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Editor's Introduction

Maria Federica Moscati

University of Sussex

Dear Reader,

I write this editorial after attending a show performed by the Company of Elders at the Sadler's Wells theatre in London. The first piece, *They Look Like People*, by John-William Watson, opened with an inspiring sentence:

> Change is inevitable;
> stillness is impossible.[1]

This made me think about this Issue of *Amicus Curiae*. Indeed, all contributions in this Issue demonstrate that law changes, and so too do the ways we not only learn about the law but also how we teach it, how we represent and write about it, and how we resist it. Law can be reimagined, walked, transplanted, resisted and taught and the pieces in this Issue demonstrate how, just like a choreographic work, *what we do* with the law can be achieved through collaboration, empathy, constructive critical conversations and creativity. Indeed, in this Issue you can even dance the law while listening to the song *Equali-T*, by SJ Cooper-Knock.[2]

How can law be reimagined? In what ways do law and space interact? In what ways do intergenerational conversations contribute to implementing children's rights? How can legal pedagogy help to address the challenges of artificial intelligence (AI)? How is law transformed when it travels from one country to another? How does legal interpretation change lives? But also, what media do we use to convey our knowledge, ideas and perceptions of the law? These are some of the broader questions that the authors in this Issue address by using not only text but also songs, photographs, drawings and videos. On their own and taken together all the pieces presented here contribute to several areas of current literature including comparative legal studies, queer studies, dispute resolution, law and humanities and children's rights.

[1] John-William Watson is the author of the script of the choreographic work *They Look Like People* and also the author of this sentence.

[2] Included in the Special Section on "Queer Judgments".

I see editorship as relational, and therefore I try not to limit myself to just overseeing peer-reviews or chasing people to meet deadlines; rather, I prefer to accompany authors and guest editors on their journey. In my role as editor of this edition of *Amicus Curiae*, I have had the privilege of working closely with some of the authors and guest editors, and what emerged from our conversations was a common belief that differences are resources to celebrate, and that we share a commitment to uphold critical and respectful thinking. So, I wish to thank all contributors, reviewers, editorial colleagues, Marie Selwood and Narayana Harave, and, in particular, Graeme Reid, United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity; they have all contributed to shape this Issue as a collaborative and joyful journey with the hope of encouraging further creative, empathic and critical reflections on how law shapes our lives.

The Issue starts with Johannes San Miguel Giralt who traces the complex exchanges between United States (US) and Cuban legal traditions during the period of military occupation, revealing how law speaks across languages and empires. Drawing on comparative legal scholarship, he reconstructs how US common law ideas were transplanted into Cuba's continental-style system at the turn of the twentieth century—an experiment in legal translation that exposes both the ambitions and limits of transplantation. Neemah Ahamed's study of Black women's experiences of workplace harassment under #MeToo brings law into dialogue with lived experience, revealing how race and gender alongside other identity factors intersect in shaping access to justice. Drawing on empirical work and the "Naming, Blaming, Claiming" paradigm, Ahamed shows that, while her participants are often able to identify and name harm and able to attribute blame, they hesitate to pursue formal redress. The piece challenges legal scholars and practitioners to consider how intersecting identities mediate one's relationship with the legal system, and how law might better listen to—and believe—the voices of those most marginalized within it.

Then Victoria Barnes, Liam Sunner, and Monica Vessio carry that spirit of listening and questioning into the law school, asking what legal education should offer in an age of AI. They situate debates about integrity and authorship within a broader question of what legal education is meant to achieve, and their piece is an encouragement to address critically, and with a needs-based approach, the emergence of generative AI in law schools. The final article by Nicholas A Pratt turns to Chinese jurisprudence,

examining how "custom" and "good custom" operate as sites of negotiation between traditional values and socialist ideology. By placing the jurisprudence of Mainland China and Taiwan in comparative relief, Pratt shows how the concept of custom remains an active terrain where morality, politics, and legality overlap. His discussion of "good custom" opens a window into the ways in which states articulate social values through law—and, in turn, how business communities might respond to those articulations.

The articles are followed by a note authored by Bianca Jackson on the case law concerning medical treatment for trans children and the concept of a "special category" of medical treatment. Her analysis reveals how the judiciary has largely rejected the idea that gender-affirming care for young people requires automatic court intervention and that the standard principles around consent and parental responsibility apply. However, she also notes an internal dissonance in the recent case of *O v P and Q* [2024] EWCA Civ 1577, where the decision of the court seems somewhat at odds with established law.

The Issue then moves on to host three Special Sections. The first Special Section, edited by Katie Jukes and Alex Powell, is the second output of the Queer Judgments Project. It opens by inviting the reader to watch the video of Graeme Reid's "Foreword" to the Special Section. Then the reader is taken on a journey through various types of contribution that demonstrate how a queer perspective on law can be adopted to make meaningful changes to the lives of queer people—a queer approach that is conveyed through text, music, songs, poems. Then, our second Special Section, "Pushing the Boundaries of Intergenerational Activism in an Era of Polycrisis", edited by Kristen Hope, Amrit Rijal, Prathit Singh, Januka Jamarkatel, Brian King, Siroun Thacker, Rodoshee Sarder and Osish Niraula, brings together youth and adult voices that offer various examples of intergenerational collaborations advancing children's rights. The last Special Section, "Law's Spaces and Places", edited by Andrew Benjamin Bricker, offers a scholarly exploration of law's spatial dimensions in Central London, curated by members of the Law and the Humanities Hub at the Institute of Advanced Legal Studies—law can indeed be walked!

In the Visual Law section, Hamsini Marada reflects on the various ways in which law interacts with the visual when it is captured by the camera. Marada does so by analysing visuals created by the camera and her own paintings and sketches.

Three book reviews then follow. Marian Roberts' review of *Rethinking*

Family Mediation: The Role of the Family Mediator in Contemporary Times by Rachael Blakey offers the reader some broader reflections on mediation theory and practice. Ling Zhou brings the reader a review of a comparative analysis of *Law and Social Policy in the Global South: Brazil, China, India, South Africa*, an edited collection by Ulrike Davy and Albert H Y Chen. Finally, Mei Ning Yan reflects on the links between big tech and the law in China that Angela Huyue Zhang analyses in her *High Wire: How China Regulates Big Tech and Governs its Economy*.

As usual, the Issue ends with Eliza Boudier's round-up of news and events from the Institute of Advanced Legal Studies.

For Professor William Twining

Sadly, while this Issue was in production, we received the news that Professor William Twining died on 9 October 2025 at the age of 91. Professor Twining has gifted us not only with his formidable scholarship but he has also shown us all that emotions, personality and personal histories are essential in studying, learning and practising law comprehensively, critically and creatively. His legacy is to situate the importance of human relationships and their dynamics at the core of approaching the study of law and for that we will be forever grateful.

Transplants from Different Legal Families in Comparative Law: The Case of the Incorporation of US Common Law Institutions into Cuba for State-Building Purposes (1898-1902)

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Abstract

This article aims to provide a detailed account of receptions and transplants from the United States (US) into Cuban domestic law within the period of military occupation (1898-1902). The underlying assumption points to the particular history of the rough exposition of Cuban continental-style law to the overwhelming influence of US common law at the beginning of the twentieth century. There is scant evidence of this phenomenon in the Hispanic-American area. However, the particularities of Cuban law provide almost laboratory conditions for the insightful study and analysis of dynamic complex interactions between legal families through transplants and receptions.

Keywords: comparative law; legal transplants; legal families; Cuban law; US common law.

[A] INTRODUCTORY REMARKS

From a visual standpoint, Cuba is inextricably linked to the image of paradisal beaches, Spanish colonial architecture, 1940s and 1950s American-brand classic cars, 1970s and 1980s Soviet out-of-style vehicles and modern 1990s European automobiles. This mottled and varied scenery creates an ensemble showing how different traditions and ways of living from various historical moments and ideological or geographical origins can coexist and relate to each other. This very same scenario can be observed *mutatis mutandis* in the current Cuban domestic law as different legal categories and institutions are heavily influenced or directly imported from United States (US) common law, Soviet socialist law, and the *lex mercatoria*; all of these are fully blended into a Hispanic-continental legal traditional base. The cars described above run together, side by side, very carefully along the same bumpy streets and roads to avoid the slightest collision. However, this is not the case with the law;

courts, notaries and parties must navigate imported legal categories as they draw up contracts, put them to use in arbitration centres, and even conduct foreign litigation involving more than two million Cubans migrating overseas.[1] Many factors determine the current configuration of a significant part of Cuban law, among them the complex interaction process between domestic and foreign law, which has been exhibited through different legal families throughout history.[2]

Legal transplants are a central topic in comparative legal history. Authors and scholars have dedicated a lot of thought to the specifics of the loans and reception of foreign legal categories and institutions, stressing that the transplantation process does not provide an exact replica. This is particularly true for receptions between different legal traditions. In addition, the transplantation process is deeply influenced by legal history and many other factors involved like geography, path dependence, culture and so forth.[3]

As a case study, insufficient research has been conducted about the interactions between different legal families within the Cuban domestic legal context. The main contributions are formalist references to comparative law and certain papers that analyse some specific points of the US occupation in Cuba. Diego Vicente Tejera's early descriptive contribution to the foreign legal influences on Cuba must be mentioned in this research context. His scholarly work was duly praised and acclaimed in Spain (Vicente Tejera 1925). Likewise, the compilatory contribution of Milo Adrián Borges (1935) should also be mentioned as particularly insightful (although I do not share some of the conclusions) and the contribution of Vicente Julio Arranz Castillero with regard to incorporating US-style witness protection arrangements (Arranz Castillero 2011).

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1 An additional forthcoming paper will delve into the feasibility of control groups in comparative legal history, using Puerto Rico as a test case to draw the line of legal history developments in Cuba. Another forthcoming paper will address legal transplants from the US during the military occupation, emphasizing private law.

2 This is probably a case study of "transfer of normativity" in legal history, following the guidelines set forth by Thomas Duve and most legal historians in Europe (Duve 2014: 4). However, this article deals with the complexities of interrupted transfer due to cultural rejection, resulting in a mixed hybridization process of the legal categories involved leading to transculturation.

3 The adoption of foreign law in the form of the wording from statutory provisions, whole pieces of legislation, codification bodies, *regulae iuris*, doctrinal categories, institutions, legal principles, judicial reasoning, or the entire rule of law conception is rooted in history (Cairns 2013; Graziadei 2019). The effectiveness of such a transplantation process depends upon many variables, one of the most complex being path dependence, related to institutional behavior of inertia and resistance to change (Husa 2018). In any case, transplants are a cost-saving tool to build, rebuild, or modify domestic legislation, as Smits put clearly in the example of the wide adoption of Western countries' occupational safety legal criteria by other countries (Smits 2006).

Also very relevant for the current analysis are the works of the early twentieth-century Cuban historians Ramiro Guerra and Rafael Martínez Ortiz, who boldly dedicated themselves to digging into the entanglement of facts, characters, global context and the overall intricacies of the construction of the new Republic of Cuba. From their perspective as historians, their conclusions on the legal implications stemming from the political processes experienced at the time are greatly appreciated (Martínez Ortiz 1929; Guerra 1952a; 1952b).

[B] MAIN ACTORS INVOLVED IN THE SOURCES: LATE NINETEENTH-CENTURY US COMMON LAW, THE MCKINLEY ADMINISTRATION, THE MILITARY GOVERNORS AND THE CUBAN CIVIL ADMINISTRATION

The twentieth century in Cuba starts with the end of the Spanish–American War, the cessation of 400 years of Spanish sovereignty over the island, and the tireless efforts by both the Americans and the Cubans to give birth to the penultimate Hispanic-American republic in 1902 (Panama, the last one, came later in 1903). Following state-building purposes, President William McKinley engaged in the endeavour to bring a new independent republic to life, and, as soon as the Paris Treaty was signed, the US Army was instructed to change its mission: from war operations to leading a civil government plus implementing a new constitutional framework (Guillard 2020: 26). That is how the executive branch of government, the military governors and the appointed civil administration became the most prominent actors involved in legal transplantation from US common law into Cuban domestic law.

Expressions like “actors” or “legal actors” convey the idea of a human element which took part in the processes of transplantation (eg the persons, organizations and informal associations with some degree of organic cohesion), giving way to adhesions, resistances and hybridization in the legal structures under transplant. However, it is the formal actors, namely, the sovereign authorities in Cuba, that are the most important due to the Paris Treaty which ended the Spanish-American War. Likewise, informal actors must be included in the narrative as those holding adequate power to bargain and strike deals concerning the construction of the new Cuban domestic law. Formal and informal actors must be analysed according to a twofold consideration of comparative law: the

formalistic perspective focused on the strictly literal wording of written rules, and the social context comprising the different dynamic forces and mainstream trends significantly affecting regulations in force.

With regard to the sources, formal and informal actors can participate in the global circulation stream of legal ideas by providing the categories, conceptions, theories and doctrines to be incorporated into domestic law by the recipient jurisdiction. Transmission of legal ideas for transplants and receptions may take two different forms. First, an actively coercive and repressive form through the imposition of a new law under social, political and military violence or the threat of violence to crush any hint of domestic resistance. Second, the non-violent form may include coercive pressure without detracting from the receiver's willingness to adopt new laws and plan consensus as the receivers actively incorporate foreign legal instruments and measures into their domestic law. American authorities displayed a dual approach for their legal state-building task in Cuba: the non-violent use of some coercive pressure and the passive Cuban consensual adoption of legal ideas under scrutiny.

Overall, the most relevant actors from the donor's side were the officers on the ground: the military governors and their Cuban civil administration. Leonard Wood, who succeeded Major General John Brooke, was an important roleplaying character as he dealt with the Cubans, mostly with intermediation. He was the high-ranking military authority appointed by the executive branch to enforce legislation, presidential proclamations and secretary instructions *in situ*. President McKinley, his administration, and the Senate may have been the framers, but it was up to Wood to decide how it should play out in Cuba: the stick, the carrot, or a combination of both. Moreover, he was skilful in deploying his diplomatic touch, competence, abilities and knowledge of human character as an army man. He was also handy when it came to picking the Cubans and the Americans to work with.

Wood is undoubtedly the most impactful in the cast of characters at the time because he firmly imprinted his own idiosyncrasies and personal background onto the whole transplantation process. He can be characterized as having both a moral and physical side to his personality, being fond of outdoor activities and actively engaging with friends and acquaintances; he was quite an odd mix but a typical self-righteous, intensely moral New Englander Yankee. He was of a very democratic standing, but his moral self-righteousness also drove him toward contradictory—and yet necessary, given the circumstances—outbursts of authoritarian, arbitrary decision-making. It is known that his initial bent

for the decentralization of power from Brooke's Havana to the regional military commanders while he was assigned to Santiago (the easternmost province in Cuba where the US Army landings took place), but as soon as he was appointed as the military commander of the Division of Cuba, he reversed his position, dropping his plea for decentralization, and started to push for recentralization of command.[4]

The highest ranked of all the actors was undoubtedly President McKinley, even though he did not take part in the actual process of building the new legal system. He was sworn in and took office in March 1897, was re-elected in 1900, and was killed by a gunshot on 6 September 1901. He was succeeded by the wilder character of Theodore (Teddy) Roosevelt, who, however, did not play a significant role in this process despite his wartime experience in Cuba. The President of the United States was (and still is) a key personality in constructing the new Cuban state because he vetted and appointed the talent directly charged with carrying out the main tasks.

Lane has stressed that the friendship between McKinley and Wood developed earlier, when the latter became the first lady's attending physician, and was a firm foundation for the former's military career path. Also, his circle of conservative politician friends and acquaintances helped a lot to secure Wood's appointment as the Commander of the Division of Cuba on 13 December 1899, among them was Senator Henry Cabot Lodge (Republican, Massachusetts), Governor Teddy Roosevelt (New York), Secretary of State John Hay, and some others. For his legal work, Wood brought to Cuba his long-time San Francisco friend James Runcie to be part of his team as a volunteer legal advisor and as support to an injured, retired official, however, he had to let him leave after an old press article raising criticism about the previous Brooke administration triggered an outcry in Washington on how the Cubans' affairs were being handled (Lane 1978).

As for the civil administration, it was formed by Cuban veterans and intellectuals appointed as a mirror image of a cabinet, with secretaries to

[4] Wood's opinions on centralization and decentralization filtered into the constitutional debates later in 1901 and even gave motives for a heated internal battle against Major General Brooke, sending shockwaves throughout the press and to the Army bureaucracy in Washington DC, as a testament of the ambitions and career-focused mindset which the general showed from the start.

In his letters to his all-time friend Teddy Roosevelt, he showed acrimony against Major General Brooke because the latter decided to restore Spanish law and the judiciary, making it impossible—in Wood's view—to achieve a liberal system of government while allowing Cubans in the civilian cabinet to undermine state-building efforts in a country that needed "decent, candid, courageous government; good courts, good schools, and all the public work we can pay for, and a businesslike way of doing things" (Lane 1978; Peters & Ors 1900).

carry out the duties and provide solutions for the supply of basic living conditions and the appropriate legislation for a transitional stage to the new Republic of Cuba.[5] Without the civil administration, the American authorities would have found it impossible to modernize the new Cuban domestic legal system to ready the country for trade, investment and modern financial exchange according to US standards. Some particularly effective members are worth mentioning, such as Dr Miguel Gener, who oversaw the complicated and controversial justice reforms—later in disgrace as mayor of Havana.

[C] MAIN ACTORS INVOLVED IN THE PROJECT: THE CUBAN CONSTITUENT ASSEMBLY, WAR VETERANS, THE PRESS AND THE PROFESSIONAL COMMUNITY OF ATTORNEYS

Many Cubans were involved in the state-building project. They were a crucial part of receiving legal transplants into the target domestic legal system through direct transposition or hybridization. The most active Cuban institutional actor involved was the Constituent Assembly, which engaged in resistance mode against legal transplants for two reasons: firstly, because the US Government wanted a privileged relationship and, secondly, because the common law was deemed culturally incompatible with the Hispanic-continental legal tradition of civil law (Martínez Ortiz 1929: 194; Martínez Martínez 2005: 206). The Assembly was formed by elected Cubans from many different backgrounds with the massive task of drafting a constitution from scratch.

From an individual point of view, Generalissimo Máximo Gómez, the only founding father who survived to enjoy independence, was the most important but also the most low-key of all. Admired by the people throughout the country and with a solid moral authority among the veterans, insurgency officials, members of the Constituent Assembly and the local press, he was well aware of how impactful his words would be for the military occupation. From the beginning, American military authorities tried to woo, flatter and please the old general. Despite his widely recognized and well-deserved *auctoritas* over the Cubans, Máximo Gómez decided not to take an active role in constructing the new state.

[5] This mirror-image approach largely laid the foundations for the structure of the new executive branch of government in the new 1901 Constitution, and therefore for the upcoming republican institutional framework following the path-dependence constraints.

From a collective standpoint, the most potent yet ill-advised force comprised the Cuban insurgency veterans. Some veterans, specifically from the Ten Years' War, were also attorneys; most were exiled to the US. Other veterans became agents for reception because they had participated in the constitutional and legislative efforts to organize a republic in arms during the wars. This experience was helpful in listening to, discussing and creating favourable public opinion such that some of them were voted in as delegates to the Constituent Assembly. Some of them sympathized with the French Revolution; concerning the law, their role model was France, the mother of the Spanish codified continental tradition.

Cuban newspapers were also instrumental and an obstacle to the military occupation, given their influence over public opinion. For example, they loudly voiced their rejection of the use of violence and forced Secretary Elihu Root to change the tone of the military occupation. Given this criticism, General James Wilson and Wood were called to Washington to receive new instructions, and, as a result, there was a transition of power with Military Governor Brooke handing over to Wood (Martínez Ortiz 1929: 100). On many occasions, the press dedicated a lot of effort to the strict surveillance of American military activities, thus promoting the hyperventilation of intellectuals and public opinion. Likewise, on other occasions, the press attacked the legal influence of the US in Cuban affairs, as with the *Aduanas* case (unreported) in which Wood removed the Cuban Solicitor General (*Fiscal del Tribunal Supremo*). Historian Martínez Ortiz also considered that the press's voicing of the concerns of Cuban war veterans and the rejection of those concerns were decisive in bringing about a lighter touch from Washington (1929).

Finally, yet importantly, Cuban attorneys were essential in legal transplants and receptions. This professional group of attorneys won either the medal or bore the guilt, depending on the standpoint, of being the main characters in conserving continental law on the island despite US influence. Ricardo Pelegrín Taboada broadly argued the importance of attorneys as a social and professional group in Cuban independence and for the subsequent construction of the new republican institutionality (Pelegrín Taboada 2018). However, the leading cause for the common law ideas spreading through the island in the nineteenth century lay with the gradually increasing process of economic, commercial and investment interests between the vigorous industrial American power and the fertile conditions for the sugar agro-industrial business. In addition, Cubans' small but steady migratory movement to and from the US considerably helped some attorneys embrace the full adoption of US common law. In the mid-nineteenth century, large Cuban communities in Tampa, Key

West, New Orleans, Philadelphia and New York were formed by political exiles and tobacco-makers (*tabaqueros*). This economic reality translated into annexionist political ideas spreading all over the island at that time.

A last-minute character in this drama—the marriage formed by geography and meteorology—played an indisputable role in the history of the US–Cuba bilateral relationship. In the 1840s, increased hurricanes, both in number and strength, devastated the island, leaving destruction and havoc behind. The geographical distance between Cuba and Spain made it very hard to send provisions such as food and medicine from the Peninsula when they were most needed to relieve the population. There were dire living conditions as the hurricane seasons were harder than expected. As an emergency measure, Captain General O'Donnell allowed a powerful American merchant fleet to dock in Cuban harbours to bring food for the people who were near (Pérez 2001: 131-138). This was the start of a rising intimate trade and investment relationship that would turn, in time, into a stormy, melodramatic love–hate political relationship lasting to the present day. More than a hundred years later, despite the Cactus Curtain, emergency relief due to natural disaster keeps flowing from the US to the island.

[D] SPECIFIC TRANSPLANTS INTO CUBAN DOMESTIC LAW FROM US COMMON LAW

It is essential to clearly set out the need for the conceptual distinction between authentic *per se* legal transplants and different management decisions by the military occupation which did not rank as legal transplants. The state-building project, as envisioned and performed by the US establishment in Cuba, involved not one but many legal incorporations. In this context, US authorities engaged in a piece-by-piece approach, choosing which were the most important and necessary incorporations into domestic law and which to bargain for, according to the Cubans' hesitation, reluctance, or resistance.

For explanatory purposes, there follows a classificatory list of findings: transplants not made effective due to self-abstention by the US authorities; those not made effective due to outright rejection by the Cubans; those made effective despite local rejection of them as legal irritants; those made effective with strong resistance but finally accepted by the Cubans; those made effective with moderate resistance or with reluctance; those made effective with hybridization as a strategy to avoid rejection; and those made effective without any resistance but willingly accepted by the Cubans.

Legal transplants not made effective due to US abstention to push them through

Receptions from foreign law usually require the willing disposition of the domestic legal establishment, namely, legislators, academia, practising attorneys and judges. In the circumstances of forced, semi-forced, or co-sponsored legal transplants in the case of state-building efforts as in a protectorate, there is an additional requirement: the willing disposition by the protecting state engaged in constructing the new law. Contrary to the general view, Americans did not land in Cuba to burn down the old legal structures to create a scorched-earth legal landscape. On the contrary, the military occupation made statements for self-restriction: public assertions containing the negative self-imposed duty not to bring some legal institutions or measures into domestic law. There were many reasons for this: to calm the waters and reduce local public inflammation towards the occupation, to show tolerance for the domestic culture and traditions vis-à-vis the international community, to avoid unnecessary friction with established local elites, and the like. This may be the first time a US occupation force had appealed to the local *mores* as a limit to their governing activities in occupied land.

In the Cuban case, unexpected self-restriction statements were very relevant and full of symbolism. These announcements ranged from retaining Spanish law in force to tolerate some petty offences; in these instances, the military occupation was very careful. First, the US authorities proclaimed the continued legal effectiveness of substantive criminal law and the law of persons. Following the Paris Treaty, the military intervention stated the continued legal effectiveness of the Spanish Criminal Code 1870 and the Spanish Civil Code 1889 (Guerra 1952a: 461; Parise 2014: 319). During his tenure as provincial governor, Wood was among the first commanders to align with this approach in his early provisional constitution. Authorities also proclaimed the continued legal effect of pending court decisions, proceedings and procedural law. The 1898 Paris Treaty was clear on the temporary validity of law and court proceedings. According to the provisions included in the final draft by the American delegation, the US confirmed the continued legal effect of court decisions, proceedings already in place and Spanish substantive law.

In this context, it is worth noting that the US military occupation had a hard time dealing with religion, and it soon retreated from the entanglement of ancient statutory provisions and customary rules by proclaiming self-restriction. In this regard, the military occupation

preferred the dereliction of the duty to appoint prelates of the Catholic Church and abstained from dispute resolution in ecclesiastical claims; it proclaimed the continued effect of all ecclesiastical law and practices. According to the ancient institution of royal patronage (*regio patronato*), the Pope formally vested the Spanish Crown with the right to appoint diocesan authorities in Hispanic America. This high-royal attribution was always coupled with state sovereignty, which Spain lost as the viceroyalties became independent republics from 1810 to 1825. The new American states retained their prerogative to negotiate new deals with other countries, including concordats and *modus vivendi* with the Vatican. However, Cuba and Puerto Rico remained sovereign Spanish territory, with the *regio patronato* in force until 1898.

Legal transplants not made effective due to outright rejection by the Cubans

Alongside the US authorities' abstentions, the Cubans quickly and bluntly rejected many legal transplants. The most relevant was the municipal autonomy framework following New York State law. The issue of municipal self-management could not wait for the enactment of the new Constitution so the *ad hoc* commission on legal reform rapidly dealt with it.[6] Businesses needed clear rules for procurement contracts at the municipal level for urban renovation, hygiene campaigns, sanitization, promotion of public services, street layout and so on. Wood included municipal autonomy in the 10th Provision in his Provisional Constitution for Santiago de Cuba on 20 October 1898.

These liberties were provided to the municipalities to replace old rules and limitations inherited from Spanish law. In one particular case, the military governor of Matanzas proposed adopting the New York State municipal legal framework, characterized by the classification of towns and settlements according to their population. Coincidentally, around 66 years later, the Soviet socialist-inspired municipal legal framework was also first implemented as an experiment in the province of Matanzas in 1974.

This system was similar to the Spanish charters (*fueros*) but not the same. First, Iberian town charters (*cartas puebla*) had similar content to each other, but they were granted to specific towns, villages, or major

[6] It is important to distinguish early efforts to re-establish municipal authorities and the late project to build a long-lasting municipal legal framework. Reference on the subject as a legal transplant is made to the latter but the diligence shown by the military authorities to provide for local order and rules should not be diminished (Wood 1903: 154).

cities. This differed from the New York municipal structure as these were granted powers and prerogatives according to a previous state law classification. Second, *fueros* did not reach the island because the first villages were built and founded in Cuba after charters were granted. Third, as said before, Cuba was not a regular province but a General Captaincy with a military nature comprising a wide range of powers, so municipal autonomy was restricted.[7] These were the main reasons American authorities considered that replacing the municipal legal framework in Cuba was essential (Wilson 1899).

Legal transplants made effective despite rejection of them as legal irritants

Some other transplants were successfully incorporated but soon ejected from the legal system for cultural reasons, among them trial by jury and the prohibitions against gambling and other dubious moral behaviours. Along with state witnesses, correctional justice and *habeas corpus*, trial by jury was one of the four criminal law institutions under transplant from the US common law into Cuban domestic law. Of these, trial by jury

[7] There is still a debate among historians across the Atlantic Ocean on the nature of the Spanish rule in the Americas including Cuba. Most Spanish and Cuban exiled authors argue that Cuba was never a colony but a Spanish province as an equal and integral part of the peninsular territory. This is a current hot issue since Spanish intellectuals are now arguing against the so-called black legend (*leyenda negra*) with the publication in 2016 of Roca Barea's *Imperiofobia y leyenda negra: Roma, Rusia, Estados Unidos y el Imperio español*.

I respectfully disagree. Certainly, the political status of the island had evolved towards equality with the metropolitan peninsular provinces, but Cuba had not reached equal status at all—the confusion stems from the lack of a legal perspective. First, the liberal Cadiz Constitution enacted in 1812 granted Cuba the status of a province with the right to elect and send representatives to the Spanish legislative body, *Cortes*; this provincial prerogative disappeared in 1836. Second, section 89 of the 1876 Spanish Constitution granted devolution of provincial status to Cuba and Puerto Rico, also with the prerogative to elect and send representatives to the *Cortes*; still, the provision made very clear that both were just "overseas provinces" (*provincias de Ultramar*) under special legislation. Third, unlike the peninsular provinces in mainland Spain, government secretaries were in charge of the provinces of Cuba and Puerto Rico. They often changed names but the political intent to submit both islands to special reinforced treatment never went away: State Secretary and Desk of Overseas Commerce and Government (*Secretaría de Estado y Despacho de Comercio y Gobernación de Ultramar*, 1836-1847), General Director of Overseas Government under different ministries (*Dirección General de Gobierno de Ultramar*, 1847-1863) and Overseas Ministry (*Ministerio de Ultramar*, 1863-1898). Fourth, ordinary legislation and codification enacted in Madrid never reached direct *ipso iure* validity in the island; the Overseas Minister would be required to stamp and proclaim the extension of validity to Cuba. For instance, the Royal Decree of 6 October 1888 enacted the former Civil Code for all of Spain but, for Cuba, with the requirement of the Royal Decree of 31 July 1889, to extend the scope of application to include the island. Fifth, all liberal Spanish constitutions in the nineteenth century provided for and confirmed that Spanish territory overseas would be militarily managed through general captaincies with a concentration of executive and judiciary powers, unlike mainland continental provinces. Last, but never least, the hot issue of slavery in the overseas province of Cuba cannot be understood from a legal standpoint without considering the island as what it was: not a province but a colonial territory under a specific constitutional framework of rights different from mainland Spain where slavery was prohibited.

was the most performative, appealing and representative of the Anglo-Saxon approach to justice.

First, it must be noted that criminal institutions were the most critical transplants in relation to local public opinion because they dealt with order, crime, petty offences and the perception of safe streets (Arranz Castillero 2011: 191). The military occupation quickly grasped the fact that the successful transplant of the jury trial needed the acquiescence of the Constituent Assembly as it was not appropriate to shove it down the throats of all Cubans without their consent, at least in part. Historian Martínez Ortiz (1929) reported that Cuban courts did summon people for jury duty in several cases, but things quickly got out of hand. Given this setback, the military occupation turned for help to the Constituent Assembly, but only met reluctance and rejection (Martínez Ortiz 1929: 177; Guerra 1952b: 84).

Second, the jury trial triggered much controversy. The main objections, at least in Cuba, lay with the negative perceptions that society shared about the average individual's ability to resist becoming embroiled in schemes, indecent propositions, political pressure, extortion and the like. Governor Wood insisted that the main hurdles were twofold: first, the gap between law and morality, given that regular citizens were not willing to act as jury members in cases involving prosecution against gambling practices and cockfights, which were very much part of popular traditions in the island; and, second, illiteracy rates (Wood 1903: 160). These objections deserve context: Cuba was drowning in exhaustion and stagnation after 30 years of war with a tense, dramatic, peaceful interregnum. All of this was fuel for the weakening of public moral convictions.

Speaking of moral issues, Wood attempted to put together rules for decent public behaviour, namely the prohibition of gambling and cockfights. In most cases, sudden sovereignty shifts also bring cultural shock to an occupied land. Cuba was no exception because there was a cultural overlap in daily life between Cubans, military staffers and soldiers. Cubans, particularly Havana residents, discovered baseball, canned food, shiny white dentures, wool cloth uniforms, Christian prayers without heavy liturgy or image worship, English vowels, phonetics and refreshing beverages like iced tea or Coca-Cola. In return, some American soldiers had their first experience of high-degree-spirited rhum and hard liquor made from sugar cane, the habit of taking an afternoon nap or having a

deep smoke from cigars (endearing for Winston Churchill, who learned about this during his wartime stay in Cuba), and, of course, cockfights.[8]

Until 1898, cockfights were not only allowed but also taxed by the municipalities. However, the authorities were pressured to eradicate them by public opinion concerned with morals and appropriate behaviour to preserve family life and set an example for young people. With the ban, a legal translation problem arose: Brooke's legal staff made the final draft in English, providing for the ban on the construction of new fighting grounds, and the press had a Spanish version containing a total ban. As this language difference was discovered, many people expressed their concerns. In the end, General Wood dealt with the issue by enacting the total ban as requested by public opinion, but the tradition was heavily rooted in rural areas (Martínez Ortiz 1929: 131). Cockfighting, as immoral as some people may consider it, is still a deeply rooted rural tradition in Cuba.[9]

Legal transplants made effective with strong resistance but subsequently accepted by the Cubans

Probably the most critical incorporation which caused great public controversy was the right to vote with restrictions. As surprising as it may be, there was no right to vote under Spanish sovereignty in Cuba. On the contrary, the Captain General, sent from Madrid with concentrated military powers, handled all political authority on the island. As mentioned, the island had the right to send representatives to the Spanish *Cortes* for a very short period, but universal suffrage was not the norm. The *ad hoc* commission dealt with the right to vote through Military Order in April 1900 following a restrictive interpretation as it ruled for the exclusion of illiterate people, women, and also men unless they could prove personal savings higher than 250 pesos or had taken arms in the insurgency fighting for Cuban independence (Martínez Ortiz 1929: 130). The restricted criteria set forth are a reflection of the morally rigid feature in Wood's personality as he took a negative ethical position towards those

[8] Some popular culture innovations from this period are known worldwide, such as mixing local and imported drinks like *Cuba Libre* and *Daiquirí*.

[9] Probably one of the first instances of vast distance between the law in books and the law in action during the military occupation. As deeply rooted popular traditions are hard to prevent or discourage through law, Wood knew his limits very well in providing new morals through legislation. As striking as it may appear to the regular US citizen, cockfights, as with many other traditions related to gambling, did not have the stain of anti-values in the Spanish possessions in the Caribbean but played an important role as an amalgamating phenomenon in rural areas (Wood 1903; Woolsey 1899).

men unable to have savings or willing to work, which he associated with laziness or an irresponsible lifestyle.[10]

Again, these rules triggered action by the veterans even before the call for the Constituent Assembly, particularly General Bartolomé Masó and General José Miró Argenter. This debate needs context. Delegates Berriel and Alemán raised the controversy on the constitutional nature of the right to vote. General Julio Sanguily, one of the delegates who caused the most bother for Governor Wood, voiced his concern that the Assembly was feeling the pressure of public opinion. However, delegates also wanted the Americans' approval (Guerra 1952b: 90). In addition to this, it is essential to note the reception of elements of British domestic law into the new electoral system proceedings and scrutiny of votes. Historian Guerra reported how the military occupation transplanted electoral practices and regulations from the political reforms supported by William Edward Forster, a Member of the British Parliament (Guerra 1952b: 123).

Interestingly, state witnesses were a key legal transplant from the US which was initially met with particular trepidation but slowly gained traction among Cubans. Military Order 24 1900 provided for state witnesses upon judicial declaration. Additionally, Military Order 24 referred to the Spanish Criminal Code 1870, sections 398 and 400, then in force, releasing from punitive criminal consequences all public officials committing bribery as long as they made the authorities aware of such facts and supplied all pertaining information.

From a strictly dogmatic standpoint, state witnesses were barely compatible with the Spanish criminal law then in force. It has been argued that the "protected" status of the witness related to their "repentance" of a legal nature which fell somewhere between substantive and procedural criminal law, consistent with the theory of ulterior circumstances cancelling out punishment. The state witness still ranks as a dogmatic category associated with the opportunity principle, an instrument to simplify criminal justice by improving both persecution and prosecution of complex criminal schemes needing help from the offender's side. Arranz Castillero (2011) argued that the lack of such an institutional instrument in continental-related domestic law required a functional equivalent approach for its incorporation. This transplant was purported to slot into Cuban criminal law categories so that it could fully deploy

[10] It has been argued that the main reason Wood decided for the minority report on electoral legislation was that this report contained a restricted version of the right to vote, excluding the "illiterate Cuban mass" from relevant decisions and, thus, avoiding radical factions rising to political power (Lane 1978: 94, 95). In such context, Wood chose the path of limited enfranchisement.

aims and effectiveness as in its original legal source, under an approach called "presumptive similarity of solutions" (*presunción de similitud de soluciones*). According to this approach, if the state witness played a vital role in the persecution and prosecution of certain crimes in US common law, *a fortiori* they would play a vital role in the persecution of certain crimes in the less complex Cuban criminal environment. This legal institution was intended to help prosecutors in bribery cases, allowing the recruitment of criminals with the purpose of destroying corruption rings (Arranz Castillero 2011: 211).

The generalized corruption in the Customs Department was the main reason the military occupation had to pull the rabbit out of a hat and bring state witnesses into the mix. Additionally, Spanish criminal reforms at the time allegedly raised the sanctions for customs fraud crimes as provided by the Royal Decree of 20 June 1852. However, this reform was not in force in Cuba. Accordingly, the Cuban "province" was distinguished from the continental provinces of Spain in customs infractions because it gave out reduced punishments and impunity despite the Customs Ordinance of 17 December 1880.

In a broader sense, some authors argue that the purpose of this transplant was the "Americanization" of justice and not a legitimate measure to cut out the cancer of colonial corruption (Arranz Castillero 2011: 192). But, on the contrary, the state witness was not transplanted to add a new element to the "Americanization" of justice, despite the widespread perception of constitutional superiority and efficient public management that Americans enjoyed on the island. There were no reasons to doubt Wood's intentions: corrupt practices inherited from colonial authorities were simply considered malignant, that was it. This was a double rejection since the US was still going through the healing process of the Reconstruction through the Gilded Age. Moreover, the military personnel sent to Cuba from the US were war veterans and officials with high professional standards. Ultimately, the state witness scheme became rooted in Cuban law and academia as the institution was further developed and codified in Decree Act 628 on 26 October 1934.

Contrastingly, one of the most praised legal receptions by the Cuban people (being tagged with a widespread popular nickname as a show of appreciation or mockery) was correctional justice. Military Order 213 1900 created a small court for Havana under Captain Pritcher to prosecute petty offences and misdemeanours (in Spanish legal language: minor crimes, administrative infractions). The correctional court delivered great results in a short time, including the persecution of infractions against

public hygiene, urban mobility, immoral behaviour and the protection of women's decorum, so it was popular with ordinary people.

This court was initially very controversial because American officials ran it. Although good and bad behaviour is the same everywhere, Havana had some regular, widely tolerated characters dedicated to licentious, promiscuous, libertine lifestyles with a rampant problem of male and female prostitution—a normal day at the office in Caribbean harbourside cities. However, the situation was exacerbated by the increasing migration of poor workers from abroad and war-struck rural areas; the social post-trauma impact of war without independence leading many veterans to alcohol addictions and poverty; and family break-ups due to Spanish officials' withdrawal to Europe. Many minor offences were persecuted and eradicated, such as popular market and street vendors' "bad habit" of going shirtless in front of ladies and housemaids buying fruit several times a day; and the unhygienic habit of milking cows early in the morning on streets to directly sell fresh milk to neighbours, among many others activities. This court served the purpose of bringing decency to urban life. The correctional court went on to clean up the cities even when this meant an invasion of privacy, forcing the installation of essential sanitation services in all houses and office buildings. This was an abrupt but temporary suspension of privacy rights in a justified context.

Legal transplants made effective with moderate resistance or with reluctance

In the scale of resistance intensity felt by Cubans opposed to attempts to transplant new measures from US common law, a special mention should be dedicated to those that faced moderate resistance. First, the introduction of civil marriage from America was probably the most people-friendly US transplant. As paradoxical as it may seem, the US and the Soviet Union were the primary sources of civil marriage in Cuba as a result of the Christian-tolerant American mindset during the military occupation and the decisive influence of moral Soviet socialist conceptions on working-class values coupled with religious abolitionism.

Ab initio, the military occupation proclaimed the exclusiveness of civil marriage, forcing all young brides and grooms to head to the civil register offices days after the Catholic wedding. However, US authorities rapidly corrected things on 8 August 1900, through a military order, proclaiming equal status and validity for civil and religious marriage (Guerra 1952b: 34). Despite the good intentions Americans had, in the beginning civil marriage did not take hold. We should consider that

the US was characterized by Christian diversity, and American people professed several different denominations. Hence, the legally binding civil contract was instrumental in enforcing compulsory duties between spouses throughout the nation, no matter the religious denomination of the married couple. On the other hand, at the moment of the military occupation, the Cuban people were predominantly Catholic for historical reasons: the Royal Patronage for the Indies (*regio patronato indiano*), the lack of US religious penetration in the island, the overwhelming role played by the parochial priests in articulating community life in towns and cities, and so forth. All these differences meant that Cubans were not in a hurry to embrace civil marriage in the first republican years.

This context gave birth to a Catholic culture and prevalent religious feelings, no matter the actual religious beliefs. Back then, women in families had domestic housekeeping roles, and their free time was dedicated to reading social notes in the newspapers and celebrity magazines portraying young ladies being presented in society at a very common, traditional social event on their 15th birthday, getting engaged to be married and later getting married. Ceremonies of baptism, confirmation and sacerdotal ordination of relevant high-class family members were followed through the newspapers. Demographically speaking, the first years of the Republic found the island scarce in males due to the long-lasting war (this was subsequently corrected by the Cuban public policy to bring more than 100,000 men from Spain, mainly from Galicia and Asturias, to "whiten the island" (*blanquear la isla*) adding new white males to the working-class population). Daughters were under tremendous pressure to get engaged and married, and these marriages were celebrated as great social events, and families invited many guests to emulate higher-class engagements. Family members' faith practice was irrelevant, and the social rite was more important than the liturgical; however, Catholic consecration became a rite of passage, at least for baptisms, weddings and burials. This is still part of popular Cuban culture; for obvious economic reasons, it is more frequent in the emigré population than at home.

The crime of perjury was also one of the legal transplants accepted with moderate resistance. Spanish criminal law in Cuba included the crime of false statement but with many differences to the crime of perjury as provided for in US law. Military Order 116 1900 amended the Criminal Code, turning upside down the legal wording on the crime of false statements. This was one of the first results delivered by the *ad hoc* commission formed by Wood to upgrade Cuban law. There was an initial reluctance, but it was rapidly superseded.

Legal transplants made effective with hybridization: the Supreme Court

Innovation came via the Supreme Court, the best example of hybridization among the legal transplants from US common law. The military occupation was concerned about the need for a court to rule on last-resort appeals. As Spanish sovereignty ceased with the Paris Treaty, the procedural line for cassation to Madrid was severed, and the country needed a new court to play this role. Military Order 41 1899, brought in by General Brooke, following a proposal made by the civil administration in the person of the Cuban Secretary of Justice and Public Instruction, provided for a Cuban Supreme Court: it was made up of a Chief Justice, seven associate justices, a Solicitor General, two deputy solicitors general, a clerk and two additional attorneys.[11]

In most countries from the continental family, the highest court is characterized by access through a particular, technically complicated proceeding (*le recours en cassation, el recurso de casación, il ricorso per cassazione*) which admitted cases for review by different chambers instead of the entire court *en banc*. The new Supreme Court of Cuba was structured without chambers, resembling the American common law setting with the *writ of certiorari* instead of cassation proceedings. In addition, the leading state attorneys for criminal and civil cases, such as the US Solicitor General, were also included in the mix.

The Supreme Court's reception was successful as, although it was founded under the American structure, it was subsequently reformed through the years to become closer to the continental style with separated chambers, access through cassation proceedings, adding a chamber on constitutional rights, and such like, but it remained with the Solicitor

[11] It is important to distinguish the Supreme Court established by Military Order 41/1899 and the Supreme Court established by the 1901 Constitution; both showed traces of mixture and hybridization because they produced rulings *en banc* or in plenary as the US Supreme Court, but according to the procedural standards of cassation, totally different to the US appeal and *certiorari* proceedings. The Military Order 41 Supreme Court lacked attributions for judicial review as its many tasks involved, among others, appellate review from the lower courts (*audiencias*) on the grounds of error of law and legal doctrine (*vitium in iudicando*), or defects in procedure (*vitium in procedendo*) (Mirow 2010): additional reference in Military Order 41, 14 April 1899 ("Civil Report of Major General John Brooke US Army" 1900: 34); subsequently amended by Military Order 111, 24 April 1901.

