the variant

iterations of spatio-temporal arrangement over ions that bring to life the past, present and future. If those acts themselves are unrecorded, do they happen at all? At the beginning of time, at least from the scientific historiographies recorded within Western accounts (Haskell 2022: 6-7), life was silent—or there was no way to hear life. With reference to the philosophical proposition, "if a tree falls in the forest and there was no one there to hear it, does it fall at all?" At what point does all experience determine itself through vibration alone, and the sonic as a mechanism of processing—a juncture of judgement and fractional crystallization. Does this mean that there always requires a receiver of sound, for the sonic moment to be registered and exist? This question reveals a dichotomy of sender and receiver, sound and a capacity to hear, within the integral nature of the aural. It appears that underlying and underpinning the beginnings of time were the movements of vibration, and ways in which these bacterial developments became heard were within the whirlpool as *cilia* growing within bacterial life. These cilia are tiny hairs motoring bacteria around, picking up vibrations across waves, within fibres to connect and feel and hear without ears—similar cilia as those now commonly found within our cochlea (Haskell 2022: 6-7; Finchett-Maddock 2025). Once these cilia developed, there arrived a capacity for the burps and bloops of the primordial to be auratically registered, and as such, empirically become real.

This coupling of sound and hearing brings us to the event which the project **Instrumenting(s)** brought to the fore in November 2024, through raising awareness around the banning of aesthetic forms through the Criminal Justice and Public Order Act 1994 (CJA[1] 1994). **Instrumenting(s)** investigates the relations between sound, property and law, and how we may best understand the history of land within legalities and their resistances, via a combination of legal, scientific and artistic research through the development of a *geosocial instrument*. This geosocial instrument is both empirical and allegorical, questioning whether the external world and law itself can ever be investigated and accessed through scientific means, and if not, then a speculative and creative device that may allow us to foresee where law comes from and where it may be heading—and our agential role within its formulation. With two strands to the project, **Instrumenting(s)** brings together legal thinkers, artists and scientists with a specific concern for finding law within the land, and not just through

[1] The acronym CJA, instead of CJPJOA, is used as this is the one that is more well known among activists as opposed to the latter, which is more equated with legal practice.