On the other hand, the Supreme Court established by the 1901 Constitution had been categorically empowered with judicial review attributions in section 83, subsection 4, and the Act on the Constitutionality of Acts enacted on 31 March 1903, annotated and commented on by Betancourt. However, the most important doctrinal references to judicial review in this period belong to the constitutional jurisprudence referred to by the same author (Betancourt 1915: 5).

General to handle, manage and plea bargain all the cases in the name of the Republic.

Legal transplants made effective without any resistance

To understand how legal transplantation occurs without resistance—or rather zero-friction transplants—from two different economic, political, social and cultural backgrounds, it is essential to get a whiff of the context. In the 1890s, the US was immersed in the so-called Gilded Age, characterized by a weird mixture comprising rampant free-will industrial impetus towards monopoly protected by tariffs combined with the intention to fix the social consequences of this through liberal progressive initiatives from charitable Christian organizations and civil society. One of the consequences of this domestic mix was a foreign policy characterized by an extra-continental expansionist Grand Strategy pinpointing the Caribbean, Hawaii and the Panama Canal, coupled with a heavy drive to provide these territories with good government, democratic values and the benefits of civilization pouring in from the progressive views at that time.[12]

Two main aspects of US law were observed with great interest by the Cuban delegates to the Constituent Assembly: constitutional rights within the framework of the presidential system of government and business law. The Constituent Assembly aimed to install a US mirror-image government system following the acclaimed civic virtues of the northern republic. Likewise, business people started to land in Havana looking for new opportunities, adding to the already existing large US business community, and they all required a legal framework for trade.

This section of the article addresses legal transplants in public law with a particular reference to constitutional law. The latter were the most important for both the US establishment and Cuban veterans, so it was an easy ride for Wood in this context. As mentioned before, for the McKinley

[12] Industrial impetus and liberal progressive views in social affairs as the main features of domestic policies and debate in the Gilded Age of the US have received a lot of previous attention. This mix is probably the origin of the US Army's double purpose to conquer and bring the conquered into civilization. Unlike conquering adventures, US Army efforts overseas during the Gilded Age brought cataclysmic consequences at home and abroad. First, the birth of not only an empire but "the Empire", the new hegemony in substitution for the seagoing British metropolitan power with a new Alfred Mahan naval supremacy in the Atlantic and Pacific oceans. Second, new domestic opportunities for the release of the industrial and banking power under a previous unwavering and increasing build-up but also raising concerns about the set of values the US should promote around the world, not only focused on raw materials and secured markets but also to promote progressive social views (Jackson 2022).

administration, legal transplants from US constitutional law were the main aim because this policy matched the expansionist purpose of bringing a constitutional republic to life and the successful starting point in the US coming-of-age as a major player in geopolitics with respect to European powers. In addition, the replication of a constitutional republic in the island of Cuba also matched the progressive views of bringing a humanistic touch to "downtrodden people" around the world by the impetus and powerful influence of the Christian charitable efforts of the new imperial country. For Cubans, constitutional transplantation meant fulfilling the long-held dream of self-determination by the most prominent Cuban minds of the nineteenth century, led by José Martí.

Habeas corpus, the public defender and other constitutional rights

The concept of *habeas corpus* was praised and welcomed in Cuba. Wood enacted *habeas corpus* and the entire Bill of Rights through a transposition into the Provisional Constitution for Santiago de Cuba as early as 20 October 1898. Later, he enacted Military Order 427 1900, providing the procedure to grant *habeas corpus*. Here, it is worth noting, however, that the military occupation could still avoid enacting constitutional rights and other American legal protections and seize opportunities to act freely via the old Spanish wartime legislation remaining in force to crush newspapers' criticism. Despite the apparent political and economic interests involved, there is no doubt that President McKinley, Secretary Root and the military staff in Cuba were engaged in giving birth to a republic very similar to their own; they did not hesitate to extend to all Cubans the legal protections for personal integrity, property and freedom that Americans enjoyed at home under their constitutional protections.[13]

The liberal spirit that had developed in Spain since 1812 with enactment of the Cadiz Constitution also included *habeas corpus* protection. However, the constant boiling political and insurgency state on the island made an exception to the full force and extent of these legal protections as the Captain General saw fit. On the other hand, the primary source for this institution was the English Bill of Rights 1689; hence, the US constitutional provisions, case law and understanding of *habeas corpus*

[13] A free press, among many other constitutional rights, was particularly controversial as it was the main focus of the clash between both personalities in Wood: the straight moralist and the authoritarian as the affair Castellanos proved very well. The publication of a cartoon vignette, a very strong tradition in the Cuban press and opinion making, on Good Friday 1901 provoked Wood's irritation. It caused the newspaper *La Discusión* to be subject to censorship and the author to a one-day detention (Del Risco 2023).

were closer to this source than any Spanish constitutional provision at the time.

Following the introduction of *habeas corpus*, the second most important constitutional right brought in by the US authorities was the role of public defender. The primary purpose of this institution, incorporated by Military Order 500 1900, was to grant people the right and financial resources to access a public defender according to the wording and meaning of the US Bill of Rights. However, Spanish law had not one but two institutions with the same purposes: the attorney for poor people (*abogado de pobres*) and the municipal attorney (*procurador síndico*). The attorney for poor people was similar to the US public defender in providing defence for those who could not afford an attorney of their own, but they had some relevant differences: the US public defender was hired by the state; in contrast, the *abogado de pobres* was not hired but randomly selected from the roster of the municipal bar association, and he had to deliver his services without a salary as mandatory *pro bono* work (Wood 1903: 159; Pelegrín Taboada 2018: 129).

As a contribution to the controversy related to the functional equivalence between both categories, it should be mentioned that the Spanish version, *abogado de pobres*, was not nearly as effective as the US public defender; again bringing into play the empirical versus the literal meaning, the law in books versus the law in action. As this was an assignment from the bar association (definitely not a full-time job), there was neither the opportunity for state surveillance of compliance with the duties of representation nor clarity on the subject. In other cases, the attorneys appointed for the task, intriguingly, were not even living in the local town at that time. The second alleged functional equivalent was the municipality attorney, hired full-time to offer legal assistance to the local council, dating back to the nineteenth century. As time went by, some new attributions were added to the job, including the defence and protection of enslaved and emancipated people, similar to the protector of Indians (*protector de indios*) whom the viceroyalties had appointed in Hispanic-American continental land (Pelegrín Taboada 2018: 59). The municipal attorney was initially conceived as the full-time legal counsel for the town council, which was formed from local people. Gradually, through legal reform from Madrid, additional responsibilities were added, but, in the end, municipal attorneys dedicated themselves to dealing with mistreatment claims brought by slaves against their owners. In this role, the municipal attorney was also charged with the duties of *coartación de esclavos*, a customary procedure in which a particular slave notified the attorney of their will to gain freedom, expressing their will to pay

a lump sum as retribution, grounded in excessive mistreatment by the slaveowner. The procedure included appointing a third-party assessor by the municipal attorney and another by the slaveowner to reach an agreed amount to be paid so that the applicant could become a former slave individual (*liberto*) (De La Fuente 2007).

Concerning the functional equivalence between the public defender and the municipal attorney, there are some arguments against this contention. First, both categories differ in formality and purpose because the municipal attorney was mainly for town business, while the public defender aimed specifically for trial defence. Second, the public defender was meant to represent full citizens with all their constitutional rights in trial. In contrast, the *procurador síndico* did not represent slaves as he was meant to protect slaves in the name of the Crown but only if requirements were met, namely that the lump sum be paid. If a slave raised a claim against his slaveowner without proper provision of funds, another slaveowner or regular citizen could buy out the slave, and this meant the original slaveowner was compelled to deliver the slave according to the mandatory *traditio*. Additionally, the evidence material in procedures of *coartación* held by the *procurador síndico* was the market-value assessment delivered by an expert. On the other hand, the public defender had the opportunity to show all sorts of evidence admitted by law in the client's interest. Lastly, *coartación* procedures were customary, without initial explicit legislative references, and served to perpetuate slavery because the most common outcome from these claims was the alternate buy-out. This was different from the public defender responsibilities as put in place by the US military occupation in Cuba (De La Fuente 2007).

Concerning other constitutional rights that were transplanted into Cuban law—such as prohibiting cruel and unusual punishment—torture-like punishment had been explicitly allowed by Spanish authorities on the island under the pretext of civil war, so like many other proclamations of transplants from the Bill of Rights, the prohibition of torture was well received by the people. Cuban academia and practising attorneys also welcomed the right to confront the accuser as a testament to the high consideration and esteem Cubans finally had for the US as an organized model of society with full respect for the rights of the individuals.

Constitutional checks and balances

The US constitutional system of checks and balances was probably the most revered, praised and welcomed of all receptions by journalists, politicians and lawyers. This was not a unique incorporation into Cuban

law, as similar experiences had occurred in other Hispanic republics during their foundational periods. However, it was not merely a transition, but the establishment of a new constitutional framework. What, then, was Cuba's distinctive feature? Among all Hispanic American states, Cuba was the only one where the transposition of the US constitutional framework took place under their sovereign authority on the island, with the acquiescence of the locals. This is not a simple transition into a specific legal discipline; this was the entire configuration of the constitutional framework in each one of the Hispanic republics while they kept the French continental legal tradition in place. Given this common element with the rest of the sister republics in Hispanic-America (Brazil included), what is Cuba's distinctive feature? Of all American states, Cuba was the only one where the Americans carried out the vast transposition of the US constitutional framework under their sovereign rule in Cuba, with the acquiescence of the locals.

Concerning the form of government, delegates to the Constituent Assembly had the European parliamentary form available from the nineteenth-century Spanish experience. However, Cubans rightfully adopted the American presidential system. Most of the debates focused on the balance of powers between the executive and legislative branches of government due to the domestic plague of *caudillos* (charismatic authoritarian political leader in Iberoamerica). In this context, the US presidential system's legal paradigm took root and was fully adopted in the new Constitution.

Similarly, impeachment was also considered for incorporation into the new constitutional arrangements, and, without further debate and with minor considerations, delegates agreed it was appropriate to incorporate impeachment to hold the president accountable for high crimes to the legislature, with the House as the accuser, the Senate as the jury, and the Chief Justice leading the proceedings. Delegates expressed a strong rejection of trial by jury; however, they welcomed with open arms the prospect of the president's trial by a legislative jury (Guerra 1952b: 87).

The total transposition of the US branches of government into Cuban domestic law necessarily meant the adoption of the bicameral legislative initiative and the presidential veto. Broadly speaking, the delegates were almost unanimous about the reception of these arrangements. The idea of the presidential initiative to bring bills to the floor gained momentum. However, this amendment was rejected in order to keep draft bills within the chambers and leave presidents with only the remaining veto power. In this way, governments would always need political representation in

Congress to approve their agenda. In this context, presidential elections raised many doubts, concerns, propositions and counterpropositions from the delegates. On the other hand, the four-year term proposal was quickly accepted. However, regarding direct/indirect elections, the Assembly decided on the US legal practice of indirect elections through the College of Compromisaries. The test would be the first presidential election, and the system worked well.

As part of the Cuban state mimetic construction following the US structure, delegates to the Constituent Assembly also debated and agreed upon the reception of the presidential annual message to Congress on the state of the republic. This was considered a matter of high importance despite its apparent formal nature, as it did not compel the chambers to follow the executive's initiatives. According to the new Constitution, the president did not have the authority to send a bill of his own but only through his partymen in the chambers. Again, like the rest of the US constitutional provisions to uphold checks and balances of power, the president's appointment of the justices of the Supreme Court was also proposed, considered, debated and finally approved by the delegates. Their main concerns were whether it was appropriate to include the requirement of confirmation hearings by a Senate committee on the judiciary.

[F] FINAL REMARKS

The importance of comparative law is on the rise amid the current environment of high global connectivity, the ecstasy of cultural communication, free access to sources of information, and intense human interaction worldwide. Legal transplants are a particularly controversial subject due to the current technology allowing quick access to information on not only foreign law but also foreign legal practices and culture, giving way to new data and discoveries. In addition, to reach valid conclusions or inferences in legal transplantation, it is important to achieve a high threshold of cases under analysis, clearing the path for assessing regularities through a wide set of samples.

The description and analysis of the Cuban case of legal transplants from US law at a particular moment in history is relevant because they shed light on the dynamics and interactions between individual and institutional actors involved in the process. In addition, many complexities should be considered, namely that the target and the source legal systems belong to different legal families, and the transplantation process was conducted with a particular state-building purpose. The aforementioned

and many other features make the Cuban scenario a great laboratory test case on the subject.

Out of many findings, the most relevant indicate that state-building efforts engaged in by the McKinley administration in Cuba involved transplants in public and private law, as the new republic needed basic modern legal rules for business (particularly American business) as much as a constitutional framework. Additionally, most transplants involving family traditions, private behaviour and core personal beliefs met some resistance, an important difference from transplants involving only abstract conceptual categories.

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Cadiz Constitution 1812 (Spain)

Civil Code 1889 (Spain)

Constitution of Cuba 1901

Constitution of Spain 1876

Criminal Code (Cuba)

Criminal Code 1870 (Spain)

Customs Ordinance 17 December 1880

Decree Act 628 26 October 1934

Military Order 41 1899

Military Order 24 1900

Military Order 116 1900

Military Order 213 1900

Military Order 427 1900

Military Order 500 1900

Military Order 111 1901

Paris Treaty 1898

Provisional Constitution for Santiago de Cuba 1898

Royal Decree of 20 June 1852 (Spain)

Royal Decree of 6 October 1888 (Spain)

Royal Decree of 31 July 1889 (Cuba)

Naming, Blaming but Not Claiming: Intersectionality, Power and Sexual Harassment in the Workplace Post #MeToo

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Abstract

In the context of #MeToo, addressing workplace sexual harassment is a critical issue. This article discusses aspects of the author's empirical work on the role of intersectional identities in influencing Black women's perceptions of their workplace sexual harassment and pursuit of access to justice in England and Wales and elaborates further on its findings in light of recent legal developments. It draws on Felstiner, Abel and Sarat's "Naming, Blaming, Claiming" framework (1980-1981) to examine the extent to which Black women in England and Wales seek redress for their harms. It argues that aspects of Black women's intersecting identities, including their race, gender, and physical characteristics interact with workplace power dynamics to negatively inform their decisions to blame and claim and shape their assumptions about being stereotyped by their employers and lawyers/the legal system. It concludes that, while the Black women tend to name and blame, there was a hesitancy to claim.

Keywords: intersectionality; naming; blaming; claiming; power; access to justice; #MeToo.

[A] INTRODUCTION

The article explores the manner in which Black women navigate experiences of sexual harassment in their workplace settings in England and Wales. It addresses the question: to what extent do Black women research participants' perceptions of their intersectional identities influence their ability to name, blame and claim after they have been sexually harassed at work? The article argues that the Black women's perceptions of their intersectional identities, their assumptions about how they are expected to behave in the workplace and how they believe

they are viewed by their employers/managers play contributory roles in their decisions to seek redress. The article further contends that the power disparities that the participants encountered in the workplace added to their reluctance to escalate their disputes. Their hesitation was compounded by the authority which their employers derived from the employment contract. The consequent power imbalance resulted in the participants' submission and subordination, imposed obligations on them as employees (Collins 2018) and also exposed them to structural vulnerabilities in the workplace (Mantouvalou 2018).

This article draws on interviews conducted with Black women who experienced workplace sexual harassment as well as with lawyers advising on this issue. The interviews formed part of the author's broader doctoral project ("the study") (Ahamed 2025), which examined how intersectional identities shape experiences of workplace harassment and access to justice. It focuses on a selection of the data by discussing the findings that specifically illuminate how Black women respond to workplace harms.

The article makes a focused contribution, with its originality residing in the application of the naming, blaming, claiming (NBC) framework to examine Black women's responses to workplace sexual harassment in England and Wales through an intersectional lens. While the NBC framework has been used in various contexts in socio-legal literature, it has not been used to explore the combined effects of intersectional identities and power dynamics in relation to workplace sexual harassment in England and Wales. The analysis here offers insights into how participants' self-perception and the interplay of power have shaped their decisions to name, blame and claim. Whereas there indeed was an inclination to name and blame, there was a hesitancy to claim. By examining lawyers' perceptions about Black women's inclination to seek redress, the study also contributes to the literature on access to justice. The author situates the findings in recent legal developments including the 2025 *Weinstein* ruling and the enactment of the Work Protection (Amendment of Equality Act 2010) 2023. These developments underscore the continued relevance of examining individual and institutional responses to workplace harms. Finally, the author shows how the empirical findings of the study, examined through the NBC framework, can highlight the barriers Black women face in seeking access to justice while extending socio-legal debates on responses to workplace sexual harassment.

The structure of the article is as follows: section B frames the #MeToo movement (#MeToo) within the context of sexual harassment. Section C outlines the feminist methodology adopted in the study and in this article.

Section D provides an overview of the NBC framework and examines the various stages of the NBC process while centring the intersectional identities of the participants in each phase of the dispute transformation process. Section E sets out the conclusion and possibilities for future research.

[B] BRIEF OVERVIEW OF #METOO MOVEMENT IN RELATION TO SEXUAL HARASSMENT

The prevalence of workplace sexual harassment has "never been much of a secret" (Davies 1981: 200). Sexual harassment came to the forefront of feminist agendas in England and Wales in the 1980s (Wise & Stanley 1987). #MeToo drew renewed attention to the occurrence of sexual harassment in the workplace (Phipps 2020) and mitigated some of the shame and stigma around sexual harassment (Wexler 2019). It illustrated that women were more open about identifying themselves and recounting their experiences (Srinivasan 2022). Sara Ahmed (2017) notes the significance of safe spaces for women to discuss their harassment stories and recognizes how, in the case of sexual harms, although stories emerge with a "drip, drip" effect, as more women feel empowered to share, name and blame, there ensues a "flood" of testimonies. #MeToo and its platform on X gained traction with social media users as a safe and transformative space where women felt enabled by virtual solidarity to share their stories of sexual harm.

#MeToo, however, significantly failed to acknowledge the distinct and particular forms of sexual abuse that Black women faced in the workplace (Onwuachi-Willig 2018). This is reflected in the dearth of research in England and Wales that elicits the voices of Black women who have been sexually harassed at work or considers how their identities have influenced their experiences or their desire to seek redress. Only three studies have explored the workplace sexual harassment experiences of women of colour (Davidson 1997; Holder & Ors 2000; Fielden & Ors 2009), with none addressing the experiences of Black women. While calls continue for more research on intersectionality and sexual harassment (Cassino & Besen Cassino 2019; Minnotte & Legerski 2019; Jones & Wade 2020), a growing body of literature on the subject is emerging, predominantly from the United States (Ontiveros 1993; Buchanan & Omerod 2002; Berdahl & Moore 2006; Hodgins 2023). In contrast to American studies, this research integrates the lived experiences of Afro-Caribbean women and women of Black British heritage in England and

Wales with structural power dynamics and applies the NBC framework to examine workplace sexual harassment. The findings presented here contribute to this body of empirical literature on intersectional sexual harassment by illuminating how these experiences are recognized and responded to by Black women in England and Wales.

[C] METHODOLOGY

The primary research question of the study (Ahamed 2025) related to the extent to which intersectional aspects of Black women's identities influence their understanding of their workplace sexual harassment experiences and inclination to seek access to justice. The NBC framework enabled the study to focus on the initial phases of the participants' grievance process to examine their reactions. The article particularly focuses on this dimension of the research undertaken for the study (Ahamed 2025). Alongside NBC, intersectionality (Crenshaw 1989; Crenshaw 1991; Cho & Ors 2013) was used as a theoretical lens to examine whether a harm had been done (naming), whether an individual had been attributed responsibility for it (blaming), and whether remedy was sought (claiming) (Felstiner & Ors 1980-1981). Intersectional theory holds that individuals have multiple identities, including race and gender (Crenshaw 1989), which enable the relationship between oppression and power, and it explains how multiple dimensions of power that crosscut across social groups may be understood (Rice & Ors 2019). Although intersectionality's ability to capture how individuals use their identities to make sense of their realities has been questioned (Nash 2008: 11), the current study, combined with the NBC framework, enabled the Black women participants' experiences to be centred, permitting an indepth examination of their patterns of behaviour.

Rebecca Campbell and Sharon Wasco (2000) note that one of the aims of feminist research is to document women's experiences in a way that validates their voices as significant sources of knowledge. Feminist research focuses on how women's lives are controlled by the actions of men and on the approaches used by women to prevent and challenge these (Maynard & Ors 1994). Women's accounts on their own cannot, however, provide a comprehensive picture of how this is achieved, since the scope of the problems and the ways in which men and patriarchal organizations preserve their power narratives are difficult to ascertain (Maynard & Ors 1994), suggesting that feminist research should examine both women's experiences and the power structures that constrain or empower them (Disch & Hawkesworth 2016). Accordingly, the study analysed the participants' perceptions of their harm and their understandings of the

workplace power dynamics to determine how and the extent to which these factors shape their decisions to name, blame and claim (Ahamed 2025).

The study also used intersectionality as methodology to conduct feminist research as a tool with which to examine the experiences of the participants to uncover understandings that might otherwise have remained hidden (Ackerly & True 2020). It adopted Leslie McCall's intra-categorical approach (McCall 2005) to allow the diversity within the group to be highlighted.[1] This approach enabled the fragmented and overlapping nature of the participants' intersectional identity categories to emerge and allowed the reasons these affected their perception of their harms and influenced their ability to name, blame and claim to be drawn out. The intra-categorical approach also allowed identity categories like race and gender, alongside other interconnected aspects such as body shape and skin tone, to all be considered. Simultaneously, the intra-categorical approach highlighted how hierarchical and power structures in the workplace resulted in particular dynamics between the participants, their supervisors, perpetrators, and co-workers which shaped their perceptions of harm and their subsequent actions in terms of blaming and claiming. The limitations of this approach, as adopted in the design of the study, include that the perspectives of employers, human resources managers, and trade union representatives were not taken into consideration (Ahamed 2025).

The research data drew on interviews with Black women who had been sexually harassed in the workplace and lawyers and activists involved in advising and helping them. Semi-structured interviews were conducted with 15 Black women who were sexually harassed at work, eight lawyers specializing in anti-discrimination law and three activists working in sexual harassment.[2] This pool arises from a recruitment process that drew on individuals who were able to recognize and articulate their experiences as sexual harassment, and therefore the study is underpinned by a self-selection bias. The study's participants differ from Black women who may have suffered from workplace harm and remain silent or unable to frame their harms in this way. The generalizability of the findings, therefore, is limited, as it excludes subtle, cumulative or coercive experiences of sexual harassment that are less easily named. This underscores the

[1] Leslie McCall argues that adopting an intersectional methodological approach enables the ongoing processes through which identity categories are constructed, perpetuated and challenged within the realm of everyday life to be examined. For further discussion, see McCall (2009).

[2] Ethical approval to carry out these interviews and permission were granted by the Social Sciences & Arts C-REC, University of Sussex [ER/NA463/1] [ER/NA463/2] and [ER/NA463/3].

need for future research to examine the normalization of harm and the ambivalence of women to "name" sexual harassment. The limitation of self-selection, however, does not diminish the study's significance in highlighting the behavourial responses of Black women who were able to name their harm and the factors that shaped their decision to blame and their hesitancy to claim (Ahamed 2025).

While not being entirely unstructured, the interviews were conducted as relatively informal conversations. The interviews took place during the Covid-19 pandemic between November 2020 and May 2021. The fieldwork was adapted to take into consideration lockdown and mandatory social-distancing measures (Teti & Ors 2020). Although traditional modes of fieldwork have been questioned and divisions between "home" and the "field" have come to be recognized as "blurred", the need to rethink boundaries to fieldwork became more apparent during this period (Günel & Ors 2020). Gökçe Günel's patchwork ethnography approach was adopted. It integrates "home" and "field", and reimagines research as a "collaborative" process that embraces the gaps, constraints, partial knowledge, and diverse commitments inherent in knowledge production. This enabled the challenges and constraints of the pandemic to be navigated while maintaining the integrity and rigour of the research and was also applied to conceptualize the use of fragmented data, allowing the retention of contextual knowledge akin to the knowledge collected in traditional fieldwork. At the same time, the impact of the evolving social context of the participants' knowledge production was explored. In this way, the study's method was adapted to incorporate diverse sources of information and to capture the dynamic nature of the research topic while ensuring the thoroughness and depth associated with traditional fieldwork practices (Günel & Ors 2020).

After data collection, the interviews were thematically coded using the NVivo software program. This enabled their nuanced meanings to be examined and allowed a comparison of how words were used contextually by the participants (Charmaz 2006). Feminist knowledge production suggests that a researcher should be recognized as "a real historical individual with concrete, specific desires and interests" (Harding 1998: 9) and whose social, cultural, and economic background shape the analysis. Guided by this, the data was refined through an iterative process. For instance, themes such "naming", "blaming" and "claiming" were created prior to developing subthemes such as "not taken seriously", "not naming", and "talking to friends". A comparative exercise was then carried out to identify common features and variances which involved examining the participants' statements to extract meanings

(Zhang & Wildemuth 2009). It also included efforts to understand, within and across the interviews, the participants' reactions, how they described harms and the factors that shaped their decisions to blame and claim (Charmaz 2006). To capture the range, complexity and richness of the data, the selection of the participants' testimonies included in the study aimed to reflect their shared experiences. Converging views were also drawn upon to highlight the varied ways the participants responded to their sexual harassment grievances which in turn shaped their inclination to blame and claim. Divergences between the participants' and lawyers' testimonies revealed varying assumptions about how Black women are perceived and understood in legal and workplace settings. These were further highlighted by the study to explain the complex reasons why Black women do not claim or seek redress for harms (Ahamed 2025).

The recruitment process for the interviews presented three main challenges which were addressed but are noted briefly here. First, the sensitive nature of the research topic made recruitment more complex. Second, the Covid-19 pandemic raised difficulties, as many women were dealing with additional domestic duties while remote working, with other responsibilities forced on them by the circumstances. These two factors deterred potential participants initially, but, when the Covid-19 restrictions began to ease, engagement improved. Third, as recruitment was carried out mainly through social media platforms and direct outreach to law firms and barristers' chambers, there was a concern that potential participants outside these domains may have been excluded. To address this, organizations that support Black women who have suffered sexual abuse were approached to facilitate wider access. This resulted in three women coming forward to participate in the study. While these challenges shaped the recruitment process, they also informed a more nuanced understanding of the participants' decisions to name, blame and claim, explored in the sections below (Ahamed 2025).

[D] NAMING, BLAMING, CLAIMING, AND INTERSECTIONAL IDENTITIES

An overview

The NBC framework developed by William Felstiner and colleagues describes how disputes evolve and transformations within them occur (Felstiner & Ors 1980-1981). The first stage, "naming", occurs when an injured party realizes that a problem exists and transforms their unperceived injurious experience (unPIE) into a perceived injurious

experience (PIE). The second phase, "blaming", happens when the injured party holds another responsible for the harm, and this transforms the incident into a grievance. The third phase, "claiming", takes place when the injured party turns to the blamed party and seeks a remedy. A claim is transformed into a dispute when it is either partially or fully rejected. During this stage, the disagreement may be vocalized to a third party, such as a mediator, a judge, or friends (Felstiner & Ors 1980-1981). While Felstiner and colleagues attempt to categorize the dispute process into three stages, in reality, a grievance may not always go through them chronologically (Olesen & Hammerslav 2023), and not every conflict will cross all the phases. Individuals may not feel aggrieved, and therefore they may not necessarily ascribe blame, and "those who claim may not blame" (Genn 1999: 10). Furthermore, individuals could shift from claiming "back to naming and blaming, to changing perceptions of injury and to changing attributions of responsibility for causing injury and providing remedy" (Galanter 2010: 4). The participants' accounts, discussed below, illustrate this moving and shifting and the complex nature of disputes. In many instances, participants named and blamed but did not claim.

In a 2020 interview, Felstiner, Abel and Sarat revisited their framework, nearly 40 years after its original publication, and reiterated that its purpose was to understand why some disputes and injuries go unaddressed and unrecognized.[3] As Annette Olesen and Ole Hammerslev note (2023), an individual's acknowledgment that they have been injured marks a pivotal transition in the naming stage. This point is important in drawing a connection between unPIE and the idea of "false consciousness" (Trubek 1980-1981). UnPIE recognizes that at times individuals do not realize the extent of their harm because they have a distorted perception or are unaware that they have been harmed (Olesen & Hammerslev 2020) and therefore have a "false consciousness" of what happened (Trubek 1980-1981). False consciousness "assumes that there is a fundamental truth hidden from consciousness by ideology and thus not discoverable by any purely empirical technique". At times, it is this lack of awareness that prevents injured parties from accurately naming the injury and seeking justice (Trubek 1980-1981).

Trubek's notion of false consciousness reveals how individuals may internalize ideas and norms detrimental to their own empowerment. False consciousness exposes the complexities of capturing accurate and comprehensive data, since it raises questions about beliefs that may have informed an individual's perceptions and reporting behaviours (Trubek

[3] See Olesen and Hammerslav's interview (2020) with Felstiner, Abel and Sarat for a retrospective discussion of their "naming, blaming, claiming framework".

1980-1981). Trubek's idea of false consciousness explains how some of the participants' internalized beliefs disempowered them, leading them to downplay their harm experiences. For instance, participant Gemma, a general practitioner, reported that sexual harassment was a "normal part of everyday life". Her perception suggests how false beliefs shaped by societal expectations can contribute to the normalization of sexual harassment and an unwillingness to blame and claim.

Michael Palmer (2014) identifies the strengths and shortfalls of the NBC framework, acknowledging its role in enhancing an understanding of the challenges of achieving equality and access to justice. He draws attention to how NBC lends itself to empowering marginalized and economically disadvantaged individuals to recognize the violation of their rights and overcome resignation to accept injustice and grievance apathy (described below). He notes how the framework enables the examination of early stage dispute reactions which can lead to resolution. For instance, if a blamed party accepts their wrongdoing and offers an apology, it could prevent further dispute escalation. While he identifies the positive role of lawyers in the transformation of disputes, he also points out how sometimes they can provoke and foster disputes and critiques the NBC for being unable to shift its focus away from courts and lawyers (Palmer 2014). Palmer's examination also draws attention to whether and to what extent individuals consult lawyers and seek remedies through the courts (for further discussion, see Palmer 2014: 27-32). This insight highlights structural and relational barriers that shape whether harms are recognized and whether individuals pursue formal redress.

NBC, intersectionality and #MeToo

During the 1980s, the NBC framework was part of the contemporaneous legal-anthropological and socio-legal approach that examined dispute processes as social constructs within their situational contexts, both empirically and theoretically (Olesen & Hammerslev 2020). Its influence and relevance has grown over the past 40 years in scholarly studies which illustrated how it has been used to understand how disputes evolve in different contexts (Olesen & Hammerslev 2023). Recently, it was employed to examine why survivors of human trafficking do not report their victimization (Hefner & Hill 2023). Within the workplace context, Sara Charlesworth and colleagues' study (2011) draws upon "naming" and "claiming" to examine cases of sexual harassment of women and men in Australian workplaces to consider how sexual harassment is understood. In relation to #MeToo, the framework offers a valuable lens through which the behavioural responses of sexually harassed women

can be examined to determine whether they are able to attribute blame to their perpetrator and seek remedies for their workplace harms.

In their 2020 interview, Felstiner and colleagues also point out how social media shapes the articulation of grievances and NBC (Olesen & Hammerslev 2020). The connection between #MeToo (as a digital form of feminist activism) and NBC becomes evident in two ways: one involves the individual's perception of the wrong and their ability to recognize that they have been harmed (ie naming); while the other is highlighted in their ability to assign the harm to another (blaming). Giti Chandra and Irma Erlingsdóttir (2020) acknowledge that #MeToo reassured survivors that they were not alone and provided those who felt denied justice a platform on which to share their stories. They note that, while #MeToo empowered only certain women to speak out (they do not specify which women), they maintain its historic and unprecedented significance. Angela Onwuachi-Willig (2018), however, noted that #MeToo significantly failed to recognize the distinct forms of sexual abuse that Black women face in the workplace. She observed that the term "MeToo" had shifted its intersectional emphasis to being predominantly about the experiences of heterosexual, white, cis women, and consequently any legal responses would disproportionately benefit them. While #MeToo mitigates grievance apathy by fostering online solidarity, qualitative research on women's experiences of the movement remains sparse (O'Halloran & Cook 2023). Findings from the interviews add to this empirical literature and align with Onwuachi-Willig's (2018) position on the movement, illustrated in participant solicitor Geraldine's words that Black women felt "somewhat on the sidelines of the #MeToo movement". This insight lends weight to the claim that the movement primarily focused on certain groups of women, while failing to adequately address the experiences of Black women, as noted above.[4]

The findings also suggest that, while #MeToo gained visibility as a movement against workplace sexual harassment, it did not resonate as an accessible space for the participants to speak out about their harm. For instance, one participant, Nola, a funeral parlour owner, noted its selective focus and said it was "more geared toward" "a particular type of woman". The testimonies also revealed that the #MeToo campaign had raised awareness about the law around sexual harassment. Participant Luna, a trainer, shared that, the movement had helped her to understand that "comments" could constitute sexual harassment and deepened her awareness about legal protections. This knowledge aligns with case law

[4] For further discussion on how Black voices have been overlooked by #MeToo, see Alison Phipps (2020) and Marai Larasi (2020: 233).

in which employment tribunals (ETs) have interpreted unwanted sexual conduct widely, acknowledging that a single incident may constitute sexual harassment, depending on gravity and context (*Bracebridge Engineering Ltd v Darby* 1990). The movement's effectiveness, however, in promoting naming and blaming in relation to intersectional sexual harassment within institutional settings for the participants in the study was limited.

Although #MeToo broadly gave visibility to workplace sexual harassment experiences, its framing around naming and blaming has deflected attention from structures that enable harm to perpetuate. Low-level employees were also not a focal point of the movement (Clarke 2019). The Workers Protection Act (Amendment of Equality Act 2010) 2023, England and Wales, in force from October 2024, shifts attention to institutional behaviour and responsibility. It introduces a new obligation on employers to proactively take reasonable steps to protect their employees from sexual harassment and anticipate situations in which sexual harassment might take place. This new duty draws attention to structural accountability across all levels of workplace hierarchy and the need to address systemic failings.[5]

The conviction of Harvey Weinstein for sex crimes based on the allegations of two white women took on a larger societal meaning, namely, that the justice system, which had so often failed women, had succeeded in this case, and that women no longer had to be silent about being compelled to trade sex for work (Corbett 2020). The New York Appeals Court, however, in 2024, overturned Weinstein's conviction (Corbet 2020). As part of its ruling, the Appeals Court held that the trial court had "erroneously" permitted a further three witnesses, whose accusations had not been part of the initial charges, to testify on behalf of the prosecution to evidence Weinstein's "unlawful intent" (*People v Weinstein* 2024). As a result, the original conviction was vacated. The split verdict in Weinstein's 2025 retrial (*Weinstein retrial verdict* 2025), delivered after the completion of the study, and prior to the drafting of this article, resulted in a partial conviction, acquittal and jury deadlock.

Commenting on the initial trial, participant Mandy said that it reminded her that sexual harassment is "just something that happens to women" and "how normalised sexual harassment is". She elaborated: "I think so many women have experienced sexual harassment and never done

[5] See section 2 of the Worker Protection (Amendment of Equality Act 2010) Act 2023, which inserts section 40B into the Equality Act 2010 and imposes a duty on employers to take reasonable steps to prevent sexual harassment of their employees.

anything about it." The recent 2025 verdict reflects how organizations similarly respond to allegations of sexual harassment in ways that are dismissive or inconsistently sanctioned, thereby perpetuating its ongoing normalization.

Having provided an overview of the NBC and its relevance to #MeToo, in the following section we will examine how power dynamics shaped the study's participants' inclination to name, blame and claim. These findings become increasingly salient in England and Wales in the aftermath of the #MeToo movement, where questions about accountability remain pressing, in light of the Worker Protection (Amendment of Equality Act 2010) Act 2023, which places a positive duty to take reasonable steps to prevent workplace sexual harassment.

NBC, power, and intersectionality

The NBC framework illuminates how power shapes an influential aspect of the interactive process, known as "reactivity" (Felstiner & Ors 1980-1981). This occurs when aggrieved parties reframe their perceptions of harm and grievances in response to discussions with figures of authority, their colleagues, and their adversaries (Felstiner & Ors 1980-1981). Through these interactions, individuals recognize that they have been harmed. Recognition and attribution of harm may contribute to the escalation of grievances. This, however, is contingent upon the underlying power dynamics at play in the workplace. The strong influence of imbalanced power relations to shape the extent to which grievances evolve into disputes reinforces its significance in the workplace. Hugh Collins, within the context of labour law, describes how power in the workplace stems from the "practical authority" that an employer derives from the employment contract (Collins 2018: 56). The relationship that crystallizes from this enables the employer to give orders that the employee is legally obliged to obey (Collins 2018: 49). This component of the employment contract emerges in the subordination dynamic between the employer and employee (Collins 2018: 52-53).

Employees are often compelled to comply with their employer's orders, not only from fear of job loss, but also because employers have the ability to dictate and influence their working lives (Collins 2018). This tension ensures that employees remain subordinate (Collins 2018) and is reflected in the account of participant Daniella, a nightclub entertainer. In her interview, it emerged that her manager reinforced her subordination when she complained about being sexually harassed. In response to her complaint, by saying that she was "paid to be a whore", he displayed

his ability to control her working conditions, reasserting her inferiority. Daniella's statement signals a form of hypersexualization. Her manager's demeaning remark diminished her identity to one merely being available for male gratification. His behaviour can be understood in light of Sandra Fredman's argument that Black women are often subjected to harassment because they are perceived as sexually indiscreet or robust (an idea that is often propagated through discriminatory images of them) (Fredman 2016). Daniella's testimony, when viewed through the lens of NBC, also illustrates how her manager's reaction led her to downplaying her complaint and highlights the impact of subordination that fosters a cycle of exploitation and oppression when employees are vulnerable.

Virginia Mantouvalou (2018) addresses how vulnerability may be created through an individual's characteristics, such as race and gender. Her notion of interpersonal wrong relates to how the employment relationship enables employers to exploit employees' personal circumstances, capitalize on their weaknesses and place them in positions of "extreme" and "oppressive subordination" (Mantouvalou 2018: 197). Mantavalou's view highlights how unjust background structural factors can exploit an individual's vulnerability. It also illustrates how the moral aspects of exploitation are sometimes obscured, leaving employers unaccountable.

Against the backdrop of exploitation, the empirical data in the current study (Ahamed 2025) showed that workplace power can emerge as gendered or hierarchical, or both. Moreover, an individual's race subtly shapes the way the power is exerted over them. Participant Chris, a church assistant, noted that men "target" Black women because "it's easier for [them]". Her understanding reflects an awareness of the connection between men's assumed gender-based power and how this impinged upon Black women's intersectional identities. Participant Penny, who worked in the marketing industry, recognized the effect of hierarchical power. She said: "When you're in that sort of place, and there's a power dynamic, if you're in a position of power you can easily tilt your conversation to your own sort of advantage." Participants Chris and Penny's testimonies shed light on their perceptions of how forms of power (gendered or hierarchical or both) intersected with their race and gender to compound their oppression. Participant Chris's use of the word "easier" and participant Penny's use of the phrase "tilt the conversation to your advantage" reinforce how they believed that men in positions of authority had the power to manoeuvre situations to their advantage in relation to them as Black women. While they do not articulate their experiences in structural terms, their accounts point to how unjust institutional dynamics heightened their vulnerability and hindered them

from attributing responsibility (blaming) and asserting their rights and asking for remedies (claiming). These testimonies illustrate how gendered and hierarchical forms of power embedded in the workplace setting interact with aspects of intersectional identities, in this case, race and gender, to reinforce vulnerability to sexual harms. This dynamic further perpetuates exploitation and subordination, making it more difficult to attribute blame and seek remedy.

A perpetrator, however, who lacks seniority or authority is also able to create an intolerable work environment (Fredman 1997). Participant Anya's observation of her situation reflects Fredman's insight in the way it illustrates how power was tilted in her perpetrator/colleague's favour because his mother owned the business. She realized that if she had blamed him, she would have been "fired". Her vulnerability is highlighted in how the perpetrator threatened her, relying on his familial connections which rendered her position at work precarious and deterred her from blaming.

Having discussed the interplay between power and intersectionality in shaping the study's participants' decisions to name, blame and claim, in the subsequent sections we will examine each stage of the transformation process, centring the significance of the intersectional identities of those involved.

Naming

Naming occurs when an individual perceives that a particular experience has been harmful (Felstiner & Ors 1980-1981). Following this, an unPIE may be converted into and identified as a PIE. Felstiner and colleagues propose two alternative approaches to examine perceptions, while recognizing the setbacks of each (1980-1981). The first, the objective approach, enables a general definition of an injurious experience to be offered to an individual. The second, a subjective approach, allows the harmed individual to describe the injury. While the former approach may fail to capture all aspects of harm, the latter may open floodgates to self-definition and may not include behaviour commonly perceived as injurious. Although the risks of both approaches were recognized, no definition of harm was offered to the participants in the current study. This was to encourage them to define their harms using their own words (naming). Participants were asked to explain whom they held responsible for their harm (blaming) and whether or not they voiced their grievance

and sought remedy (claiming).[6] To ascertain the extent their grievances turned into disputes through NBC, the interview questions were designed to explore how their experiences fit within the NBC framework.

The interviews began with a focus on the naming of sexual harassment. Specifically, the participants were invited to describe what happened to them and what they did about it. In particular, the questions explored whether participants had consulted a lawyer or sought advice from a helpline or Citizens Advice Bureau. If they had engaged legal assistance, then the participants were asked about the nature of advice that was given to them and whether this shaped their decisions on what to do next. In instances where participants had not sought legal support, the questions then explored what informed their decisions not to do so.

Once the participants named their harms and had an opportunity to reflect on what they did about them in terms of legal consultation, the focus shifted to blaming. To understand how they attribute blame and to whom, they were asked whether they had spoken to their human resource department or their managers about it. If they said yes, they were asked what was done in their workplaces to address their harms. If the participants had not reported it, they were asked the reasons behind their decision not to do so. Depending on their responses, further questions probed the challenges the participants faced when attributing blame, especially when societal stereotypes may be used downplay or dismiss their concerns.

The questions then turned to examine whether participants had raised complaints at work about their harms and how these were addressed. They were asked how their employers/managers handled these and whether their actions aligned with what the participants wanted. The participants were asked whether they considered pursing their claims through formal channels, such as raising formal grievances through their company procedures or through the ETs. Where no formal action was taken, they were asked to explain why and what factors shaped their decisions.

The empirical data showed that, although the participants had their own distinct experiences of sexual harassment and may not have ascribed them all to their intersectional characteristics, they had, at least once, perceived their sexual harassment to be injurious, whether physical or verbal. The physical nature was reflected in how their breasts and bottoms

[6] The term "intersectionality" was not used in the study's interview questions in order to encourage the participants to reflect on their identities without being prompted by specific terminology.

were "groped" and "grabbed" and how their bodies were "forcibly touched a lot". The verbal nature of their harassment consisted of a range of comments and sexual banter. For instance, participant Mandy, a trainer, said that she was referred to as "you little minx!" and participant Sandra, a shop assistant, was asked if she had "done anal sex before". The terms they used to describe their experiences reflect their perceptions of the harm and informed their decision to "name" it. The value assigned to the experience through linguistic framing influences whether they felt compelled to seek a remedy, as it shapes their understanding of the seriousness and legitimacy of the harm suffered. And, also, whether they went on to name the harm and attribute responsibility. This highlights the complex interplay of language, interpretations, and the transformation of perceived harms into grievances (Ahamed 2025).

Marc Galanter's (2010) analysis of injury and remedy as cultural constructions emphasizes the importance of considering the specific context of perceptions and responses to harms. Galanter (2010) argues that injury is not a fixed, objective concept, but emerges from a breach in the moral order and is affected by cultural norms and values. The perception of injury, therefore, cannot be disentangled from the broader situational and cultural context of individuals, which also includes their identities and workplaces. The interplay of these factors was reflected in the participants' perceptions of their harms. They described their experiences of "discomfort" to varying extents. For instance, participant Chris, perceived her colleague's advances in a Black church as "uncomfortable", while participant Daniella, a waitress, used the same term to describe how she felt when a customer came in and frequently stared at her in a fast-food restaurant. Participant Sally, a lawyer, however, did not experience any "discomfort" when someone looked at her glaringly and described it as "not too serious". These varying permutations of the term "comfort" in relation to sexual harassment experiences illustrate Galanter's claim about perceptions of injury which cannot be disentangled from cultural and institutional contexts (Ahamed 2025).

This leads to Galanter's (2010) wider view of injustice as relational and advancing. He argues that a moving legal frontier will play a pivotal role in expanding notions of injustice because it will uncover new ways of envisioning and understanding harms and remedies. Galanter's insight on the evolving nature of injuries and remedies offers a broader way through which the participants' harm can be understood. It allows for a continued examination of how the perception of harm is shaped by intersectional identities and power dynamics in varied organizational settings. These factors also influenced whether, and how, the participants

decided to blame once they had named and recognized their experience as injurious (Felstiner & Ors 1980-1981). The participants' testimonies revealed that they responded to their harms through "avoidance" and "grievance apathy", examined below.

Avoidance

Within the context of sexual harassment, avoidance is viewed as a non-confrontational approach to create a distance from the harasser (Menkel-Meadow & Ors 2021). Although individuals may respond in this way after blaming, the findings indicate that participants adopted this strategy in advance of the blaming stage. While scholars have categorized avoidance broadly, their interpretations differ. For instance, Felstiner (1975) argues that avoidance occurs when the injured party adjusts their behaviour to reshape the relationship with the opposing party to diffuse the situation. As participant Nola, a funeral parlour owner, explained, she tried to downplay the impact that ongoing sexual harassment had on her. She explained that at "first" when she was "touch[ed]" she reacted mildly and kept it "kind of light and laugh[ed]". This was a type of avoidance to deflect her discomfort. She continued, "but if I feel like it's getting a bit too intense, I may limit my interactions with that person". Participant Nola then adopted a more active form of avoidance that reinforces Felstiner's assertion of how individuals reshape behaviour (Ahamed 2025). In this context it was an attempt to manage the dynamic with the perpetrator to prevent the conflict from escalating (Felstiner 1975). These forms of avoidance, subtle or assertive, point to a preference among participants to carry on with their lives rather than being consumed by disputes (Moscati & Ors 2020).

Avoidance strategies are distinctive, as Phillip H Gulliver's (1996) categorization of avoidance as intentional avoidance of conflict or dispute avoidance suggests. While dispute avoidance is evasive conduct to prevent a dispute from escalating, conflict avoidance is behaviour that prevents a conflict or disagreement from arising (Gulliver 1996). Both forms of behaviour identified by Gulliver emerged in two participants' testimonies.

Participant Penny decided not to report her perpetrator because she believed the dispute would result in his dismissal. Her choice not to make a complaint aligns with Gulliver's notion of dispute avoidance. Her avoidance was motivated by "thinking of this man's livelihood" and that he had a family to support. Similarly, participant Yanni explained why she decided she preferred avoidance. She said: "And I will sit and think, okay, well what's the impact? … Maybe he's got kids." Participants

Yanni and Penny's decisions to avoid were deliberate, shaped by the possible consequences of their actions on their perpetrators (Ahamed 2025). In line with Gulliver's notion of conflict avoidance, participants Penny and Yanni also chose not to confront their perpetrators, thereby circumventing the possibility of conflict from emerging. The participants' responses affirm that avoidance, as Gulliver suggests, can be intentional, shaped by context and constraint.

Michael Palmer and Simon Roberts (2020), however, argue that, by only focusing on avoidance as a deliberate choice, two situations may overlooked: first, where individuals feel that they have no choice but to ignore the misjustice ("lumping it"), or, second, where they suffer from grievance apathy (both described below). While they note the complexity in identifying this lack of intention, they argue that lumping it and grievance apathy are forms of avoidance strategies. Palmer and Roberts recognize that structural pressures may lead individuals to feel that they have no choice but to adopt a non-confrontational stance, which differs from stating that no deliberate choice was made.

For example, when participant Chris complained that she had been harassed, her pastor justified the perpetrator's behaviour and said, "we all hug each other", "we're all family" and "it was no big deal". His remarks were meant to convince Chris to drop her complaint. Her experience illustrates Palmer and Roberts' argument that avoidance can be rooted in structural constraints which leave individuals, like Chris, feeling that they have little choice but to avoid confrontation (Ahamed 2025).

In line with Palmer and Robert's definition of avoidance (2020), 12 women had at least once exhibited grievance apathy (Felstiner & Ors 1980-1981) or adopted the strategy of "lumping it", further discussed below. The findings build on and finetune Palmer and Robert's definition by demonstrating how these participants' behaviours were shaped by their perceptions of their identities, beliefs about being stereotyped, and the existence of male solidarity and power disparities in the workplace (Ahamed 2025).

Grievance apathy and lumping it

Grievance apathy captures both the behaviour of individuals who do not perceive they have been injured and also the unwillingness of individuals who perceive they have been harmed to pursue their grievance (Felstiner & Ors 1980-1981; Palmer & Roberts 2020). An individual's hesitance may be shaped by their friends and family who influence their response. Grievance apathy encapsulates the idea that attrition takes

place at various stages of the transformation process and that only a few injurious experiences become complaints (Felstiner & Ors 1980-1981). The participants' grievance apathy was rooted in their perception of aspects of their identities. For example, participant GMR, a waitress, explained how Black women often refrained from recognizing injurious experiences as sexual harassment. She explained that it was "embedded" in Black women's minds that "you can't do anything about it, so you're going to have to live with it". Her remark illustrates how she understood the intersectional markers of race and gender as contributing to a sense of resignation, a feeling which deepened her grievance apathy (Ahamed 2025).

Relatedly, the avoidance strategy of "lumping it" can occur at any stage of the transformation process (Engel 2016: 23-33) and reflects an aggrieved party's decision not to pursue a grievance (Palmer & Roberts 2020). In contrast to grievance apathy, which is often rooted in an individual's resignation or sense of futility, and reflected in withdrawal, "lumping it" is an act by which one party consciously ignores or refuses to take significant action in response to the dispute (Galanter 1974). It is reflected in how they choose to endure or absorb the harm to maintain an appearance of normalcy. The findings in the current study reveal that, when participants were unable to limit their interactions with their colleagues or line managers, they tended to intentionally "lump it". For instance, participant Sandra, a supermarket attendant, recognized that her manager's comments were "really, really inappropriate", but she "brush[ed] it under the carpet". Her behaviour was a form of "lumping it", which she felt was necessary to maintain the *status quo*. Her decision was informed by her understanding that such comments are made by those in "positions of power". She decided:

> It's kind of my word against his. Because ultimately, he's gonna say, like, "I didn't say that or like why would I say something like that?" And then I'm gonna look silly, and I feel, as a Black person, more often than not we're not taken seriously (Ahamed 2025).

Sandra's understanding that the organization would be likely to attribute more credibility to her perpetrator's denial exemplifies Manne's notion of "himpathy" (2017).[7] Additionally, by referring to herself as a "Black person", Sandra's account suggests that she understood her race to be a dominant component of her identity contributing to her not being "taken seriously". Her testimony encapsulates that idea that her self-perception,

[7] Kate Manne coined the word "himpathy" to refer to the tendency for powerful men to receive undue sympathy in cases of sexual violence, misogynistic harm or gender-based abuse. For further discussion, see Manne (2017).

the hierarchical power of the perpetrator and her view of being stereotyped in the workplace as a "Black person", all informed her response to her harm and compelled her to "lump it". This assumption that, as Black women, the participants would be stereotyped, was a prevalent finding in relation to their responses after they had been harmed. For example, participant Pam, a lawyer who had been sexually harassed whilst working in a bank, noted that, as Black women, "we are more likely not to be believed" (Ahamed 2025). Participant Barbara, a solicitor, said:

> There is a prevalence of exaggeration sometimes in my experience of the impact of certain actions, … and there is a perception that Black women are more sensitive and sometimes quicker to complain.

Participant Barbara explained that she believed this is based on the commonly held idea that Black women are inclined to be "more sensitive" and "sometimes quicker to complain", and that, in many cases, employers and managers are dismissive of Black women, and respond to their allegations with the phrase, "oh here they go again". Participant Barbara's description reflects how structural constraints imposed on Black women prevent the validation of their experiences. In contrast, participant Pam's view indicates that she believed there was an inclination for Black women to remain quiet because they felt they were unlikely to be believed. These testimonies reveal how the participants perceived themselves in the process of deciding whether to blame alongside how their allegations could be received were they to claim (Ahamed 2025).

The participants' race and gender, and their perceptions of how they may be racially stereotyped, shaped their view that their accounts were unlikely to be believed, not taken seriously and not acted upon. The complexity of these factors reinforced their decisions to adapt grievance apathy or to "lump it", and highlights the significance of avoidance strategies, particularly within the context of intersectional identities and power dynamics in the workplace.

Blaming

The second phase in the transformation process is "blaming". Blaming occurs after an individual identifies the incident as harmful, determines accountability for the wrongdoing, and assigns fault for the injury to an individual or societal entity (Felstiner & Ors 1980-1981; Olesen & Hammerslev 2023). When this occurs, a PIE is converted into a grievance (Felstiner & Ors 1980-1981). For blame to be attributed, the perpetrator or organization must be viewed by the wronged party as both accountable and responsible (Wiethoff 2003: 67). Nine participants attributed blame

at least once. There was, however, a self-selection bias since only Black women who self-identified as having named and blamed responded to the call on the recruitment flyer. The participants' recollections of blaming fall within Liz Kelly's continuum of violence based on their understanding of their harm, how they contextualized it and later reflected on it.[8] The findings suggest two main points in relation to blaming: the first relates to how participants experienced a shift from self-blame to attributing responsibility to the perpetrator and/or organization implicated, while the second concerns their need for acknowledgment from bystander witnesses (Ahamed 2025).

Attributing blame

The complexity of the blaming process within the context of sexual harm becomes apparent when an individual begins to question whom they ought to blame and for what (Bohmer 1994; Taylor 2020). The aggrieved individual may shift from self-blame to blaming the perpetrator and/or entity responsible (Bohmer 1994; Taylor 2020). In line with this, the first finding in the current study in relation to blaming revealed how two participants were able to transfer blame to the perpetrators. For instance, in participant Anya's case, while observing how another woman said "no" to a perpetrator's advances, she asked herself, "why didn't I do that in the car? But I thought that's me again, blaming myself." She reflected on why she did not reject the sexual advances and recognized that self-blame was a behavioural pattern. She eventually transferred blame to the perpetrator by writing a complaint to her manager (Ahamed 2025).

The difficulties of ascribing blame in cases of workplace sexual harassment also becomes evident when individuals grapple with determining whom to hold accountable (Weithoff 2003). At times, when individuals realize that institutions prioritize their own self-protection, blame is directed to the institution, for example, in cases where churches were involved, as Carol Bohmer's (1994) research suggests. This was particularly evident in participant Chris's case where the sexual harassment took place in the church setting. Chris held her perpetrator responsible and complained to the pastor about his "touching", "hugging", and "kissing". However, the pastor denied it and said, "there was nothing happening in my church". He justified the

[8] Liz Kelly contends that violence encompasses a wide range of harms, including "abuse, coercion and force" which are "a continuous series of elements or events that pass into one another" and cannot be readily distinguished. The continuum has different dimensions that include: the nature of the harm; the relationship between the perpetrator and the woman; whether the harm was ongoing or a single incident; the context; the extent of threat perceived by the woman; and whether the harm was linked to prior experiences. For further discussion, see Kelly 1987: 46, 48.

perpetrator's behaviour by stating "we all hug each other", downplayed it as "no big deal" and then defended it on grounds that "we're all family". The pastor's allegiance to the church took priority over Chris's allegation. He used his hierarchical authority to normalize the harm to keep her quiet (Ahamed 2025). This finding contributes to Bohmer's research (1994) by illustrating how the church prioritized protecting its reputation and minimizing its exposure to legal liability over addressing the complaint. In Chris's case, the pastor's response compelled her to also blame the church.

Participant Chris's testimony reveals a broader pattern among those who have experienced harm, namely, in how she then felt compelled to resign. Her response may be understood through the lens of "exit and avoidance" (Galanter 1983). Galanter notes that this tendency is contingent on factors such as the availability of other opportunities, job transfers, relocation, and the creation of new networks. While aligning with Galanter's analysis, this finding nuances his reasoning further by revealing how Chris's decision to resign was shaped by the lack of available employment options (Ahamed 2025).

The findings in the current study also reveal the widespread reluctance to attribute blame to organizations for sexual harassment in the hospitality industry (Madera & Ors 2018; Equality and Human Rights Commission 2022). Dawn Szymanski and Renee Mikorski's (2017) research highlights how women possess less authority and influence in such work environments. Building on their study, the empirical data here identifies instances where the participants' complaints about customers were trivialized by their managers. For instance, participant GMR, a bar waitress, gave an account of how her breast was "grabbed" by a customer which was then dismissed by her manager because she ought to know "it gets like that" (Ahamed 2025). Her manager's response highlights how hierarchical power can be used to deflect institutional responsibility, normalize misconduct, suppress complaints and reinforce subordination (Collins 2018).

Validation from witnesses

The second finding reveals how participants in the study who did not formally raise complaints sought recognition and validation from workplace witnesses to make sense of their intersectional experiences. Olesen and Hammeslav (2023) note how the significance of a third party's interaction or non-engagement with the aggrieved party has the ability to inform their response in the pre-dispute stage. The lack of third-party

response was evident in participant Yanni's experience. She spoke of how, while she was conducting a training session in a police station, a junior male officer passed suggestive comments. His comments reflected a form of gendered contra-power (Rospenda & Ors 1998) where his subordination did not prevent him from asserting his authority through sexual undermining. Unable to attribute blame, she sought validation of her experience from witnesses present. She noted, however, that "nobody in the room challenged it, not even my other coach". This finding reveals how the lack of validation and recognition from witnesses (as third parties) plays a critical role in shaping how individuals make sense of their harms and go on to claim (Ahamed 2025).

Claiming

Claiming occurs when an individual expresses their grievance to the party that they identify as responsible and requests a remedy from that person (Felstiner & Ors 1980-1981; Galanter 1983). A claim is transformed into a dispute when such a request is rejected partially or in full; a delay may be also perceived as a rejection (Felstiner & Ors 1980-1981). A compromise offer or refusal may also be evidence that a claim has been transformed into a dispute (Felstiner & Ors 1980-1981). Furthermore, a range of factors shape an individual's inclination to claim, such as the nature of the injury, the likelihood of receiving a legal remedy, its associated cost, and the level of awareness of the aggrieved party (Galanter 1983).

The empirical data in the current study (Ahamed 20205) reveals that, although only two participants claimed by seeking redress through their organizations formally or informally, it did not result in adequate remedial action by their line managers. This was seen in participant Chris's case when she "asked the church to do an investigation". Although she expected a fair and impartial process, the inquiry was led by "the perpetrator's Godfather". The outcome framed the perpetrator as ignorant, to diminish the gravity of harm, and no support was offered to Chris. Her account illustrates how claiming can be thwarted by individuals' positions of power, by how harms are excused and perpetrators defended, thereby stopping a further transformation from occurring.

These findings corroborate recent research that shows that only a few individuals make claims in relation to workplace sexual harassment (Government Equalities Office 2019: 185). A study conducted by the Equality and Human Rights Commission (2020) in England and Wales noted that 50% of its respondents did not voice their grievances or ask for a remedy. The reasons included a perception that their employer

would not take their allegations seriously, that perpetrators in senior positions would be protected, and that there was a lack of appropriate procedures in place to address such concerns. In contrast to the Equality and Human Rights Commission's findings, the participants' testimonies in the current study (Ahamed 2025) suggest that their reasons for not claiming are shaped by their intersectional identities as well as their self-perceptions and personal contexts.

Another key finding of the study (Ahamed 2025) was that the participants' inability to claim was informed by their self-perceptions as well as their beliefs. This is closely linked to how they felt they ought to behave within their workplace setting, particularly in relation to their perceived capacity to withstand sexual harassment.

For example, participant Daniella, an entertainer at a nightclub, said that there was an assumption that Black women "could put up" with sexual harassment because they are "strong". Participant Chris also initially hesitated to claim because she felt that the church held an expectation that Black women "should be strong". A common theme in their testimonies was the belief that Black women were not expected to display vulnerability but instead ought to embody resilience in the workplace (Ahamed 2025). This finding contributes to existing literature on the stereotyping of Black women as inherently strong (Brassel & Ors 2020) and possessing an "innate capacity" to withstand harm (Byran & Ors 2018: 2).

A further significant finding was that skin colour, as an identity marker, aside from race, was a factor that some participants took into account when deciding whether to claim (Ahamed 2025). For instance, participant Chris explained that "dark skinned women are often seen to be …. strong Black women and so on". Her decision not to claim was shaped in part by her perception that her dark skin would influence her employer's response, leading her to believe her employer would not side with her. In this instance, her "dark skin" took on a structural dimension in how she anticipated that it would negatively shape the outcome of her complaint. Her skin tone, as an integral part of her identity, became a barrier to claiming—affirming bell hooks' argument that to "be born dark" is to have a "serious disadvantage".[9] Colourism, as a form of discrimination, penalizes individuals based on their racialized physical features, including skin tone (Russell & Ors 1993; Dixon & Telles 2017). Participant Chris's experience illustrates its existence within the Black community and in

[9] hooks reflects on how hierarchy based on skin tone systematically discriminates against individuals with darker skin tones. For further discussion, see hooks (1994: 204).

her workplace. This finding contributes to the limited literature on how intraracial discrimination may vary along the continuum of colour (Monk 2014; 2015; 2021). It exemplifies how perception of skin complexion and beliefs shape understandings of grievance outcomes and contribute to the hesitancy to claim.

Fredman (1997) acknowledges that the working lives of individuals are also shaped by embodied factors such as their socioeconomic status, racial background, and familial roles. She notes that individuals often wrestle with competing interests and offers examples of how Black women sacrificed maximizing their earnings to prioritize family obligations. This issue was raised by participant solicitor Jenny who explained that, since Black men face greater challenges accessing employment, Black women frequently carry the financial burden of the family and therefore seeking "some kind of justice" is not a priority. As a Black woman she explained:

> you're the main breadwinner, because access to decent jobs for African or Caribbean men is not easy, then you think twice about whether you are going to spend 20, 30, 40, or 60 grand to obtain some kind of justice when you have other priorities (Ahamed 2025).

Her testimony offers an insight into how Black women may be constrained from claiming by their competing responsibilities and economic situations. Participant Jenny's reference to Black women carrying the primary financial burden lends support to Julianne Malveaux's conception of a "third burden" borne by Black women because of the treatment of Black men in the labour market (1990: 223). Patricia H Collins (1991) recognises that poor Black families in the United States distributed their economic burden unevenly to ensure survival and attributes this to their racial oppression. Similarly, Fredman acknowledges this and, drawing on Collins' work, points out that Black women in England and Wales are often compelled to accept any work they can find to "survive" (Fredman 1997: 146). While these constraints emerged in the findings, they may be common to women across diverse backgrounds and thus also hinder them from pursuing legal claims.

An individual's perception of the law's efficacy and their treatment by the legal system are also factors which influence their decision to pursue a claim through the ETs. ETs, established in 1964, are the main avenue to pursue workplace sexual harassment claims. They were intended to provide an "easily accessible, informal and inexpensive procedure" (Royal Commission 1968: paragraph 572) to resolve disputes between employers and employees. Over time, however, they have become increasingly formal and technical (Corby 2015). Despite the lifting of the tribunal fees based on *Unison v Lord Chancellor* (2021), legal costs remain a barrier. In

participant Daniella's view, tribunal fees were a deterrent which "scared [her] off" (Ahamed 2025).

Over the last 20 years or so, the experience of bringing a claim to the ETs and its effects has attracted sparse attention from policymakers (Busby & McDermont 2020). Academic literature contains few empirical accounts of individuals', particularly of women's, experiences of bringing claims and of the challenges that they face (Busby & McDermont 2020). Adding to these empirics, participant Chris noted that, when Black women go to court, their credibility is at times questioned, and they are asked whether they "attracted the perpetrator" (Ahamed 2025). This attitude from the courts compels injured women to defend and justify their behaviour (Samuels 2003), adding an additional burden on them, deterring them from claiming.

Although Giorgio Monti (1999) argues that the ETs have been encouraged to adopt a more feminist and sympathetic approach, none of the participants pursued their claims through an ET. The findings highlight two reasons: the first links to their perceptions of the likelihood of fair treatment being conferred on them by the legal system; and the second relates to their beliefs about being stereotyped by the ETs and judges. The testimonies reveal that participants' self-perceptions, how they view judges and how they believed judges would view them, deterred them from claiming through the courts.

Fair treatment

Lisa Webley (2017) acknowledges that there are multiple cases that illustrate how women encounter discrimination in the legal system, which is structured by men to serve male interests. While she makes this point within the realm of family law, it is important to highlight here because it reveals the socialization of judges within the system that prioritizes male views which could affect a woman's perception of fairness. Participant solicitor, Patti, however, emphasized the increased vulnerability of women to harm. She explained:

> Men have never really been in a situation where there is a systematic targeting of them. So, there are no tools that men can create to actually deal with something like this or ever really address something like this (Ahamed 2025).

Her view provides insights into her understanding that, because men are seldom exposed to such harm, it limits their capacity to "address" the harm experienced by women. It may be inferred from her testimony that she believed it creates a structural barrier to the recognition of harm

encountered by women in the workplace and deters them from claiming (Ahamed 2025).

Stereotyping

Kimberlé Crenshaw (1992) recognises that there is a tendency to question the truthfulness of Black women's stories of sexual harassment. This is based on an assumption that Black women are more likely to lie. In the current study, a perception that the legal system was likely to stereotype Black women emerges as an issue that dissuaded participants from seeking redress through the ETs (Ahamed 2025). The stereotype biases held by judges were noted as a common barrier to accessing justice (Monteith & Ors 2022). This is reflected in participant GMR's account, where she noted "Black people in society are already looked down on, but for Black women it's even worse." Her understanding suggests that inequalities may be compounded for Black women who are viewed less favourably because of their gender and race, leading to intersectional bias. Participant Chris supported this view by stating that judges have "predisposed ideas" of Black women, which prevents them from starting their cases on an "equal footing". She said:

> it is because very much her character is put in the way, that you caused this, you know, even civilly, civil justice is not often afforded to us … (Ahamed 2025)

Participant Chris's explanation highlights her lack of confidence in the legal system's ability to provide justice to Black women, citing concerns that they will be stereotyped and discredited (Ahamed 2025). Tribunals, however, may draw inferences and make predetermined judgements of character from the way a claimant represents themself in court (*Laing v Bury & Bolton Citizens Advice* 2022). Within this context, it is notable how activist phrases such as "Believe women" and "#IBelieveHer" have recently come to the fore in social media, highlighting solidarity with women who feel that they have been or will be discredited by the law (Srinivasan 2022: 9).

The participants' accounts highlight the complexity of claiming from two perspectives. The first, is the notion of raising a complaint formally or informally at their workplace; the second is in relation to claiming through the ETs. An understanding of this was shaped through the participants' perceptions of the fairness of the legal system in relation to their intersectional identities and also their understandings of stereotyping. These factors in various degrees inform their views on whether to seek redress and claim through the workplaces and ETs (Ahamed 2025).

[E] CONCLUSION AND FUTURE RESEARCH

This article has presented selected findings from the study that rely upon the NBC framework to examine responses to workplace sexual harassment (Ahamed 20205). It has drawn attention to the relationship between NBC and #MeToo. While #MeToo was able to mitigate grievance apathy by fostering online solidarity, the narratives cited here revealed that the movement did not adequately address the experiences of Black women. In particular, it did not resonate as an accessible space for the participants of this study to speak out about their workplace harms. Rather than providing a platform to share their experiences, the findings suggest that #MeToo played a role in raising awareness about the meaning of sexual harassment set out in the Equality Act 2010. This positive step has been reinforced by the employers' new proactive duty to take reasonable steps, as set out in the Worker Protection (Amendment of Equality Act 2010) Act 2023.

Although #MeToo fostered legal consciousness, the participants' decisions to seek redress were shaped by their perceptions of their harms and by the interplay between their intersectional identities and workplace power dynamics. This tension influenced whether and how they decided to blame once they had named their harm. The testimonies reveal that participants tended to respond to their harms by avoidance and grievance apathy and preferred to carry on with their lives. The findings reinforce and refine Palmer and Robert's (2020) definition of avoidance by highlighting how the decision to lump it and grievance apathy were influenced by the perceptions of identities, beliefs about being stereotyped, male solidarity and power disparities in the workplace. Grievance apathy was rooted in the participants' perception of aspects of their identities; where it was difficult for them to limit their interactions with their colleagues or line managers, they intentionally lumped it. The participants' race and gender, and their perceptions of these, and their understanding of being stereotyped contribute to their view that their allegations may not be believed and may be minimized or not taken seriously. The interplay of these factors reinforced their decisions to opt for grievance apathy or lumping, rather than blaming. These findings reinforce the significance of naming and avoidance strategies, particularly within the context of intersectional identities and power dynamics in the workplace (Ahamed 2025).

The testimonies illustrate the complexity of the blaming stage and offer insights as to how participants shift from self-blame to blaming their perpetrators. There were two main findings. The first relates to the

recognition that institutions prioritized their self-protection and that this led some participants to also blame their institutions. The second finding highlights that, in the absence of speaking out and blaming, participants sought recognition from bystanders. The testimonies reveal that only two participants claimed, but no adequate remedial action was taken by their line managers. A significant observation is that the participants' inability to claim was shaped by their self-perceptions and internalized beliefs. This was closely associated with how they believed they ought to behave within their workplace setting, particularly in relation to their perceived capacity to withstand sexual harassment (Ahamed 2025).

The participants' perceptions of their race, gender, and skin tone, in various combinations, were key contributory factors that hindered them from claiming. The participants' inclination to claim was examined based upon their perceptions of their workplaces and their understanding of ETs. Within the workplace context, there were two main reasons why participants did not claim: the first related to their self-perception and their understanding about how they were expected to behave as Black women in their workplaces. An important finding is how one participant had an internalized belief about how her skin tone would negatively influence how she was perceived in the workplace and affect the outcome of her grievance. The second reason relates to how family burdens and financial responsibilities constrained the participants as Black working women to make legal action less of a priority from the outset. Within the context of claiming through the tribunals, notably none of the participants pursued their claims through the ETs. There was a lack of confidence in the legal system based on their belief that they would be treated less favourably based on their race and gender, a form of institutional bias. The participants' decisions not to claim highlight complex barriers rooted in perceptions of intersectional identities. These shaped the participants' sense of futility to claim within the workplace and ET system (Ahamed 2025).

Future research

The article has drawn on qualitative interviews with 15 Black women who had experienced workplace sexual harassment (Ahamed 2025). A more expansive sample of participants could enhance the findings. Moreover, interviewees from a larger set of industries, as well as from different types and sizes of organization could contribute broader data. A wider regional pool of subjects would likewise enhance what has been reported here. For instance, for the study, eight lawyers were interviewed for their

perspectives on anti-discrimination law, but future studies could include interviews with tribunal judges specializing in employment law.

The scope exists for triangulating the research analysis by engaging empirical evidence beyond interviews, for example, with other research methods and forms of data collection, including questionnaires, and comparative assessments of Black versus white women who have suffered workplace sexual harassment. This could be extended to other employee groups, including people with disabilities and trans- and non-binary women, and across a range of age. Further comparative investigations could be undertaken across jurisdictions to trace the evolution of disputes arising from the sexual harassment grievances of Black women to help bridge the academic fields of access to justice and labour law, paying particular attention to the roles played by employers and lawyers in facilitating the transformation of grievances into disputes. Such future research could add to the ongoing necessity to have a dynamic and continually evolving understanding of sexual harassment of Black women in the workplace which this study illuminates.

About the author

Dr Neemah Ahamed *is a socio-legal researcher whose work explores discrimination law and access to justice through an intersectional feminist lens, examining how identities influence experiences of harm and responses to it. Her PhD in Law at the University of Sussex examined the workplace sexual harassment experiences of Black women in England and Wales and the structural and legal barriers they faced when seeking redress. Dual-qualified as a solicitor in England and Wales and also an advocate of the High Court of Kenya, Dr Ahamed draws on legal practice and qualitative research. She is the founder of* Raintree Works*, a consultancy specializing in fostering fair and inclusive workplace cultures.*

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Pericles and the Plumber: Reigniting the Debate of the Purpose of Legal Education for the age of AI

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Abstract

Much is now being said in the wake of artificial intelligence (AI) about marking and assessments. This year represents the first year in which generative AI usage is considered by the scholarly community to be widespread. The article responds to the recent policy outlined by UCL Laws to introduce a return to traditional assessments, which preserve the integrity of a law degree. We place this debate within the wider context of law schools and what legal education ought to provide for society, more generally. Universities and law schools have different public mandates and should respond in accordance with their aims, community and identity.

Keywords: AI; legal education; assessments; law degree; legal profession; law in context.

[A] INTRODUCTION

Much is now being said in the corridors of the law school, in virtual meetings over coffee, and on exam boards regarding the impact of artificial intelligence (AI) on marking and assessment. Such discussions relate to AI as a wider field of intelligent systems but, reflective of the outputs and usages, a significant portion of the discussion relates to generative AI software and systems (Gen AI). This year represents the first in which AI usage has been significantly taken up by the student body. The considerable portion of student usages relates to Gen AI technologies, but

* We are grateful to the anonymous reviewer's comments, which helped sharpen this paper. We thank Clemens Rieder for his comments on this piece and his encouragement and Naomi Lott for her insights.

there are also transcription and dictation software, support tools, and a number of accessibility tools (Freeman 2025). Although emerging research has started to explore this area, the statistical evidence is still nascent and lacks longitudinal depth. The use of AI, unlike more traditional plagiarism, cannot be proven with specialist software, like Turnitin for example. The tell-tale signs are fabricated references, a superb command of English, especially when this level of sophistication is suddenly inconsistent with the student's previous work and classroom performance, and a superficial knowledge of research with all the structural hallmarks of a scholarly paper. It is now fair to say that most in the academic community believe the use of Gen AI in their assessments is widespread. Responses to AI have not been speedy (McDougall 2023).

The article responds to the recent move by UCL Laws to return to traditional assessments to preserve the "integrity" of a law degree (Veale & Ors 2025). The UCL Laws report is thorough and clear in its examination of assessments and recommendations. In response to the risk and rise in use of Gen AI, the report recommends revising modules to ensure that between 50% and 100% of their assessments are conducted in a manner deemed secure from artificial intrusion. This article broadly supports the move to return to the traditional mode of assessment. This format might be adopting oral assessment, common across the continent, or moving back to written exams in the examination hall. It does so, though, by following a different route than the path plotted by the team at UCL Laws (Veale & Ors 2025). We place our knowledge about Gen AI within the wider context of the scholarship in legal education and the debates therein. As such, it moves this debate on from how to secure our assessments to the bigger question about what the purpose of legal education is (or not). The latter question is now the elephant in the room.

We connect this debate about Gen AI and assessment to the epistemological question of what legal education ought to provide for its students, and society more generally. What learning outcomes are we trying to achieve and assess, and how to do so reliably? How might we react to and integrate Gen AI into our curriculum? These enquiries ultimately converge on a fundamental issue: what are the critical skills and competencies that legal educators are now expected to cultivate in their students in light of this evolving technological advancement? How might this differ in light of varied institutional missions and educational imperatives? We do not propose to write an emphatic, exclamatory and ideologically driven paper about how AI should be used (or not) in the law school. We wish to avoid espousing the virtues of Gen AI and equally in engaging antagonistically with its vices. Our aim is not to persuade

nor recruit those to join us in one particular mission to involve Gen AI. This is for a simple reason: all positions can be justified. There is no one-size-fits-all approach to Gen AI. Each of us will come with our own background, training and research interests. Those with an interest in law and technology may be more likely to embrace it in their teaching, learning outcomes and assessment than those with a doctrinal background, for instance. This plurality and variety in research interests, skills and background ought to be seen positively. The diversity on show here is one of the pillars of the British higher education system.

What this article aims to do here is give space for each of various different positions on Gen AI, but unite them around the concept of the law school, the university itself and some pedagogical imperatives. The law school is the unit and the university is the community to which we belong. What we do here is present a range of options that those within law schools can take. It builds a conversation about what suits those communities best. The approach that suits each individual law school can well be described as a historical, legacy or an identity issue. How each law school and each university sees itself, its purpose and its social mission depends often on the context in which it was formed. These specialisms, the social groups they cater to, and the people attracted to teach in them are all different. Embracing Gen AI will benefit some of those social groups, while, for others, it will not at all. Incorporating too much Gen AI will, for some, be harmful and act as a barrier for skill development and future employability. The aim with this article is, perhaps, typical of most educators. In short, we are not going to tell you what you ought to think or do about Gen AI. The variety of universities means that such a singular approach to Gen AI is idealistic and naïve for an article, which looks at the sector rather than the individual law school. It is impracticable to suggest a single Gen AI policy applicable to all law schools, as such an approach would have little meaningful impact across the sector. Our intention, rather, is to encourage readers to engage critically with the position that their own school adopts on AI and reflect on how this might be translated into module-level practice. The method applied here within this article is to place AI and the choices it gives us within the context of the growth of universities and law schools.

To do so, we adopt the following structure: we divide the paper into four parts. The section that follows brings in a broader theoretical debate about what law schools and legal educators do. We introduce William Twining's popular characterization of the role of the law degree from the 1960s. In the 1960s, Twining challenged traditional views of legal education in Britain, particularly in his 1967 book *Legal Education: Its Aims and Methods*. He

rejected the notion that the law degree should serve purely as professional training for solicitors and barristers, arguing instead that it should be an intellectually rich, liberal academic discipline. Twining emphasized the importance of critical thinking, analytical skills, and understanding law within its broader social, political, and economic contexts. He promoted a pluralistic, interdisciplinary approach, drawing on fields such as sociology and philosophy to deepen students' engagement with legal issues. Crucially, he distinguished between "training" (technical skills) and "education" (intellectual and moral development), asserting that law graduates should be thoughtful, informed citizens, not just practitioners. This metaphor serves as the red thread, a hook over which we hang the article, and this depiction is then used throughout. We turn to consider the expansion of higher education, law schools and the law degree in the 1990s, and then explore the impact of Gen AI on the legal profession. The penultimate section considers the future of legal education in the midst of the changes brought about by the growth of AI. The final section contains our concluding remarks.

[B] THE DEBATE OVER THE PURPOSE OF A LAW DEGREE, 1960-1990

What is a law degree for? What purpose does it hold for students? What purpose does it hold for employers? How have law teachers imagined the degree that they teach upon? This debate was most eloquently described by Twining in 1967 in an Inaugural Lecture delivered before the Queen's University of Belfast as the tussle between "Pericles" and the "plumber". Queen's University Belfast was not founded in the 1960s. It was founded in 1848 with law as one of its original faculties (Montrose 1952). Twining wrote the book *Blackstone's Tower* (1994) while at UCL. UCL was founded in 1827 and appointed two chairs of jurisprudence and law the following year. There were a few universities in the Victorian period with law professors, outside of the ancient colleges of Oxbridge. Twining also worked in Warwick, which was founded in the 1960s. His time as an academic in the United States (US) and Africa in particular influenced his thought (Sugarman 2020; Twining & Sugarman 2020). In short, Twining had a varied academic career where he saw a variety of models for legal education. "Pericles" was an "enlightened policy-maker, the wise judge"; whereas the "plumber" was "a no-nonsense down-to-earth technician" (Twining 1997). His metaphor has been taken up with humour and enthusiasm (Sedley 2008). It has such a firm purchase today because the dichotomy and broader questions are still relevant to the everyday work in the law school (Maharg 2011). In the late nineteenth

century, there were a small number of elite universities, which trained those of relative privilege, and even fewer law departments. The law school in King's College London opened in 1831 (Hearnshaw 1929). With the rise of universities and university students in the mid-twentieth century, the teaching of law had moved away from the student–master model, where it could only be a technical craft. A law degree could serve as a gateway to the legal profession, but it could also equip graduates with transferable skills applicable to a wide range of other employment contexts. Some law firms even preferred candidates with an undergraduate degree in a subject other than law and then a conversion course (Twining 1994; Boyle & Capps 2019). Now, Imogen Moore and Craig Newbery-Jones report that law firms have no preference for the LLB or Graduate Law Degree (Moore & Newbery-Jones 2018: 35–36). Law schools thus had to decide on a possible future of law in their department: whether they integrated law into the wider university or saw themselves as separate and distinct. *Blackstone's Tower* was radical in drawing attention to this (Cownie & Jones 2021). Law schools were required to determine whether to approach legal education as a liberal arts degree or as a standalone, practical, and vocational subject.

Law schools bifurcated in response, and that sometimes depended on their institutional roots rather than the particular views of the leadership or their view of the market. Those formed before the 1960s tended to have close connections to the legal profession. Their heritage was as a small institution, which consisted of and serviced those who were of economic and social privilege. They were the elites of society, who looked for a university education as a process of socialization, which also allowed access to the professions. Some of these historic institutions taught law, but did not have a law department nor a law degree. Bristol University, for instance, was founded in 1876, but discussions about creating a law faculty did not emerge until 1918, and they did not bear fruit until 1933 (Borkowski & Thomas 1984: 3). Law schools, like all of British society, were disrupted by the onset of the Second World War. The postwar period saw reorganization, and a change in mood came in the 1960s.

One of those universities that came to the fore in the 1960s was Warwick. Another was Brunel. This group of universities became known as the plate-glass universities. The name is similar to the previous name, red-brick universities, as the classification of plate-glass universities refers to their common founding and architecture style. The backdrop was the Robbins Report, which came out in 1963. The guiding principle here was that "all young persons qualified by ability and attainment to pursue a full-time course in higher education should have the opportunity

to do so" (Committee on Higher Education 1963: paragraph 135). The emphasis was on expanding the number of universities and their student body. Universities were there to train, educate and socialize: "to promote the general powers of the mind. The aim should be to produce not mere specialists but rather cultivated men and women" (Committee on Higher Education 1963: paragraph 26) and "the transmission of a common culture and common standards of citizenship" (paragraph 28). The value of a university education was well defined here: it had an inclusive social mission (Ross 2005). It spoke to the socio-political context of the 1960s. Warwick Law School established itself as the leader of an alternative to doctrinal thinking, and it adopted the "law in context" method. Brunel offered its students a sandwich degree structure, in which work placements and employability were central to the institution's educational ethos. A sandwich degree (the term originated in the United Kingdom (UK) and was widely institutionalized since the mid-twentieth century) is a university programme that integrates work placements with academic study. It typically includes either a year-long placement (thick sandwich) or several shorter placements (thin sandwich). The structure aims to enhance employability and practical skills by providing real-world experience alongside academic learning. The legal scholars at Brunel had strong links to the profession, but focused on subjects beyond the remit of the traditional doctrinal lawyer, like consumer law and welfare (Barnes & Wheeler 2024). Other law schools retained their traditional focus. Another significant shift occurred following the enactment of the Further and Higher Education Act 1992, which enabled polytechnics and colleges to attain university status. The following section examines this in greater detail.

[C] THE GROWTH OF LAW SCHOOLS, 1990-2020

The implementation of the Further and Higher Education Act 1992 resulted in the establishment of 35 new universities. The aim of John Major's Government (1990-1997) was to end the distinction between colleges and universities. However, this bifurcation was in name only. The post-1992 universities and pre-1992 universities were still intended to have different functions. The polytechnics had a practical element to their courses; they were designed to drive and develop skills and train their graduates to carry out jobs. Universities had a less practical function as their purpose was to drive research and theory. The changes made to the status of former polytechnics and colleges did not mean that they were the same as universities, nor did they have identical intellectual or educational

offerings. A class structure and the hierarchy therein was preserved. Polytechnics, and then what became former polytechnics, retained their teaching-focused and vocational agenda. The White Paper that introduced these proposals explained the shift in government policy. It read:

> As higher proportions of both young and more mature people enter higher education through academic and vocational routes, it will be important for institutions to review the content and structure of their courses and the way in which they are provided … The Government believes that there is a case for some increase over the next decade in the provision of high quality two year full-time diploma courses, particularly those with a vocational emphasis (Department of Education and Science 1991: paragraph 16).[1]

They lacked the prestige and reputation of the older universities. Law remained, in many respects, a vocational discipline for these new universities, functioning as a gateway into the legal profession through its emphasis on instilling practical skills. These new universities flocked to offer the Legal Practice Course, which was approved in 1990.

Over the course of Tony Blair's term as Prime Minister (1997-2007), there was a massive expansion of universities in the UK, including law faculties. This growth was not funded by the Government or society collectively—but by individual students, who paid what we now think of as relatively modest top-up fees. Top-up fees referred to the variable tuition fees introduced from 2006 through the Higher Education Act 2004, which allowed universities to charge up to £3000 per year for undergraduate degrees—"topping up" the flat-rate tuition fees previously capped at around £1125. Indeed, the use of top-up fees changed the financial model of universities quite considerably. They moved then more towards the market and away from the state as their source of income. The opening lines of the Dearing Report explained what were purported to be the motivating factors. It stated that:

> The purpose of education is life-enhancing: it contributes to the whole quality of life. This recognition of the purpose of higher education in the development of our people, our society, and our economy is central to our vision. In the next century, the economically successful nations will be those which become learning societies: where all are committed, through effective education and training, to lifelong learning …. So, to be a successful nation in a competitive world, and to maintain a cohesive society and a rich culture, we must invest in education to develop our greatest resource, our people. The challenge to achieve this through the excellence and effectiveness of education is great (Dearing 1997: paragraph 1.1).

[1] This was the second of two education White Papers published by Major's Government in May 1991. The first dealt with further education.

Overall, the expansion of universities in the Blair years was not framed as an altruistic social mission, aimed at addressing structural inequalities, as had been the case in the 1960s. Instead, it was more closely aligned with economic and policy objectives related to workforce development and competitiveness. Here, the rhetoric struck a balance between growth and prosperity, on one hand, and social improvement, on the other. The former struck a chord with more market-driven and neoliberalist agendas, although these factors can be looked at more positively to place emphasis on values, such as liberalism, student choice, and individualism. The introduction of the National Student Survey came in 2005. Also, part of the broader reform of the Blair Labour Government—developed by the Higher Education Funding Council for England, in collaboration with the Quality Assurance Agency, Universities UK and National Union of Students—it aimed to enhance student choice, institutional accountability, and quality assurance within the expanding university sector.

With universities adopting a market-oriented approach and students seeing themselves more as consumers than learners, law, as a degree, grew in popularity. This shift became apparent for most in England when the top-up fees, introduced by Blair, were tripled by the Cameron–Clegg coalition. Caps on numbers were also removed. They had prevented universities from growing excessively and created a level of stability in the sector. Growth was now unrestricted. Law schools grew because of their teaching model. To obtain a qualifying law degree, students were required to complete a set of compulsory modules. Consequently, teaching was primarily concentrated on the foundational or core subjects, such as constitutional law, contract law and other areas defined by professional accreditation requirements. Large lecture theatres, capable of accommodating hundreds of students and with a single lecturer, proved a highly efficient teaching model. The expansion of student numbers placed relatively modest demands on physical resources, requiring primarily additional books rather than costly laboratory equipment (Hudson 2021). Moreover, law proved to be an attractive subject for prospective students due to its clear vocational pathways and links to the profession, an appeal not typically associated with disciplines such as history or art.