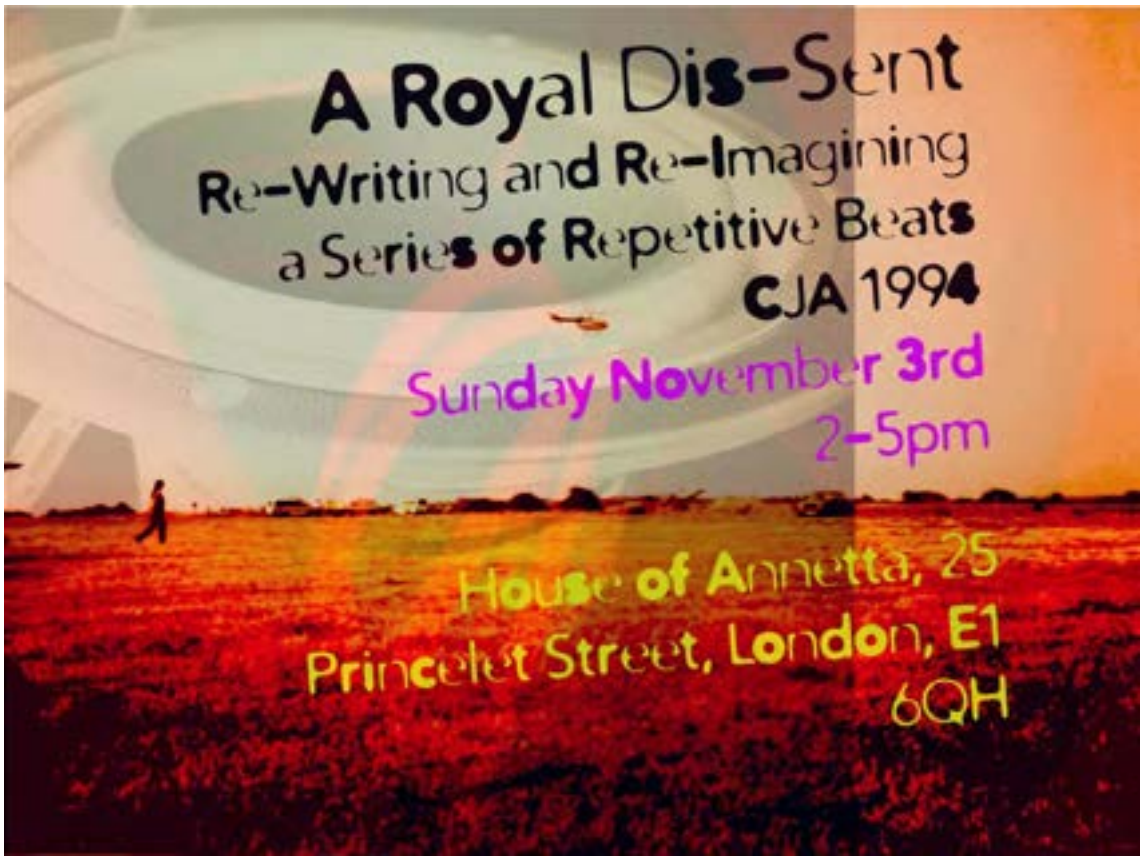

Figure 2: Flyer for "A Royal Dis-Sent", 3 November 2024.

traditional legislative form (within the strict abstraction of land law, or the temper of juridical texts)—but out there, in the ground. The first, methodological, the second contextual. The contexts thus far have sought to understand how material formations (such as found in geological layers of sediment and rock) may impact upon the cultures of given communities, affecting language and the kind of law created, in turn. The material forms of ice, slate, natural resources that are integral to the surroundings of native Sámi and Welsh cultures in turn, based in, on and around, the Norwegian Arctic Circle and Welsh Snowdonia are part of this convergent investigation as to how these minerals, processes and formations create materio-linguistic cultures of law. The second focus, and that most relevant for this surmising, is that of a connection between rave, land and law.

In 2024 we saw the 30-year anniversary of the passing of the CJA 1994 under English and Welsh law.[2] The Act brought in a legislative damning of the nomadic and alternative cultures of the Irish and New Age traveller and Romany Gypsy communities (sections 60-62), the rave generation (sections 63-66), street artists and graffiti writers (section 62), and squatters

[2] The Act extends mainly to England and Wales only, but for exceptions see section 172(7)-(16).

Figure 3:"A Series of Repetitive Beets", by Lucy Finchett-Maddock for "Origins" (Brighton), 2024.

(sections 72-76), in one of many symbolic junctures that saw private accumulation take over less orderly, less conventional, ways of life.

Known for its now infamous passage under section 63(i)(b), CJA 1994 made the unlicensed emission of a "series of repetitive beats" to a crowd of revellers outdoors, a criminal offence. Under section 63(1)(B), music that "includes sounds wholly or predominantly characterized by the emission of a succession of repetitive beats", under certain circumstances, was made illegal. Under section 63(1), a rave was originally defined as a gathering on land in the open air of 100 or more persons (whether or not trespassers), until its amendment by section 58 of the Anti-Social Behaviour Act 2003 to a gathering of 20 or more persons, and on land which is not in the open air (ie within a building) as well as outside.

The lead-up to that point has been discussed in different fora (Gilbert 2017; Ashford & O'Brien 2022; Finchett-Maddock 2020; 2024; 2025)—a recounting in musicology, subcultural theory and, to some extent, socio-legal and public order law scholarship—and yet a generation has gone by

that may not know of the legislative architectures closing in on 20,000 people dancing for many days and nights, at Castlemorton Common, Gloucestershire in South West England, during the second May bank holiday weekend of 1992.

Repetitive beats amounted to a public nuisance in *R v Shorrock* (1993). In the indictment against the defendants (the organizers of an "acid house party" and a farmer who owned the land on which the party had been held) stated that their appearance before the court was for causing or permitting loud music to be played from a field off Broken Stone Lane, Blackburn, so interfering with the convenience and comfort of the people of the neighbourhood. Within the judgment the defendants were deemed to:

> have caused appalling misery to local residents where the peaceful lives of rural societies have suddenly been ripped apart by the all-pervasive sound of what is sometimes delicately described as "music", the noise of which travels for miles, affecting everyone in its path—both man and beast—and from which it is impossible to escape. It can be a modern-day torture for the unwilling and the unwitting … (Earl Errol, HL vol 554, cols 384-385).