The growth of law schools and the LLB were thus backed both by the university, which considered its financial model, and, more importantly, by the students, who pursued those degrees. A potential shift in this teaching model came with the changes brought in by the Solicitors Regulation Authority. Undergraduate degrees in England were no longer required to conform to the qualifying law degree framework to confer eligibility for professional qualification. Law schools in England could

have offered a combination of elective modules while still presenting the programme as an LLB degree. Yet, they have not done so. They still follow the same curriculum with the same core modules in place (Giles & Ang 2025). The inertia in the system stems from student choice, as students perceive that the employer's needs and expectations will not have changed (Giles & Ang 2025). This idea about their future, as they choose their degree, is lost somewhere along the way, as estimates suggest that only half continue into the profession (Guth & Ors 2021). Due to the rise in tuition fees and the rising significance of the National Student Survey, the student experience and market demand now play a far more influential role in shaping the modern law school in a way that was not previously the case (Guth & Ors 2021). A degree is seen as an investment, where university ranking and reputation matters most for securing a good job and thus return on the investment in the degree (Shepherd 2013: 4-5). Employability and skills-based modules are now widely incorporated into the law school (Millmore 2024). Assessment, contact hours and conditions, which promote individual student success, are also important factors for choice (Shepherd 2013: 4–5). Wellbeing initiatives, in this context, may be perceived as driven less by genuine concern for the law school community and more by strategic considerations related to institutional performance metrics and marketing narratives (Collier 2014; 2021).

A postgraduate law degree, such as the LLM, differs significantly in nature and structure from the undergraduate law degree. Twining made the same point in 1994 in *Blackstone's Tower* (Twining 1994: 52, 54), although the postgraduate programme has since evolved (see section [E] below). The UK has always followed a slightly different model to other jurisdictions with its qualification system. In other jurisdictions, such as the US, law is only a postgraduate programme; it does not exist at the undergraduate level. As a postgraduate degree in the UK, the LLM does not have to deliver foundational legal knowledge, as this is provided at the undergraduate level. LLMs grew in popularity between 2000 and 2020. This is true—even for the US—where the JD is a postgraduate degree (Silver & Ballakrishnen 2022: 487). They are a way of offering specialist knowledge or skills. It follows that LLM programmes became increasingly specialized, with the generic LLM in law supplemented with focused offerings in areas such as commercial law and other fields. With the increase in undergraduate enrolment during the Blair years and changes to tuition fees, it was thought that this might prompt a change in programme expectations: the Masters degree could emerge as the new standard or serve as a means for graduates to gain a competitive edge or similar advantage in the job market. The anticipated shift does not

appear to have materialized, as little change occurred (Bradney 2011). The principal change, however, was an increase in LLM students, primarily comprising international students. In 2019/2020, there were 192,305 total non-UK student enrolments on full-time postgraduate taught programmes. In 2022/2023, this had grown to 386,655 (see Higher Education Statistics Agency (HESA 2019-2024: figure 9).

Overall, this section has demonstrated that the purpose of the law degree has undergone a significant transformation over the past three decades. It is no longer the pursuit of wealthy and privileged individuals, nor does it guarantee entry into the legal profession. Law schools in this context have a choice to position themselves strategically within the higher education market, aiming to attract students who wish to become both, as Twining puts it, "Pericles", the critical, reflective policy-maker, but also the "plumber", as the skilled legal technician (Twining 1997). Law schools tended by the end of this period to appeal to both. They value the emphasis placed on critical thinking that a liberal law degree can bring, while also recognizing the importance of providing a solid foundation in the want to offer the nuts and bolts of legal knowledge. The following section considers the challenges and opportunities brought by AI in the last few years.

[D] CHALLENGES AND OPPORTUNITIES BROUGHT BY AI, 2020-PRESENT

Over the last few years, platforms that use Gen AI have been rapidly evolving. Feuerriegel and colleagues (2024) define Gen AI as "computational techniques that are capable of generating seemingly new, meaningful content such as text, images, or audio from training data". Such a definition may be viewed as overly generalized from a technological and computer science perspective. It does, however, correctly summarize the system approach in line with how it is viewed and understood from a more general perspective. Following the public release of Chat GPT3 and the entry of rival programmes into the market, the use of Gen AI has changed. ChatGPT is, of course, not the sole Gen AI tool available; other platforms, such as Grok, Poe, Gemini and Claude, also serve as significant examples. While such programmes and tools differ from technical and back-end processing approaches, their use by the wider student body is relatively similar, and the observations and arguments presented in this article are intended to apply broadly across Gen AI technologies. Through various technological iterations, we have seen an exponential increase in the use of AI by the public (Hu 2023). Additionally, the compulsory

integration (or intrusion) of Gen AI into writing software, platforms, and wider operating systems is beginning to standardize the use of Gen AI. For example, Microsoft has integrated Co-Pilot into the Windows OS; Apple has done similar with Safari; Samsung with Galaxy AI; and Google search results now display an AI overview of the topic. It makes everyday tasks, like writing emails or synthesizing swathes of information, more efficient. The technological capability of AI will, no doubt, have an impact on clerical jobs and tasks, which can be automated (Samuel 2023). Legal rules are far more theoretical and creative than a set of rules that can be reduced to an idiom. AI works as a supplementary tool in this field. At the same time, the potential use of Gen AI can offer some benefits in relation to reducing the cognitive load or burden on individuals, allowing them to focus on critical thinking (Ravšelj & Ors 2025: 1, 5). It can also support those who are working in a non-native language in terms of refining their language (Chan & Lee 2023). As such, the inclusion of Gen AI must be seen as a device that can enhance daily life. By extension, it can be seen as a tool that can evolve with the legal profession.

AI is already starting to revolutionize the work of those in the legal profession (Wakefield 2023). It has been suggested, for instance, that it could be used to draft standard form contracts, check for inconsistencies and find leading precedents (Thomson Reuters 2024). Lawyers could use AI-generated boilerplate clauses and thereafter vet those contracts and documents before submission to counterparts or the court (Wakefield 2023). Elite law firms are not just using AI software but buying AI companies and integrating them, finding that it helps them win previously unwinnable cases by transforming complex data into courtroom-ready visuals, delivering faster, cheaper, and better results for clients, and turning a simple tool into a powerful competitive advantage (Merken 2025). Using Gen AI can, therefore, save legal professionals valuable time, as this software carries out these tasks far more quickly than manual efforts. The potential of Gen AI to reduce costs could be significant. There are some who see these trends as alarming for the vibrancy and survival of the legal profession (Poppe 2019). However, it could make access to justice wider as the cost of legal services may potentially become cheaper. It is hailed as a tool for those on low income and unable to afford a lawyer to access legal knowledge (Chien & Ors 2024).

However, Gen AI is, indeed, a tool that carries with it opportunities as well as risks (*R (Ayinde) v London Borough of Haringey* 2025: paragraph 5). For example, while it may facilitate access to justice, there are concerns that this solidifies a two-track system in an uncritical manner. It divides those with legal advice, on one hand, from those with AI-generated legal

advice, on the other (Simshaw 2022). Furthermore, certain parties that have access to these tools also hold specialized expertise in their use, raising concerns about the potential exacerbation of existing structural inequalities in the legal system (Veale & Ors 2025: 3).

Fabricated references and hallucinated cases in AI-generated text are plentiful; they are not recognized by the human author to be fake and so are passed off as real (Magesh & Ors 2025; *SW Harber v Commissions for His Majesty's Revenue and Customs* 2023; *Olsen v Finansiel Stabilitet A/S* 2025; *Zzaman v Commissioners for His Majesty's Revenue and Customs* 2025; *Bandla v Solicitors Regulation Authority* 2025). Evidence of fictional cases has created havoc in the courtroom. When commenting on the production of fake citations in *Ayinde* (2025), Justice Ritchie criticized lawyers who "tried to finesse them into being 'minor citation errors'". The inclusion of these cases was far from a minor slip-up in case name or court. He said that he would "consider that it is self-evident that both counsel and solicitors should never knowingly mislead the court". Such an act would not demonstrate the ethical standards, integrity or honesty required by those in the legal profession. "Producing submissions based on fake cases is", he added, "misleading the Court" (*Ayinde* 2025: paragraph 30). He ordered that the transcript be sent to the Bar Standards Board and to the Solicitors Regulation Authority (ibid: paragraph 30). Dame Victoria Sharp P pushed further in her commentary on the inclusion of fake cases in legal documents seen before the court. She said that these cases "show that promulgating such guidance on its own is insufficient to address the misuse of artificial intelligence". Indeed, the appendix listed a number of cases and jurisdictions where this had also happened. "More needs to be done", she summed up, "to ensure that the guidance is followed and lawyers comply with their duties to the court" (*Ayinde* 2025: paragraph 82).

One suggestion is self-regulation. In the US, Christina Frohock has called for greater vigilance over fake citations in the courtroom. Her argument is that the bar should be free of ethical issues as it is our duty as lawyers to "safeguard the integrity of the law" (Frohock 2025). The bar may be higher for lawyers, who seek to uphold professional standards and instil public confidence in their work. Frohock's suggestion mirrors the approach of Justice Ritchie on the bench and others, who order others to self-report. An additional solution to addressing the misuse of Gen AI within the courtroom lies in the reform of legal education and professional training. Law degree programmes should not only incorporate instruction on the ethical use of Gen AI in alignment with the values and standards of the legal profession, but also equip students with the practical and

cognitive skills necessary to critically engage with, evaluate, and effectively navigate emerging Gen AI technologies in legal contexts. It is to this issue that we now turn.

[E] THE FUTURE OF LEGAL EDUCATION

Law degrees—and in fact all degrees—are, in the UK, built upon learning outcomes and programme specifications that align with the Framework for Higher Education Qualifications (FHEQ) and any relevant Subject Benchmark Statements. The FHEQ is maintained and overseen by the Quality Assurance Agency for Higher Education (QAA) in the UK. The learning outcomes are required by the FHEQ to be clearly specified at the appropriate level (eg Level 6 for an undergraduate LLB). Outcomes encompass both disciplinary knowledge and higher-order skills such as analysis, autonomy, and professional judgement. Programmes must be designed and assessed robustly so that all students can demonstrate attainment of those outcomes in line with national standards and professional benchmarks required from professional or statutory regulatory bodies such as the Solicitors Regulation Authority or the Bar Standards Board. These requirements ensure academic quality, transparency, and professional readiness for graduates entering the legal profession.

One of the challenges in determining an appropriate approach to Gen AI lies in its entanglement with the wider discussion surrounding higher education. It is a complex and contested domain characterized by diverse stakeholders, competing priorities, and multiple institutional responsibilities. The issue is not confined to the law school. In this regard, Illingworth (2023) views the adoption of Gen AI as one with both risk and opportunity for scholars more widely. Others note the shift (for better or worse) such integration into the academic environment that Gen AI currently presents (Waltzer & Ors 2023; Ali & Ors 2024) and that the "presence of ChatGPT has also sparked regulatory and ethical concerns surrounding academic integrity in higher education. Most higher education institutions lack rules for its use" (Ravšelj & Ors 2025: 7). At present this nebulous "no-man's-land", often varying between university, faculty and school level, has created an ambiguous situation in which some students fear the use of Gen AI and others are more brazen with regard to its use. The same is true of academic staff, most of whom were trained in eras before Gen AI existed. Some of the concerns surrounding Gen AI reflect long-standing patterns in societal responses to new technologies. It is often characterized by a cycle of exaggerated

fear and inflated expectations, commonly referred to as the "fear–hype dynamic" (Seidensticker 2006).

In context, this means that some academic and professional anxieties may stem not solely from AI's current impact, but from historical tendencies to either glorify or demonize emerging tools before their real implications are understood fully. Recognizing this dynamic is crucial for forming thoughtful and measured responses in the legal education milieu. Gaining a comprehensive understanding of the transformative potential of AI will necessitate academic scholars to engage in a form of foundational re-skilling or reorientation. This would entail revisiting core technological, pedagogical, and epistemological principles to effectively evaluate, integrate, and respond to the capabilities and limitations of these emerging tools within their disciplines. Thus, the development of clear guidelines and scope on the use of AI is essential for students (Hassoulas & Ors 2023; Xu & Ors 2024), but also for high-level pedagogical discussion among academic scholars. This section maps out three approaches that can be taken in the context of the law school.

Prohibiting Gen AI

The first and most conservative position is to effectively ban and prohibit the use of AI at all stages of legal education. The risks associated with the negative aspects of Gen AI are most evident within the context of assessments. Both from a pedagogical perspective but also student inclusion of fabrications or unverified material. This is, after all, how we assess whether a student has met the learning outcomes and performed as intended to do so. Evidence of the use of Gen AI exists at both ends of the marking spectrum. Students on the lower end may see their mark boosted through the use of Gen AI created or enhanced submissions, while higher-achieving students could be at risk by not using Gen AI through potential grade value deflation in comparison to Gen AI-assisted classmates (Choi & Schwarcz 2025: 397). This proves to be a particular problem for law. Armin Alimardani found that, in questions which required detailed legal and critical analysis, Gen AI performed below the student average, though we submit that this is unlikely to remain true as AI capabilities improve. However, in open-ended questions and essay-writing tasks, all Gen AI papers performed better than students (Alimardani 2024). Across multiple jurisdictions such as the US (Katz & Ors 2024) and the UK (Head & Willis 2024), Gen AI has not only been passing legal examinations, but it has also been scoring significantly high. Daniel Katz and colleagues (2023) note that "large language models can

meet the standard applied to human lawyers in nearly all jurisdictions in the US by tackling complex tasks requiring deep legal knowledge, reading comprehension, and writing ability". Amanda Head and Sonya Willis (2024) state that Chat GPT-4 is now "scoring 70/90 or 78%, which would have put it in the top quintile for the November 2021 and July 2022 sittings". Commenting on the widespread use of AI, Head and Willis note: "Gen AI's ability to pass many traditional legal assessments potentially undermines these substantive legal knowledge requirements, posing a significant risk to the legal profession and the law academy" (2024: 296). In this connection, permitting the use of Gen AI can increase the risks to student learning, such as dependency on Gen AI and for deep thinking (Ravšelj & Ors 2025: 1, 5), the risk of creating a focus on automation of outputs rather than deep learning (Farrokhnia & Ors 2024; Farazouli & Ors 2024) and contribute to an overall loss of critical thinking and prevent students from developing this skill through human-generated outputs (Dergaa & Ors 2023; Hsu & Ching 2023; Strzelecki 2024; Kosmyna & Ors 2025; Naidu & Sevnarayan 2023). The question of whether assessments should be in person/invigilated or online/uninvigilated is a central tenet of this discussion.

While some note the practical, logistical, and accessibility elements of a full return to in-person assessment, the current risks of Gen AI that exist in online-only assessments have become inexorable. Peter Scarfe notes that "[i]t is unfeasible to simply move every single assessment a student takes to in-person. Yet at the same time the sector has to acknowledge that students will be using AI even if asked not to and go undetected" (Goodier 2025). With the inclusion of writing modules and clear strategies for their use, the overall promotion of academic integrity necessitates some degree of supervised or invigilated assessment. It appears impossible to operate without it, owing to the spectre of Gen AI in academic writing (Perkins 2023; Sullivan & Ors 2023). This is now the Law School at UCL Laws' position, anyway. UCL Laws have reshaped the law degree so that modules have 50-100% "secured" assessment. "Secured" means that their assessments "reliably safeguard against the use of generative AI". The move here is to ensure that a law degree from UCL Laws maintains continuity in terms of what it has always offered. The authors of this report explain:

> We design and maintain our programmes so that students obtain rigorous legal knowledge and skills for both predictable and novel situations; forge an ability to question received wisdom and formulate effective arguments; develop their capacity to independently, critically and analytically engage with complicated and often lengthy material;

> engage in contextual assessment and problem solving; communicate powerfully and effectively; and are exposed to spaces and experiences that allow them to develop their personal and professional values and ethics (Veale & Ors 2025: 2).

The shift to "secured" assessments aligns with Twining's conceptualization of lawyers as "plumbers" and "Pericles" within the legal system. If the institution deems that its mandate is to train those entering into the legal profession as "plumbers", the student must possess legal knowledge themselves. They must be able to identify and remember the key cases, understand the operation of particular doctrines and be able to apply these to the facts. Assessments authored through the use of Gen AI prompts do not generally demonstrate that the student possesses the foundational legal knowledge. For those institutions with a strong link to the legal profession or courses, like the MLaw, SQE and so forth, that provide direct entry into it, it seems that a return to in-person, secured, invigilated oral exams is now necessary, if they have not already moved. While the UK SQ1 examination is already conducted in person, an indication that examinations can return to in-person formats, the assessment criteria may need to be reviewed and recontextualized in light of Gen AI developments. Similarly, the US Bar exams are online but strictly invigilated to prevent the use of Gen AI, but are at risk of other issues (Solomon 2025).

However, because Gen AI software has this "knowledge" built into it, the importance of this legal skill requirement may be declining. The use of fictious cases in the courts also suggests that those lawyers, who have legal training and so a "plumber-like" legal approach, do not use their own knowledge to critique information generated by AI. It may be that there is now a role for legal educators, in response to Gen AI, to help those using the tool, to provide them with intelligently designed prompts and the ability to critique it. As Anil Balan (2024: 328) notes "[l]egal educators must therefore strike a careful balance, ensuring that students are trained not only in how to use AI tools but also in understanding the limitations of such tools and making the human judgement necessary for legal practice". To do this and exercise judgement on the quality of AI-generated materials, however, the user must have a standard of foundational legal knowledge themselves first and must also have developed the cognitive skills-blend of discernment and creativity. Law students should exit law school with a good breadth of knowledge and a reasonable expectation that they possess a depth of technical or substantive knowledge. It is thus becoming increasingly impossible to avoid recognizing that AI is somehow acknowledged and absorbed into our teaching practice. The

aim here has to be to train the next generation of lawyers to have both the legal knowledge themselves and the legal skills needed to master AI and use it critically. This point takes us to the second position.

Integrating Gen AI

Some law schools may wish to find a middle ground between prohibiting AI and embracing it. They may wish to occupy a midway position and thus produce both "Pericles" and the "plumber". There are ways of integrating it. The integration of Gen AI systems as a whole within an academic setting has been recognized as "a major shift in the educational technology landscape" (Ali & Ors 2024). This is especially true in relation to legal education. Law schools hold strong links with the professional institutions. Lawyers, as a professional group, are themselves traditionally conservative (Abel 1999). The focus must therefore shift to how law schools can effectively adapt to, and strategically embrace, the benefits of Gen AI technologies, particularly by leveraging these tools to enhance legal training and professional development. Integration of AI tools in the educational environment should benefit students in their future employment and their ability to enter the legal profession, if they so wish.

There is currently insufficient data to fully evaluate the impact of the use of Gen AI on students' cognitive skills, although this remains a crucial consideration from a pedagogical and formative standpoint. A recent but highly relevant MIT study by Kosmyna and colleagues (2025) does set off some alarming bells. The study tracked 54 participants to examine how Gen AI tools like ChatGPT impact learning. Participants were divided into three groups: one using only ChatGPT, one using only search engines, and one using no digital tools. Brain scans revealed that those who worked without tools maintained the strongest neural activity, while those using search engines showed moderate activity. Those relying on ChatGPT had the weakest brain engagement. The study found that most ChatGPT users copied and pasted content with little editing, while others used it for minor tasks like grammar checks or transitions. Even those who used the tool strategically, such as for essay structure, experienced a decline in memory retention and cognitive performance over time. The findings raise serious concerns about the long-term cognitive effects of relying on AI for academic tasks, suggesting that incorrect use of ChatGPT may hinder critical thinking and reduce students' ability to retain and process information. The study suggests that the timing of AI integration into learning is crucial for students' cognitive development (Kosmyna & Ors 2025: 139). Specifically, participants who had already developed critical-thinking skills prior to using AI demonstrated increased neural

efficiency and connectivity compared to those who began using AI from the outset. The study observed that participants who relied on AI from the beginning exhibited persistent neural under-engagement, even after AI tools were withdrawn, suggesting the concept of cognitive debt accumulating over time.

Initial development of cognitive skills provides a crucial foundation that enables more effective and meaningful collaboration with Gen AI. Participants who cultivate critical-thinking abilities before engaging with Gen AI are better positioned to use it as a supportive tool. In contrast, those who depend on AI from the outset often fail to develop these essential foundational skills (Kosmyna & Ors 2025). The timing makes a significant difference. Participants who began with their own thinking before integrating Gen AI retained cognitive control and became more efficient. In contrast, those who started with AI assistance experienced diminished abilities, even after the tool was no longer in use (Alcock 2025). Notably, even participants who used ChatGPT for seemingly permissible tasks, such as structuring rather than drafting essays, showed signs of cognitive impairment. These findings have important pedagogical implications: the point at which Gen AI is introduced in the curriculum may need reconsideration. Early use (eg in Part 1 or early modules) could disproportionately affect participants who have not yet developed strong critical thinking skills. This raises issues of equity. Participants arriving at university with well-developed cognitive skills may benefit from AI use, whereas those without may face neurological disadvantages may not—potentially exacerbating educational inequalities. Institutions should consider structured support for AI use, focusing on enhancing critical thinking through other methods while also carefully guiding AI adoption until participants are prepared to move beyond the stage of acquiring legal knowledge.

Academic integrity is increasingly nuanced, extending beyond straightforward cases of plagiarism. Students who utilize Gen AI tools often perceive their actions as compliant, viewing their use as “structuring” or “editing” rather than copying. However, neuroscientific evidence suggests that these distinctions may have less cognitive significance than previously assumed (Alcock 2025). Even seemingly ethical AI usage was shown to be cognitively detrimental. In other words, students who use Gen AI are outsourcing their thinking. This is not the intended outcome of a law degree: to produce students who are not trained to think. Educators must therefore decide whether their priority is the production of competent outputs or the development of capable, critically minded individuals. Educators confront a foundational decision: if the goal is to

produce competent outputs, AI assistance poses little concern. However, if the aim is to cultivate capable, independent thinkers, the use of AI must be thoughtfully and strategically managed (Alcock 2025).

Pedagogical approaches could well recognize that the ability to effectively synthesize and critically engage with AI-generated content depends on the prior development of substantive subject knowledge and cognitive skills. This precipitates a structured educational scaffold over time, allowing students to build the foundational competencies required for meaningful interaction with AI tools. Consequently, it may be beneficial for students to be made explicitly aware of such studies, both to foster an understanding of deferred use of AI in the LLB curriculum and to motivate more self-regulated, informed and responsible engagement with these technologies.

Embracing Gen AI

The final position is to embrace Gen AI. These would be educators who see themselves and programmes as technology-oriented or those that offer transferable skills with little or no link to the legal profession. The graduates of these programmes would be "Pericles" rather than "plumbers". The integration of Gen AI into legal education represents a modern-day Pandora's Box, a source of unprecedented opportunity as well as significant disruption. It has the potential to radically overhaul and reimagine legal education, from design, to delivery, to engagement and consumption (Balan 2024: 323, 329). There are institutional contexts in which a more radical reimagining of legal education that is facilitated by Gen AI may be appropriate.

For students with learning disabilities or diverse educational needs, traditional pedagogical models may present significant barriers to success. In such cases, AI tools tailored for accessibility and differentiated learning offer promising alternatives. These technologies can support asynchronous learning (Li & Xing 2021; Cotton & Ors 2024: 229), deliver real-time and continuous feedback (Faiz & Ors 2023; Fyfe 2023; Han & Ors 2023), and create more adaptive and personalized learning environments. It is important to note that these tools are more likely to take the form of agentic or bespoke AI applications, rather than general-purpose AI systems, an important distinction with significant pedagogical implications. Agentic or bespoke AI applications are AI systems that can operate autonomously but this is goal-directed behaviour, in other words, it follows objectives that it has been programmed or trained to achieve (Acharya & Ors 2025). While such AI tools may enhance educational

delivery in particular instances and support skill development in resource-constrained settings, it remains essential to ensure that foundational cognitive skills, particularly critical thinking and legal reasoning, are explicitly developed during the early years of legal education. This is especially important where these competencies have not been sufficiently cultivated at the secondary level. Equally, much has now been written on the way traditional modes of assessments (eg in-person exams) widen the awarding gap. It will only benefit those of privilege and who come to university with what is otherwise termed cultural capital (Cagliesi & Ors 2023; Mountford-Zimdars & Moore 2024). Institutions with an explicit mandate to engage in a civilizing mission, reconstructing the fabric of our society, and improving social mobility, may be at a disadvantage. An institution that seeks to predominantly serve and improve the working-class community may not fulfil its mission if it attempts to return to the traditional mode of educating and assessing.

Postgraduate law programmes, particularly the LLM, offer even the most cautious a compelling context in which to integrate AI into legal education meaningfully. At this advanced stage, students are presumed to have already developed legal knowledge and the capacity for critical thinking during their undergraduate studies. The LLM, therefore, is not primarily a space for foundational knowledge acquisition, but rather one for intellectual refinement and cultivation of specialized competencies: among them, the effective and ethical use of Gen AI. For most law schools, the mainstay of teaching is undertaken at the undergraduate level, where the majority of students are enrolled. In 2023/2024, there were 1,759,245 undergraduates studying law full time, while 578,350 postgraduates were studying law full time (HESA 2019-2024: figure 9). In many institutions, the LLM has evolved into a flagship programme, especially in law schools that continue to attract international students, despite a broader decline in international numbers. In 2021/2022, for example, there were 345,445 total non-UK student enrolments on full-time postgraduate taught programmes. In 2022/2023, this had grown to 431,740 but the following year, 2024/2024, it had fallen to 412,105 (HESA 2019-2024: figure 9). It is within these programmes, where learners are not expected to gain the foundational “plumber-like” legal training but can engage instead in more reflective and analytical practices, that Gen AI can be purposefully and productively incorporated in the teaching and learning practice.

The past decades have witnessed increasing diversification of LLM offerings, with many programmes becoming more specialized and niche in scope. A notable example is the emergence of LLM programmes, in

the last five years or so, that offer modules in AI, law and technology or combinations of those. For postgraduate law students there is a clear imperative to be upskilled and equipped to navigate the complex interface between law and emerging technologies. Therefore, postgraduate programmes warrant a pedagogical approach distinct from the broader institutional shift suggested above. They represent a space where innovation in curriculum design and assessment strategies, incorporating the use of AI at a more finite and interdisciplinary level, can and should be embraced.

Educators who integrate AI into teaching must remain alive to the potential pitfalls and the complex ethical dilemmas already evident in the legal profession. The use of fabricated cases is not just seen in the courtroom. We see the same issues in the work of lawyers, in law students. We have seen an accelerated uptake in allegations of academic misconduct, such as plagiarism, contract cheating, and fabrication of material. This is, of course, a direct result of the use of Gen AI. A "survey of academic integrity violations found almost 7,000 proven cases of cheating using AI tools in 2023-24, equivalent to 5.1 for every 1,000 students. This was up from 1.6 cases per 1,000 in 2022-23" (Goodier 2025). While legal education may not have a comprehensive and complete answer, it nonetheless has the obligation to prepare students and future lawyers to be aware of the new tools and technologies, with some commentators further stressing the need for the wider ethical considerations to be included, and, in doing so, with the wider awareness and knowledge of these tools, their strengths and their weaknesses (Chan 2023).

[F] CONCLUSION

Over the last hundred years, the law school and higher education more generally have gone through significant changes. In the early twentieth century, universities served a small community of society, and law schools were few and far between. In the 1960s, the agenda was predominantly about inclusion. It centred on expanding access and participation for a broader demographic of learners. This is, of course, when Twining first wrote about the bifurcation between law schools, which aimed to produce "Pericles" and the "plumber". Since then, the scale and scope of law schools have grown in tandem with the number of universities, embracing law as part of a broader liberal education programme. Later decades introduced higher education as a marketplace, allowing for the unfettered growth of universities. This expansion occurred both in an institutional capacity and also in student numbers. Change came with the democratization of choice around education, a policy focus on enhancing competition and

improving employability skills. Each of these shifts reflected social and economic demands of the time.

That said, the current era presents an unprecedented challenge: the rapid, disruptive advancement of Gen AI. There are a variety of ways that this dilemma can be solved. Assessment design will, no doubt, fit around the law school's mission and its understanding of its own purpose. As UCL Laws and other institutions have suggested, even traditional assessments can be reconfigured, for example, reinstating hand-written exam conditions. These methods make false authorship, outsourced thinking and hallucinated case law and legislation via AI much more difficult, while also deepening intellectual engagement. For those age-old institutions or programmes with a close relationship to the legal profession, such an approach is inherently attractive. It is perhaps now impossible to ignore. A degree, which shows that the student can function in the legal profession, is clearly a necessary part of the entrance process. This means that a set of examinations, which decisively tests their legal knowledge, as opposed to the legal knowledge of Gen AI, is essential. It is the only way to attest to their ability to function as a lawyer.

Most law schools, and the students in them, see value in law as a subject; they undertake a law degree because of the *potential* to enter into the legal profession (Twining 1994: 60-61). Not all law students do enter the profession; the choice is made by the student and, more latterly, the recruiters or law firm. To ensure that the degree provides a set of transferable skills in light of this new technological landscape, there is now a need for additions to the legal curriculum and a foundational rethinking of what we equip our graduates with. The urgency now lies in a needs-based skills focus. This is the introduction of policies and pedagogies that prioritize what graduates need to survive, adapt, and thrive in a world where AI is not just a tool but a pervasive force shaping how we think, work, and relate. Graduates today must develop cognitive dexterity—the ability to think critically, creatively, and flexibly—and learn to harness AI not as a crutch but as a vehicle for efficiency, innovation, and strategic advantage. In this context, educators are tasked with the complex responsibility of not only integrating AI literacy into curricula, but doing so in a way that ensures we teach and assess our students on their legal knowledge.

One more general approach here could be applied to all law schools. This is midway between prohibiting and embracing Gen AI. It is to scaffold cognitive and epistemic development—essentially to delay the use of AI rather than to short-circuit it. There can be a deliberate and

phased curricular approach. Rather than introducing Gen AI tools from the outset, programmes could be designed with a waterfall framework that builds students' independent cognitive capacities and foundational knowledge first, whilst developing their intellectual maturity to use such tools judiciously, deliberately, and ethically. This strategic delay is both a design nuance and a pedagogical imperative. It shifts the emphasis toward intelligent, holistic programme modelling that foregrounds formative assessment as a core developmental tool. Crucially, this also necessitates, at least in the earlier years, a shift away from conventional written assessments, which are increasingly susceptible to Gen AI interference. These experiences not only stimulate early cognitive development but also lay the groundwork for managing complex tools like Gen AI later on. These skills remain essential for those students seeking a career pathway outside of law. In doing so, this scaffolded and middling approach allows law schools to produce graduates who can be either "Pericles" or the "plumber". The integration of AI into legal education will not follow a uniform trajectory but may, at times, be accelerated or deferred in response to contextual demands. In certain cases, earlier exposure may be warranted to accommodate specific student exigencies, such as learning difficulties, where AI tools can provide tailored forms of support. Conversely, at more advanced stages, such as in postgraduate study, the assumption of a more developed cognitive skill-set may justify more use of AI as a catalyst for higher-order analytical and professional capacities.

Overall, the path forward is not simply about banning or embracing Gen AI (or AI more broadly). It still remains a broader task of getting a sense of the law school's identity, its purpose and community and building a policy around that. More thought can be given to assessment design to achieving this dual approach, but timing, at least, remains relevant. By embedding a needs-based skill agenda within thoughtfully scaffolded programmes and varied assessment strategies, we can prepare graduates not to compete with Gen AI but to lead alongside it. Educators must now rise to this challenge, reimagining curricula not just for survival in the AI age, but for the thriving of human potential within it. Uniformity is not common in academics, nor is it common across law schools. Each of them is now left in the market place emphasizing themselves as somehow different to—and better than—their competitor institution offering the same course down the road or in a nearby city. Module choice, curriculum design and assessment are all ways to distinguish one programme from the other. There is much to be gained from variation and deviation. That said, universities are, after all, places where helping students to reach

their potential is paramount. Law schools are no different from each other, and they have a civic mission. Each caters to different student bodies with different demographics, needs and aspirations. The incorporation of Gen AI should, therefore, differ from law school to law school and even within it, from programme to programme.

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Good Custom in China: To What Extent Is General Applicable Custom in the Commercial Context Consistent across Chinese Legal Systems?

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Abstract

This article undertakes a comparative law analysis of "custom" and "good custom" in the Chinese legal systems of the People's Republic of China (Mainland China) and the Republic of China (Taiwan), and situates them within the wider civil and common law contexts. Through an analysis of the language and jurisprudence of each Chinese legal system, the article explores the challenges of comparing their respective definitions and applications. In scoping the application of custom, this article notably proposes an alternative perspective on Socialist Core Values articulated from the perspective of "good custom".

Keywords: custom; public order; good custom; Socialist Core Values; customary implied terms.

[A] INTRODUCTION

Whilst custom is widely considered inferior to law, its scope and authority are actually determined by the system of law itself. Civil law broadly provides for three categories of custom: (1) custom *secundum legem* (ie custom in accordance with the law); (2) custom *praeter legem* (ie custom beyond the law); and (3) custom *contra legem* (ie custom contrary to law). Custom can thus be considered a source of "living law" (*Lebendes Recht*) (Ehrlich 1936: 493) outside the Westphalian Duo (ie state and international law) necessary to understand the legal system and its development in the global context (Twining 2009: 357, 363-364).

A brief review of the respective Chinese Civil Codes indicates many parallels on the general treatment of custom (*xiguan*: 习惯) across the

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Chinese legal systems. On the one hand, both Chinese Civil Codes provide for the application of custom. Article 10 of the Civil Code of the People's Republic of China[1] (PRC Civil Code) provides for the application of custom in the absence of other legal provision, providing that the custom does not violate "public order and good custom" (*gongxuliangsu*: 公序良俗). Similarly, Articles 1 and 2 of the Civil Code of the Republic of China[2] (ROC Civil Code) permit the application of custom in the absence of an applicable provision, providing it is not contrary to "public order or good custom" (*gonggong zhixu huo shanliang fengsu*: 公共秩序或善良風俗). On the other hand, both Chinese Civil Codes also contain provisions invalidating acts contrary to "public order and good custom" (*gongxuliangsu*: 公序良俗) in Articles 8 and 153(2) PRC Civil Code[3]

[1] Civil Code of People's Republic of China (adopted Third Session of Thirteenth NPC on 28 May 2020), Book 1 (General Part), Chapter I (General Provisions), Article 10: "Civil disputes shall be resolved in accordance with law. Where the law does not specify, custom may be applied, provided that public order and good morals may not be offended." (official translation) ("*zhonghua renmin gongheguo minfadian*" *(2020 nian 5 yue 28 ri dishisanjie quanguo renmin daibiao dahui disanci huiyi tongguo) diyibian (zongze) diyizhang (jiben guiding) dishitiao: "chuli minshu jiufen, yingdang yizhao falü; falü meiyou guiding de; keyi shiyong xiguan, danshi dude weibei gongxuliangsu.":* 《中华人民共和国民法典》（2020年5月28日第十三届全国人民代表大会第三次会议通过）第一编（总则）第一章（基本规定）第十条：“处理民事纠纷，应当依照法律；法律没有规定的，可以适用习惯，但是不得违背公序良俗。”). NB: "public order and good morals" is elsewhere translated as "public order and good custom".

[2] Civil Code of the Republic of China (26 June 2002), Part 1 (General Provisions), Chapter 1 (Legislation), Article 1: "If there is no applicable provision for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be decided according to the jurisprudence." ("*minfa*" *(minguo 91 nian 06 yue 26 ri) diyibian (zongze) diyizhang (fali) diyitiao: "minshi, falü suo weiguiding zhe, yixiguan; wu xiguan zhe; yifa li.":* 《民法》 （民國91年06月26日）第一編（ 總則）第一章（法例）第1條：「民事，法律所未規定者，依習慣；無習慣者，依法理。」); Article 2: "Only those customs which are not against public order or good custom shall be applied to a civil case." (*diertiao: "minshu suo shiyong zhi xiguan, yi bu beiyu gonggong zhixu huo shanliang fengsu zhe wei xian.":* 第2條：「民事所適用之習慣，以不背於公共秩序或善良風俗者為限。」).

[3] Civil Code of People's Republic of China (adopted Third Session of Thirteenth NPC on 28 May 2020), Book 1 (General Part), Chapter I (General Provisions), Article 8: "When conducting a civil activity, no person of the civil law may violate the law, or offend public order or good morals." (official translation) ("*zhonghua renmin gongheguo minfadian*" (2020 *nian* 5 *yue* 28 *ri dishisanjie quanguo renmin daibiao dahui disanci huiyi tongguo*) *diyibian* (*zongze*) *diyizhang* (*jiben guiding*) *dibatiao*: "*minshi zhuti congshi minshi huodong, bude weifan falü, bude weibei gongxuliangsu.*": 《中华人民共和国民法典》（2020年5月28日第十三届全国人民代表大会第三次会议通过）第一编（总则）第一章（基本规定）第八条：“民事主体从事民事活动，不得违反法律，不得违背公序良俗。”); Book 1 (General Part), Chapter VI (Civil Juristic Acts), Section 3 (Effect of a Civil Juristic Act), Article 153(2): "A civil juristic act that offends the public order and good morals is void." (official translation) (*diyibian* (*zongze*) *diliuzhang* (*minshi falü xingwei*) *disanjie* (*minshi falü xingwei de xiaoli*) *diyibaiwushisantiao dierkuan*: "*weibei gongxuliangsu de minshi falü xingwei wuxiao.*": 第一编（总则）第六章（民事法律行为）第三节（民事法律行为的效力）第一百五十三条第二款：“违背公序良俗的民事法律行为无效。”) NB: "public order and good morals" is elsewhere translated as "public order and good custom".

and Article 72 ROC Civil Code[4] respectively. As such, the legal architecture governing custom is broadly similar between the two Chinese Civil Codes, since both: (a) provide for the application of custom in absence of other legal provisions subject to "public order and good custom", and (b) invalidate acts contrary to "public order and good custom".

However, since the general clauses in civil law provide only the generalization of principles with the normative function of these embodied by a judgment (Yang 1999: 135; Yang 2021: 406), this analysis seeks to explore whether custom *secundum legem* aligns, custom *praeter legum* supplements, and custom *contra legum* overrides the respective Chinese Civil Codes in similar ways.

In order to explore these potential discrepancies, this analysis thus draws on specific socio-legal and comparative law theories where relevant to examine a particular issue (eg legal transplant, legal culture and legal pluralism), but is primarily driven by the functional method, given the "basic methodological principle of all comparative law is that of *functionality*" (Zweigert & Kötz 1998: 34). The functional method should be broadly sufficient given that the People's Republic of China (PRC) and Republic of China (ROC) shared the same history until 1949, so this is not broadly a comparative law analysis across different legal cultures. However, in light of the political, social and economic divergences between the PRC and ROC since 1949, the analysis acknowledges that a pattern of law "requires a knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a purely legalistic spirit which ignores this context of the law" (Kahn-Freund 1974: 27).

Starting from the point of similarity of the Chinese Civil Codes (ie law in books), this analysis draws comparisons between the function of "custom" and "good custom" in order to determine their comparative application in the private law commercial context (ie law in action). Whilst an examination of these theoretical concepts does not provide a wholistic understanding of the law of custom in each Chinese legal system, the comparison of the private law function of "custom" and "good custom" avoids being drawn into considerations of "public order", which requires

[4] Civil Code of the Republic of China (26 June 2002), Part 1 (General Provisions), Chapter 1 (Legal Acts), Article 72: "A civil juristic act that offends public order and good custom is void." ("*minfa*" *(mingguo 91 nian 06 yue 26 ri) diyibian (zongze) disizhang (falü xingwei) diyijie (tongze) diqishiertiao: "falü xingwei, you bei yu gonggong zhixu huo shanliang fengsu she, wuxiao.*": 《民法》（民國91年06月26日）第一編（總則）第四章（法律行為）第一節（通則）第72條：「法律行為，有背於公共秩序或善良風俗者，無效。」).

normative assessments of public policy and is identified as a specific area where judgement must be suspended (Zweigert & Kötz 1998: 40).

This analysis commences with a broad comparison of the respective treatment of "custom" to inform the respective treatment of "good custom" between the Chinese legal systems. The analysis then delves further into the application of "good custom" to draw comparisons over the application of "good custom" against the broad themes from the PRC cases, interpretation and guidance: (1) *Zhang v Liang*; (2) Ten Types of Behaviour; and (3) Socialist Core Values.

[B] CUSTOM

In order to identify "good custom", it is first necessary to identify the meaning of "custom", which highlights various distinctions in the definition between the Chinese legal systems.

In the Interpretation of Several Issues Concerning the Application of the General Provisions of the Civil Code of the PRC ("Interpretation"), the Supreme People's Court (SPC) defines "custom" in Article 10 PRC Civil Code as "folk customs generally observed by ordinary people engaging in civil activities for a long time within a certain region or the scope of an industry".[5] The Interpretation thus resolves the prior debate over whether "custom" was to be interpreted according to: the Customary Law Theory (ie custom being restricted to customary law) (Peng 2017: 52-53); the Customary Theory (ie custom being only custom as a finding of fact) (Zhang 2019: 41); or the Double Institutionalization Theory (ie custom includes both a practical custom and customary law) (Gao 2020: 22). The notable lack of reference to customary law in the Interpretation endorses the Customary Theory, which thus supports the arguments made by various scholars that: (a) the law itself already includes customary law; and (b) there is no conceptual distinction between "good" and "bad" customary law without reference to comparative law (Zhang 2019: 41; Zhang 2024: 239). Since "custom" cannot become established by precedent, it needs

[5] Interpretation of Several Issues Concerning the Application of the General Provisions of the Civil Code of the People's Republic of China (Fashi (2022), No 6), Chapter 1 (General Provisions), Article 2: "Folk customs generally observed by ordinary people engaging in civil activities for a long time within a certain region or industry extent can be identified as custom stipulated in Article 10 of the Civil Code." ("*zuigao renmin fayuan guanyu shiyong 'zhonghua renmin gongheguo minfadian' zongze bian ruogan wenti de jieshi" (fashi (2022) 6 hao) diyizhang (yiban guiding) diertiao: "zai yidian diyu, hangye fanwei nei chang qi wei yibanren congshi minshi huodong shi pubian zunshou de minjian xisu, guanchang zuofa deng, keyi rending wei minfadian dishitiao guiding de xiguan.*": 最高人民法院关于适用〈中华人民共和国民法典〉总则编若干问题的解释》〔法释〔2022〕6号〕第一章（一般规定）第二条：“在一定地域、行业范围内长期为一般人从事民事活动时普遍遵守的民间习俗、惯常做法等，可以认定为民法典第十条规定的习惯。”).

to be proven in each case, which may create evidential challenges (Zhang 2024: 244).

In ROC law, the Supreme Court has similarly clarified that "custom" arises from customary law "based on the long-term practice and conviction of ordinary people"[6] (ie the Customary Theory). As such, the key distinction between the two Chinese Civil Codes is that "custom" in ROC law is restricted to: (a) customary law; and (b) *de facto* custom provided otherwise by the law. Notably, *de facto* custom does not otherwise have legal status and is not a source of law in its own right (Wang 2022: 68-69).

As such, the definitional divergence in "custom" between the Chinese legal systems produces divergent outcomes in the commercial context. Excluding consideration of limitation for "public order and good custom" (see below), the basic scope of "custom" under PRC law can potentially implicate commercial arrangements even more broadly than implied terms by custom under the common law (including the law of Hong Kong) which only applies to customs that are "certain, notorious, reasonable, recognised as legally binding and consistent with the express terms" of the contract (*Cunliffe-Owen v Teather & Greenwood* 1967: 1438-1439). By contrast, the approach to custom under ROC law is almost as restrictive as the law of Macau, which (in addition to limiting custom by doctrine of good faith) also contains the comparable requirement that custom be provided by the law itself.[7]

[C] GOOD CUSTOM

Definition

The starting point for comparing "good custom" between PRC and ROC Civil Codes is an analysis of the language of the original and translated legal texts.

[6] Supreme Court (Shang Zi No 613, 2006): "The establishment of Customary Law must be based on the fact of a long-term practice and conviction of ordinary people." (*zuigao fayuan (17 nian shangzi di 613 hao): "xiguanfa zhi chengli, xu yi duonian guanxing zhi shishi ji putong yibanren zhi quexin xin, wei qi jichu.":* 最高法院（17年上字第613號）：「習慣法之成立，須以多年慣行之事实及普通一般人之確信心，為其基础。」).

[7] Civil Code of Macau (Decree No. 55/99/M), Volume 1 (General Provisions), Part 1 (Law, Legal Interpretation and Application), Chapter 1 (Sources of Law), Article 2 (Legal Value of Application): "Custom that does not violate doctrine of good faith is taken into consideration only to the extent when stipulated in law." (*"minfadian" (aomen) (di 55/99/M hao faling) diyijuan (zongze) diyibian (falü, falü zhi jieshi ji shiyong) diyizhang (fazhi yuanyuan) diertiao (xiguan zhi falü jiazhi): "bu weibei shanyi yuanze zhi xiguan, jin zai falüyou suo guiding shi, fang yu kaolü.":* 《民法典》（澳門）（第55/99/M號法令）第一卷（總則）第一編（法律、法律之解釋及適用）第一章（法之淵源）第二條（習慣之法律價值）：「不違背善意原則之習慣，僅在法律有所規定時，方予考慮。」).

The analysis of the Mandarin original of the PRC Civil Code draws on a consideration of the legal culture to assist the interpretation of the Chinese definition of "good custom", by referring broadly to "those parts of general culture—customs, opinion, ways of doing and thinking—that bend social forces toward or away from the law and in particular ways" (Friedman 1975: 15). In the Mandarin original of the PRC Civil Code, the terminology "public order and good custom" (*gongxuliangsu*: 公序良俗) is a fixed idiomatic expression (*chengyu*: 成语), which as a "collective name reflects a combination of social order and morality" (Deng 2024: 97). Whilst scholars generally consider that "public order and good custom" is composed of two concepts (ie "public order" and "good custom(s)") (Zhang 2024: 241), Yang notes "choosing one concept or merging them into one concept is inappropriate", so suggests using the two concepts simultaneously to account for the overlap despite having commonalities and differences (Yang 2021: 404-405). As such, the original Mandarin of the PRC Civil Code does not lend itself to extracting an independent category of "good custom".

The analysis of the English translation of the PRC Civil Code situates "good custom" within the wider civil law context in order to consider the domestic legal transplant or influence from this legal context. In the English translation of the PRC Civil Code, the fusion and overlap of "public order" and "good custom" raises additional questions about the general scope of "good custom". Namely, the equating of "public order and good custom" (*gongxuliangsu*: 公序良俗) respectively to not disrupting the "social (and) public interest" (*shehui gonggong liyi*: 社会公共利益) and respecting "social morality" (*shehui gongde*: 社会公德) under the previous Law of Contracts 1999[8] (Liang 2021: 51-52, 210-211) does not reflect the terminology used in the official English translation of the PRC Civil Code or the wider civil law context.

On the first limb, "good custom" is equated to "good morals" (*Gute Sitten*), which is a reference to public policy in German law (Herbots 2023: 52). This is not a reference strictly to social ethics, but conversely to the dominant moral and social behaviour recognized by most people in society (Yang 2021: 404). As such, whilst "good custom" is informed by

[8] Contract Law of the People's Republic of China (adopted Second Session of NPC on 15 March 1999), Order No 15, Article 7 (Liability for Breach of Contract): "A party concluding or performing a contract shall comply with laws and administrative regulations, respect social morality, and must not disturb socio-economic order nor harm the public interest." ("*zhonghua renmin gongheguo hetongfa*" *(1999 nian 3 yue 15 ri dijiujie quanguo renmin daibiao dahui dierci huiyi tongguo) zhonghua renmin gongheguo zhuxi ling (dishiwuhao) diqizhang (weiyue zeren): "dangshiren dingli, lüxing hetong yingdang zunshou falü, xingzheng fagui, zunzhong shehui gongde bude, raoluan shehui jingji zhixu, sunhai shehui gonggong liyi.*": 《中华人民共和国合同法》（1999年3月15日第九届全国人民代表大会第二次会议通过）中华人民共和国主席令（第十五号）第七章（违约责任）："当事人订立、履行合同，应当遵守法律、行政法规，尊重社会公德，不得扰乱社会经济秩序，损害社会公共利益。").

morality, it is semantically and legally distinct, as it does not inherently contain the civil law concepts of social morality (ie honesty, fairness and justice) (Yang 2021: 404).

On the second limb, "public order" (*gongxu*: 公序) in Article 10 likely refers to the same "public order" (*gonggong zhixu*: 公共秩序) in Article 8 PRC Civil Code, which Herbots equates being a much narrower and more internationally aligned concept than "social and public interests" that "opens the door to arbitrariness … [and] allowed the People's courts to take the concrete circumstance of the case into consideration to judge if the contract was void" (Herbots 2023: 52-53). The "public order" under the PRC Civil Code can thus be equated to the "public order and good morals" in French law (*ordre public et bonnes moeurs*), which is focused on reflecting and protecting national fundamental interests (Yin 1995: 170) and encompasses good custom within political public order (Yang 2021: 402, 404). Consequently, the notion of "public order" must overlap with "good custom" in the context of political public order.

As such, not only is there overlap for political public order, the English terminology used in the official translation of the PRC Civil Code does not indicate that "public order and good custom" corresponds perfectly to "social public interest" and "social morality" respectively. Namely, "public order" is definitionally *broader* than "social public interest" and "good custom" is *narrower* than "social morality". Whilst the only authentic text is the Mandarin original, the official English translation is provided under the exclusive responsibility of the Legislative Affairs Commission of the Standing Committee of the National People's Congress (ie the legislature), so "may have a value similar to that of an authoritative scholarly writing" (Herbots 2023: 54). Whilst borrowing has been widespread in the development of legal systems, a legal transplant may operate to different effect in a different country (Watson 1974: 20-21). As such, even if these underlying (Western) civil law concepts of "social morality" and "public order" were transplanted into the PRC Civil Code via the English translation, it would not necessarily lead to convergence in function or result between the Mandarin and English versions.

By contrast, the language in the ROC Civil Code for "public order or good custom" (*gonggong zhixu huo shanliang fengsu*: 公共秩序或善良風俗) expressly provides a separation of public order "or" (*huo*: 或) good custom. However, there is no need to delineate between these categories to extract a private law function of "good custom", because both "public order" and "good custom" are combined into one concept (Liang 2021: 283) of "social appropriateness" (Yang 2021: 400), which is indicative of both limbs

being focused towards a private law function. Consequently, there is a discrepancy in the ease of extracting and defining a separate category of "good custom" between the two Chinese Civil Codes.

Application

Despite the uncertain boundary between "good custom" and "public order" in the PRC Civil Code, it is nonetheless possible to make broad comparisons with the disapplication of custom and acts based on "good custom" between the two Chinese Civil Codes.

Notably, the two Chinese Civil Codes show a distinction in the respective treatment of the "custom" of traditional culture, potentially leading to a divergent application in the commercial context. Under the PRC Civil Code, the standard of "good custom" is based on the "goodness standard of the general public in society", limiting customs that: are feudal superstitions (*fengjian mixin*: 封建迷信); breach the spirit of the law; are unconducive to social stability or harmony; or damage the interests of the social group (Zhang 2024: 241). Consequently, a custom does not stand as "good custom" in PRC law merely because it is traditional Chinese culture. This context-specific nature of determining "good custom" can be seen in the judicial treatment of Feng Shui. Namely, Feng Shui was upheld as a "good custom" for obtaining a reduction in the construction fee for the contractor disrupting the owner's Feng Shui by fabricating European-style lines that resembled a coffin (*Cheng v Yang*),[9] but not for the relocation of a grave in a cemetery with burials from different religions (*Li v Chen*).[10] Whilst the ROC law similarly considers "good custom" according to the "ethical requirements respected by a particular society" (Yang 2021: 404), it adopts a more deferential approach to traditional culture as consistent with "good custom", which is a reflection of its legal status as customary law. For example, an agreement to provide living expenses to a concubine is unlikely to violate "good custom" because (even though the relationship is not recognized in the current ROC Civil Code) early precedents consider concubines as members of the family (Wang 2022: 302).

By contrast, the disapplication of acts contrary to "good custom" only has residual application in the commercial context in both Chinese Civil

[9] Dongtai District People's Court, *Cheng v Yang* (*dongtaishi renmin fayuan, cheng mou su yang mou an*: 东台市人民法院，程某诉杨某案).

[10] Gulou District People's Court, *Li v Chen* (*gulouqu renmin fayuan, li mou su chen mou an*: 鼓楼区人民法院，李某诉陈某案).

Codes. In the PRC Civil Code, Liang argues that the general principle of "good custom" operates in the area of family relationships, but not the commercial context (Liang 2021: 52, 283), with the developing economic context towards the protection of consumers and workers (Liang 2021: 211-212). This is likely due to the drive to regulate widespread behaviour previously regulated by "public order and good custom". For example, a local requirement was introduced mandating that the sale price of land be higher than the market price, in order to account for the custom of informing relatives and neighbours, which can have a detrimental impact on the price (Yang 2021: 405-406). Similarly, "public order and good custom" (*gongxuliangsu*: 公序良俗) in the ROC Civil Code has the function of regulating standard contracts, but there have been no cases since consumer contracts were regulated separately (Wang 2022: 299-230). As such, the residual role in the contractual context for both Chinese Civil Codes means "good custom" is likely restricted between contracting business entities to the limited circumstances where one party is presented with unnegotiated or non-negotiable terms and conditions that are contrary to "good custom".

Zhang v Liang

The invalidation of acts contrary to "public order and good custom" is determined in PRC law on the basis the act harms the national interest (*guojia liyi*: 国家利益), social welfare (*shehui gongyi*: 社会公益) or social moral order (*shehui daode zhixu*: 社会道德秩序) (Liang 2021: 52), but the full extent of its application is demonstrated in *Zhang v Jiang* (the *Luzhou Bequest Case*).[11] In *Zhang v Jiang*, which concerned a will bequeathing property to the testator's mistress, the People's Court directly applied the requirement that an act must not violate "public order and good custom" to override the testator's bequest to his mistress. This finding was reached on the basis that the relationship between the testator and his mistress was contrary to social morality, given the mistress was aware the testator was married. However, Deng made two notable observations on the application of "public order and good custom" in this judgment. First, "public order and good custom" was applied to override statutory provisions and legal instruments (ie the application of "public order and good custom" being in contravention of the provisions of both a validly executed will and the law of succession). Second, "public order and good custom"

[11] Luzhou Intermediate People's Court, *Luzhou Bequest Case* ([2001] Lu Ming Yi Zhong, No 621) (*luzhoushi zhongji renmin fayuan "luzhou yizeng an" ((2001) lu min yi zhong zi diliubaiershiyihao)*: 泸州市中级人民法院《泸州遗赠案》（2001）泸民一终字第621号).

was applied to the surrounding circumstances (ie the extramarital cohabitation) rather than the provisions of the will, in order to determine the effectiveness of the testamentary legal instrument itself.

As such, the judicial application of "public order and good custom" in PRC law is arguably neither standardized nor defined, but rather consists of "indeterminate concepts with a wide range of connotations and extensions" (Deng 2024: 98). However, the judicial application of "public order and good custom" can be broken down into the broad categories of the: "basic type" (ie invalidation of contract violating public order and good custom); "ill-gotten gains" (ie obtaining property in breach of public order and good custom), and disapplication of tort (ie exclusion of damages from acts violating public order and good custom) (Yang 2021: 409).

By contrast, whilst ROC law has a similar provision for the disapplication of tort (eg not finding liability for the destruction of a brothel in a residential area),[12] the Supreme Court has repeatedly emphasized that custom cannot override the law (Wang 2022: 67), unless it is otherwise provided specifically by the ROC Civil Code (eg Article 207(2) ROC Civil Code allows compound interest to apply if there is a trade custom).[13] Thus, the application of "good custom" under ROC law is more restricted than PRC law, and aligned with the position under Hong Kong law, where the applicable custom must be "recognised as legally binding and consistent with the express terms" of the contract (*Cunliffe-Owen v Teather & Greenwood* 1967: paragraphs 1438-1439). In the context of adultery, ROC law specifically requires the immorality be the subject of the contract itself, and draws a fine distinction between the validation of a contract where the relationship has terminated[14] and the invalidation of a contract where the relationship is ongoing.[15] Since the will in *Zhang v Jiang* was not the subject of the immorality and the adultery was no longer ongoing since the testator had passed away, it is likely this case would be decided differently under ROC law.

[12] Judicial Yuan (First Division), Compilation of Civil Law Issues 8 (1993), page 99. (*sifayuan (diyiting) "minshi falü wenti huibian" dibaji, 1993 nian 6 yueban dijiushijiu ye:* 司法院（第一廳）《民事法律問題彙編》第8輯，1993年6月版，第99頁).

[13] Supreme Court (Yu Shang Zi No 948, 1937) (最高法院（1937年渝上字第948號）).

[14] Supreme Court (Tai Shang Zi No 2505, 1980) (最高法院（1980年台上字第2505號）).

[15] Supreme Court (Tai Shang Zi No 2436, 1976) (最高法院（1976年台上字第2436號）).

The Ten Types of Behaviour

Despite not seeking to undertake an analysis over the specific application of "public order", it is not possible to entirely exclude public law concerns, as "public order and good custom" still operates as a coordinator between public and private law in PRC law (Yang 2021: 406). In PRC law, the primary aim of "public order and good custom" is the sanctioning and eliminating of immoral behaviour, which reflects the close relationship between custom and politics in Chinese history (Yang 2021: 403). This approach is reflected in the Ten Types of Behaviour[16] as outlined by Liang (2021: 212-214) and adopted in the Trial Practice Guidelines (Deng 2024: 93), which (with the possible exception of grossly unconscionable behaviour) all broadly concern public policy issues (eg competition, consumer rights, labour rights, human rights, public order etc). This approach is also reflected in the PRC Civil Code, by separately providing a limitation of "public order and good custom" for both civil activity (Article 8) and civil juristic acts (Article 153(2)).

By contrast, although the prohibition of civil juristic acts violating "public order and good custom" in ROC law also functions as "hidden legislation" (*yincang lifa*: 隐藏立法) (Wang 2022: 294), there are two main distinctions between the Chinese Civil Codes. First, ROC law permits a greater role for contractual interpretation, given, for example, that the conclusion of contract under a borrowed name (*jieming*: 借名) is not a violation of "public order or good custom" (*gongxuliangsu*: 公序良俗) (Wang 2022: 373). Second, ROC law is also more focused on private law concerns, such as the prevention of profiteering or collusion with intent to defraud (eg harmful acts by agents against the principal) (Wang 2022: 307, 474).

Socialist Core Values

The relative impact of moralistic social norms through the application of "good custom" is also divergent between the two Chinese legal systems.

In the Interpretation, the SPC clarifies that custom must not be contrary to Socialist Core Values (SCVs) (*shehuizhuyi hexin jiazhiguan*: 社会主义

[16] The Ten Types of Behaviour (*shizhongxingwei leixing*: 十种行为类型) are: (1) endangering the national public order (*weihai guojia gongxu xing*: 危害国家公序型); (2) harming family relationships (*gonghai jiating guanxi xing*: 公害家庭关系型); (3) violating sexual morality (*weifan xingdaode xing*: 违反性道德型); (4) speculative behaviour (*shexing xingwei xing*: 射幸行为型); (5) violating human rights and respect for dignity (*weifan renquan he renge zunzhong xing*: 违反人权和人格尊严型); (6) restricting economic freedom (*xianzhi jingji ziyou xing*: 限制经济自由型); (7) violation of fair competition (*weifan gongpingjingzheng xing*: 违反公平竞争型); (8) violating consumer protections (*weifan xiaofeizhe baohu xing*: 违反消费者保护型); (9) violating labour protection (*weifan laodongzhe baohu xing*: 违反劳动者保护型); and (10) grossly unconscionable behaviour (*xianshi gongping xingwei xing*: 显失公平行为型).

核心价值观),[17] which consist of four national values, four social values, and four individual values.[18] These SCVs, which are considered more Confucian than socialist (Frank 2016: 24), both restrict custom (ie by limiting the application of custom contrary to SCVs) and expand custom (ie by broadening the effect of custom consistent with SCVs). The legal basis for custom complying with SCVs is not stated in the Interpretation, so could be an expansion of the general statement on the "carrying forward of Socialist Core Values" in Article 1 PRC Civil Code.[19] However, there are two reasons for believing the application of SCVs arises inherently from the "good custom" promulgated by the Chinese Communist Party (CCP). First, the SPC initially identified the cultivation and practice of the SCVs in pursuance of "public order and good custom".[20] Second, the SCVs were used as justification in People's Court judgments between 2012 and 2015 (Lin & Trevaskes 2019: 56), which is notably before: (1) the Guiding Opinion from the SPC in October 2015; and (2) the enactment

[17] Supreme People's Court, Interpretation of Several Issues Concerning the Application of the General Provisions of the Civil Code of the People's Republic of China (Fashu [2022], No 6), Article 2: "The application of custom must not violate the Socialist Core Values, and must not violate public order and good custom." (*zuigao renmin fayuan "guanyu shiyong 'zhonghua renmin gongheguo minfadian' zongze bian ruogan wenti de jieshi" (fashu (2022) 6 hao) diyizhang (fali) diertiao: "shiyong xiguan, bude weibei shehuizhuyi hexin jiazhiguan, bude weibei gongxuliangsu.":* 最高人民法院《关于适用〈中华人民共和国民法典〉总则编若干问题的解释》〔法释〔2022〕6号〕第一章（法例）第二條："适用习惯，不得违背社会主义核心价值观，不得违背公序良俗。").

[18] The twelve Socialist Core Values are the: national values of prosperity (*fuqiang*: 富强), democracy (*minzhu*: 民主), civility (*wenming*: 文明), harmony (*hexie*: 和谐); social values of freedom (*ziyou*: 自由), equality (*pingdeng*: 平等); justice (*gongzheng*: 公正), rule of law (*fazhi*: 法治); and individual values of patriotism (*aiguo*: 爱国), dedication (*jingye*: 敬业); integrity (*chengxin*: 诚信), and friendship (*youshan*: 友善).

[19] Civil Code of People's Republic of China (adopted Third Session of Thirteenth NPC on 28 May 2020), Part 1 (General Provisions), Chapter 1 (Basic Provision), Article 1: "This Code is formulated in accordance with the Constitution of the People's Republic of China for the purposes of protecting the lawful rights and interests of the persons of the civil law, regulating civil-law relations, maintaining social and economic order, meeting the needs for developing socialism with Chinese characteristics, and carrying forward the Socialist Core Values." (*zhonghua renmin gongheguo minfadian (2020 nian 5 yue 28 ri dishisanjie quanguo renmin daibiao dahui disanci huiyi tongguo) diyibian (zongze) diyizhang (jiben guiding) diyitiao: "weile baohu minshi zhuti de hefa quanyi, tiaozheng minshi guanxi, hongyang shehuizhuyi hexin jiazhiguan, genju xianfa, zhiding ben fa.":* 《中华人民共和国民法典》（2020年5月28日第十三届全国人民代表大会第三次会议通过）第一编（总则）第一章（基本规定）第一条："为了保护民事主体的合法权益，调整民事关系，维护社会和经济秩序，适应中国特色社会主义发展要求，弘扬社会主义核心价值观，根据宪法，制定本法。").

[20] Supreme People's Court, Several Opinions on Cultivating and Practising Socialist Core Values (Fafa [2015], No 14), Section XI (Upholding Public Order and Good Custom): "All levels of People's Court shall be based on the actual operation of local courts, innovate the form to cultivate and practice robustly the Socialist Core Values. (*zhonghua renmin fayuan "guanyu zai renmin fayuan gongzuo zhong peiyu he jianxing shehuizhuyi hexin jiazhiguan de ruogan yijian" (fafa (2015) 14 hao) dishiyizhang (weihu gongxuliangsu): "geji renmin fayuan yao lizu bendi ben yuan gongzuo shiji, jianchi yindizhiyi, jianchi yi fa wei mei, buduan chuangxin xingshi, zhazhashishi di peiyu he jianxing shehuizhuyi hexin jiazhiguan.":* 最高人民法院《关于在人民法院工作中培育和践行社会主义核心价值观的若干意见》〔法发〔2015〕14号〕第十一章（维护公序良俗）："各级人民法院要立足本地本院工作实际，坚持因地制宜，坚持以法为媒，不断创新形式，扎扎实实地培育和践行社会主义核心价值观。").

of the PRC Civil Code in 2020. As such, the most likely legal source for the application of the SCVs is the application of "good custom" by reference to the: (1) CPP's declaration at the 18th National Congress in November 2012 stating the SCVs to be the "soul of the Chinese Nation;"[21] and (2) the CPP Central Committee entitled Opinions on Cultivating and Practising Socialist Core Values in 2013, asserting the implementation of SVCs "using the authority of the law to cultivate and practice the self-consciousness of the Socialist Core Values".[22]

The substantival implications of these SCVs can be determined from the direction given by the SPC in the (a) Guiding Opinion[23] and (b) Guiding Cases.[24]

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[21] Hu Jintao's Report at the 18th National Congress of the Chinese Communist Party: "The system of Socialist Core Values are the invigorating soul of the Country, and determining the direction of Socialism with Chinese characteristics." (*hujintao zai zhongguo gongchangdang dishibaci quanguo daibiao dahui shang de baogao (2012 nian 11 yue 8 ri): "shehuizhuyi hexin jiazhi tixi shi xingguo zhi hun, juedingzhe zhongguo tese shehuizhuyi fazhan fangxiang."*: 胡锦涛在中国共产党第十八次全国代表大会上的报告（2012年11月8日）：“社会主义核心价值体系是兴国之魂，决定着中国特色社会主义发展方向。”).

[22] Central People's Government (General Office of the Chinese Communist Party), Opinion on the Cultivation and Practice of the Socialist Core Values (23 December 2013), Section 3 (Implementing the Cultivation and Practice of the Socialist Core Values in Economic Development Practice and Social Governance), Clause 8: "It is necessary to implement Socialist Core Values into the practice of ruling the country, governance and administration in accordance with the law, as well as all aspects of practically legislation, enforcement, judicial findings, and lawful governance, and using the authority of the law to increase people's self-consciousness in cultivating and practicing the Socialist Core Values." (*zhongyang renmin zhengfu (zhonggong gongyang bangong ting) "guanyu peiyu he jianxing shehuizhuyi hexin jiazhiguan de yijian" disanzhang (ba peiyu he jianxing shehuizhuyi hexin jiazhiguan luoshi dao jingyi fazhan shijian he shehui zhili zhong) dibatiao: yao ba shehuizhuyi hexin jiazhiguan guanche dao yifazhiguo, yifa zhizheng, yifa xingzheng shijian zhong, luoshi dao lifa, zhifa, sifa, pufa he yifa zhili gege fangmian, yong falü de quanwei lai zengqiang renmen peiyu he jianxing shehuizhuyi hexin jiazhiguan de zijuexing.*": 中央人民政府（中共中央办公厅）《关于培育和践行社会主义核心价值观的意见》第三章（把培育和践行社会主义核心价值观落实到经济发展实践和社会治理中）第八条：“要把社会主义核心价值观贯彻到依法治国、依法执政、依法行政实践中，落实到立法、执法、司法、普法和依法治理各个方面，用法律的权威来增强人们培育和践行社会主义核心价值观的自觉性。”).

[23] Supreme People's Court, Notice on the Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (Fa [2021], No 21) (*zuigao renmin fayuan "guanyu shenru tuijin shehuizhuyi hexin jiazhiguan rongru caipan wenshu shifa shuoli de zhidao yijian" de tongzhi (fa (2021) 21 hao)*: 最高人民法院《关于深入推进社会主义核心价值观融入裁判文书释法说理的指 导意见》的通知〔法〔2021〕21号〕).

[24] Supreme People's Court, The Supreme People's Court Announced 10 Typical Cases of Promoting Socialist Core Values (10 March 2016) (*zuigao renmin fayuan "renmin fayuan dali hongyang shehuizhuyi hexin jiazhiguan shi da dianxing minshi anli" (2016 nian 02 yue 10 ri)*: 最高人民法院《人民法院大力弘扬社会主义核心价值观十大典型民事案例》〔2016年02月10日〕); A Typical Case of the Supreme People's Courts on Promoting Socialist Core Values (23 August 2016) (*"guanyu hongyang shehuizhuyi hexing jiazhiguan dianxing anli" (2016 nian 08 yue 23 ri)*: 《关于弘扬社会主义核心价值观典型案例》〔2016年08月23日〕); Top Ten Typical Civil Cases of the People's Courts Vigorously Promoting Socialist Core Values" (13 May 2020) (*"renmin fayuan dali hongyang shehuizhuyi hexin jiazhiguan shi da dianxing minshi anli" (2020 nian 05 yue 13 ri)*: 《人民法院大力弘扬社会主义核心价值观十大典型民事案例》〔2020年05月13日〕); The Second Batch of Typical Civil Cases of People's Courts Vigorously Promote Socialist Core Values (23 February 2022). (*"dierpi renmin fayuan dali hongyang shehuizhuyi hexin jiazhiguan dianxing minshi anli" (2022 nian 02 yue 23 ri)*: 《第二批人民法院大力弘扬社会主义核心价值观典型民事案例》〔2022年02月23日〕).

Guiding Opinion

The Guiding Opinion outlines the higher People's Court's theoretical understanding of the use of the SCVs within the framework of the law. Despite the SPC's explicit rejection of the SCVs overriding the law,[25] as with "good custom" generally, the application of SCVs has also exceeded the limits of the law in certain cases (eg *Jiang v Liu*).[26] This is consistent with the argument by Yun that Confucian moral law (*rujia lunli fa*: 儒家伦理法) has a "strong tendency toward Pan-moralism—that is, in is willingness to accord supremacy above law to prescribed moral principles" (Yun 1990; Lin & Trevaskes 2019: 49). Following the conception of Pan-moralism of "a certain 'overwhelming' or exaggeration of the claim of the moral standpoint … even into areas which ought to be governed by particular standard rules deriving from the given legal system" (Hála 1994: 89), Liao and Wang identify four problematic techniques of implementing the SCVs into PRC law: (1) quoting SCVs without substance; (2) exaggerating moral and political standpoint to avoid the legal application; (3) losing the underlying legal principles to avoid a violation of the SCVs; and (4) implementing the SCV only for low-level cases without resolving the complex legal issues (Liao & Wang 2019; Lin & Trevaskes 2019: 56). In the commercial context, it is therefore likely that placing dual emphasis on law and morality likely falls into the "balance trap" of undermining the legal reasoning with an ever-expanding and ever-changing process of bargaining, negotiation and mediation to reach a suitable balance point (Ji 2014; Lin & Trevaskes 2019: 50).

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[25] Person in Charge of Reform at Supreme People's Court Answering Reporter's Questions, Deeply Promote the Integration of Socialist Core Values into the Judgment Document Interpretation and Reason to Lead the Social Trend with Fair Judgment (18 February 2021): "The thing that needs to be emphasised, is this Guiding Opinion clarifies the basic position that judges use Socialist Core Values within the legal framework to interpret the law, to avoid misunderstanding and doubts that the use of Court Judgments Socialist Core Values substitute or take precedent over the law, they will lodge the Socialist Core Values in concrete legal rules and principles and further organise the intrinsic unity of the Socialist Core Values with legal regulation." (*zuigao renmin fayuan si gaiban fuzeren da jizhe wen "shenru tuijin shehuizhuyi hexin jiazhiguan rongru caipan wenshu shifa shuoli yi gongzheng caipan yinling shehui fengshang" (2021 nian 02 yue 18 ri): "xuyao qiangdiao de shi, zhege zhidao yijian" mingque "faguan zai falü kuangjia nei yunyong shehuizhuyi hexin jiazhiguan shifa shuoli" zhe yi jiben dingwei, jiushi bimian yinfa "yi shehuizhuyi hexin jiazhiguan tidai huozhe youxian falü jinxing sifa caipan" de wu duhe yilü, jiang shehuizhuyi hexin jiazhiguan "luo jiao" yu juti de falü guize he falü yuanze, jinyibu lishun shehuizhuyi hexin jiazhiguan yu falü guize de neizai tongyi guanxi.*": 最高人民法院司改办负责人答记者问《深入推进社会主义核心价值观融入裁判文书释法说理以公正裁判引领社会风尚》〔2021年02月18日〕：“需要强调的是，这个《指导意见》明确“法官在法律框架内运用社会主义核心价值观释法说理”这一基本定位，就是避免引发“以社会主义核心价值观替代或者优先法律进行司法裁判”的误读和疑虑，将社会主义核心价值观“落脚”于具体的法律规则和法律原则，进一步理顺社会主义核心价值观与法律规则的内在统一关系。”).

[26] Chengyang District People's Court, *Jiang v Liu: Dispute Over Rights to Life.* (*chengyangqu renmin fayuan, "jiang qiulian su liu nuanxi shengming jiufen an"*: 城阳区人民法院《江秋莲诉刘暖曦生命纠纷案》).

Guiding Cases

The Guiding Cases demonstrate the practical application of the SCVs, by providing the "parallel reasoning" alongside the legal basis (Liu 2024: 236-239). The first batch of Guiding Cases were all selected from the district level (ie the lowest level of local People's Court), and it is clear that the SCVs have had a disproportionate influence on lower-level judgments, given Liao and Wang's review of 352 cases between 2012-2017 showing that: 255 were from local People's Courts; 72 were from intermediate People's Courts; 25 were provincial level People's Courts; and none were from the SPC (Liao & Wang 2019; Lin & Trevaskes 2019: 55). Given the SCVs are recent and more prominent in the lower People's Courts, we have "not yet seen 'extraordinary' cases with strong political sensitivities being decided under this new norm" (Liu 2024: 255). This "parallel reasoning" might be interpreted as a type of a "weak" (ie subordinate) or "strong" (ie coexistent) legal order of legal pluralism (Griffiths 1986: 4-6) in pursuance of managing customary norms and transnational legal interactions (Berman 2012: 10). However, Zhang argues these Guiding Cases nonetheless go beyond the higher courts giving mere guidance to lower courts and establish authoritative legal principles across all People's Courts (Zhang 2010; Lin & Trevaskes 2019: 506).

This "parallel reasoning" from the incorporation of the SCVs has several legal implications in the commercial context. First, it has created an open category of liability (Zhao 2022), akin to the breach of a two-limbed "proximity of relationship" under common law (*Anns v Merton London Borough Council* 1977; *Caparo v Dickman* 1990). However, despite comparisons with common law by legal commentators (Gao 2022) and practitioners (Chen 2022), PRC judges do not create precedent, but merely exercise an expanded discretion to incorporate the SCVs (Liu 2024: 241). This expanded discretion is likely to create open categories of liability in two main commercial areas. On the one hand, the SPC has notably identified concerns with personal gain at the expense of others

(*sunrenliji*: 损人利己),[27] which may implicate sharp business practices. On the other hand, the limitation of "common sense and reason based on the requirements of the era, culture, and conditions of the country"[28] may implicate high-level commercial and board decisions on "cases covering issues such as national interests, public concerns, and societal order".[29]

Second, the parallel reasoning empowers PRC judges to find or refute liability. When the second batch of Guiding Cases was released, Yang Wangming (Vice-President of SPC) stated "we always intend to distinguish between right and wrong, punishing evil and promoting good, settling disputes and resolutely say no to 'smoothing things over' [ie settling out of court]" (Zhang 2023). On the one hand, the "parallel reasoning" empowers

[27] Supreme People's Court, Several Opinions on Cultivating and Practicing Socialist Core Values (Fafa [2015], No 14), Section XI (Upholding Public Order and Good Custom): "It is necessary to deeply understand and accurately grasp public order and good custom to establish the important points, to respond to the prominent problems existing at the present time, such as seeing others dying but not save them, being killed but not helping, personal gain at the expense of others, unfilial heartlessness, etc., as well as vigorously advocating for the notably conduct of: serving others, valuing harmony, forgiveness and mutual accommodation, respect for the elderly and cherishing the young, pleasure from helping others, and being a brave and selfless Samaritan, etc." (*zuigao renmin fayuan "guanyu zai renmin fayuan gongzuo zhong peiyu he jianxing shehuizhuyi hexin jiazhiguan de ruogan yijian" (fafa (2015) 14 hao) dishiyishang (weihu gongxuliangsu): "yao shenke lijie, zhunque bawo gonggong zhixu he shanliang fengsu de shidai neihan he jianshe zhongdian, zhendui dangqian cunzai de jiansibujiu, yunan bu zhu, surenliji, buxiao buren deng tuchu wenti dali changdao "yurenweishan" "yiheweigui" "kuanrong hurang" "zunlaoaiyou" "zhurenweile" "jianyiyongwei" deng gaoshang xingwei.*": 最高人民法院《关于在人民法院工作中培育和践行社会主义核心价值观的若干意见》〔法发〔2015〕14号〕第十一章（维护公序良俗）："要深刻理解、准确把握公共秩序和善良风俗的时代内涵和建设重点，针对当前存在的见死不救、遇难不助、损人利己、不孝不仁等突出问题大力倡导"与人为善""以和为贵""宽容互让""尊老爱幼""助人为乐""见义勇为"等高尚行为。").

[28] Supreme People's Court, Notice of the Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (Fa [2021], No 21): "Comprehensively consider factors such as law reason and emotion based on the era, state of the country and culture; enhance the guiding function of the Socialist Core Values; and unceasingly promote the legal, social and emotional common sense of judgments. (*zuigao renmin fayuan "guanyu shenru tuijin shehuizhuyi hexin jiazhiguan rongru caipan wenshu shifa shuo zhidao yijian" de tongzhi (fa (2021) 21 hao) disantiao: "lizu shidai, guoqing wenhua zonghe kaoliang fa, li, qing deng yinsu, jiaqiang shehuizhuyi hexin jiazhiguan de daoxiang zuoyong buduan tisheng sifa caipan de falü rentong, shehui rentong he qingli rentong.*": 最高人民法院《关于深入推进社会主义核心价值观融入裁判文书释法说指导意见》的通知〔法〔2021〕21号〕第三条："立足时代、国情、文化，综合考量法、理、情等因素，加强社会主义核心价值观的导向作用，不断提升司法裁判的法律认同、社会认同和情理认同。").

[29] Supreme People's Court, Notice of the Guiding Opinion on Deeply Promoting the Integration of Socialist Core Values into the Analysis and Reasoning of Adjudicative Instruments (Fa [2021], No 21), Article 4(1): "(The judgments of the following cases should intensify the use of Socialist Core Values to interpret the law) cases concerning country national interest, great public interest, concerning wide society". (*zuigao renmin fayuan "guanyu shenru tuijin shehuizhuyi hexin jiazhiguan rongru caipan wenshu shifa shuo zhidao yijian" de tongzhi (fa (2021) 21 hao) disitiao diyikuan: "(xialie anjian de caipan wenshu, yingdang qianghua yunyong shehuizhuyi hexin jiazhiguan shifa shuoli) sheji guojia liyi, zhongda gonggong liyi, shehui guangfan guanzhu de anjian*": 最高人民法院《关于深入推进社会主义核心价值观融入裁判文书释法说指导意见》的通知〔法〔2021〕21号〕第四条第一款："〔下列案件的裁判文书，应当强化运用社会主义核心价值观释法说理〕涉及国家利益、重大公共利益，社会广泛关注的案件").

the People's Courts to find absence of liability (*Wu v Hongshan*)[30] or causation (*Sun v Guo*).[31] On the other hand, it also empowers the People's Courts to make an explicit finding of fault, instead of spreading liability between parties by ignoring or stretching legal rules in order to avoid controversy (Liebman 2020: 198-199).

By contrast, the impact of moralistic values is significantly softer in ROC law. Whilst justification is one of the four main functions of custom in ROC law (Wang 2022: 305-306), civil law judges have very limited discretion beyond the statutory code to construct new rules (Maclean 1982: 239-240). Whilst the SCVs may have a soft influence on ROC law given that Chinese peoples "share a broadly accepted, common sense understanding of Confucian values" (Gow 2017: 25-26), this is unlikely to impact the definition of "good custom" in PRC law for two reasons. First, whilst "good custom" is informed by morality, it is broader than morality itself as it is imbued with social factors. Second, whilst goodness contains ethical and moral values, custom is based on "a real living conditions and relatively specific behavior pattern which are available for reference" (Yang 2021: 404). Consequently, ROC judges cannot turn a moral obligation into a legal obligation (Wang 2022: 294) by applying Confucian values to create a "new model of authoritarian legality" (Liu 2024) or a "virtuous Leviathan" (Lin & Trevaskes 2019).

[D] CONCLUSION

Comparing the two Chinese Civil Codes, "custom" and "good custom" are more bluntly applied in PRC law, with a wider notion of "custom", but an even wider disapplying notion of (not) "good custom".

In particular, the comparable application of "good custom" highlights a significant discrepancy in the jurisprudence between the two Chinese legal systems, notwithstanding either its limitation to the private law sphere or the cultural alignment between the PRC and ROC. Whilst both Chinese legal systems recognize the disapplication of acts in violation of "good custom" (including the disapplication of tort), PRC law has significantly broader reach into ancillary acts in violation of "good

[30] Supreme People's Court, Top Ten Typical Civil Cases of the People's Courts Vigorously Promoting Socialist Core Values" (13 May 2020), Case 3 (Compensation case for climbing a tree to pick fruit without permission and falling to one's death). (*zuigao renmin fayuan "renmin fayuan dali hongyang shehuizhuyi hexin jiazhiguan shi da dianxing minshi anli" (2020 nian 5 yue 13 ri) anli san (cunmin sizi shang shu zhaiguo zhuiwang suopei an*): 最高人民法院《人民法院大力弘扬社会主义核心价值观十大典型民事案例》〔2020年05月13日〕案例三〔村民私自上树摘果坠亡索赔案〕).

[31] Ibid. Case 4 (Compensation case for being hindered departing from bumping into child and dying suddenly). (*anli si (zhuangshang ertong likai bei zu cusi suopei an*): 案例四〔撞伤儿童离开被阻猝死索赔案〕).

custom", implicating both liability and causation. This disapplication of acts on the basis of (not) "good custom" notably includes acts contrary to: (1) broad public policy concerns (the Ten Types of Behaviour) and (2) mandatory moralistic social norms (SCVs). Furthermore, PRC law has also created an inverse application of (not) "good custom" to establish a basis of liability *per se* (*Jiang v Liu*). The creation of this (not) "good custom" liability indicates that Article 10 (applying custom in absence of the law) is being overrun by Article 8 PRC Civil Code (disapplying civil acts violating good custom). As such, whilst "custom" applies *praeter legem*, the disapplying category of (not) "good custom" traverses between custom *praeter legem* and custom *contra legem*. Indeed, the cause of action for acts and disapplication of ancillary acts contrary to good custom *contra legem* is positively controversial, in that it is contrary to legal positivism and poses the question whether (not) "good custom" in PRC law is even compatible with civil law jurisprudence generally.

By contrast, ROC law only recognizes "custom" and "good custom" *secundum legem* (ie there is no application of custom or good custom *contra legem* or *praeter legem*). ROC law notably has no equivalence of Article 8 PRC Civil Code because only civil *juristic* acts can be disapplied for being contrary to "good custom" under Article 72 ROC Civil Code (ie not civil acts or activity generally). Consequently, the respective boundaries between Articles 1 and Article 72 ROC Civil Code are delineated and restrained against the creation of new legal effects, so function more like a (Western) civil law system.

Global businesses would likely benefit from the broader PRC definition of "custom". Indeed, the burden of demonstrating the existence of custom would likely favour the commercial context because the associated costs of evidencing a trade custom are unlikely to be prohibitive for a widely recognized trade custom, with the evidential discretion weighted proportionately (ie the more implausible the custom, the greater the evidential burden to discharge). However, the definition of "custom" being that of "ordinary people" has likely informed the contention that "good custom" does not operate in the commercial context (Liang 2021: 52). This contention is likely an overstatement given that custom itself has been clarified to apply "within the scope of an industry" (*hanye fanwei nei*: 行业范围内) by the SPC and held subject to "good custom" in the commercial context by the lower People's Courts (eg the dispute between homeowner and builder in *Cheng v Yang*). However, it is unclear whether or how (not) "good custom" might be applied to non-Chinese or international customs, particularly where the extent that a contract is negotiable (or otherwise dictated by relative bargaining power) is highly debatable.

Conversely, the same global businesses are likely to consider that the broader application of (not) "good custom" in PRC law creates uncertain legal risk, particularly given the broad scope of the: (1) public policy concerns (ie the Ten Types of Behaviour); and (2) moralistic social norms (ie SCVs). The possibility of establishing liability based solely on (not) "good custom" provides a legal basis for bringing a moral claim under PRC law. In the commercial context, this notably facilitates actions by companies against counterparties for sharp business practices, and by shareholders against senior management for decisions lacking common sense or sufficient moral or societal concern. However, because there is no precedent in PRC law, the legal risk remains, as the initial finding rests on the discretion of a People's Court, which is then also vulnerable to being overruled by a higher People's Court.

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Supreme People's Court, Top Ten Typical Civil Cases of the People's Courts Vigorously Promoting Socialist Core Values (*renmin fayuan dali hongyang shehuizhuyi hexin jiazhiguan shi da dianxing minshi anli*: 人民法院大力弘扬社会主义核心价值观十大典型民事案例), 13 May 2020

Special or Not Special Enough? The Legal Status of Gender-Affirming Hormones and the Curious Case of "Q"

Bianca Jackson
Coram Chambers

[A] INTRODUCTION

For the vast majority of decisions about medical treatment, even those that are life-limiting, a young person (if *Gillick* competent)[1] and/or their parents/carers with parental responsibility can consent to the same and no court intervention is required. However, it has been suggested that there are certain medical interventions that fall within a "special category" of medical treatment, namely treatments where judicial oversight and authorization is required before the medical intervention can be administered, either because there is a common law rule or it is a matter of good practice.[2] Against a backdrop of significant legal and regulatory changes, the question has inevitably arisen whether gender-affirming hormones can or should be regarded as falling into this "special category". This article will explore this concept of a "special category" of medical treatment, the status of gender-affirming hormones, and whether the decision in respect of "Q" marks a deviation from the established approach.

[1] *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) held that a minor can consent to medical treatment, in that case contraception, without the approval of the parent, provided that the child has sufficient intelligence and understanding, which is a question for medical professionals, done on a case-by-case basis, not for the court to attempt to give general principles.

[2] In *AB v CD and Others* (2021), Mrs Justice Lieven (paragraph 72) took the view that there was "a distinction without much difference" between whether the "special category" is invoked with reference to common law or good practice, as a principle of good practice is likely to have a similar effect to a legal requirement.

[B] "SPECIAL CATEGORY" OF MEDICAL TREATMENT

The concept of a "special category" of medical treatment appears to have arisen for the first time in the courts in the case of *Re D (A Minor) (Wardship Sterilisation)* (1976). Re D concerned an 11-year old girl—"D"—who had been diagnosed with Sotos syndrome, the symptoms of which included accelerated growth during infancy, epilepsy, generalized clumsiness, an unusual facial appearance, and behavioural problems, including emotional instability, certain aggressive tendencies, and some impairment of mental function. The extent of the impairment of her mental function was unknown and was a matter of disagreement between medical and educational professionals; however, it was common ground amongst both the professionals and D's parents that D had the capacity to marry.

When D was a young child, her parents had decided that they should apply to have her sterilized when she was about 18 years old to prevent her from having children who might also be "abnormal". When D reached puberty at the age of 10, her mother became increasingly concerned that she would be "seduced" and possibly give birth to an "abnormal" child (D's father had died in the interim). She consulted with D's paediatrician, under whose care D had been since birth, and he took the view that there was a real risk that D would give birth to an "abnormal" foetus. The paediatrician also raised concerns that D's epilepsy might cause her to harm a child and that there were "social reasons" why she should not have children, namely that D would:

> … be unable in the future to maintain herself save in a sheltered environment, her inability due to epilepsy and other handicaps to cope with a family if she were to marry, without substantial support, the deterioration in her behaviour for which he said there was no known method of improvement and the possibility that she might have to enter an institution as he alleged for social or criminal reasons in the future (*Re D* 1976).