The legacy of the CJA 1994[3] is at the forefront of national debates around questions of access, protest and assembly with the recent Police, Crime, Sentencing and Courts Act 2022 giving a statutory redefining of public nuisance under section 78, making the previous common law offence of public nuisance much broader, limiting demonstration noise levels and time limitation, with protestors now facing a criminal offence where they did not before. These incursions have been the topic of debate nationally, and the workshop was a moment to consider the ongoing impact of the legislation.

'A Royal Dis-Sent – Re-Writing and Re-Imagining a Series of

[3] "Keep Britain Tidy", 1990s; Anti-Social Behaviour Act 2003 – anti-social behaviour orders; Anti-Social Behaviour Act 2014 – public spaces protection orders (sections 59-75), dispersal orders (sections 34-42) and community protection notices (sections 43-93); Police, Crime, Sentencing and Courts Act 2022, unauthorized encampments (Part 4), intentional public nuisance (section 78), criminal damage to memorials was raised from a £5000 fine and six months' imprisonment to 10 years' imprisonment under section 50 (amending the Magistrates' Courts Act 1980, section 22 and Schedule 2 paragraph 1. *R (on the application of Smith) v Secretary of State for the Home Department* (2024). The extension of the "no-return" period from three months to 12 months, in offences relating to the failure to leave private land under the CJA 1994, sections 60C, 61, 62(1A)(a) and 62B, was incompatible with the rights of Romany Gypsy and Irish traveller communities and breached their European Convention on Human Rights 1950 Articles 14 and 8 rights. The shortage of available short-term transit caravan pitches, which also had a three-month maximum stay, meant that those communities would be disproportionately disadvantaged by the change. The court rejected related arguments that other amendments to the 1994 Act constituted unjustified direct or indirect discrimination to those groups.

Repetitive Beats CJA 1994' was held on the anniversary of the coming into force of the CJA 1994 on Sunday 3 November from 2 to 5pm at the House of Annetta, London. Artists, musicians, former ravers, academics, activists and members of the public were invited to consider the notorious section of the CJA 1994 that banned raves and take apart the very meaning of the language in order to provoke how and why such a form of legislative drafting took place and how it may look in times to come. Amidst the discussion was a desire to consider the reasoning behind banning repetition in sound. The workshop opened with a series of vocal exercises initiated by philosopher and sound expert, Dr Charlie Blake, setting the scene for a reverberation of practice-based and theoretical conversation. As the workshop developed, attendees were asked to consider the relation between sound and music, questioning the extent to which there is an alteration between the two or otherwise. What was the CJA 1994 seeking to do amidst its concern for repetition? Was it inadvertently seeking to deny all forms of music, as within the workshop most agreed that there is some element of recurrence, continual action and reassertion within all forms of music and refrain. Within the Copyright Design and Patents Act (CPDA) 1988 a musical work refers to a work "consisting of music, exclusive of any words of action intended to be sung, spoken or performed with the music".[4] Considering legislative constraints, there is no legal definition of music within copyright law, other than that which music is not (Rahmatian 2024: 19):

> The copyright countries sometimes offer an exclusive definition ("music without …" or "exclusive of …") but leave the question of what constitutes music to statutory interpretation. Both in copyright and in author's rights countries, the definition of "musical work" is referred to judicial practice.

A deciphering between musical work and that of music, within juridical interpretation, has proven one such opportunity to describe the elements of music, whereby sound is a participle, as well as ornamentation and bass.[5] This is opposed to notes and sonic interludes that operate as the music without arrangement.[6] What drew the then Government in 1993 (the year prior to the CJA 1994 coming into force) to pre-empt a sudden definition of music whilst

4 CPDA 1988, section 3(d).

5 *Sawkins v Hyperion Records Ltd* (2005).