The paediatrician suggested that D should be sterilized immediately, without waiting until her 18th birthday, and D's mother agreed. The operation—a hysterectomy—was scheduled to be carried out in May 1975. Other professionals involved in D's care raised concerns about this course of treatment, which would be irreversible and permanent; however, the paediatrician refused to defer the operation. D's educational psychologist, who was attached to the educational department of D's local authority, initiated wardship proceedings to make D a ward of the court and to prevent D from being sterilized.

In support of D's mother, D's paediatrician argued that, provided that the parent or parents consented, the decision to sterilize a child was made pursuant to the exercise of the clinician's judgment and there should be no interference with his clinical freedom. The other medical experts who were consulted disputed this assertion and submitted that the decision to sterilize a child was not entirely within a doctor's clinical judgment, save where sterilization was the treatment of choice for some disease (ie where the treatment was for "therapeutic" purposes). Heilbron J agreed, noting:

> I cannot believe, and the evidence does not warrant the view, that a decision to carry out an operation of this nature performed for non-therapeutic purposes on a minor, can be held to be within the doctor's sole clinical judgment (*Re D* 1976).

In other words, sterilization falls into a special category of medical intervention that requires judicial oversight. Ultimately, the court held that the sterilization of D was neither "medically indicated nor necessary".

Following on from *Re D*, the concept of a "special category" of medical treatment has typically arisen in cases regarding the forced sterilization of incapacitated women[3] and decisions to withdraw clinically assisted nutrition and hydration, though any ambivalence in respect of the latter seems to have been put to rest by the Supreme Court in *NHS Trust v Y (Intensive Care Society Intervening)* (2019).[4] Only two reported cases concerned children under the age of 17, namely the aforementioned *Re D* and *Re E (A Minor) (Medical Treatment)* (1991).

In *Re E*, a severely mentally challenged young woman—"J"—suffered from serious menorrhagia (excessive menstruation). J was under the full-time care of her parents and unable to make decisions for herself. The only viable treatment for J's condition was a hysterectomy, and there was no dispute between the clinicians and the parents that the surgery should be undertaken. The purpose of the operation was not to sterilize J; however, it would be the inevitable result of the treatment.

The Medical Defence Union advised J's consultant that he should not take any steps unless the court made an order approving treatment in the wardship proceedings. In an effort to clarify the legal position of doctors and parents placed in a similar position to J's parents, the Official

[3] See, for example, *Re B (A Minor) (Wardship Sterilisation)* (1987); *F v West Berkshire Health Authority* (1990); *Re E (A Minor) (Medical Treatment)* (1991); *Re GF (Medical Treatment)* (1992); and *Re S (Sterilisation Patient's Best Interests)* (2000) 2 FLR 389.

[4] In *NHS Trust v Y (Intensive Care Society Intervening)* (2019), the Supreme Court made it clear that the common law did not require that an application must be made to the courts in every case where clinically assisted nutrition and hydration was being considered: see paragraph 93 in particular.

Solicitor, who was the guardian *ad litem* for J, made an application to the court as an interlocutory application in wardship proceedings. No party sought to argue against the proposed treatment and the court agreed that it was in J's best interests. As such, the principal issue before the court was whether such treatment required an application to the court in the first instance, regardless of the consent of all of the relevant parties to the same. In other words—though the term is not specifically referenced in the judgment itself —whether the proposed hysterectomy fell into the "special category" of medical intervention that requires court oversight.

The Official Solicitor argued that it did not. He submitted that there was a distinction to be made between cases where an operation is required for genuine therapeutic reasons and those where the operation is designed to achieve sterilization, such as *Re D* (though *Re D* was not cited in the judgment). Where an operation is required for genuine therapeutic reasons, he maintained that it ought not be necessary for a responsible doctor to have to seek the formal consent of the court for carrying out the operation. The court agreed and held that consent was not required. As such, *Re D* appears to be the only case[5]—and non-therapeutic sterilization the only medical treatment—where the court has identified a legal requirement for the matter to come to court to consider the proposed treatment for a child, notwithstanding the consent of the parents and agreement of the treating clinicians.

As the above discussion intimates, there is no statutory definition of or criteria for what defines a medical intervention as falling into a "special category" of medical treatment, and the court has been resistant to extending principles or guidance applied in cases in respect of incapacitated adults to cases involving children and young people. A "special category" of medical treatment is thus a narrow category in the first instance, and even narrower in respect of children and young people.

[C] THE LEGAL STATUS OF GENDER-AFFIRMING HORMONES

Gender-affirming hormones (also known as cross-sex or masculinizing/feminizing hormones) are used to achieve physical changes that align with a person's affirmed gender identity, for example, breast development or the deepening of the voice. These include testosterone, oestrogen, progesterone and antiandrogens. In the United Kingdom, gender-affirming

[5] This was confirmed in *AB v CD and Others* (2021), which sets out a very helpful summary of the line of cases that have dealt with the concept of a "special category" of medical treatment. See paragraphs 71-99.

hormones are available on the National Health Service (NHS) to treat young people with gender incongruence from around their 16th birthday, subject to meeting strict eligibility criteria and not meeting any of the exclusion criteria.[6] Gender-affirming hormones, unlike puberty blockers, are also available privately; neither the private sale nor supply of gender-affirming hormones to young people is prohibited by law.[7]

The question of whether gender-affirming treatment constituted a "special category" of medical treatment for young people was first considered in the case of *AB v CD* (2021), albeit in respect of puberty blockers.[8] In *AB v CD*, AB, the mother of XY, applied for a declaration that she and CD (the father of XY) had the ability in law to consent on behalf of XY to the administration of puberty blockers, without the need for a "best interests" decision from the court. The main question for the court was whether parents/carers could provide consent on their child's behalf (as part of their exercise of parental responsibility) or whether puberty blockers fell into a "special category" of medical treatment which required court oversight.

Mrs Justice Lieven—who was one of the presiding judges in the (later successfully appealed) first instance decision in *Bell v The Tavistock and Portman NHS Foundation Trust* (2020)—reiterated the concerns raised in that case about the safety and efficacy of puberty blockers. In particular, she made reference to the allegedly poor evidence base for puberty blockers; the lack of full and long-term testing; their use being highly controversial, including within the medical community; the lifelong and life-changing consequences of the treatment, which in some ways are irreversible; and the idea that puberty blockers were "experimental treatment", all of which had been accepted in *Bell v Tavistock* (2020: see, in particular, paragraphs 36-37). Indeed, Her Ladyship indicated that it might be argued that—in light of *Bell v Tavistock*—puberty blockers

6 On 24 March 2024, NHS England published a Clinical Commissioning Policy as part of the Children and Young People's Gender Service" which sets out the "eligibility and readiness" criteria that all patients must meet in order to access gender affirming hormones, as well as the "exclusionary criteria" would prevent a patient from accessing treatment (NHS England 2024).

7 On 30 May 2024, shortly before Parliament was dissolved, Victoria Atkinson, the then-health secretary, brought into effect emergency legislation banning the sale and supply of puberty blockers, namely the Medicines (Gonadotrophin-Releasing Hormone Analogues) (Emergency Prohibition) (England, Wales and Scotland) Order 2024/727. On 11 December 2024, the ban was made indefinite under the Medicines (Gonadotrophin-Releasing Hormone Analogues) (Restrictions on Private Sales and Supplies) Order 2024, with a review scheduled for 1 October 2027.

8 The (successfully appealed) first instance decision in the judicial review case of *Bell v Tavistock* (2020) did not specifically consider whether puberty blockers fell into a "special category" of medical treatment, as it only dealt with the patient's consent, rather any larger consideration of parental consent.

were sufficiently different from other medical treatments as to be treated differently, though was hampered by the fact that none of the parties sought to make this argument. Notwithstanding her apparent disquiet, Mrs Justice Lieven ultimately accepted that parents could consent to puberty blockers on their child's behalf without the matter requiring court oversight; in other words, puberty blockers did not fall into a "special category" of medical intervention.

Mrs Justice Lieven's reasoning was subsequently adopted by Mrs Justice Judd in *O v P* (2024) to confirm that gender-affirming hormones also do not fall into a "special category" of medical intervention. This was reconfirmed in *O v P and Q* (2024), both of which will be discussed in greater detail below.

[D] FIRST INSTANCE DECISION: *O v P* (2024)

The facts of *O v P* (2024) can be summarized as follows: "Q" was born female but began to identify as male when he reached the age of 12 years old. Supported by his father, Q sought to access gender-affirming care; however, Q's mother, who did not accept that Q was transgender, applied for a prohibited steps order under section 8 of the Children Act 1989 to prevent Q from accessing private gender-affirming treatment (the parties had already agreed that Q could join the waiting list for treatment through the NHS). The mother subsequently agreed that Q could be assessed by Gender Plus, a private provider, and invited the court to adjourn the proceedings until the assessment was completed. She sought for the court to retain oversight in the event that Gender Plus prescribed gender-affirming hormones, which the mother firmly opposed.

Additionally, the mother sought a declaration that any proposed prescribing of puberty blockers or gender-affirming hormones to a person under the age of 18 years of age by a private provider must be subject to the oversight of the court. She argued that, in light of the findings contained in Dr Hilary Cass's *Independent Review of Gender Identity Services for Children and Young People* (2024) (the Cass Review), the decisions of *Bell v Tavistock* and *AB v CD* could no longer stand. In other words, puberty blockers and gender-affirming hormones should now be regarded as falling into a "special category" of medical treatment. Conversely, Q's father and Q asked the court to dismiss the mother's applications on the basis that Q should be assessed and then left to make decisions as to any treatment offered on his own with the assistance of treating clinicians.

Mrs Justice Judd held that the findings of the Cass Review did not justify her departing from the decisions in *Bell v Tavistock* and *AB v CD*.

Her starting point was that Q was *Gillick* competent and therefore he was entitled to consent to his own treatment. Whilst she acknowledged that there may be situations where it might be necessary to invoke the inherent jurisdiction of the court to prevent gender-affirming treatment—for example, where a child was particularly vulnerable or was accessing an unregulated provider—this did not apply to Q; there was "no realistic basis" on which she could override Q's consent to treatment by a regulated provider or clinician in the United Kingdom (*O v P* 2024: paragraph 61). As such, there was no legitimate purpose in adjourning the proceedings for court oversight, and it was in Q's best interests to conclude the proceedings.

Likewise, Mrs Justice Judd declined to make a declaration that any prescribing of puberty blockers or hormone treatment to a person under the age of 18 by a private clinic should be subject to the oversight of the court, rejecting the argument that puberty blockers or gender-affirming hormones fell into a "special category" of medical treatment. She echoed the warning given by Lord Philips of Worth Matravers as to the dangers of a court grappling with issues which are divorced from the specific facts of a case (*O v P* 2024: paragraph 64).

[E] THE APPEAL: *O v P AND Q* (2024)

Q's mother applied for leave to appeal Mrs Justice Judd's decision. The main issue before the Court of Appeal was whether Mrs Justice Judd was right to conclude that there was no legitimate purpose for adjourning the case in circumstances where it was agreed that Q was *Gillick*-competent and had mental capacity to consent to his treatment. The mother contended that there was a legitimate purpose in adjourning the proceedings because: (i) the legal and regulatory landscape for gender-affirming treatment was changing rapidly; (ii) the final report of the Cass Review was only published on 10 April 2024, a week prior to the hearing before Her Ladyship; (iii) the Government was continuing to take steps in response to the Cass Review (as evidenced by the ban on the private sale and supply of puberty blockers); and (iv) Gender Plus was a private provider, whose practices and procedures did not completely mirror those of the NHS. The appeal was opposed by the father and J, who argued that the court at first instance had been right to conclude the proceedings, which had already been going on for two years, as it was in J's best interests to do so.

The Court of Appeal, albeit "not without hesitation" (paragraph 7), held that Mrs Justice Judd had been wrong to refuse to adjourn the mother's

applications and to dismiss the proceedings. The Court of Appeal agreed with the mother that Mrs Justice Judd had not placed enough weight on the rapidly changing regulatory landscape of gender-affirming care nor the fact that Gender Plus did not conform to the recommendations of the Cass Review. In particular, the Court of Appeal highlighted that Gender Plus did not comply with recommendation 9 of the Cass Review, namely the need for the case to be discussed by a national multidisciplinary team. In those circumstances, the Court of Appeal took the view that the proceedings should have been adjourned and the mother's applications remained live to enable the court to maintain oversight of J's care. The appeal was granted and the case was adjourned with no continuing orders in place, with leave to the parties to restore the matter for further directions to be made.

In considering Mrs Justice Judd's decision, the Court of Appeal re-emphasized that gender-affirming hormones do not fall into a "special category" of medical treatment whereby there is a *prima facie* requirement to apply to the court for a best interests decision.[9] However, the reasoning for their decision to keep the proceedings live seems at odds with this established *dictum*. As Sir MacFarlane notes in his remarks in the judgment, where a young person is between 16 and 18 and capable of giving consent to treatment, the best interests jurisdiction is not a general welfare jurisdiction; the court will only override the young person's consent where it is necessary to intervene to protect them from "grave and irreversible mental or physical harm" (paragraph 46); quoting *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (1993). Implicit in the decision of the Court of Appeal, therefore, is that the changing regulatory and medical landscape and/or the inability of private providers to meet NHS specifications may cause J "grave and irreversible mental or physical harm", which may lead the court to override his consent to treatment were the mother's applications to be determined; thus, the adjournment is legitimate and purposive.

[9] It is interesting to note that even though Sir Geoffrey Voss, Master of the Rolls, who took the lead in the judgment, indicated that the administration of gender-affirming hormones was not in a "special category" (*O v P and Q* 2024: paragraph 42), Sir Andrew McFarlane, President of the Family Division, reiterated the same in his brief remarks (ibid: paragraph 46).

Putting aside the reasonableness of that claim,[10] both of the arguments relied on—the changing regulatory and medical landscape and the inability of private providers to meet NHS specifications—are not specific to J's case; they are generalized concerns around gender-affirming hormones and would arise in any situation in which a young person seeks to access gender-affirming hormones privately. As such, the basis for the court's decision to keep the proceedings live seems to suggest that the administration of gender-affirming hormones requires court oversight and is therefore in a "special category" of medical treatment (regardless of the competent young person's consent), whilst simultaneously claiming that it does not fall into a "special category" of medical treatment.

[F] CONCLUSION

Since the case of *Bell v Tavistock* (2020), the family courts have increasingly been tasked with making decisions around gender-affirming medical care for young people. In doing so, established legal principles—from Gillick competence to parental consent to medical care—have been carefully scrutinized, but ultimately upheld. The courts have been clear that any changes to the legal status of gender-affirming hormones are the purview of Parliament, not the courts; they are to be treated like any other medical interventions. Notwithstanding the purported internal conflict in *O v P and Q* (2024), it seems that gender-affirming treatment is regarded as "special", but not "special" enough.

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[10] There are a number of difficulties with the court's reasoning in *O v P and Q* (2024) which are beyond the scope of this article, including: the extent to which the possibility, rather than actual, changes to the regulatory and medical landscape should affect decision-making around a specific child; the questionable suggestion that the administration of gender-affirming hormones by Gender Plus, which has an outstanding Care Quality Commission rating, solely because it has not adopted the NHS practice of a multidisciplinary assessment may cause a risk of "grave and irreversible mental or physical harm"; and the reliance on the Cass Review as a Ur-text, when it does not have any legal status and there are conflicting expert reports.

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Queer Judgments, edited by Alex Powell &
Katie Jukes, pages 133-339

Foreword to the Special Section

Graeme Reid

Before reading this "Editorial" and the articles that follow in this Special Section, please watch the "Foreword" recorded by Graeme Reid, the United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity.

Editorial

Alex Powell
Oxford Brookes University
Katie Jukes
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It is a pleasure to introduce this Special Section which, following on from the publication of the *Queer Judgments* edited collection earlier this year, marks out the arrival of a distinctive field of work engaged in the practice of Queering Judgment (Ferreira & Ors 2025). This Special Section is the second planned output from the Queer Judgments Project.[1] Decisions regarding how the Queer Judgment Project should operate were made collectively during a series of workshops at the outset of the endeavour. The Project continues to be active, and we hope that this will be the second of many outputs associated with it. The Queer Judgments Project builds on a range of earlier antecedents, including the Feminist Judgments Project (Hunter & Ors 2010) and the work of theorists such as Alex Sharpe (2017) who have argued that the relationship between queer theory and law is not always a simple one with the act of legal judgment often cast as being a mode of practice that has the effect of cementing particular arrangements of power/knowledge (Butler 2020: 132). In other words, legal judgment and its calcifying effects are of

[1] The project has its own website and we would invite you to check it out regarding the Queer Judgments Project.

exactly the form that queer theory is generally understood as trying to challenge (Halberstam 1998). Indeed, as Raj has argued, queer judgments engage in processes which "critique … socio-legal norms that cohere the value of social reproduction, gender conformity, sexual monogamy and privatised responsibility", rendering visible the role of these knowledges and ideological devices within the context of legal judgment (2025: 4). But, as a result of engaging with the formal structures of legal judgment, queer judgments also engender the forms of governmentality incumbent within the form and style of legal judgment (Raj 2025: 4).

Where queer approaches to law are deployed from a counter-normative perspective, with the focus being on the "repudiation of dominant norms" without the "renunciation of prescriptive projects", we argue that queer theory can offer useful interjections which show how other domains of power/knowledge condition legal reasoning (Zanghellini 2009: 1-3). This is because, much as David Nelken has argued, "What counts as legal knowledge, or knowledge for law, is something that changes over time. And this mainly happens outside the courtroom" (2006: 602). Given this, we argue that queer judgments, and the analysis which has emerged around them, present a useful interjection that can help to showcase how different epistemes are enacted within legal regimes. In so doing, much as the Feminist Judgments Project did before, queer judgments showcase the contingency of legal reasoning with a view to demonstrating how a different outcome could have been reached, even from within the same legal framework as those deployed within the original judgment. In this sense, we might see one of the primary strengths of queer judgments as arising from their ability to expose the relationship between law and epistemology in both an analytic and pedagogical sense.

Indeed, through exposing the contingency of legal decision-making, even when operating within a singular legal framework, queer judgments can help to expose how forms of knowledge regarding the nature of subjectivities become implicated within legal reasoning, affecting how legal institutions comprehend and make sense of human lives. Adopting Judith Butler's understanding of the human subject as a category that can be given or retracted depending on compliance with other norms (Butler 2009: 1-15), it could be argued that queer judgments enable us to recognize what Alex Powell terms "meta-politics", that is, the ways in which discourse with its effects on power/knowledge shape and reshape human beings and the attendant effects that this has on how law is interpreted and applied (2025: 22-38).

Further, as Emily Grabham has argued, within law there is a "propensity to categorise", therefore the role of meta-politics in the (re)shaping of subjectivities might be seen to have particular salience for understanding which lives and bodies legal frameworks are designed around (2008: 186). For example, the way in which subjectivities are conceptualized might have implications for whether (or not) someone fits within a given legal framework and, accordingly, can impact factors such as access to rights and amenities. In this sense, one way in which we might understand the practice of queer judgment-writing, as a subset of the broader pattern of authoring alternative judgments, is as a part of both posing and responding to broader questions around who is the subject of law or who is the human of human rights (Foucault 2001; Rancière 2004; Mignolo 2009; Coleman 2024)? Such questions, of course, link back to the underlying assumptions which, as highlighted through Jack Halberstam's (1998) work mentioned above, queer theorists are invested in challenging. Indeed, much as Sara Ahmed (2021: 175-220) has argued that the shape and structure of an institution can tell you a great deal about whom an institution is designed for (or not), we might say that the shape and structure of law, particularly in its relation to other disciplines and forms of knowledge, can tell you a great deal about whom a society is designed for (or not). Or at least which kinds of subjectivities are validated and intelligible within the epistemes through which that society is constituted.

In this sense, the practice of queer judgment-writing might be viewed as a more practical implementation of the principles of queer theory to the domain of legal reasoning. Within this intervention, there lies the potential to showcase the radical contingency of legal outcomes, also linking the project into broader histories of critical legal and legal realist analysis (Tushnet 1990; Tamanaha 2008). This, in turn, might be seen as providing a critical intervention regarding the role that law plays in creating the subjectivities through which we make sense of the world more broadly. Indeed, if we follow Elena Loizidou's (2007) argument for understanding law as a form of performativity, with a concomitant recognition of how the frames deployed within legal decision-making install themselves as necessary grounds for how we make sense of the world around us, it might be seen that the interventions offered by the practice of alternative judgment-writing are foundational to understanding the relationship between law and epistemology (Butler 1999: 16).

To expand on this, the forms of counter-normative reasoning deployed within the authoring of alternative judgments can be argued to showcase the contingency of the forms of knowledge which law generally renders

as neutral or predetermined and, accordingly, can shed greater light on how law and the knowledges which inform it themselves shape the day-to-day engagements of people, both with each other and the state, not just through the legal frameworks that are established but also in terms of the subjectivities which are fostered within that system and their social implications. Such a task may be seen as particularly important due to the capacity of law to construct what Berlant terms "emblematic knowledge", that is to say knowledge that attains the level of truism, an unchallengeable status often resulting in those challenging such orthodoxies being cast as engaging in strange or threatening kinds of thought (Berlant 1998: 108). Building on this, we might more broadly understand law as contributing to the production of hegemonic frameworks that become foundational to the ways in which people within a society make sense of their interactions of relations (Bates 1975). As Judith Butler and Gayle Rubin (2012) have discussed, these scripts are often particularly strong in relation to sex, gender and sexuality, and the deployment of queer approaches to the act of legal judgment could be argued to be a particularly salient intervention into a field of knowledge that is often presented in such hegemonic terms as to be constructed as effectively beyond challenge, with even affirmative or supportive framings often emerging from forms of biological essentialism, such as what Tim Johnston (2015) has called the "born this way" phenomenon.

Indeed, as Lucy Mayblin has argued, in the context of migration and asylum, law reform and lawmaking often engage significant forms of complexity reduction (2016). They do this partly in order to emulate the scientific method with a focus on enabling legal decision-making as a mode of generating legitimacy based in its neutral and "objective" analysis, or at least the presentation thereof (Douzinas & Geary 2005). In this sense, the deployment of queer theory, with its focus on contesting oversimplified conceptualizations of gender and sexual diversity may offer an important set of interjections to show how law could be otherwise understood and engaged and, in so doing, create the conceptual space for different forms of life to be accommodated within both the legal and epistemological contours of state and society (Powell 2025: 31-34). Indeed, as Spade has argued, harm is often structurally embedded within forms of governance which seek to categorize for the purposes of technical organizational or other forms of sorting (2015). In this sense, alongside its epistemological potential, consideration might also be made of the possibility for queer judgments to offer a useful mode through which students may be taught to better comprehend law within its social and political context. Indeed, it could be said that the work of alternative judgments operate to strip

away the sense of law as being an objective reality discerned by judges and instead show how legal decisions are produced by the interaction and relationship between legal criteria and the other forms of knowledge which must be deployed by judges in order for them interpret and apply this legal criteria.

This stripping away operates by demonstrating to students the epistemological foundations of legal knowledge, bringing into view evidence of the normative judgments which inform the legal reasoning of judges and calling on students to consider how their own knowledge of the world around them would interact with the legal frameworks, rules, and standards with which they engage in a classroom. Indeed, the value of queer approaches to legal pedagogy has recently been recognized in the publication of one of the first textbooks on gender, sexuality and the law (Ashford & Maine 2024). This text includes the use of alternative statutes and judgments in ways which encourage students to reflect on the relationship between knowledge, subjectivities, and the law.[2] As this again suggests, there is an increasing recognition of the need to ensure that students understand how legal education links into other disciplines and forms of knowledge, as well as into the ways in which people experience the world more broadly.

In line with the above, we might conceptualize judgment-writing as a "subversive challenge to judicial authority" (Rogers 2017: 61). However, while doing this, as argued by Nicole Rogers, the act of rendering an alternative judgment also serves to provide a visible example of the malleability of the law. Showcasing this malleability is particularly important because, as Rosemary Hunter has outlined, the mode of teaching law in a United Kingdom (UK) context often focuses strongly on analysis of appellate court decisions (2012). Whilst this is often accompanied by engagement with academic journal articles, this focus on appellate decisions can often leave students with an impression that learning the law is an objective enterprise, as if it were a process of unearthing objective facts, or discovering a law already written. The implication of this is, of course, that law is given, rather than the reality, which is that it is produced within a particular social and political context which then affects how it will be interpreted. As such, whilst the deployment of the format of legal judgment can be argued to, at times, endorse a form of conservatism insofar as it reifies the institution of legal judgment, the act of authoring queer judgments also fits into a broader history of critical

[2] For an example of an alternative statute, see Powell's alternative envisioning of section 66 of the Sentencing Act 2020 (Powell 2024).

scholarship which functions to highlight the contingent and political nature of legal judgment as an enterprise.

In this way, alternative judgments of the kind outlined in this issue, can be argued to carry significant pedagogical potential in balancing the development of legal skill, in terms of understanding and making sense of conventions of legal writing across a range of forums, with substantive understanding of the way in which law sits both within and alongside other forums of power/knowledge. Indeed, as outlined by Ferreira, Moscati and Raj, queer judgments might usefully be understood as opportunities to "reflect on the desirability and possibilities of law", in this sense powerfully combining outsider and insider perspectives (2025: 48). Outsider in the sense that queer judgments, like feminist or wild judgments (Rogers & Maloney 2017), offer a space for different perspectives to enter into the regimes of legal reasoning. But also, insider in the sense that such judgments often draw on forms of legal argumentation which are, at least in part, true to judicial approaches. This, in turn, offers a productive engagement between issues of substance and form, encouraging students to reflect on the role of both substantive power/knowledge and the structure and format of legal judgment as forces which shape the world around them.

In this way, alternative judgments offer a significant pedagogical resource. Indeed, in light of their capacity to show students how various elements of the legal process work, as well as the forms of knowledge deployed within it, alternative judgments operate to produce particular outcomes which are neither given, nor necessary, offering a significant contribution to the critical thinking skills of students, encouraging them to consider both the inputs which legal reasoning accounts for and the normative implications which flow from how judgment is undertaken. For example, as Hunter argues, alternative judgments might support students to understand the importance of how stories are told to the process of legal reasoning, how the way in which the facts are analytically characterized might in turn lead towards alternative legal outcomes, such as by giving voice to subjects who have been historically and contemporarily silenced (2012: 52). In this sense, alternative judgments powerfully and directly draw attention to how a diverse range of factors can become integrated into the production of a legal outcome, foregrounding the role of judges in determining not just law, but also fact. Similarly, and linked into a broader queer work around the nature and function of ignorance, the way in which these stories are told can speak to the types of knowledge that are permitted to be heard within the legal arena (Sedgwick 2008: 8). Of course, these questions of knowledge and ignorance can also powerfully

show the kinds of lives around which legal frameworks are constructed and can therefore support students in understanding the role of law as a governmental regime (Burchell & Ors 1991: 102-103; Dean 1999). In this sense, one of the primary functions of queer judgments can be said to lie in the empowerment of students and scholars alike to "account for the nuanced lives of those who are minoritised because of their sex, sexuality and gender" (Raj 2025: 2).

One form which this pedagogical potential might take is in the fostering of accountability within students of law. Raj defines the idea of accountability as part of a process of becoming responsible (2025, 5). Specifically, accountability therefore supports the process of transforming "silence into language and action" (Lorde 1984: 43). Through this process, it is argued that queer judgments empower students to both read and see how forms of legal reasoning foster certain subjects while disavowing others (Foucault 1991). Indeed, one of the primary values of queer judgments as a pedagogical tool could be in their ability to make clear the forms of discipline, governmentality and violence operating within the purportedly neutral devices and knowledges through which legal judgment functions. This is important because of the tendency of legal systems, and the decision-makers within them, to present themselves as neutral arbiters. This is despite the fact that the decisions that they render depend significantly on the forms of life that are imagined as existing within the legal system. It is therefore valuable for students to enhance their awareness of how legal frameworks (re)inscribe normative structures and subjectivities. In this sense, the kind of legal education that queer and alternative judgments can empower might be said to correspond to the Foucaldian insight that:

> The real political task … is to criticize the workings of institutions that appear to be both neutral and independent; to criticize and attack them in such a manner that political violence that has always exercised itself through them will be unmasked so that one can fight against them (Chomsky & Foucault 1971).

In this sense, a part of the pedagogical value of queer judgment could be said to be in precisely the sense that they render visible how legal judgments draw from and cement particular epistemologies, therefore enabling students to engage with law as critical thinkers and to both recognize and challenge the forms of violence which are (re)produced within the form of legal judgments.

In order to advance these epistemological and pedagogical values, this Special Section presents six articles and two artistic pieces which contribute to the emerging corpus of work around queering judgment.

These articles span a diverse range of subject matter, each of which advances understanding of the relationship between queer theory, queering and legal institutions, norms and judgments. The academic submissions are diverse in nature, spanning from alternative judgments—offering re-interpretation of previous decisions, but undertaken from a queer perspective—to contributions which seek either to unpack the reasoning from a particular judgment or to unearth broader dynamics in terms of their function in cementing, advancing or fostering particular characteristics and subjectivities.

The section starts with Rafael Lelis, who explores the extent to which the Yogyakarta principles can be considered to be an autochthonous source of law, through an exploration of their deployment within both United Nations and regional human rights forums. Through this exploration, Lelis's contribution develops understanding regarding critical questions around jurisprudence and the origins and sources of law, offering evidence of the role of non-governmental organizations and non-state actors as producers of law and thereby queering the very nature of what it is to author (international) law. In this sense, Lelis's work provides a critical interjection regarding what can be considered to constitute a form of law, offering a strong argument for why the Yogyakarta principles—as a form of queer knowledge production—might be considered to themselves constitute a constituent part of the broader body of human rights international law and thus challenging overly formalist conceptions of international law.

Mariza Avgeri then presents an analysis of the extraterritorial application of the European Convention on Human Rights (ECHR), arguing that the non-extension of extraterritorial protection to gender diverse people arises from conservative conceptions of Convention rights which fail to account for the importance of publicly expressing gender and sexual identities to the realization of privacy and moral autonomy under Article 8 ECHR. In doing this, she draws powerful attention to how gender and sexuality are conceptualized within legal decision-making and how alternative and more expansive conceptualizations of these characteristics would necessitate broader interpretation of state obligations to provide protection. In this sense, the article contributes to understanding of the previously highlighted questions over which kinds of lives the law is authored around and the kinds of knowledge which play into the constructions of the subjectivities around which legal decisions go on to be made.

Sean Mulcahy provides an alternative judgment reconsidering a councillor misconduct claim before the Councillor Conduct Panel in the context of local government in the Australian State of Victoria. In the original decision, the statements of the councillor accused of misconduct had ultimately been found to be a matter of "vigorous political discourse" which, while worthy of begin discouraged, were ultimately not determined to be a matter of serious misconduct. Mulcahy reconsiders this decision, embracing broader conceptions of prejudice and exclusion which demonstrate the limited terms on which the original decision had considered these matters. Mulcahy goes on to examine the implications of these limited conceptions for the ability and willingness of LGBTIQA+ people and women to participate in local government, concluding that the adoption of a wider frame of reference, which is more able to recognize the impacts of the conduct of (now former) councillor Lew and others in a similar position on the safety and welfare of LGBTIQA+ people within the political arena, would have resulted in findings of misconduct. In offering this, Mulcahy draws attention to how harms directed towards women and LGBTIQA+ people are often discounted or minimized within decision-making forums.

Eder Van Pelt undertakes a critical reading of the judgment of the Brazilian Supreme Federal Court regarding the legal recognition of same-sex civil unions. By deploying critical perspectives on law and sexuality, he argues that the decision of the court—while ultimately affirming the rights of Brazilians to form same-sex unions—deployed a heteronormative framework which relies on and reifies forms of affect and subjectivities which are dependent on domesticated and respectable performances of difference. Through doing this, he demonstrates how legal decisions which extend legal rights also regulate and govern the kinds of difference which are permissible in a given setting. In this sense, Van Pelt's analysis contributes a valuable interjection which perfectly captures the dilemmas of liberal legalism as a mode through which to advance the protection of LGBTIQA+ people. The article contributes to our understanding of some of the trade-offs which emerge within the context of sexual and gender diverse people accessing rights and protections from liberal structures.

Po-Han Lee analyses how the Taiwanese courts restrict and suspend the sexual agency of disabled people when adjudicating issues regarding consent. By looking at a range of key rulings, Lee analyses how the Taiwanese courts produce desire within a pathologizing lens that evades contextualization and complexity. He goes on to deploy a crip/queer lens to enable them to reconceptualize legal personhood beyond binary questions of capacity, instead arguing for a relational conception of agency

that may permit law to recognize subjectivities which are often framed as ambiguous or unintelligible within legal reasoning. Through doing this, he seeks to expand the scope of rights-based analysis for better accounting for the lived realities of both queer and disabled subjects. As Lee's work usefully demonstrates, the framing of people labelled with intellectual disabilities as non-agentic within legal rationality is often mirrored within clinical and familial settings. This, in turn, speaks to the performative dimensions of law that we have explored above, demonstrating how law operates alongside other epistemes to produce subjectivities and frameworks that are often mistaken as being free-standing or innate. The work is particularly effective in challenging the totalizing or categorical terms through which law makes sense of matters such as capacity and the implications that this has for the sexual agency of people with intellectual disabilities.

Finally, Jwalika Balaji and Mandar Prakhar offer a re-imagining of the *Supriyo v Union of India Judgment*. The actual 2023 judgment saw the Supreme Court of India deny legal recognition to same-sex marriages. Balaji and Prakhar utilize a queer lens to author an alternative judgment which recognizes marriage as a constitutional guarantee within the Indian context. They do this through exploring the promises of dignity, autonomy and equality and through rejecting the heteronormativity and exclusionary framings which had been enshrined in the Special Marriage Act of 1954. However, they go further, arguing that queer relationship structures can work to remove the link between legal benefits and marital status, and instead proposing that legal protection be extended to a diverse range of kinship forms in a manner which permits the legal recognition of types of intimacy and care beyond the context of marriage. In doing this, they contribute a further powerful example of the use of queer judgments as a means to show the contingency of law and how alternative outcomes can be reached from within existing legal frameworks.

As this Special Section is focused on queer judgments, it is also important that attention is paid to the relationship between queerness and legal form and the relationship between methods and our readers. Accordingly, in adopting a queer positionality, it is important to note that the violences produced by law arise not just from the substance of legal judgments, but also from the form and method of legal judgment as an enterprise. In recognition of this, this Special Section explores not just challenges to and interjections within the epistemological foundations of law—or the disciplines on which legal reasoning is required to draw—but also the form and nature of legal reasoning. For this reason, the Special Section includes a range of artistic and creative contributions alongside

the alternative judgments and academic articles. Creative responses to legal judgments are also, of course, an integral part of the original Queer Judgments Project. Echoing the words of the original editors, Ferreira, Moscati and Raj, our project is legally artistic, aiming to stimulate "further questions on queer law by unleashing bravery, grace, sensitivity to others, creativity" (Ferreira & Ors 2025: 8). These creative outputs, like the academic work and alternative judgments, operate to challenge the subjectivities, epistemologies and frameworks through which law operates. The creative contributions to this Special Section invite readers to rethink law with a call to the senses and to the imagination and to challenge epistemic norms with their own language and imagery. This not only serves the vision of creating a new norm that asserts queerness, but also builds upon the evolution of the existing legal norm to include queer methodology as explored above.

Raju Behara's contribution uses poetry as "jurisdictional counterpractice", challenging legal and corporate "inclusion" with neurodiverse and caste-conscious voices. Set against the backdrop of apparently progressive and inclusive statutory and common law reform in India, Behara's poetry workshops created the space for participants to "perform radical surgery on legal texts". This work is a powerful example of the contribution that poetic imagery and collective thinking can make to reframing normative legal principles and epistemology, showing that: "Queer is the resistance to epistemological violence."

S J Cooper-Knock's song *Equali-T* uses song-writing and poetic methods such as rhythm and rhyme to respond to and challenge the *For Women Scotland Ltd v The Scottish Ministers* (2025) judgment on the definition of the word "woman" within UK law. Cooper-Knock introduces their song with a personal commentary on the judgment and offers the listener not only a response to the judgment but also the joy of a jazzy blues tune, a warm harmony and the surprise of laughter and hope in what might otherwise feel like a dark and exclusionary legal case.

At a time when queer lives including trans and non-binary people are being eroded by the legal establishment, these creative contributions to the Special Section offer an antidote to the cisnormative and heteronormative logics which all of the contributors challenge in diverse and varied ways. These contributions welcome our readers in to listen, to feel and to dance.

Having explored the wonderful contributions which make up this Special Section, we would like to take this opportunity to thank the many fabulous collaborators who have been a part of this project to date. Firstly, we would like to extend our sincere thanks to everyone involved

in the Queer Judgments Project. This project has been undertaken on a collaborative basis and the outputs associated with the project are the realization of decisions made during collaborative workshops at the outset of the project. We would like to express particular thanks to the project's initial organizers, Nuno Ferreira, Senthorun Raj and Maria Moscati, for bringing together such a productive collective and for all of the work that they put into the edited collection which this Special Section follows.

We would also like to take this opportunity to extend our sincere thanks to everyone who has given their time to review contributions to this Special Section. Without the work of peer-reviewers, this Special Section would not have been possible. At a time when many colleagues are facing pressure on workloads, we want to recognize the efforts of those who gave their time to review articles and offer constructive feedback to authors. I am sure they would agree that this has significantly contributed to the strength of the Special Section as a whole.

Finally, we want to thank Graeme Reid for giving his time to provide a foreword for this special section. As the United Nations Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, we appreciate both the important role that Graeme plays in global monitoring of the lived experiences of LGBTIQA+ people around the world, and how busy this role must leave him. We are therefore particularly grateful for his taking the time to engage with the contributions to this special issue.

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Queer Source of Law: Expectation of Compliance with the Yogyakarta Principles in International Human Rights Mechanisms

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Abstract

The Yogyakarta Principles (YPs) were produced by transnational civil society actors involved in sexual orientation and gender identity (SOGI) human rights activism. The document has had a significant impact on debates surrounding gender and sexual diversity in international human rights law. As such, it provided a new source, a *queer* source, of law for friendly actors who were already inclined to decide favourably on issues regarding SOGI rights. This article analyses the extent of the YPs' political efficacy in the context of global governance and international law institutional mechanisms. More concretely, the main research question asks: what is the nature, or quality, of the application of the YPs by international human rights monitoring bodies? What does it tell us about their level of political influence? In responding to these questions, the article employs the analytical framework of expectation of compliance as an indicator to measure the YPs' political efficacy.

Keywords: Yogyakarta Principles; sexual orientation and gender identity; international human rights law; queer; law-making.

[A] INTRODUCTION

"And they were put before judges. You can use these documents. And, obviously, you need a receptive judge, but they have a very great effect," Edwin Cameron, former justice of the Constitutional Court of South Africa, and well known for his years-long activism on HIV/Aids and queer rights, told me. Over a faulty internet connection during our online conversation, he continued, "I cannot overstate the importance of these international documents. They're not just talking shops. They actually have an impact" (Cameron, Interview with the author, November 2023). Cameron was a signatory to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to

Sexual Orientation and Gender Identity (YPs, or Principles), as well as to an additional set of principles that amended the original document, the Yogyakarta Principles plus 10 (YP+10). His answer, however, had been given from the standpoint of a judge—in a way, like many of his peers frequenting international bodies, he also occupied the seats of both addresser and addressee of the YPs, since there was an expectation that the document would also find its way to be applied by domestic courts. What his statement reveals is that the YPs provided a new source, a *queer* source of law, for friendly actors who were already inclined to decide favourably on issues regarding sexual orientation and gender identity (SOGI). In other words, it enabled those who wished to deliver queer judgments to do so, backed up by an increasingly authoritative document in the field of international human rights law (IHRL).

The YPs were a civil society-led initiative to fill a regulatory gap regarding SOGI in IHRL (O'Flaherty & Fisher 2008; Lelis 2025: 194-250; Narrain & Patel 2025). Borrowing both the "epistemic authority" (Zagzebski 2016) and the social ties from many of the experts who signed the document, who were known actors within global governance human rights fora, the document achieved an unprecedented impact in both domestic and international legal contexts (Lelis 2025: 194-250). The positive reception of the Principles has led critical scholarly work to frame it as a successful initiative of alternative law-making, blurring the *straight* limits of international legality, which is usually associated with state-crafted norms (Lelis 2019; Santos De Carvalho 2024). While elsewhere I have analysed the elements driving the YPs' normative legitimacy, and which explain their level of success, this article presents evidence of their political efficacy (Lelis 2025: 194-250). That is, their ability to "achieve political force" (Fraser 2007: 13).

On the one hand, their efficacy can be measured by the way national legal bodies make use of the document. In an analysis of the application of the YPs by the Supreme Courts of Brazil and India, I have identified that they are actively applied by these courts with varying degrees of deference, which goes from their characterization as an obligation-setting document to their framing as a soft law instrument (Lelis 2019). Despite nuances seen in different judgments, the overall use of the document's provisions in both domestic contexts, as Juliana dos Santos has likewise observed (Santos De Carvalho 2024), gives a concrete instance of their political efficacy in national legal orders. The Principles have further supported legal reasoning to advance the recognition of SOGI/SOGIESC

rights in multiple national contexts, including their application by the Supreme Court of Nepal, the Court of Appeal in Botswana, and others.[1]

In this article, I focus on the ways in which the same provisions have been mobilized by international human rights mechanisms, including regional human rights courts, United Nations (UN) special procedures mandate holders, and human rights treaty bodies. More concretely, the main research question asks: what is the nature, or *quality*, of the application of the YPs by international mechanisms? What does it tell us about their level of political influence? In responding to these questions, I employ the analytical framework of *expectation of compliance* to partly measure the Principles' political efficacy.

As such, this article sits in dialogue with the literature on queer approaches to international law and LGBTI+ transnational activism (Thoreson 2014; Ayoub 2016; Otto 2018; O'Hara 2022) as well as the growing field of research on alternative forms of international law-making and the possibilities of producing law without (or beyond) the state (Pauwelyn & Ors 2012; Schultz 2015; Rodiles 2018; Krisch 2021; Reiners 2021; Santos De Carvalho 2024). But most importantly, it brings contributions to the more specific literature on the YPs, alongside other research focused on understanding the document's elaboration (O'Flaherty & Fisher 2008; Brown 2009; Thoreson 2009; O'Flaherty 2015) and their application in domestic and international legal frameworks (Ettelbrick & Zerán 2010; Lelis 2019; Santos De Carvalho 2024). The research is mainly based on case law analysis, complemented with data from key informant interviews to provide context of the YPs' drafting purposes.[2]

The article is divided into two main sections, in addition to this introduction and a brief conclusion. In the following section, I situate the theoretical underpinnings of the analysis, explain what I mean by a *queer* source of law, and elaborate on how the expectation of compliance might be a useful *qualitative* indicator to assess the impact of non-state law-making. Then, in the subsequent section, I move on to examine the mentions of the YPs in the selected international human rights mechanisms.

[1] On mentions to the YPs to both deny and reinforce their legal status, see Submissions on Behalf of the Australian Human Rights Commission (2011); *Ang Ladlad LGBT Party* (2010). See also International Service for Human Rights (2020; 2023).

[2] In this sense, this article uses a very minimal amount of the interview data from a broader research project which interviewed several people involved in the drafting of the document and/or its early dissemination campaigns. The project encompassed 65 interviews, including oral history interviews and semi-structured interviews with key informants. Amongst these, 14 were with people involved with either the YPs or the YP+10. The larger research project, entitled "Reimagining a Queer Human: The Social and Legal Production of Subjects in International Human Rights Law Discourse", was examined and cleared by the Ethics Review Committee of the Graduate Institute of International and Development Studies in July 2022.

[B] EXPECTATION OF COMPLIANCE, POLITICAL EFFICACY, AND QUEER SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

As mentioned before, there is a growing amount of literature collecting evidence of how domestic courts effectively apply the YPs to advance on rights related to lesbians, gays, bisexuals, trans, and intersex persons (LGBTI+), as well as others within a broad spectrum of SOGI[3] that falls outside these identity markers (Lelis 2019; Santos De Carvalho 2024). But in global governance bodies, too, the YPs' influence is visible. During our interview in Amsterdam, Boris Dittrich shared how getting the YPs known within global governance bodies was a key element from day one when he joined the LGBT rights programme at Human Rights Watch (HRW) at the beginning of 2007. "At the same time, when I started working for Human Rights Watch, the Yogyakarta Principles had been introduced," he remembers.

> And so, when he [Scott Long, my boss] hired me, he said this is your main task, the Yogyakarta Principles, bring them to the UN and elsewhere in the world. And through the Yogyakarta Principles, we need to focus on equal rights. So, I was always there with my Yogyakarta Principles (Dittrich, Interview with the author, July 2022).

Dittrich was responsible for organizing a strategic launch of the Principles in New York. "We call[ed it] the introduction of the Yogyakarta Principles," he says (Dittrich, Interview with the author, July 2022). Similar to the first launch that took place in Geneva, the New York event included many familiar faces from the world of the UN human rights bodies, including former UN High Commissioner for Human Rights and former Irish President, signatory to the document, Mary Robinson, as well as activists and state representatives. This would be the initial spark that later led to the formation of the New York-based UN LGBTI Core Group, which convenes more than 40 member states, the Office of the High Commissioner for Human Rights (OHCHR), and includes only two non-governmental organizations (NGOs)—HRW and Outright International—with the goal of working "within the United Nations framework on ensuring universal respect for the human rights and fundamental freedoms for all", particularly focusing on LGBTI persons' protection from violence and discrimination (UN nd).

[3] I mostly use SOGI in this article, instead of SOGIESC (meaning sexual orientation, gender identity, gender expression, and sex characteristics) because the mentions analysed are usually restricted to either status aspect covered by SOGI and tend to focus more on the original version of the YPs instead of the YP+10 document.

Political efficacy

As a result of campaigning and strategic dissemination of the Principles by advocates, the document would incontestably demonstrate their ability to "achieve political force" (Fraser 2007: 13), including through the positive reception by the Inter-American Court of Human Rights (IACtHR), and by the European Court of Human Rights, as well as meaningful citations of it by states during the Universal Periodic Review (UPR), by the UN Treaty Bodies (TBs), and by the UN Special Procedures (SPs) (Ettelbrick & Zerán 2010). In particular, all these global governance actors share different levels of *expectation of compliance* with the YPs. Put differently, the mentions of the YPs indicate, in varying degrees, the assumption that this is a document whose provisions are expected to be complied with, providing an important indicator of the YPs' political efficacy.[4]

When questioning the applicability of the Habermasian public sphere theory (Habermas 1989; 1996) in the transnational framework, Nancy Fraser offers a decoupling of the two necessary conditions for political efficacy: translation and capacity. *Translation* refers to the possibility of communicative power produced by the "publics" being "translated first into binding laws and then into administrative power" (Fraser 2007: 22). Addressing only "binding laws" does not make sense in an international law framework, where non-binding rules play a crucial role, especially within human rights structures. Rather, it would suffice to think in terms of norm creation—to what extent a given public has been successful in creating a new normative document. In turn, the *capacity* condition alludes to public power's ability to implement this "discursively formed will to which it is responsible" (Fraser 2007: 22). Inquiring into the latter condition is beyond the scope of this article. Therefore, the focus will remain on how different mechanisms potentially frame the YPs as a normative source of obligations within IHRL.

Expectation of compliance

The use of compliance as a means to assess the state of international law is frequently contested (Dunoff 2019). The source of contestation can be either because "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin 1979: 47), or because interpretation may complicate defining if

[4] Although I follow Fraser's terminology of "political efficacy", this could also be understood as a matter of descriptive legitimacy. That is, depending "on whether an institution is perceived as legitimate, rather than on whether it is legitimate as a matter of normative theory" (Bodansky 2012: 328).

a norm has indeed been complied with (Howse & Teitel 2010). The fact is that compliance itself may give few clues regarding what international law is and what degree of influence it exercises over states and other actors. This is why I suggest employing not compliance, but the *expectation of compliance*, as relevant evidence of a document's political efficacy and the possibility of recognition of its normative value in international law.[5] In this context, I define expectation of compliance as the public signalling, by either states or international legal or political bodies, that an actor (most often a state) should comply with a given norm or with a document containing a set of rules. Put differently, the expectation of compliance can be identified by assessing whether states and international bodies have indicated that other actors should follow the provisions of a document, rather than evaluating whether the actor has indeed complied with the provisions. When, for instance, a state makes a recommendation during the UPR to other states to follow a specific rule, they assume the norm's legitimacy for a future expectation of compliance regarding themselves. Likewise, recommendations issued by international bodies for states to follow a given provision implicitly recognize it as a valid rule while demonstrating the expectation that it should be complied with. As such, expectation of compliance shows the legitimacy that is ascribed to these documents whose provisions are being recommended for other parties to comply with.

In this sense, the expectation of compliance is closely related to the role of effectiveness in international law. According to Kal Raustiala, "an effective rule is simply a rule that leads to observable, desired behavioural change. Effectiveness is the measure of that change" (Raustiala 2000: 394). Expectation of compliance may be the first sign of a rule's effectiveness. Even if a state has not changed its behaviour meaningfully in relation to something, recognizing that others should comply with a given document is the result of being influenced by it. A small reorientation, but a behaviour change, nonetheless. This may seem trivial when considering laws made by states, but it has a crucial function in considering the possibility of international law-making by civil society and other actors.

At first, it may appear counterintuitive to imagine that a state would recommend to another one to follow a given rule if they (the recommending party) do not comply with it themselves. But precisely because interpretation leaves so much space for understanding what the rule *is*, it is not so unlikely that, applying different standards, opinions about non-

[5] It is true, of course, that the YPs may not be seen as only one norm, considering the range of different obligations they proscribe. However, for the purpose of this analysis I am considering them as a unit, so that it is possible to measure their overall impact in transnational spaces.

compliance may diverge (Howse & Teitel 2010). Hence, the expectation of compliance provides a more objective criterion for determining the existence of a norm without entering the discussion of its content. In addition, as the YPs have a set of different obligations, it may be the case that states only partially comply with them. Nevertheless, when referring to one of the principles, states and experts in human rights bodies recognize the legitimacy of the document as a whole and illustrate its efficacy. Where a more traditional approach would view this only as a process of customary law formation, I want to stress the possibility of seeing it as a direct attempt at the application of rules crafted by international civil society.

In this sense, the expectation of compliance with the Principles, and therefore their political efficacy, can be seen in different spheres of international legal practice. Aside from their use by domestic bodies mentioned before, states rely on the YPs during the UPR to provide recommendations to their peers, both acknowledging part of their normative content and further (re)constructing the document's legitimacy through its citation. A similar effect can be seen in the mentions to the document by UN human rights TBs, including the Committee Against Torture (CAT) (2011a; 2011b; 2016), the Human Rights Committee (HRCtt) (*G v Australia* 2017), the Committee on Economic, Social, and Cultural Rights (CESCR) (General Comment (GC) No 20 2009: 20), and the Committee on the Elimination of Discrimination against Women (*Rosanna Flamer-Caldera v Sri Lanka* 2022); as well as its use by different UN SPs, including the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI); the Special Rapporteur on the right to privacy (SR Privacy); the Special Rapporteur on the situation of human rights defenders (SR HRDs); the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture); the Special Rapporteur on the right to education (SR Education); the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health); the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (SR Terrorism); and the Special Rapporteur on violence against women and girls, its causes and consequences (SR VAWG). Finally, the YPs arguably acquire the status of a source of international law, too, from the ways international human rights courts refer to them—either in a more timid manner, such as the European Court of Human Rights (eg *Zontul v Grèce* 2012; *Hämäläinen v Finland* 2014; *AP, Garçon and Nicot v France* 2017; *X v The Former Yugoslav Republic of*

Macedonia 2019) or in the notoriously progressive stance assumed by the IACtHR (eg *Duque v Colombia* 2016; *Advisory Opinion* OC-24/17 2017).

Both the quantity and especially the *quality* of each of these mentions and instances of application of the Principles serve to demonstrate the success of the initiative and their undeniable political efficacy. As Boris Dittrich deftly summarized in very few words during our interview, "the strategy with the Yogyakarta Principles was to highlight that LGBT rights are human rights" (Dittrich, Interview with the author, July 2022). And, as the next section's analysis suggests, they were successful in their task.

Queer source(s) of law

As far as traditional approaches go, Article 38 of the Statute of the International Court of Justice lists all available sources of international law,[6] which would include international conventions (expressly agreed upon by *states*), international custom, and the general principles of law; judicial decisions and legal doctrine reside there as subsidiary sources. While the overreliance on the categories offered by Article 38 conceals (or attempts to conceal) its historical colonial origins (Chimni 2018), it also elides from the debate the role of other, non-state, actors in producing the law—sticking to the sources of the provision as if stating an all-encompassing truth of the reality of the legal field forecloses the possibility of even considering civil society as legitimate lawmaker. In this sense, a strictly positivist approach to the subject leaves non-state actors out of the realm of intelligibility in the exercise of this specific legal function and consequently renders the notion of "civil society international law-making" an oxymoron. Part of overcoming this mode of thinking requires that we approach international legality as a multifaceted category, instead of focusing on what characterizes the binary distinction between binding and non-binding rules. To be sure, many, if not most, classic approaches

[6] As with other approaches, the label of "traditional" does not cover a monolith and nuance is also present therein—for one possible framing of "traditional approaches", see Bianchi (2016: chapter 1). However, even if the recognition of "other possible sources of international law" are still acknowledged, the analysis of sources is invariably guided by the provisions of Article 38, and the broadening of legal categories can be often dismissed, for instance, through the claim of "confusion between law-making, law-determining and law-evidencing", or at best characterizing it as a possible evidence of custom provided that *opinio juris* is demonstrated (eg Shaw 2017: 85). Likewise, the mention to "soft law" often accompanies the caveat that, in fact, "soft law is not law" (Shaw 2017: 87); and the value of legal acts that fall outside Article 38, such as unilateral acts of states or decisions of international organizations, is eventually asserted based on the thin differentiation of the sources of international law listed in the said Article and "sources of obligation" (see ibid: 90); or, yet, these other acts are recognized as a "*lacune*" or "*source oubliée*" from Article 38, even if only some acts can legitimately be ascribed this place of valid-albeit-forgotten-source (Pellet & Müller 2019: 38; Pellet 2021: 184-185). For yet another "traditional" take on the issue, see Crawford (2019: 18-44).

likewise place the production of soft law under state monopoly, as they more clearly do with hard law instruments, and would not confer the legal label to any civil society practices or documents. In what follows, I approach international law-making despite these differentiations.

In this context, the meaning of *queer* source(s) of law is twofold. On the one hand, it refers to the legal production taking place outside the traditional limits of international legal practice set out by Article 38. In other words, it refers to the mobilization of legal discourse by civil society in ways that fall outside the state-centric arrangement, which only recognizes the legitimacy of state-produced law. What the evidence ahead demonstrates is that, despite lacking the *formal* requirements that would confer upon the YPs the status of a legal source, they are still applied by international actors *as if* they were one—and, through this process, they become one. On the other hand, the YPs are a queer source because they establish obligations that directly affect the lives of queer people. In a way, they inaugurate many obligations regarding SOGI that had never been codified or consolidated in any other international legal documents. Thus, they serve as a source for judges or experts who need a source to justify progressive decisions on queer rights within the discursive economy of *legal* discourse. As such, they provide the necessary instrument for actors who were already willing to rule favourably on issues regarding SOGI and LGBTI+ rights but who lacked some legal foundation to do so.

What the notion of a queer source of law suggests, then, is giving a "queer use", to borrow Sara Ahmed's conceptualization (Ahmed 2019), to the framework that limits the definition of what is (and what can be recognized as) a source of international law. In this sense, following Ahmed (2019: 199), "queer use as when you use something for a purpose that is 'very different' from that which was 'originally intended'." Reclaiming, and demonstrating through the empirical evidence ahead, the YPs as a queer source of law troubles the traditional understandings of what sources are and opens up new possibilities to (re)thinking how this *straight* legal category can be broadened—or, as it were, queered.

[C] APPLYING THE YOGYAKARTA PRINCIPLES: MENTIONS OF THE YPs BY GLOBAL AND REGIONAL HUMAN RIGHTS MECHANISMS

This section provides a *qualitative* analysis of mentions of the YPs by relevant actors of the international human rights system, including its citation by states during the UPR, by the UN SPs, by the UN human rights TBs, by the IACtHR, and by the European Court of Human Rights (ECHR). In this sense, the sample of analysis includes all the main global human rights-monitoring mechanisms, as well as all the regional mechanisms which have mentioned the YPs in their case law (as there are no cases at the African Court on Human and Peoples' Rights where the Principles are cited).[7] As such, it further substantiates the argument introduced above by identifying how the expectation of compliance may play a role in understanding the normative character of the YPs and their political efficacy. With variations depending on the mechanism analysed, the temporal frame covered by the analysis includes documents available until the end of 2024—judgments or reports published after that were not included in the research. Additionally, the documents analysed are limited to the data available in the databases chosen for the research, as indicated below. Therefore, this is not meant to offer an exhaustive analysis of every single mention of the Principles made by those bodies, but only to use the qualitative examination of the cases and reports recorded in the databases to infer how different actors perceive the YPs' legal nature. Moreover, because of the focus on international bodies, this small sample leaves out a number of domestic bodies that could be used to measure the Principles' political efficacy and might merit future research.

The Universal Periodic Review

The UPR is one of the many mechanisms of the UN Human Rights Council (HRC). Through the UPR, each state is periodically evaluated regarding the fulfilment of its human rights obligations (Schutter 2014). In this

[7] An in-text search in all the 'finalized' cases with a decision on the merits on the official website of the African Court on Human and Peoples' Rights (AfCHPR) indicated that the Court has never mentioned the YPs in its judgments, which is the reason why the AfCHPR is not included in the sample analysed that otherwise includes judgments from the other two existing regional human rights courts. The absence of mentions can be explained both by the fact that the AfCHPR has been created relatively recently when compared to its Inter-American and European counterparts (therefore having decided on a smaller number of cases), but especially because the Court has not yet ruled on the merits of any case regarding SOGI. Evidently, in the only thematic related case, the *Advisory Opinion No 002/2015* (2017), concerning the observer status of the NGO Coalition of African Lesbians (CAL) before the African Commission on Human and Peoples' Rights, the Court declared that it could not deliver the Advisory Opinion because the NGOs which had requested it did not fulfil all the requirements to access the Court's jurisdiction.

State	Recommendations			
	Recommended	**Received**	**Supported**	**Noted**
	Canada (1)	Albania (1)	Albania (1)	Albania (0)
	Czechia (1)	Canada (1)	Canada (1)	Canada (0)
	Finland (1)	Chile (1)	Chile (1)	Chile (0)
	Malta (1)	Czechia (1)	Czechia (1)	Czechia (0)
	Netherlands (4)	Dominica (2)	Dominica (0)	Dominica (2)
	Norway (1)	Estonia (1)	Estonia (0)	Estonia (1)
	Panama (2)	Finland (1)	Finland (1)	Finland (0)
	Slovenia (6)	Grenada (1)	Grenada (0)	Grenada (1)
	Spain (1)	Jamaica (1)	Jamaica (0)	Jamaica (1)
	Sweden (4)	Malta (1)	Malta (0)	Malta (1)
	-	Mauritania (2)	Mauritania (0)	Mauritania (2)
	-	Panama (1)	Panama (1)	Panama (0)
	-	Peru (2)	Peru (1)	Peru (1)
	-	St Kitts & Nevis (1)	St Kitts & Nevis (0)	St Kitts & Nevis (1)
	-	San Marino (1)	San Marino (0)	San Marino (1)
	-	Serbia (1)	Serbia (1)	Serbia (0)
	-	Sweden (1)	Sweden (0)	Sweden (1)
	-	Ukraine (2)	Ukraine (0)	Ukraine (2)

Table 1: Distribution of UPR recommendations with mention to the YPs by State. Source: elaborated by the author.

sense, states' mention of the YPs in the UPR recommendations is an important indication that certain states, at least those that have made the recommendations, consider the YPs to contain human rights norms that should be applied.

I used the search tool in the Universal Human Rights Index, a database provided by the OHCHR, to select the relevant recommendations.[8] The results indicated a total of 22 recommendations mentioning the term "Yogyakarta Principles" since the beginning of the review cycles. For someone familiar with the mechanism, this might come across as an insignificant number. After all, by 2021, sexual orientation and gender identity alone had already been referenced more than two thousand times since the first UPR cycle (McGoldrick 2016; Galil 2020). Nonetheless, my primary concern is to qualitatively analyse those appearances, in order to better understand how states consider the YPs. In Table 1, I present the distribution of the recommendations by state.

Examining the recommendations more closely,[9] it is possible to see that they vary from broad comments regarding the application of the

[8] The search was first conducted on 19 November 2021 with the filter "UPR" in the mechanism field. I ran the search a second time on 11 December 2024, obtaining the same results. "Yogyakarta Principles" was the defined search descriptor. For confirmation, I likewise conducted the same search on the UPR Info database, obtaining the same results.

[9] See Table 2 at the end of the article for a summary of the recommendations mentioning the Yogyakarta Principles.

YPs to their use concerning particular matters—like decriminalization of same-sex sexual relations, implementation of legal gender recognition, and elaboration of anti-discrimination legislation. However, the overall tendency was to recommend the document without specification. The language used could be summarized in the following pattern groups: 1) apply/follow/consider using the YP; 2) undertake measures or adopt legislation in line with/develop comprehensive policy instruments based on/harmonize legislation in accordance with the YPs. These appeared either alone or, more frequently, conjugated with the idea of having the YPs as a "guide to assist policy development".[10] The only recommendation to directly signal the YPs as a form of interpretation of other human rights law (and not as a norm in itself) was made by Sweden.[11]

Balancing this set of results, it is interesting to notice that there is indeed an expectation of compliance with the YPs by some states, namely the 10 recommending ones. Despite being addressed in the diplomatic suggestive language that characterizes the UPR, they attribute a normative force to the Principles. Something that is reinforced by the support of the recommendations by eight of the receiving states. They appear to see it as a norm of international law, be it binding or not, and expect it to be followed by their peers.

The United Nations Human Rights Treaty Bodies

The UN TBs are treaty-based mechanisms responsible for monitoring the implementation of UN human rights conventions. They are judicial-like bodies that deliver authoritative interpretations of their respective human rights conventions. Among their functions are: reviewing states' commitment to their human rights obligations; assessing individual cases; and issuing GCs interpreting the content of specific human rights provisions.

[10] Eg recommendations by Slovenia to Czech Republic (2008) and to Finland (2008); and by the Netherlands to Chile (2009).

[11] It reads: "Take all necessary measures to ensure the full enjoyment of human rights by lesbian, gay, bisexual and transgender persons, as stipulated by the principle of non-discrimination established under international human rights law and articulated in the Yogyakarta principles." See: Recommendation made by Sweden during the session of review of Jamaica in 2011 at the UPR.

To select the documents for analysis, I proceeded again with the search in the Universal Human Rights Index.[12] The database shows only concluding observations and/or recommendations containing the specified expression. It does not display other types of manifestations from human rights mechanisms. Even though the YPs might have been mentioned in other treaty bodies' documents, according to the database, the CAT is the only one to have included them in its "concluding observations" regarding states' reviews.[13] To broaden the search, I consulted the OHCHR Jurisprudence Database[14] and the UN Treaty Body Database.[15] They each identified one additional mention of the YPs, respectively, regarding a View on an individual communication by the HRCtt and a GC adopted by the CESCR.

The CAT is the UN TB responsible for monitoring the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Among its functions is the periodic review of states' efforts concerning the scope of the Convention. The search result indicated a mention of the YPs in three different reviews conducted by the CAT. The first of them was the 2011 consideration of the report submitted by Mongolia. Under "discrimination and violence against vulnerable groups", the Committee noted that the state party should "establish effective policing, enforcement and complaints mechanisms with a view to ensuring prompt, thorough and impartial investigations into allegations of attacks against persons on the basis of their sexual orientation or gender identity *in line with* the Yogyakarta Principles" (CAT 2011a, emphasis added).

[12] Similarly to the procedure I followed with the UPR, the Universal Human Rights Index search was first conducted on 19 November 2021 with the filter "Treaty Bodies" in the mechanism field. I ran the search a second time on 11 December 2024, obtaining the same results. "Yogyakarta Principles" was the defined search descriptor. For confirmation, I likewise conducted the same search on the ILGA World database, which only includes documents since 2016 meaning that the search found only one match, coinciding with the only post-2016 mention found in the previous search.

[13] Even within the context of the CAT, the principles have been mentioned in other documents, but it will not be explored here considering the focus on direct recommendations/concluding observations. Or, for instance, the Committee on the CEDAW has referenced the Principles in its View on *Rosanna Flamer-Caldera v Sri Lanka* (2022).

[14] Research conducted on the OHCHR Juris Database; advanced search parameter, "Yogyakarta", on 8 January 2025.

[15] On 8 January 2025. Using the UN Treaty Bodies Database, I selected the following search parameters: document search; Filter by Document Type "General Comment/Recommendation"; Filter by Symbol/Dates 01.01.2007-31.12.2024. Having downloaded all 83 documents resulting from the search, I proceeded to a "word query" using the software NVIVO, searching for the word "Yogyakarta".

The next appearance would be in June of the same year, during the revision of Finland. In a sentence constructed much like the recommendations seen in the UPR, the CAT indicated that the state should "consider using the Yogyakarta Principles … as a guide to assist in the development of its policies" (CAT 2011b). Finally, the last reference to the principles in the context of the concluding observations would come up again during a review of Mongolia, but in 2016. On this occasion, the Committee reiterated its previous suggestions to the state, saying it should adopt measures "in line with" the YPs (CAT 2016).

On all three occasions that the CAT included the YPs in its concluding observations, it expressed the understanding that states parties should observe the obligations outlined in the document to the Convention. Once more, it is possible to see an expectation of compliance with the principles. This time not coming directly from states, but from the experts who compose the Committee. This provides more evidence of the document's political efficacy and its perception as establishing international legal obligations.

Another reference found in the research was made by the CESCR, the TB responsible for monitoring state compliance with the International Covenant on Economic, Social, and Cultural Rights. In its GC No 20 ("Non-discrimination in economic, social and cultural rights"), regarding Article 2, paragraph 2, of the Covenant, the Committee alluded to the Principles' definitions of "sexual orientation" and "gender identity" (GC No 20, "Non-discrimination in economic, social and cultural rights 2009": footnote 25). Providing a definition of SOGI became one of the most significant collateral contributions made by the YPs, which partially helped to circumvent arguments that the two concepts could not be included in international documents due to a lack of consistent definition. The GC, however, does not go further to directly apply any of the principles contained in the document.

The last TB, within the search's sample, to reference the YPs was the HRCtt. In the View on *G v Australia* (2017), the YPs are cited thrice. The individual communication addressed the possible violation of rights under Articles 2(3), 17, and 26 together with 2(1) of the Covenant, due to the state's imposed requirement of "spousal consent" for the full gender legal recognition of the applicant, who was a trans woman. All mentions appear under the Committee's summary of the "author's comments on the State party's observations" (*G v Australia* 2017). That is because the author used the YPs as one of the legal documents to substantiate their claim before the Committee. Similar to what happens in cases at the

ECHR analysed ahead, despite not directly addressing the Principles' legal natures, the HRCtt's View reproduces the reference to it without any caveats regarding its legal value. For instance, the document is cited along with other authoritative sources from state-empowered bodies:

> Given the importance afforded to a person's gender identity in terms of privacy by the Committee, the European Court of Human Rights and the Office of the United Nations High Commissioner for Human Rights, and in the Yogyakarta Principles, the test for proportionality is high (*G v Australia* 2017: 12).

The United Nations Special Procedures

The UN SPs fall within the umbrella of human rights mechanisms available to the UN HRC. There are currently 46 thematic and 14 country SPs' mandates, executed by independent human rights experts who are tasked with conducting country visits, producing reports, and issuing communications to member states with regard to individual cases (OHCHR nd). Most importantly, they are responsible for a vast production of international legal discourse on human rights and their interpretation, through which they contribute to developing, consolidating, and *changing* the norms of IHRL.

Applying the same search parameters as for the two previous mechanisms, the OHCHR database registered no results for mentions of "Yogyakarta Principles" under the filter of "Special Procedures".[16] The same search, however, on the ILGA World SOGIESC database indicated 29 entries, which are analysed in this subsection.[17]

After eliminating the duplications in the database results, 13 single entries were left for analysis. The mentions of the YPs recorded in the database encompassed manifestations of eight different mandates, including: the IE SOGI, the SR Privacy, the SR HRDs, the SR Torture, the SR Education, the SR Health, the SR Terrorism, and the SR VAWG. Following the classification established by the ILGA database, the nature of these appearances included: mentions during country visits; recommendations in reports to the HRC; mentions in reports to the HRC; recommendations in reports to the UN General Assembly (UNGA); mentions in reports to the UNGA; and communication to state members.

[16] Last search conducted on 8 January 2025 at the Universal Human Rights Index.

[17] Search date: 16 December 2024. ILGA World Database; Filter: Special Procedures; 29 entries. Despite informing that the systematic collection of data only includes documents from 2016, the database search still showed documents dating from before that (ranging from 2009-2022). All documents were included in the analysis. For a smaller-scale analysis of the YPs' impact shortly after its launch, see the report by Ettelbrick & Zerán (2010).

The IE SOGI has mentioned the Principles on at least three distinct occasions. While the first one, during the country visit to Argentina, listed the publication of an illustrated version of the YPs among other positive trends, the other two mentions more directly address the Principles' legal nature (Report of the IE SOGI on His Mission to Argentina (A/HRC/38/43/Add.1) 2018: paragraph 35). In its 2021 report to the HRC ("The Law of Inclusion"), the IE indicated that the document has described the "process of reception of gender and of gender identity and expression in international human rights law" (Report of the IE SOGI (A/HRC/47/27) 2021: paragraph 35) and proceeded to enumerate the many domestic and international bodies that have referenced it.[18] The report goes on to explain that the "intensity of this reception" is due to a "standard identification methodology" which was "focused on treaty law, international custom, national practice, judicial decisions and doctrine, many of which are referenced in the present report and all of which – pursuant to Article 38(1) of the Statute of the International Court of Justice – are among the sources of international law" (ibid). Whereas this framing refers back to the idea that the YPs' only task was to identify already in place sets of international norms, it still reinforces its legitimacy through the citation, as there is no other document that congregates the same sets of obligations to be cited in its place. In this sense, the task of merely "identifying" or "codifying" norms that would arguably already exist is also a form of establishing and shaping the content of those very norms (Milanovic & Sivakumaran 2022: 1864).

The last mention by the IE was in a communication regarding the Scottish Parliament's deliberation on gender identity legislation. On this opportunity, similarly to the HRC report, the IE SOGI suggests that the "processes of recognition of gender, and gender identity and expression in international human rights law have been described in the Yogyakarta Principles, a set of standards identified between 2009 and 2018" (Madrigal-Borloz 2022: 7). Besides citing the many references to the Principles in international mechanisms, as before, his communication adds a new clarification: the YPs' process "was not

[18] From the IE SOGI report: "At the date of preparation of the present report have been referenced in universal periodic review proceedings, reports of the United Nations High Commissioner for Human Rights, reports of special procedures and treaty bodies, judgments of the European Court of Human Rights, judgments and advisory opinions of the Inter-American Court of Human Rights, and case and thematic reports of the Inter-American Commission on Human Rights, as well as countless decisions of domestic tribunals including the Supreme Courts of Botswana, India and Nepal, national laws, such as of Argentina and Belgium, and public policy as is the case with Colombia and Sweden." See Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity (A/HRC/47/27) 2021.

one of *obligation-setting* (as some narratives erroneously argue) but rather of *standard identification*" (Madrigal-Borloz 2022: 8, original emphasis). The denial of innovation on the normative content again sustains its authority and legitimacy, which would be drawn from other state-agreed documents, as addressed above. In this case, the hint at "narratives" that erroneously identify the document's legal nature had a precise addressee: the IE's communication to the Scottish Parliament had been issued to counter the arguments put forward by another SP mandate holder—the SR VAWG. In her letter to the legislative house, the SR VAWG acknowledged that "the Yogyakarta principles advocate for the right to define one's own gender with regards to legal gender recognition. They are however not binding" (Alsalem 2022: 3). There are two relevant aspects to be extracted from this latter excerpt. First, the SR does not deny the legal nature of the Principles, but only their bindingness. Second, the mere need to tackle the provisions set forth by the YPs demonstrates the level of influence they have reached—were they irrelevant, no counter-argument would have been required. In a way, the Principles have become a mandatory reference on SOGI debates and IHRL, even if this reference is made to undermine their legal value. As such, this further exemplifies their political efficacy by showing how these actors must consider their provisions in any legal reasoning in this issue area.

Looking at the other SPs' mandate holders, it is possible to identify a similar pattern to the one seen in the UPR mentions. The references made by the SR Privacy vary between two types of frames. First, identifying the YPs as a model of "good practices" regarding SOGI (Report of the SR Privacy (A/HRC/40/63) 2019: paragraph 98). Second, making direct recommendations regarding their application by states. According to one of the reports, "states and non-state actors should: … (l) Make sure that sports organizations integrate the Yogyakarta Principles and the update thereto of 2017" (Report of the SR Privacy (A/HRC/43/52) 2020: paragraph 37). Moreover, when addressing the implementation of recommendations, the SR emphasizes that the implementation should "be informed by the consideration of other internationally recognized instruments, such as … the updated Yogyakarta Principles" (ibid: paragraph 25). In this last mention, the YPs are listed next to legally binding instruments such as the UN Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In turn, reports by the SR HRDs and the SR Torture refer to the YPs as a "soft law instrument" (Report of the SR HRDs (A/74/159) 2019:

paragraph 111) or as an "international human rights standard" that has been violated (Report of the SR Torture (A/HRC/31/57) 2016: paragraph 48). The latter SR still made an in-passing mention to the content of two principles from the YPs, citing the mention of the same principles by the SR Health (Report of the SR Health (A/64/272) 2009: paragraph 46), without, however, qualifying its legal nature (Report of the SR Torture (A/HRC/22/53) 2013: paragraph 38). Conversely, in a report to the UNGA, the SR Education defines the Principles as a "very important contribution" to debates on sexual education, and adds that "the Special Rapporteur fully endorses the precepts of Principle 16, referring specifically to the right to education" (Report of the SR Education (A/65/162) 2010: paragraph 23). Finally, in a report presented to the UNGA, the SR Terrorism, employs the YPs at least twice to sustain the arguments included in the document. In the one in-text mention, the report does not define the legal nature of the YPs. Still, it indicates state obligations arising from the Principles:

> The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity identify that States must "ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex … reflect the person's profound self-defined gender identity" (Report of the SR Terrorism (A/64/211) 2009: paragraph 48).

This final reference illustrates how the YPs are a readily available instrument for international actors to assign state obligation, regardless of whether they have looked for an alternative source stating the same type of provision. In this sense, it is possible to grasp how the YPs have achieved their own type of autonomous legitimacy, which has detached itself from the treaties and other legal documents from which the Principles allegedly drew their authority in the first place.

The Inter-American Court of Human Rights

Another important field for investigating the political efficacy of the YPs is the regional human rights courts. I will first examine the IACtHR case law. An analysis of SOGI-related cases identified mentions of the YPs in two different opinions delivered by the IACtHR: the judgment in the case *Duque v Colombia* (2016); and the *Advisory Opinion OC-24/17* (2017), requested by Costa Rica.[19]

The first case concerned the attempt of Ángel Alberto Duque to access his right to the "survivor's pension" provided by the Colombian state

[19] As it is in the case for the ECHR as well, and, differently from the other mechanisms analysed, the case law examined is limited by the search conducted until the end of 2021 (and therefore does not include later developments).

following the death of his partner. The state refused to recognize his right on the basis that they were in a same-sex relationship. In this case, Duque argued that he was a victim of discrimination because of his sexual orientation. The YPs appear twice in the document—once in the judgment delivered by the court, and once in a dissenting opinion presented by one of the judges. In the court's decision, the Principles are applied to sustain the argument of "sexual orientation" as a protected category of discrimination within IHRL, appearing alongside citations of views adopted by UN TBs.[20] The way the mention of the YPs appears in the Court's decision again signals an expectation that states comply with what is stipulated by the document. In this case, going even further than what could be observed in the UPR or the mentions in the CAT, it adopted a language usually associated with binding instruments, indicating that "states *shall*"[21] take measures to ensure the fulfilment of the discussed right.

The YPs were again mentioned in the dissenting opinion written by judge Eduardo Vio Grossi. He suggests that the YPs are *not* a norm under international law in any capacity whatsoever.[22] Judge Vio Grossi is criticizing the opinion delivered by the majority of the court precisely because they recognized a normative value in the YPs. Nonetheless, by affirming his view that the YPs are not a norm of international law, he is recognizing that, as far as the court's ruling goes, the principles do indeed contain a normative value.

[20] It reads: "110. On the other hand, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity establish in Principle 13 that all persons have the right to social security and other measures of social protection, without discrimination on the basis of sexual orientation or gender identity. Therefore, States shall adopt all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance, health care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions, and benefits relating to loss of support of spouses or partners as a result of illness or death": *Duque v Colombia* (2016: paragraph 110). Translated by the author.

[21] The verb "*deberá*," which appeared in the original judgment, could be translated either as "should" or "shall". I chose "shall" because the text that follows is identical (even if without quotation marks) to the one in the YPs, and the word that appears in the original English version of the principles is "shall".

[22] It reads: "The Judgment even goes so far as to evoke the Yogyakarta Principles, which were not only adopted after the filing of the petition, but also were adopted by a group of 29 natural persons. Thus, at most, such document could well be considered as one, not the only or even the most relevant, of the expressions of the doctrine or as a claim, proposition or suggestion and, therefore, not as a norm of International Law and not even as interpretative of the Convention": *Duque v Colombia* 2016: 7, partially dissenting opinion of Judge Eduardo Vio Grossi. Translation by the author.

The second time that the IACtHR would apply the YPs was in the context of the *Advisory Opinion OC-24/17* (2017). The opinion was requested by Costa Rica and concerned two main issues: 1) state obligations regarding the right to gender identity and the change of name in official documents; and 2) rights derived from same-sex relationships. This time, the mentions of the principles were much more recurrent, cited more than 10 times in the document. The first group of citations appeared at the very beginning. The court referred to the YPs to establish the definitions of gender identity, gender expression, and sexual orientation. Later, it again drew from the document's provisions to illustrate states' obligations.[23] The expectation of compliance with the Principles appears in an even more accentuated manner in the Court's *Advisory Opinion*. Not only does it refer to its previous indication in *Duque v Colombia* (2016), but it goes further in listing other obligations that arise from the document, repeatedly indicating that the YPs establish/stipulate something that the state should observe.

The European Court of Human Rights

In the context of the ECHR, the use of the YPs to sustain judgments made by the court is more cautious, aligning with the Court's general reputation of being less progressive and more restrained in its judgments than its counterpart across the Atlantic (Huneeus 2011). Nevertheless, their mention in the court's case law indicates some degree of efficacy, even if they do not play as strong a role as in the Inter-American setting. Considering only the finalized judgments, the principles are mentioned in at least four cases.[24]

[23] It reads: "112. … Thus, the Yogyakarta Principles *establish the obligation of States* to … 129. … the Yogyakarta Principles *stipulate* that … 138. … the procedure … is *consistent with* the Yogyakarta Principles as these *stipulate* that … 148. … Similarly, the Yogyakarta Principles *stipulate* that … 155. In addition, the Yogyakarta Principles *have established* that … 196. In this regard, the Court has already indicated that Principle No. 13 of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, *establishes* … Therefore, 'States *shall* ….'". See *Advisory Opinion OC-24/17* 2017: paragraph 112, 129, 138, 148, 155, 196, emphasis added).

[24] As the ECHR has a considerable number of cases regarding sexual orientation and gender identity, it would not be possible to individually examine each one of them (as it was done with the cases from the IACHR). Therefore, I chose to rely on the search conducted by the Human Rights Documentation (HUDOC) database, which contains all case law from the ECHR. The full text search descriptors applied were "yogyakarta" and "yogyakarta principles". After deducting translation duplicates from the initial result (which showed nine cases), four cases were left to be examined. This search only considered the category "judgments."

Twice, the YPs were brought up in third-party interventions summarized in the court's judgment.[25] The first, in the case *Zontul v Grèce* (2012), regarded an intervention requested by the United States-based NGO, the Center for Justice and Accountability. The case concerned a Turkish migrant who was tortured after being detained by the Greek coastguard on the way to Italy. Among other reasons, the applicant argued a violation of Article 3 of the European Convention on Human Rights for being "subjected to sexual abuse (rape with a baton)" by one of the Greek officers (*Zontul v Grèce* 2012: paragraph 66). The YPs are referenced alongside several other international instruments that have binding force, all produced within the framework of international organizations, such as the Organization of American States and the UN. In this sense, the Principles are put together in the category without being questioned by the court in its judgment.

The principles were again referred to in a third-party intervention in the case *AP, Garçon and Nicot v France* (2017). This time, the mention starkly opposed the first one. The matter under discussion was the right to amend legal identity documents to reflect one's gender identity. ADF International, an organization notoriously active in the "anti-gender" movement (Kuhar & Paternotte 2018), was the one to submit the intervention, asserting, among other issues, that "no account should be taken of the Yogyakarta Principles … in examining these three applications, as *those principles did not reflect established international law* and went beyond what the Court had accepted hitherto" (*AP, Garçon and Nicot v France* 2017: paragraph 111, emphasis added). Differently from what could be concluded in a more superficial analysis, the denial of the YPs' legal force by ADF is more evidence of the reach of their influence within the international sphere. Were they insignificant or uncontroversially inapplicable, there would not be a need to deny their legal value before the Court.

[25] It reads: "81. Le CJA souligne la reconnaissance au plan international de la nécessité de renforcer la protection des droits des « minorités sexuelles ». Cette approche est corroborée par plusieurs *dispositions d'instruments internationaux* (l'article 13 du Traité de l'Union européenne, l'article 21 de la Charte des droits fondamentaux de l'Union européenne, la résolution du 3 juin 2008 de l'Organisation des Etats américains, *les Principes de Yogyakarta de la Commission internationale des juristes*, la Recommandation 2010(5) du 31 mars 2010 du Comité des Ministres du Conseil de l'Europe), par les législateurs nationaux (France, Royaume-Uni, Croatie, Suède, Roumanie), par les organes internationaux de contrôle (le Comité des Nations unies contre la torture, le Comité des droits de l'homme des Nations unies dans l'affaire Toonen c. Australie, la Commission européenne des droits de l'homme dans l'affaire Sutherland c Royaume- Uni (no 25186/94, décision du 1er juillet 1997, Décisions et Rapports 31) et la Cour dans l'arrêt SL c Autriche (no 45330/99, § 28, CEDH 2003-I), et par plusieurs juridictions nationales." See *Zontul v Grèce* 2012: paragraph 81.

The mention that perhaps shows more clearly a consideration of the legal force of the principles occurred in the case *Hämäläinen v Finland* (2014), in the dissenting opinion delivered by judges Sajó, Keller, and Lemmens. They referred to Principle 3 of the document to argue for removing the requirement of spouse consent to allow the applicant to have legal recognition of their gender identity (*Hämäläinen v Finland* 2014: paragraph 16). By doing so, the judges recognized the YPs as a relevant human rights norm when the document affirms that "no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity" (YPs 2007: 12). It contrasted with the opinion of the majority of the court that refused the claims under the argument that same-gender marriage was not recognized under Finnish law, which would require the applicant to divorce before getting the recognition of their gender identity.

The YPs would again be referred to in the judgment *X v The Former Yugoslav Republic of Macedonia* (2019). On this occasion, they were briefly mentioned in the Court's description of the facts, as the applicant used the principles as one of the legal bases for their request for rectification of legal documents in accordance with their gender identity. Although this was not included in the final reasoning, the legal nature of the principles was likewise not questioned by the judges (*X v The Former Yugoslav Republic of Macedonia* 2019: paragraph 9).

[D] CONCLUSION

International civil society organizations may sometimes do much more than merely influence states in law-making. This article has analysed how their *legal* production, even if outside the formal boundaries of authorized law-making actors, can find political efficacy. In this sense, the claim that the YPs were *interpreting* rather than *creating* human rights norms supported its normative legitimacy; even if, as the empirical analysis shows, they ended up codifying aspects of SOGI rights that thus far had not been inscribed in any international legal documents (Lelis 2025: 194-250). Consequently, as demonstrated above, the YPs are often seen as containing legal norms under IHRL, and the document's provisions have had a significant influence on different transnational actors, impacting the making of international law. For this reason, they stand out among other initiatives coordinated by civil society in attempting to advance the protection of queer human rights.

This article has demonstrated how the YPs provide a *queer* source of law for international human rights mechanisms to advance on SOGI

rights and analysed how different actors' expectations of compliance with the Principles offer evidence of their political efficacy. The nuanced forms in which various bodies might apply them notwithstanding, the analysis shows that the Principles have achieved an outstanding level of efficacy and figure prominently in the reasoning of recommendations and decisions regarding SOGI rights. As such, the findings presented above suggest that the YPs have achieved some level of normative force in international law. Most of all, this initiative and its effects provide an interesting platform for thinking about civil society's actions and its future role in norm creation within international law.

The regulatory gap filled by the YPs has led them to become an unavoidable source in legal debates around SOGI and IHRL, for both those seeking to advance the protection of these rights and those who would deny their recognition under international law. In this sense, by overcoming the lack of address with which the topic suffered in the official fora responsible for the making of IHRL, activists and experts behind the YPs' initiative offered to the international community, for the first time, a legally structured document, sustained by its alleged assembly of already existing law, that they could cite to support SOGI-related human rights claims. As such, they provided a legal source for *queer judgments*. In the same vein as Marko Milanovic and Sandesh Sivakumaran have noted about the International Committee of the Red Cross's (ICRC) study on customary international humanitarian law, "the lawyer citing the Study can not only say 'I didn't make this up;' she can also say that the ICRC didn't make it up either" (Milanovic & Sivakumaran 2022: 1896). The same applies to the YPs, which are there "just waiting to be cited" (Milanovic & Sivakumaran 2022: 1896). The continued citation of the Principles, in different contexts and by multiple human rights bodies, as analysed above, helps not only to demonstrate their impact but further roots the YPs' citational authority, which, combined with the "void-filling" nature of the Principles, makes the document an "obvious" (Zarbiyev 2023: 288, 295) resource to be cited, revealing the extent of its political efficacy.