6 Another question relating to any definition is the concern for fixation, which becomes clearer with dance but also a question concerning the manner in which live works may be recorded. See the following regarding dance and fixation in the UK, *Massine v de Basil* (1938) 82 Sol Jo 173 (CA).

the United Kingdom (UK) judiciary has been conspicuously avoidant of defining music in law? If there could be music as a succession of repetitive beats, how far could this be understood as one form of sonic denotation, many or all? What could be said of the famous composition by John Cage, *4'33"* (1952) that resulted in the performance of silence? This indeterminate form of composition brought to bear a contrast between musicological definitions of musical form and those legal, in which the very surroundings, the coughs of the audience, and the ambience itself could be seen as an aspect of the "music".

As the workshop continued its journey through these questions, repetition and iteration offered a possible means as to why this very concoction of what music should be within law was chosen to be enacted. Over the centuries sound, and resonance, have been useful mechanisms of creating order and normative behaviour through the church, workhouses and other institutions. Conor Heaney identifies the role of repetition and how noise in law developed its spatio-temporal and materiality (Heaney 2023: 6):

> Whereas the bells of the canonical hours were calls to synchronise with the theological order, the drum rolls of the prison calls to legal order, the bells of the workplace functioned as called to industrial capitalist order.

As referenced by Heaney, Henri Lefebvre illustrated the power of rhythm within daily life, whereby "the authorities have to know the polyrhythmia of the social body that they set in motion" (Lefebvre 2013: 78). The order of repetition emanating from integral actions and customs of the general population—those to be harnessed and sold back to the populace as models of social organization. Just as the developing industrial relations of labour relied on the asymmetrical division of time, thus repetition was congenital to the development of the spatio-temporal arrangement of capital, as comprehensively accounted for by E P Thompson (1967). Indeed, music has been described as "fashioned time, or if one is inclined to make an aesthetic statement, embellished time … That means music is not static at all but moves and changes all the time – if time were to stop, music would cease to exist" (Rahmatian 2024: 20).

The role of repeated action and custom is memorable of those famous words within the CJA 1994, around the succession of beats, and this connection between repetition and law posited as perhaps inimical to aesthetics itself, and indeed the nature of law. Repetition has been the subject of many a philosophical ruse, famously considered through the

Figure 4: Scenes from "A Royal Dis-Sent", House of Annetta, 3 November 2024.

work of Gilles Deleuze, allowing for repetition and difference to be that as the source of newness (Deleuze [1968] 2014). Or further impelled through the post-structuralist account of performance within the works of Judith Butler or Jacques Derrida, each iteration of a performance as that bringing forth a further construction of identity or juridical matrix.

Transdisciplinary thinker Karen Barad has brought together her body of work on quantum theory with that of performativity to argue a performance of matter. In her highly influential study of quantum physics in relation to the arts and humanities and social sciences from 2007, Barad relays a discussion of a vacuum in terms of both a scientific understanding of the presence of the fluctuations of matter within a void, the presence of vibration despite all, combined with an indeterminate description of contingent performativity that brings together the mechanism of a being and knowledge as *intra-action* (Barad 2007).

Ultimately, all and sundry being a form or repetition through vibration has been described as *un*sound "which extend[s] audition to encompass the imperceptible and the not-yet or no-longer

audible" (AUDINT 2019: 1). The more accessible level of electro-magnetism is the mechanical energy of sound: "'the deceptive [tip] of an iceberg' vis-a-vis the vast, inaudible electromagnetic spectrum" (Sciarrino in Trippett 2018: 229). Bachelard has expanded on this in his exposition of Pinheiro de Santos' "rhythmnanalysis" (later the subject of Henri Lefevbre's writings), whereby the movement of matter at the level of vibration creates realities at the physical, biological and psychoanalytical strata. Vibration itself is the very force of life, whereby (2016: 138):

> if a particle ceased to vibrate, it would cease to be. It is now impossible to conceive the existence of an element of matter without adding to that element a specific frequency. We can therefore say that vibrational energy is the energy of existence.

Labelle talks of vibration as a primary sensing that unfolds the individual body toward a "common skin" (Labelle 2019: 134). And yet this banning of a particular formation of repetition is concerning as not only does it infer an inappropriateness of repetition in sound and music but also those communities concerned. The communities impacted by the CJA 1994 were often nomadic in two ways—through heritage as travellers by ethnicity (Irish and Romany Gypsy) and lifestyle (New Age); as well as nomadic through sound-system culture, both traveller and DIY music-based. Nomadism often falls outside of an expression of state law property rights, and it is this moving element of the scene that also may encourage legal presence (such as the removal of rigs, vehicles, the presence of riot police at gatherings). The role of sound-systems with "travelling communities, at that point intersecting with dance culture for the first time" (Kinney 2022: 30) were key in the spread of electronic music from unlicensed raves to licensed festivals such as Glastonbury.

These machinations continued to be unravelled within the event held at the House of Annetta on Sunday 3 November 2024. The venue itself being formerly the home of cybernetician Annetta Predetti from 1980 until her passing, now held in trust to be used as a space for radical self-organizing in the continued ethos of Predetti's research. Work by well-known electronic artists, such as Autechre's piece "Flutter", in the album *Anti* (1994), was shared, as a piece in direct opposition to the CJA 1994, programmed to have non-repetitive beats. The album cover included the following sticker:

> Warning: *Lost* and *Djarum* contain repetitive beats. We advise you not to play these tracks if the Criminal Justice Bill becomes law. *Flutter* has been programmed in such

> a way that no bars contain identical beats and can therefore be played at 45 or 33 revolutions under the proposed law. However we advise DJs to have a lawyer and musicologist present at all times to confirm the non-repetitive nature of the music in the event of police harassment. Important: By breaking this seal, you accept full responsibility for any consequential action resulting from the product's use, as playing the music contained within these recordings may be interpreted as opposition to the Criminal Justice and Public Order Bill.

Other works were played by the organizers of the event themselves, with Hignell-Tully sharing work under Distant Animals. The album, *The Frequency of the Heart at Rest*, uses a custom tuning system (based upon multiplications of the frequency of the human heart whilst sleeping). Recordings were repeated numerous times upon the same analogue tape reel, causing multiple repetitions to bleed together in the final output. The rhythm of the heart was further analogized through the work of Finchett-Maddock under Cyrenaur, whereby electrocardiograms have been turned into data sets, and then turned into sound (*With all my Heart* 2019).

The specific drafting of the law banning repetitive beats brings into wider consideration the way the law understands "legitimate" aesthetic form. The particular instance of banned music follows long histories of prohibition—such as for religious or political reasons, for example the minor 5th banned by the Catholic Church due to its dissonance or back to the banning of "talking drums" used by slaves to communicate (see generally Čiurlionienė 2019; Hård 2023), signifying the connection between power, identity and aesthetic forms of expression. Law has often been used to ban forms of music that are seen as a threat to the *status quo*.

As for electronic bass that emanates from the rave scene, its resonance and movement transcend borders, enter bodies, alters their atomic make-up, reformulating them on their way out. Thinker Paolo Virno argues that only language establishes the possibility of negating what our senses are experiencing. Western law is thus one of the most obvious examples of language and text, "like a switch that breaks the natural link between sensorial experience and conscious elaboration" (Virno in Berardi 2015). Sound, particularly that which is of a low frequency and characteristic of electronic dance music, ignores this negation. Bass within underground electronic cultures has been said to create:

> [a] womb-like environment of dark, hot and sweaty … unhomely home[s] through the summoning of the infant child's primal memories of its original

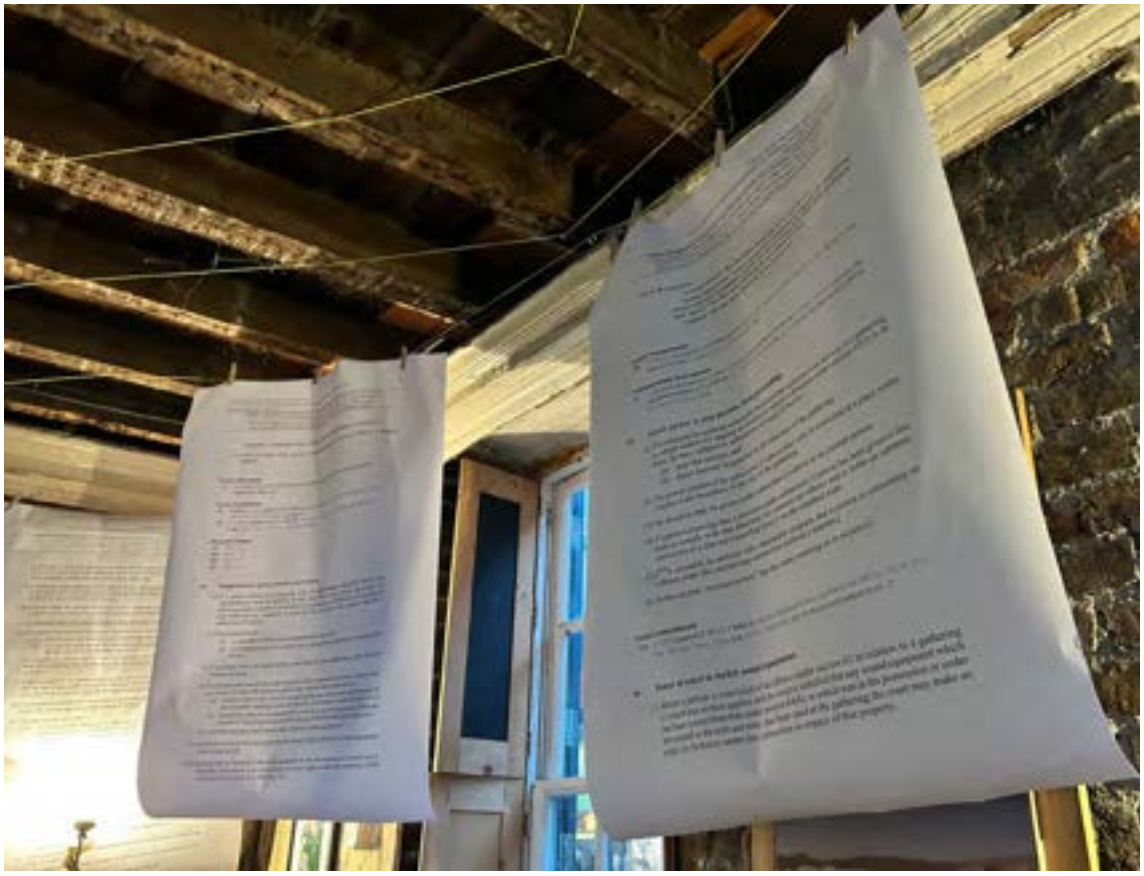

Figure 5: Printed CJA 1994, House of Annetta, 3 November 2024.

> "home" within the mother's body … Reawakening both the pre-subjective state of comfortable bliss felt by the infant from inside the womb and the subjective collapse threatened by its failure to fully enter into subjectivity outside it (Burton 2023: 11).

It is manipulated through technological form, and yet is the very low-level vibration of quantum life. Bass is movement, rhythm, the surface is the sound itself.

The edgework of trespass transcends yet also is produced by law. Like a form of ecognosis, "a letting be known. It is something like co-existing. It is like becoming accustomed to something strange, yet it is also becoming accustomed to strangeness that doesn't become less strange through acclimation" (Morton 2018: 92). This strangeness has been considered as "sensory prohibition" by legal scholar Emma Patchett, whereby the bounds of law are crossed and re-drawn through the roaming of the senses and their materiality (Patchett 2024).

Sound and its required coupling of listening was not, of course, new within legal theory as a point of discussion within the workshop and beyond. Artists bringing together legal theory and artistic work include Lawrence Abu Hamdan on justice and hearing,

following a strong tradition of sound art;[7] further legal scholars such as James Parker, Julia Chrystodolidis and Nathan Moore have also considered sound in their legal discussion of law (Mandić & Ors 2023). It is a discourse that the **Instrumenting(s)** collective seeks to build on and discover across the fields of legal theory and artistic research. The bridge between these two as a methodology for investigating the reasons why these particular forms of sound were banned is key.

Going back to an origin of sound as an origin of law, there is perhaps a dialectic between listened to and listener occurring that has been inimically discussed by thinkers such as Brandon Labelle: "Listening may show us the very limit of ourselves, attuning one to the body's metabolism, along with the flows and rhythms defining our social bonds" (Labelle 2019: 5). This connection between law and its other—its receiver—as a composite of the democratic, the represented and the relation between order and ordered—feels prescient. Who knows what is to come of section 63(ii) of the CJA 1994? But its role as that which moulds aesthetics through legislative form will continue to be so, until altered or repealed.

About the authors

Dr Lucy Finchett-Maddock *is based at Bangor University, as a Reader in Law and Artistic Research, and known for her critical legal and speculative philosophical writings on law, broadly researching on the themes of resistance, aesthetics, property, artificial divisions of art and law and entropy. Lucy uses a combination of fine arts-based, art history and legal doctrinal approaches in her research, practice and teaching. She is currently researching and writing of the relation between theory and creative practice within the history of critical legal studies and contemporary art in a monograph* "Art", New Trajectories in Law Series *(Routledge, forthcoming 2025). Her current collaboration that directly brings together practice and theory in her work is "Instrumenting(s)" with Professor Anders Hultqvist (Gothenburg) and Dr Daniel Hignell-Tully (Guildhall), investigating the relation between sound, property, entropy and geology through the development of a musical, legal and scientific "geo-social instrument". She is an exhibiting artist and curator and is one of the founders of the Art/Law Network and LORE (Legal Origins Rights Education and Art).*

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[7] Len Lye was famous for his "tangible" sound pieces such as *Fountain* (1959) and *Universe* (1963-1976), amongst others such as Max Neuhaus, Oswaldo Maciá and Takis, as well as Fluxus artists Yoko Ono, Nam June Paik and George Maciunas.

Dr Daniel Hignell-Tully *is a composer, performance artist and researcher at the London Guildhall School of Music and Drama exploring the limits of participation and sense-making. His work often seeks to locate* avant-garde *practices within everyday contexts as a means to heighten social discourse, as well as engaging with specific social, legal, political and economic barriers.*

His research has covered topics as broad as the implementation of public space protection orders to persecute travelling communities, the media-linguistics of the 'Brexit' negotiations, and the aesthetic communities that arise through the misuse of consumer technologies (such as YouTube). He runs the Difficult Art and Music micro-label, as well as the research outlet 7000 Trees. He is co-lead on the project Instrumenting(s).

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Professor Anders Hultqvist *is a Professor of Composition and Head of Research at the Academy of Music and Drama, University of Gothenburg. His various commissions and composition projects (1985-2024) consist of works for orchestra, solo with orchestra, choral works, various chamber music constellations, sound installations, musical drama, electroacoustic works, as well as film and theatre music. In addition, he has curated musical and scientific events as a festival director, a conference organizer, and journal editor. Hultqvist's artistic research has mainly been within the fields of urban and rural sound studies, musical creation/interpretation and ecological sound art. He is co-lead on the project Instrumenting(s).*

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News and Events

Compiled by Eliza Boudier

University of London

LH*ub*: A new hub of Law and the Humanities at IALS

How is this fascinating scholar related to Law and the Humanities? What and where is "law" for them? Which areas of humanities do they work on? What are they trying to understand in their research?

At the beginning of this academic year, 10 LH*ub* Visitors joined the Institute of Advanced Legal Studies (IALS) and were introduced in a group event that attempted to answer these questions. Our Visitors are a diverse group of scholars. **Laurie Bashford** is a writer and PhD candidate in Theatre and Performance at Columbia University engaged in ethnographic research of contemporary trans experience. **Andrew Bricker** is Associate Professor of English Literature at Ghent University, and an expert on humour, satire and law. **Jess Connolly-Smith** is a Senior Lecturer at the University of Lincoln, who explores how law engages in abstract and material practices of meaning-making to produce identities. Ogulcan Ekiz is a lecturer-in-law and artist at Swansea University, and expert in copyright law, its theory and practice in relation to photography, film, fashion and visual arts. **James Campbell** is a DPhil Candidate at the University of Oxford who researches the significance of physical movement within legal spaces. **Jonah Miller** is a lecturer at King's College London and a research fellow at King's College, Cambridge. He is writing about legal and political responses to police violence in 19th-century Britain, especially campaigns for justice by radical groups. **Jake Subryan Richards** is Assistant Professor at the Department of International History at the LSE, whose research examines how enslaved and free people interacted with law in a world structured by Atlantic empires. **Parashar Kulkarni** studies religion, political economy and utopias, in colonial and contemporary India and the British empire, and is writing a new novella provisionally titled *Cow and Court*. **Shekinah Vera-Cruz** is a PhD student in the Department of Classics at the University of Warwick, studying rituals within the logic of Roman civil law, and the relationship between "form" and "substance" in law. Raghavi

Viswanath is a postdoctoral researcher at SOAS, who studies the impact of authoritarianism on the land claims of nomadic communities in India.

Read more about LHub Visitors on the LHub webpage.

This range of expertise and creativity is brought together in LHub to imagine exciting futures for law and the humanities.

The hub was established as Professor Anat Rosenberg joined IALS, to foster academic expertise, creativity, and intellectual leadership in the field.

LH*ub* is conceived as a national resource within the remit of the School of Advanced Study. It welcomes collaborations with IALS fellows and associates, SLS members, as well as cross-institutional and international collaborations. The hub's webpage operates a digital Ideas Box, open for proposals of initiatives in law and the humanities from researchers, artists, practitioners, librarians and more, in and outside the UK. Its message is: *Imagine, and contact us!*

For details of all LH*ub* events and activities, visit the LHub webpage.

Library News

One-to-one advice appointments now available

From January 2025, the Library is running one-to-one advice appointments with IALS librarians. The appointments are open to all library members and can be held in person or online. At a one-to-one appointment, Library staff can support you with tasks such as finding resources in the library and online, using legal research databases, and referencing your work with OSCOLA. Book a one-to-one appointment.

Library of Things

The Library has recently been working to improve accessibility facilities and equipment so that services and collections are accessible without barriers to everyone. As part of this, a new Library of Things has been created. The Library of Things contains a range of objects and equipment that can be used by all library members to enhance and adapt the study space whilst in the library– see the full list on the Library of Things guide.

The Library of Things is housed at the Enquiry Desk on the second floor and is available when the Enquiry Desk is open: Monday to Friday 09.00am-7.45pm and Saturday 10.00am-5.15pm.

Selected Upcoming Events

LH*ub* Seminar Series: Re-orienting Punishment towards Forgiveness—The role of interpersonal concepts in legal reconstruction

Date: 18 March 2025, 5.30-7.00pm

Venue: IALS, 17 Russell Square, London WC1B 5DR

Speakers: Professor Nicola Lacey, London School of Economics, Dr Galia Schneebaum, Reichman University and Dr Andrew Benjamin Bricker, Ghent University

See website for details.

WG Hart Workshop

Dates: 11-12 June 2025

Venue: IALS, 17 Russell Square, London WC1B 5DR

Topic: Regulating the Global Movement of Care

The topic for the 2025 Hart Workshop is 'Regulating the Global Movement of Care'. The Workshop will seek to consider the role of law in managing the global movement of care, broadly defined to include healthcare, social care, domestic care and unpaid care. Immigrant labour has long been the bedrock of the care systems of many countries in the world and law is intimately involved in ordering the movement of care and care workers. The Workshop invites participants to explore the numerous distinct involvements of the law in this process of movement, such as by creating precarity through the imposition of stringent immigration or regulatory requirements, by providing migrant carers and their supporters with a tool to fight oppression, or by defining relationships between migrant carers and their broader kinship networks. The workshop will be organized around four themes—precarity, advocacy, protection and kinship networks—and will provide an opportunity to explore the legal regulation of care through the lens of a variety of disciplines, including history, anthropology, politics, sociology, criminology and creative arts.

The 2025 Hart Workshop will feature two invited plenary speakers: Professor Majella Kilkey (University of Sheffield) and Professor Eram Alam (Harvard University). There will also be a lived experiences panel, featuring care workers and individuals and organizations that support them, and a creative arts panel, featuring Dr Ella Parry-Davies (King's College London) and her collaborators on research in performance as method with migrant domestic workers. The organizers of the 2025 Hart Workshop are Priyasha Saksena (University of Leeds), Adrienne Yong (City University of London), Amanda Spalding (University of

Leeds), Amrita Limbu (University of Leeds) and Marie-Andrée Jacob (University of Leeds).

The WG Hart Legal Workshop is a major annual legal research event organized and hosted by the Institute of Advanced Legal Studies. Over the years this eponymous workshop series, subsidized by funds from the WG Hart Bequest, has focused on a wide range of comparative and international legal issues and topical interests.

SAS IALS YouTube Channel

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See website for details.

Podcasts

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Amicus Curiae

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