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Table 2: Summary of UPR Mentions to the Yogyakarta Principles. Source: Elaborated by the author with data from the UPR reports

State under review	Recommending state	Recommendation	Status	Year
Czech Republic	Slovenia	*Interactive dialogue and responses by the State under review*: 25. Slovenia thanked the Government for preparing a comprehensive report and also thanked OHCHR for the very useful and comprehensive compilations of relevant information. It noted that the Czech Republic is still not a party to the Rome Statute of the International Criminal Court. Slovenia asked, and recommended, what obstacles there were to the ratification of this important international instrument, and if the Czech Republic intended to ratify it in the near future. Slovenia commended the Czech Republic on the adoption of the national action plan entitled "Priorities and procedures of the Government in promoting equality of women and men", and enquired about the concrete results of this action plan. Slovenia recommended the full integration of a gender perspective in the follow-up of the review process and that the Czech Republic consider using the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity as a guide to assist Czech human rights policies. *Conclusions and/or recommendations:* 14. To **consider using** the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity **as a guide to assist Czech human rights policies** (Slovenia).	Supported	2008
Finland	Slovenia	*Interactive dialogue and responses by the State under review*: 43. Slovenia asked the following questions: Slovenia commended the efforts of the Government of Finland to promote and protect the rights of persons belonging to minorities, especially the establishment of the Ombudsman for Minorities and the Advisory Board for Minority Issues. Slovenia requested further information about the practical influence of both institutions on the effective implementation of the rights of persons belonging to minorities. Secondly, resolution 5/1 states that a gender perspective shall be fully integrated in the UPR. Slovenia asked Finland to provide further details as to what it has done to achieve this in its consultations and the national report, and what has it planned for the next stages of review, including the outcome of the review. Slovenia recommended that Finland integrate a gender perspective fully into the follow-up process to the UPR review and would appreciate learning about plans in that respect. Slovenia welcomed the inclusion of sexual orientation in Finland's human rights legislation and anti-discrimination training activities. Slovenia recommended that the same coverage be provided for the grounds of sexual orientation and disability as for other grounds of discrimination, for example in areas such as the provision of services and health care. Slovenia also commended Finland on its commitment to strengthen protection and respect for all persons based on sexual orientation or gender identity. Slovenia recommended to consider using the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity as a guide to assist in its policy development and would welcome Finland's views on that. *Conclusions and/or recommendations:* 7. To provide the same coverage in national legislation and anti-discrimination training activities for the grounds of sexual orientation and disability as for other grounds of discrimination, for example in areas such as the provision of services and health care (Netherlands, Slovenia) and to **consider using** the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity **as a guide to assist in its policies** development (Slovenia).	Supported	2008

State under review	Recommending state	Recommendation	Status	Year
Peru	Slovenia	*Interactive dialogue and responses by the State under review*: 33. Slovenia asked about the lack of identification papers for more than 1.5 million persons, thus denying them full exercise of their rights. It enquired about recent measures to increase the population's confidence in the judicial system, especially with regard to combating corruption and increasing capacities of the judicial system. Slovenia expressed concern about the lack of access to health facilities for poor and marginalized communities, in particular women and children, and requested information about the steps undertaken to secure such access. While commending Peru's standing invitation to special procedures mandate holders, Slovenia requested further explanations with regard to the obstacles that prevented the visit of the Special Rapporteur on freedom of expression or opinion requested four years ago. Slovenia recommended that Peru (a) issue identification papers to those lacking them, (b) ensure that a gender perspective is fully integrated in the next stages of the Universal Periodic Review, including in the outcome, and that the gender perspective be systematically and continuously integrated in the follow-up procedure, (c) report regularly to the treaty bodies and to respond to special procedures' communications and questionnaires; and (d) consider applying the Yogyakarta Principles as a guide to assist in policy development. *Conclusions and/or recommendations*: 2. To **consider applying** the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity as **a guide to assist in policy** development (Slovenia).	Noted	2008
Ukraine	Slovenia	*Interactive dialogue and responses by the State under review*: 34. Slovenia noted the improvement of the situation regarding human rights and freedoms over the last years and the abolishment of the death penalty in 1999. While noting the incorporation of the Convention on Elimination of all Forms of Discrimination against Women into the Ukrainian law, it observed however that women are paid less for the same work, are rarely represented in top positions in the public and private sectors and do not enjoy equal access to employment. Slovenia asked about the measures Ukraine intends to adopt to improve this situation. Slovenia also observed that domestic violence still remains widespread and that shelters for victims of violence were few. It asked if Ukraine intended to increase the number and capacities of these shelters. It also noted that homophobia has increased in the last years and that the problems homosexual persons face in the work place with law enforcement bodies. It asked how Ukraine intends to promote tolerance and to increase education of public servants in this field. Slovenia recommended to Ukraine to report regularly to CEDAW; recruit more women for public office and to adopt measures requiring equal pay for equal work; include systematically and continuously, a gender- perspective into the follow-up process to the Universal Periodic Review; and to consider applying the Yogyakarta Principles on the Application of International Human Rights Law in relations to Sexual Orientation and Gender Identity as a guide to assist in policy development. *Conclusions and/or recommendations*: 5. To **consider applying** the Yogyakarta Principles on the Application of International Human Rights Law in relations to Sexual Orientation and Gender Identity as a **guide to assist in policy development** (Slovenia).	Noted	2008
Canada	Netherlands	Interactive dialogue and responses by the State under review: 33. The Netherlands commended Canada for its commitment to human rights, its active role in the Council as Vice-President and the constructive dialogue in the UPR process. It asked about OP-CAT ratification. It recommended: (a) that civil society be actively involved in the further UPR process of Canada; (b) reinstating the policy of seeking clemency for all Canadian citizens sentenced to death in other countries; and (c) strengthening and enlarging existing programmes and taking more and specific measures towards Aboriginals, particularly with regard to the improvement of housing, educational opportunities, especially after elementary school, employment, and that women's and children's rights are better safeguarded, in consultation with civil society. It welcomed the extension of equal rights to same-sex couples and protection from hate crimes on grounds including sexual orientation, recommending (d) that the Yogyakarta principles be applied as a guide to assist in further policy development. Conclusions and/or recommendations: 29. Apply the Yogyakarta principles as a guide to assist in further policy development (The Netherlands).	Supported	2009

State under review	Recommending state	Recommendation	Status	Year
Chile	Netherlands	Interactive dialogue and responses by the State under review: 25. The Netherlands requested more details on the proposed anti-discrimination law pending in Parliament. It recommended that Chile (a) seek accountability for abuses by the police and ensure that civilian authorities investigate, prosecute and try such abuses; (b) take the necessary measures to prevent outlawing or penalizing legitimate protest activities or social demands by indigenous organizations and peoples and review ways to amend the Anti-Terrorism Act 18.314 according to recommendations of the Human Rights Committee; (c) prohibit by law, and include in equality programmes and policies, discrimination on the grounds of sexual orientation or gender identity and use the Yogyakarta principles as a guide to assist policy development; and (d) ratify CEDAW-OP. Conclusions and/or recommendations: 28. Prohibit by law, and include in equality programmes and policies, discrimination on the grounds of sexual orientation or gender identity (Sweden) and follow the Yogyakarta principles as a guide to assist policy development (Netherlands).	Supported	2009
Malta	Netherlands	Interactive dialogue and responses by the State under review: 49. The Netherlands, noting the large number of migrant arrivals in Malta, said international cooperation was required. Welcoming Malta's cooperativeness with the Special Rapporteur on the human rights of migrants, it expressed concern about the increasingly restrictive reception and legal procedures for migrants. It recommended (a) strengthening efforts to make the Maltese legal system for asylum-seekers effectively accessible, preventing delays and administrative obstacles and guaranteeing to asylum seekers the necessary procedural safeguards in detention according to international standards. While welcoming efforts to combat discrimination, including on sexual orientation grounds, it noted reports of continued discrimination in this regard, as well as NGO reports on the denial of legal recognition of same-sex partnerships. The Netherlands recommended (b) taking further measures to advance equality on the ground of sexual orientation and gender identity, and among others using as a guide for policy-making the Yogyakarta principles. Noting the non-submission of reports to the Human Rights Committee since 1996, it recommended (c) strengthening efforts with regard to timely reporting to treaty bodies, and especially submitting its second report to the Human Rights Committee as soon as possible. Conclusions and/or recommendations: 22. Do its utmost to combat all forms of discrimination, including discrimination based on sexual orientation (Belgium); take further measures to advance equality on the ground of sexual orientation and gender identity, using the Yogyakarta Principles, among others, as a guide for policy-making (Netherlands).	Noted	2009

State under review	Recommending state	Recommendation	State under review	Year
Mauritania	Sweden	Conclusions and/or recommendations: 93.2. Include sexual orientation and gender identity in non-discrimination laws and programmes, and promote tolerance and non-discrimination regarding sexual orientation or identity, in line with the Yogyakarta principles (Sweden);	Noted	2011
Panama	Norway	Conclusions and/or recommendations: 70.13. Harmonize all national legislation and elaborate policies in accordance with the Yogyakarta principles (Norway).	Supported	2011
Peru	Slovenia	Conclusions and/or recommendations: 116.32. Consider applying the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity as a guide to assist in policy development (Slovenia);	Supported	2011
Ukraine	Slovenia	Conclusions and/or recommendations: 97.44. Apply the Yogyakarta principles in policy development (Slovenia).	Noted	2012
Mauritania	Sweden	Conclusions and/or recommendations: 129.37 Ensure that the death penalty is not applied to consensual same sex-relations between adults, and that the Penal Code does not criminalize such activity, and include sexual orientation and gender identity in non- discrimination laws and programmes, and promote tolerance and non- discrimination on grounds of sexual orientation or identity in line with the Yogyakarta Principles (Sweden);	Noted	2015
Grenada	Panama	Conclusions and/or recommendations: 94.56 Harmonize its domestic legislation with international law and the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity by decriminalizing consensual relations between adults whose gender expression does not conform to social norms and expectations (Panama).	Noted	2020
Sweden	Malta	Conclusions and/or recommendations: 156.159 Adopt a new gender recognition law to ensure a quick, transparent and accessible mechanism based on self-definition, detaching medical procedures from legal gender recognition, in line with the Yogyakarta Principles (Malta).	Noted	2020
St & Nevis	Panama	Conclusions and/or recommendations: 130.74 Harmonize national legislation in line with international law and with the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity by decriminalizing consensual sexual relations between adults whose gender expression is not heteronormative (Panama).	Noted	2021

State under review	Recommending state	Recommendation	State under review	Year
Serbia	Netherlands	Interactive dialogue and responses by the State under review: 22. The Netherlands commended Serbia for its vibrant democracy and the protection of minorities provided for in its 2006 Constitution. Referring to paragraph 27 of the summary of other stakeholders' contributions, it wished to know how Serbia guarantees the safety of human rights defenders and an independent press, and recommended that the Government adopt a national plan for the protection of human rights defenders and independent journalists. It asked for special attention for human rights defenders in the area of lesbian, gay, bisexual and transgender rights and recommended that the protection of such activists be included in the national plan and that Serbia apply the Yogyakarta Principles as a guide for new policies on lesbian, gay, bisexual and transgender rights. Conclusions and/or recommendations: 20. To promote the work of human rights defenders (Sweden, Canada, Switzerland) and take all necessary measures to ensure their safety (France, Czech Republic) and freedom of expression (Switzerland), and ensure they have a favourable working environment (France); to follow up the recommendation of the Special Representative of the Secretary-General on the situation of human rights defenders and denounce more forcefully verbal and physical attacks against human rights defenders (Germany, Norway); to adopt a national plan of action to enhance the protection of human rights defenders and independent journalists (Netherlands), to develop and implement a comprehensive strategy to protect human rights defenders, including those working on behalf of the rights of lesbian, gay, bisexual and transgender persons (Canada); to apply the Yogyakarta Principles as a guide for new policies in the area of lesbian, gay, bisexual and transgender rights (Netherlands); and ensure the effective investigation of alleged attacks against human rights defenders (Canada, Ireland).	Supported	2009
Albania	Spain	Conclusions and/or recommendations: 7. Include sexual orientation and gender identity specifically in anti- discrimination legislation, and consider using the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Spain).	Supported	2010
Dominica	Canada & Sweden	Conclusions and/or recommendations: 6. Consider utilizing the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity as a guide to assist in policy development (Canada); […] 8. Undertake measures to promote tolerance and non-discrimination on grounds of sexual orientation or identity in line with the Yogyakarta Principles (Sweden).	Noted	2010
San Marino	Czech Republic	Conclusions and/or recommendations: 7. To explicitly include sexual orientation and gender identity as protected grounds under the principle of non-discrimination in relevant legislation and programmes, and to apply the Yogyakarta principles with regard to human rights and sexual orientation and gender identity (Czech Republic); "San Marino is not in a position to accept recommendations Nos. 5, 6 and 7 above, because the definition of "personal status", set out in the Declaration on Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, already includes all grounds for discrimination. That interpretation has been reaffirmed through San Marino case law.	Noted	2010
Estonia	Finland	Conclusions and/or recommendations: 79.13. Develop comprehensive policy instruments based on the Yogyakarta Principles to combat discrimination against sexual minorities (Finland).	Noted	2011
Jamaica	Sweden	Conclusions and/or recommendations: 101.22. Decriminalize consensual same-sex relations between males, investigate all incidents and acts of violence suspected of being motivated on the grounds of sexual identity, and take all necessary measures to ensure the full enjoyment of human rights by lesbian, gay, bisexual and transgender persons, as stipulated by the principle of non-discrimination established under international human rights law and articulated in the Yogyakarta principles (Sweden).	Noted	2011

Gender Identity, Asylum and the ECHR: A Critical Doctrinal Analysis of Extraterritorial Gender Rights

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Abstract

This article explores the jurisprudence of the European Court of Human Rights (ECtHR) in relation to gender identity and asylum. It argues that the right to privacy and moral autonomy under Article 8 of the European Convention on Human Rights must be interpreted to include public expressions of sexual and gender identity. As such, presentation, recognition and social expression are intrinsic to one's identity, preference and desire, particularly for trans and gender non-conforming individuals. The first part of the article examines post-*Goodwin* ECtHR case law on gender identity to clarify the scope of protection offered under the Convention. The second part analyses the extraterritorial application of Article 8 in asylum cases, focusing on sexuality-based claims and the absence of trans-specific case law. The article concludes by highlighting that the performance and recognition of gender identity in public spaces is inseparable from the exercise of Convention rights and must be legally protected in asylum contexts. The blurring of the public/private divide is particularly critical where validation by state and society affects one's gender expression and risk of persecution.

Keywords: gender identity; asylum; ECHR; privacy; Article 8; trans rights; public/private divide; moral integrity; persecution; legal recognition.

[A] INTRODUCTION

This article first reviews the jurisprudence of the European Court of Human Rights (ECtHR) on gender identity to conceptualize which aspects are protected and under which rights breaches are examined. It then analyses the extraterritorial application of the European Convention on Human Rights (ECHR)—particularly Article 8, which has predominantly protected LGBTQI+ rights—focusing on links between gender identity and the right to privacy and moral integrity. Finally, it proposes a conceptualization of gender rights in the public sphere, emphasizing the

right to relate, present and be acknowledged in one's true gender by state and society.

The extraterritoriality or extraterritorial application of international and European human rights treaties refers to the recognition of the international and European human rights of individuals or groups of individuals located outside their territory, followed by the identification of their corresponding duties to those individuals, such recognition being given by treaty state parties (Besson 2012). The ECHR offers protection for all persons within the limits of the jurisdiction of ECHR states. Although asylum is not one of the protections offered, protection from expulsion can influence the right to asylum. In this way, the ECHR protects rights of non-citizens with an impact that extends further than the ECHR jurisdiction, in terms that it guarantees protection from violation of fundamental rights extraterritorially, namely in the country of origin by prohibiting expulsion there. I use extraterritoriality as a term that refers to rights that make the sovereign management of borders porous, due to having an impact on the right of persons to remain in a jurisdiction, such as asylum claimants. This arises as a result of the risks that are posed in a claimant's country of origin and extends the scope of jurisdiction, not in a legal-functional way, but because it assigns state protection of non-citizens that are in the jurisdiction of the ECHR. Although the ECHR does not enshrine a right to asylum, its jurisprudence on expulsion has become central to refugee protection by prohibiting the removal of individuals to states where they face serious risks to life or ill-treatment. In this way, the Convention functions as a complementary safeguard to international refugee law, ensuring that non-refoulement obligations are respected even outside the Refugee Convention framework.

The ECtHR's case law on gender identity (especially in post-*Goodwin v United Kingdom* 2002; and *I v United Kingdom* 2002) helps delineate the scope of Article 8, which has been most extensively examined in transgender cases. In contrast, ECtHR asylum case law on Article 8 (which is the most relevant to asylum cases) focuses predominantly on homosexuality, as transgender asylum claims have not yet been adjudicated in the context of asylum claimants' right to remain in the jurisdiction (the ECHR does not guarantee the right to asylum *per se*). The argument presented is that sexuality in asylum jurisprudence is closely connected with gender identity and expression, both of which demand recognition and protection as rights that are private with public manifestations. The public/private divide is thereby blurred by the need for validation and protection of one's gender performance, particularly where persecution and credibility assessments are grounded in visibility, expression, and stereotyping

conformity. As Nuno Ferreira argues (2021), the ECtHR has presided over at least 23 sexual minority asylum claim cases. Unfortunately, some decisions—like in *ME v Sweden* (2015)—endorse the dangerous notion that applicants can be returned to their home countries if they agree to be "discreet" about their sexuality, reflecting a troubling detachment from the lived realities and vulnerabilities of sexual minorities. Ferreira frames this detachment as rooted in the Court's deference to state sovereignty and its focus on narrow jurisprudential thresholds (eg under Articles 2 and 3 ECHR) (Ferreira 2023: 118). This results in decisions inclined toward formal legal reasoning rather than substantive protection for asylum seekers.

In this article, I offer an introduction to the main themes of asylum and transgender applicants, with a focus on Laurie Berg and Jenni Millbank's work (2009). Later on, I try to expand the scope of ECHR protection of citizens' gender identity (section [C]) to asylum claimants under Article 8 applications in expulsion cases of trans applicants and provide a critique of the Article 8 notion of private life as well as the minimization of its scope of extraterritorial protection by the Court (section [D]). Finally, I focus on issues of credibility and the narrow scope of privacy (section [E]) before turning to the conclusion (section [F]).

[B] GENDER IDENTITY/EXPRESSION AND ASYLUM

Under international law, a refugee is defined in Article 1A(2) of the 1951 Refugee Convention as a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside their country of nationality and unable or unwilling to avail themselves of that country's protection. These five grounds form the basis of the asylum framework, requiring decision-makers to assess both the credibility of the applicant's claim and the nexus between the feared harm and one or more of the protected characteristics. Importantly, the ground of "membership of a particular social group" has evolved to encompass claims related to gender, sexual orientation, and gender identity, enabling protection for individuals who may not fall within the more traditional categories but who nonetheless face systemic violence or discrimination. Asylum, therefore, is not a general remedy for hardship or insecurity but a targeted legal mechanism designed to protect individuals from persecution linked to these specific grounds.

A particular social group refers to persons that have a common, immutable and unchangeable characteristic that puts them at the risk of harm and/or are perceived as members of group that is discriminated against to such an extent due to their membership in it (United Nations High Commissioner for Refugees (UNHCR) 2019). Persecution is not clearly defined in the law but it refers to gross violations of human rights, especially non-derogable ones, or a systematic discriminatory practice that adds up to that level (UNCHR 2019). Traditionally, LGBTQ+ asylum claims have been adjudicated on the grounds of a particular social group on that basis, and the United Nations High Commissioner for Refugees (UNHCR) issued guidance on SOGIESC (sexual orientation, gender identity and expression, and sex characteristics) asylum claims in 2012 in which it examines good practices in determining the status of LGBTQ+ claimants. Gender identity has also been included explicitly on grounds that it should be examined in the particular social group in Directive 2011/95/EU (the Recast Qualification Directive).

It is undeniable that, as Berg and Millbank have noted in their study of relevant decisions by administrative tribunals in Australia, New Zealand, Canada, the United Kingdom (UK) and the United States, refugee status determination (RSD) bodies' jurisprudence in the area of transgender asylum claims remains fundamentally incoherent (Berg & Millbank 2009: 2-3). This calls for the re-evaluation of the legal framework applied by RSD bodies throughout the decision-making process in claims related to gender identity and expression. Berg and Millbank argue for an RSD framework that seriously considers gender nonconformity in its social context, alongside the applicant's own sense of gender identity and expression (Berg & Millbank 2009: 4-5). This allows for a conceptualization of transgender persecution that avoids erasing trans identities. A reconceptualized RSD framework could help ensure that various forms of transgender experience are acknowledged, and persecution is addressed in ways that safeguard both the applicant's human rights and the human rights-based rationale of international protection. As Millbank notes, "the wider the gulf between the experiences of the applicant on the one hand and the knowledge base and cultural frame of the decision-maker on the other, the greater the likelihood that credibility assessment may be problematic" (Millbank 2009: 401).

This is particularly true in gender identity asylum claims. Social stereotyping is widely used for credibility inferences, and identities are often categorized in medical, psychiatric or psychological terms, although they are primarily matters of gender identification (LaViolette 2007: 173-174). The fixed categories assumed in RSD effectively negate the

fluidity, personal configuration, and social meaning of gender identity. Instead, RSD processes impose extraneous criteria that are irrelevant to the applicant's actual experience of gender nonconformity and fear of persecution. Although social stereotypes are formally placed on the "grey list" of credibility assessment tools in refugee status determination—meaning they should not serve as the sole basis for decision-making—they nevertheless re-emerge in the adjudication of LGBTQ+ asylum claims before both the Court of Justice of the European Union (CJEU) and the ECtHR. In *A, B and C v Netherlands* (2014), the CJEU made clear that authorities cannot base credibility assessments on intrusive questioning or stereotypical expectations about how a gay man should behave, yet the Court still left room for subjective evaluations that implicitly rely on such assumptions. Likewise, in *ME v Sweden* (2015), the ECtHR accepted the possibility of return on the expectation that the applicant could avoid harm by being "discreet" about his sexuality, thereby reinforcing stereotypical notions about sexual identity and expression. These cases illustrate how, despite judicial recognition that stereotypes should not dictate asylum outcomes, they continue to resurface in credibility judgments and risk assessments. This jurisprudential ambivalence highlights the enduring influence of stereotypes in LGBT asylum adjudication, undermining the principle of individualized protection and weakening the substantive guarantees of international refugee and human rights law.

As Nicole LaViolette points out, it is dangerous to universalize the lives of sexual or gender minorities, especially given the global diversity of such experiences (LaViolette 2007: 176). The dialectic of sexual normalization and deregulation in asylum claims is worsened by stereotyping in LGBTQ+ emotive journeys that demand a linear narrative of sexual identity (Vogler 2016: 856-859; Camminga 2019: 163-199). This narrativization assumes a stable, coherent, and fully realized identity by the time the asylum claim is made. Many decisions rest on the assumption that this narrative is the appropriate "evidence" of sexual identity. The law thus struggles to recognize the complex, contradictory ways in which sexual desire and gender identity are lived. When the speech of asylum applicants intersects with legal strategies attempting to reduce it to coherent narratives, sexual and gender identity is queered by its instability (Vogler 2016: 870-872; Camminga 2019: 237-258).

This invites a shift toward a more epistemically inclusive field of judicial grammar. Judges must demonstrate a "reflexive awareness" of the difficulties transgender individuals face in making their lives legible to legal authorities (Sharpe 2002: 16). Moving beyond narrow heuristics such as "sex stereotyping", the law must focus on the discursive and

material practices that comprise trans discrimination. Judicial reasoning must intertwine with lived experience. Legal institutions should reflect collective life and bodily diversity. Gender and sex are core human experiences. The law, as a system of governance, must engage with these experiences as lived and situated.

In the following sections, I will examine ECtHR jurisprudence on gender identity and asylum to illuminate the scope and limitations of its legal protections.

[C] *GOODWIN* AND *I* AND THE ECtHR TURN IN TRANSSEXUAL CASES

With the *Goodwin* and *I* cases in 2002, both against the UK, the Court's case law on legal sex and transgender rights experienced a significant shift. The Court has consistently used the term "transexual", implying a transition in sex in a more genitocentric and biological sense rather than an affirmative legal and social practice of the experience of gender. The applicants in these cases were two transsexual women who had undergone gender-affirming procedures through the National Health Service. After undergoing those procedures, they both claimed that the absence of full legal recognition of their gender that corresponded to medical interventions on sexual characteristics as well constituted a violation of their human rights. The Court unanimously agreed to diverge from its previous case law on these matters. The Court ruled that the applicants were correct and that they should be granted full legal recognition of their gender, including being treated as women for pension, retirement, and marriage purposes, as well as having their birth certificates amended to reflect their acquired gender. The Court's decision in favour of *Christine Goodwin v United Kingdom* (2002) demonstrated that it had opted to redefine legal sex in such a way that it could include transsexuals who had crossed the binary as members of the sex group on the other side of the line. The law had always been capable of reconstructing the legal concept of sex, as Judge van Dijk had anticipated in *Sheffield and Horsham v United Kingdom* (1998); rather, it was the Court itself that had declined to do so until 2002.

Nonetheless, the Court wasted yet another opportunity to explicitly acknowledge that the legal definition of sex is a legal, not a medical, problem. The Court was not persuaded that the state of medical research or scientific understanding afforded any deciding argument in the legal recognition of transsexuals or give any conclusive criteria, and the Court opted to change the legal definition of gender (2002: paragraph 82). As

a result, the Court has reserved the power to redefine its definition of legal sex in the future. However, it was unclear if this change was a recognition of the law's potential to redefine gender, or if it was simply because medical science could not (yet) deliver the "truth" about gender. As a result, the decisions in *Goodwin* and *I* rely more heavily on medical discourse than their predecessors. These cases could be interpreted as a step forward in the medical pathologization of transsexuality, in which the gender-affirming process is explained as a medically validated recipe for "relief" (Sharpe 2002: 31-32).

In reality, medical discourse was one of the key reasons for abandoning the "biological" criteria for determining gender: an examination of congruent biological variables can no longer be decisive in denying legal recognition to a post-operative transsexual's gender change. Other important factors include the acceptance of gender identity disorder by medical professions and health authorities within contracting states, the provision of treatment, including surgery, to assimilate the individual as closely as possible to the gender to which they perceive they belong, and the assumption of a gendered social role by the transsexual. Despite this, the conviction in the existence of a genuine biological sex persisted in the judgment: it remains the fact that a transsexual cannot acquire all of the biological traits of the assigned sex; the chromosomal element is the fundamental unchanging biological part of gender identity. The Court did not believe, however, that the chromosomal factor must unavoidably play a prominent role in the legal attribution of gender identity to transsexual in *Rees v United Kingdom* (1986: paragraph 46) and in *Cossey v United Kingdom* (1990: paragraph 40). As a result, the Court chose to grant privilege to another criterion in determining legal sex, despite the recognition of a biological truth of sex. The gender-affirming process, according to the Court, did not actually allow the person to acquire their gender. It just served to "assimilate" this newly acquired gender. In other words, transsexuals could never surpass the sex binary's "true" barrier even though they could come close enough that the law would overlook the "biological truth" and allow for a sex change. Furthermore, the legal ambiguity in which *Goodwin* and *I* had been living due to the partial recognition of their acquired sex was one of the decisive elements for recognizing that they had altered their gender. "The unpleasant condition in which post-operative transsexuals live in a transitional zone, not quite one gender or the other, is no longer sustainable", the Court stated in *Goodwin v United Kingdom* (2002: paragraph 77). As a result, the Court appeared hesitant to acknowledge its role in the legal ambiguity imposed

on *Rees*, *Cossey*, *Sheffield and Horsham* as a result of its previous judgments, and chose not to do so with *Goodwin* and *I*.

To summarize, after the *Goodwin* and *I* decisions, gender was no longer established by an unchangeable "biological reality" of the body, but rather by the surgically altered anatomy of the transsexual individual's genitalia. As the ECtHR observed in *L v Lithuania* (2007) and *Nunez v France* (2014), it was this procedure that revealed the truth about sex. The applicant in *L v Lithuania* was a pre-operative transsexual male who protested about Lithuania's lack of legal regulation of sex-reassignment surgery. He had undergone hormone treatment and partial sex-confirming surgery after being medically classified as transgender, including breast removal. Despite this, the hormone treatment was stopped due to legal concerns regarding the prospect of undertaking further surgery. The law did not fully recognize him as a man because of the "incomplete" stage of his transition. As a result, the applicant complained about the statute, which ostensibly recognized transsexuals who had undergone genital surgery but did not actually provide such a service. The Court acknowledged that the applicant was in the intermediate position of a pre-operative transsexual who had undergone partial surgery and had certain civil-status documents modified, but whose personal code would not be changed until full surgery was completed, leaving him legally categorized as a woman in important aspects of his private life, such as employment and travel abroad (*L v Lithuania* 2007: paragraphs 8-17, 57-59). The Court ultimately found that the lack of legal acknowledgment of the applicant's sex prior to surgery was compatible with the Convention, but it held that the refusal to allow him to complete his gender transition amounted to a violation of Article 8 (*L v Lithuania* 2007: paragraphs 56-61).

In *Nunez v Norway*, the Court reiterated its conviction that genital surgery is the decisive criterion for legal recognition of sex. The applicant was a transsexual woman undergoing gender transformation who argued that the lengthy nature of the process, together with the state's refusal to grant recognition until the transition was completed, caused her severe suffering. The Court accepted that it was not unreasonable for the state to condition full recognition of gender status on the completion of the surgical process, within its margin of appreciation (*Nunez v Norway* 2011: paragraphs 62-70). It is therefore reasonable to conclude that the Court endorsed a model of legal gender recognition contingent upon the completion of the medicalized, and particularly surgical, transition. Sharpe's allegation regarding the law's genitocentrism is backed up by

the importance accorded to genital surgery as the point that allowed for sex change (Sharpe 2002: 70).

It took the Court one-and-a-half decades to partially overcome the fixation with transsexuals' genitalia that started with the *Goodwin* and *I* judgments. The Court adopted a first (timid) step in this direction in 2015, when it decided a case regarding the requirement of sterilization for gender transition. In *YY v Turkey* (2015), the Court examined whether the legislation that established infertility as a prerequisite for obtaining a judicial authorization to undergo a gender-affirming process was consistent with the Convention. It ruled that such a requirement amounted to a breach of the right to respect for private life. However, while the Court was clear that sterilization could not be a prerequisite for authorizing a gender-transition process, it avoided offering a straightforward opinion as to whether sterilization could ever be a requirement for the legal recognition of gender. In fact, the judgment can be read as implicitly validating the requirement of sterilization that exists in many states' legislation, provided that sterility was not a condition for undergoing a gender-affirming process, but a consequence of the transition.

In *AP, Garçon and Nicot v France* (2017), the Court changed its mind about genital surgery. The case concerned three trans women who were refused gender recognition because they did not meet several conditions set forth by domestic legislation. While each applicant's situation was unique, the Court had to decide whether legislation that made legal gender recognition conditional on undergoing intrusive physical and psychological examinations by an interdisciplinary medical team and being medically diagnosed with a mental disorder was compatible with the Convention. The Court had to interpret the meaning of Articles 61-61-5 of the French Civil Code (*Code civil*), as interpreted by the Cour de cassation, which required proof of the "irreversible character of the transformation of the appearance" for gender recognition. This requirement was later removed by Law No 2016-1547 of 18 November 2016, on the Modernisation of Justice in the 21st Century. It was confirmed that the authorities had sought either sterilizing surgery or a medical therapy that was quite likely to produce sterilization (2017: paragraph 118). The state had overstepped its margin of appreciation by imposing such a condition, according to the Court. It held that the legislation's requirement for an irreversible transformation violated the applicants' right to privacy, stating that neither sterilizing surgery nor medical procedures likely to result in sterility may be deemed criteria for gaining gender recognition under the Convention.

The Court's implied overturning of its case law's genitocentrism is a crucial consequence of this sterilizing decision. Given that genital surgery most probably leads to sterilization as noted in *AP, Garçon and Nicot v France* (2017: paragraph 118), it can no longer be utilized as a criterion for gender recognition. In fact, the Court specifically stated that not every trans person can—or even wants to—have genital surgery as part of their gender change. This means that one's attitude toward genitalia should not determine one's gender, and gender can no longer be naturalized by case law as the obvious expression of an anatomical feature. That creates a new implied right—the right to gender identification and gender expression—as opposed to a more essentialistic view of gender identity based on medical interventions that confirm the transitionary state. This newly evolving right is rooted in the protection of personal identity and acknowledges social rights to validate and perform one's gender as a person wants to and, in this sense, it is highly relevant to asylum. In persecution settings, the right to gender identification and performance is socially located (in the context of gender nonconformity, see Avgeri 2021) and not necessarily seen as a medical condition. In fact, discrimination takes place in gender-performative socio-legal settings, and the risk of harm is rooted in discrimination that amounts to persecution. In the next section, I turn to how Article 8 can be applied in asylum cases, given that there is indeed a fundamental right to gender identity and identification recognized by the previously examined jurisprudence of the ECtHR. The following section interrogates the extraterritorial implication of the ECtHR's interpretation of gender recognition rights and expulsion cases of trans asylum claimants.

[D] THE ECHR, PRIVATE LIFE (ARTICLE 8) AND ASYLUM

The right to asylum is not guaranteed by the ECHR. In contrast, the Court's dynamic interpretation of Articles 2(1) and 3 prohibits member states from deporting foreigners back to their home country if their lives are threatened or they risk being subjected to torture, degrading, or inhuman treatment. The Court has ruled that if "substantial grounds have been demonstrated for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3 … the person in question should not be deported to that country" (*Chahal v United Kingdom* 1996: paragraph 74).

According to reports by the FIDH (International Federation for Human Rights), ILGA-Europe (European Organization for the Representation of

LGBT Rights), and the International Commission of Jurists (2014: 6-7), the risk of persecution due to homosexuality is recognized as a ground for asylum in 34 Council of Europe Member States, including 27 EU member states. However, there is no comparable consensus for gender identity and expression. The interpretation of risk in countries of origin remains contentious in such cases, and, while Article 8 has been a primary source of protection for LGBTQI+ individuals, the Court's judgments have so far only dealt with sexuality—not gender identity—in expulsion cases.

On the other hand, the Court's judgment in *Rana v Hungary* established an important precedent for the protection of transgender persons under Article 8 of the Convention, finding that Hungary's refusal to allow the legal recognition of the applicant's gender identity violated his right to respect for private life (*Rana v Hungary* 2020: paragraphs 41-43, 76-77). By affirming that legal recognition is central to human dignity and personal development, the Court reinforced the principle that gender identity is an essential component of Convention rights. This reasoning has direct implications for transgender asylum seekers, who face compounded vulnerabilities when both their legal recognition in the host state and their protection from persecution in the country of origin are at stake. The pending case of *MS v Malta* illustrates this intersection: the applicant, a transgender woman, risks persecution if expelled to Iran while also suffering from the absence of adequate legal and procedural safeguards in Malta (*MS v Malta* pending, communicated 2025). Taken together, *Rana* and *MS* highlight the emerging recognition within the Court's jurisprudence of the specific challenges faced by transgender asylum seekers, pointing toward an evolving framework in which the Convention may complement refugee law by addressing both non-refoulement obligations and the need for gender recognition in host states.

The jurisprudence on asylum cases of the ECtHR provides an opportunity to rethink the law. In 2004, the Court decided two cases involving Iranians seeking asylum based on the risk of persecution if deported: *F v United Kingdom* and *IIN v Netherlands*. In both, the Court rejected the applicants' arguments under Articles 2 and 3, as it did not find sufficient evidence that deportation would pose a real threat. While acknowledging that "the general situation in Iran does not foster human rights protection and that homosexuals may be vulnerable to abuse", the Court concluded that the applicants had not shown substantial grounds for believing they would be subjected to Article 3 treatment.

Non-governmental organizations (ILGA-Europe 2014; European Council on Refugees and Exiles 2015) have criticized the Court's practice of rejecting applications on the assumption that asylum-seekers could conceal or suppress their identity to avoid harm in *F v United Kingdom* (1996), *IIN v Netherlands* (2004), *ME v Sweden* (2015) and *AAM v Sweden* (2016). The idea that the risk could be averted by "discretion" undermines both the right to physical and moral integrity and the principle that rights should not be contingent on invisibility. This directly contradicts the UNHCR's *Guidelines on International Protection No 9* (2012), which state that the capacity of applicants to conceal their identity is irrelevant to their protection claim (paragraph 30). It is also in contrast to the Court of Justice of the EU in *X, Y and Z v Minister voor Immigratie* (2013), which categorically rejected the "discretion requirement" in EU asylum law.

In more recent cases, including *AE v Finland* (2015), *AN v France* (2016) and *B and C v Switzerland* (2020), the Court found that expelling homosexual applicants to countries where they faced harm would breach Article 3. The Court has repeatedly affirmed that Article 3 prohibits expulsion to a country where the person faces a real risk of torture or degrading treatment, regardless of the source of the risk or the applicant's own conduct.

Yet, other qualified rights, such as Articles 5, 6, 8, and 14, require that a removal would result in a "flagrant breach" in order to bar deportation. As explained in *Mamatkulov and Askarov v Turkey* (2005), this threshold demands that the violation would nullify the right altogether. As Bratza, Bonello and Hedigan observed in their concurring opinion, the "flagrant denial of justice" standard implies a fundamental and manifest breach that destroys the very essence of the right (ibid: Joint Concurring Opinion).

This standard, however, does not apply to Articles 2 and 3, which are absolute rights. Article 3, in particular, is not subject to derogation and allows for no justification, even in cases of national emergency. Nevertheless, the Court has acknowledged that treatment which does not meet the "threshold of severity" under Article 3 may still be relevant under Article 8, which protects physical and moral integrity (*Bensaid v United Kingdom* 2001: paragraph 46). Asylum claims based on sexual orientation or gender-based harm, including domestic violence, often face obstacles both in refugee and human rights adjudication. In *F v United Kingdom* (above), the Court declined to apply the same standards from *Dudgeon v United Kingdom* (1981: paragraph 9), noting pragmatically that expulsion to a country not fully compliant with Convention standards is not in itself prohibited. That conclusion appears to restrict the extraterritorial

scope of Article 8 protection in asylum. The severity test is not the only difference between Articles 3 and 8. Whereas treatment under Article 3 must always be prevented, Article 8 is subject to the usual limitations: legality, legitimate aim, and proportionality. Governments may invoke interests such as economic well-being to justify expulsion.

Hathaway and Pobjoy's (2012: 368-371) concept of "endogenous harm"—that is, mental harm generated by suppression of identity—has been influential in these contexts. Mental health is protected as part of private life, particularly when it relates to identity and moral integrity. Because Article 8 guarantees a "right to identity and personal development, as well as the right to establish and develop relationships with other human beings in the outside world", mental stability is essential for its full enjoyment (*Bensaid v United Kingdom* (2001: paragraph 47). Expulsion cases may fall under Article 8 where they risk deteriorating the applicant's mental health, even if not rising to Article 3 standards. However, in *Bensaid*, the Court ultimately held that the interference did not reach the threshold required to constitute a breach.

Hathaway and Popjoy's argument has been subject to strong criticism. Their argument relies on a distinction between "internal" and "external" expressions of sexual orientation and gender identity, suggesting that only the latter fall within the ambit of refugee protection (2012: 469-471). This framing risks narrowing the scope of protection by implying that concealment or suppression of identity can be a legitimate expectation if an individual can still maintain an "internal" sense of self. Millbank (2012: 497-500) has argued forcefully against this distinction, noting that it undermines the very essence of the right recognized in *HJ (Iran) v Secretary of State for the Home Department* (2011)—the right of LGBTQI+ persons to live freely, openly and on equal terms. She emphasizes that attempts to separate "internal" from "external" manifestations of identity are both artificial and damaging, as they implicitly revive discretion reasoning in another guise. Avgeri contends that this conceptual bifurcation resurrects discretion reasoning under a different name, obliging transgender and gender-nonconforming claimants to conform to stylized norms of expression to access their rights (Avgeri 2021: 12). She argues that such a framework not only "reproduces medicalized notions of gender identity" but also disproportionately burdens applicants, delegitimizing their credibility unless they fit a narrow template of visibility and comportment (Avgeri 2021: 1415).

Hathaway and Pobjoy's argument fails to acknowledge the social aspects of LGBTQ+ identity by separating a core right (in the privacy sphere) from

social manifestations of it, ones that are more often acknowledged for political belief or religious conscience that falls under Article 9 ECHR. Indeed, Article 9 ECHR has occasionally been invoked in expulsion cases to safeguard freedom of conscience and religious manifestation in the country of origin, particularly where asylum claimants face risks as converts or members of persecuted minorities. For example, in *Z and T v United Kingdom* (2001: paragraphs 82–83) the Court recognized that severe restrictions on religious practice abroad could implicate Article 9, although it ultimately analysed the risk under Article 3. Similarly, in *FG v Sweden* (2016: paragraphs 127–129, 156) the Grand Chamber stressed that national authorities must assess *ex officio* whether an asylum seeker's conversion might expose them to serious repercussions upon return. This jurisprudence shows that Article 9 is used primarily to protect conscience and external practice in the country of origin, whereas Article 8 has been interpreted largely in relation to the protection of private and family life within the host country, balancing expulsion against ties built during long asylum procedures or residence, as in *Jeunesse v Netherlands* (paragraphs 117–121).

Asylum claimants with serious health conditions have also invoked Article 8 to resist removal on the ground that their return would lead to a deterioration in physical or psychological integrity. The Court has acknowledged that "private life" includes mental and physical health (*Bensaid v United Kingdom* 2001: paragraphs 46-48), but has generally found that the state's interest in immigration control prevails where medical treatment is available, even at a lower standard (*Nnyanzi v United Kingdom*: 2008: paragraphs 76-77). At the same time, in cases where removal would cause a significant reduction in life expectancy or serious suffering, the Court has signalled that both Article 3 and Article 8 may be engaged, as clarified in *Paposhvili v Belgium* (2016: paragraphs 221-223) and further developed in *Savran v Denmark* (2021: paragraphs 131-133). In short, Article 9 protects conscience primarily in relation to risks back home, while Article 8 has been mobilized to protect integration, family life, and, in certain instances, the health and dignity of asylum claimants whose expulsion would lead to serious medical deterioration. Yet, Article 8 could also be expanded to cover the right of LGBTQ asylum claimants to live openly and authentically, free from concealment pressures in their countries of origin. Just as Article 9 protects religious converts from having to suppress their faith on return, Article 8 could be interpreted to shield sexual and gender minorities from expulsion to environments where their private life could only be exercised clandestinely, at the cost of dignity and identity. The key question is whether the right to gender

identity and expression—including sexual identity and intimacy—can be recognized as a fundamental aspect of physical and moral integrity under Article 8, not in the sense of being something exclusively individual and identitarian without social implications. If so, a serious risk of harm in the country of origin targeting LBGTQ+ identity or its manifestations can trigger extraterritorial protection.

[E] GENDER, THE PUBLIC SPHERE AND CREDIBILITY

This article has so far attempted to show that gender identity and expression, like sexuality, are integral to the exercise of human rights in the public sphere. It follows that asylum law should acknowledge that the enforcement of social norms in the public sphere may be as harmful as state-led persecution. A narrow understanding of persecution and a failure to interpret gender as performed publicly can obscure the mechanisms through which legal categories are applied to asylum seekers. To fully understand the risk of persecution on grounds of gender identity, attention must be paid to how state and non-state actors interpret nonconforming gender expression as a signifier of sexuality, and how these social responses are shaped by a collective public imagination.

The Convention organs have stated that a denial of the right to establish and develop relationships with others on account of a person's gender identity violates Article 8 of the Convention. According to the Court, these relationships form part of an individual's identity and integrity (*Van Kück v Germany* 2003; *PV v Spain* 2010: paragraph 22). As Butler points out, "it is the body's exposure to the gaze, and to touch, and to language, that constitutes one's vulnerability" (Butler 2004: 49). Legal protections that are structured around the private sphere risk ignoring the conditions under which the individual may be exposed to harm in public. This is particularly problematic when credibility assessments in asylum law demand that the individual demonstrate evidence of "being" their claimed identity, as performance. Such evidence is often produced through gendered signifiers, bodily appearance, gestures, or social acts.

In this respect, the ECHR reproduces the logic of the public/private divide by limiting SOGIESC issues mostly to Article 8 and the notion of private life. While the right to privacy and moral integrity has become a useful legal instrument to protect the rights of sexual and gender minorities, it can also obscure the public performativity of gender and sexuality as a derogable right. As Edelman observes, privacy may "repress sexuality's performativity" because it presumes that identity is "stable,

intrinsic, and anterior to its effects" (Edelman 2002: 135). Yet, as the ECtHR jurisprudence on trans identity suggests, gender identity is not merely a private self-perception but has consequences for the individual's social and legal status, shaped through relations with others in the social world. Libby Adler (2018: 57-62) develops a similar critique in *Gay Priori*, where she argues that legal strategies built on privacy claims risk reinscribing the marginalization of queer subjects by protecting them only insofar as they remain invisible within the dominant public order. In her view, such arguments enable law to tolerate difference without transforming heteronormative institutions, producing what she calls a "politics of preservation" rather than a politics of liberation (Adler 2018: 115-121). This reasoning resonates with Halley's (1998: 94) analysis that privacy-based frameworks tend to reframe sexual orientation as a fixed status, obscuring its performative and relational dimensions. These critiques underscore how the Court's emphasis on private life in SOGIESC cases, while offering protection, risks foreclosing a more robust recognition of sexual and gender identity as inherently public, embodied, and socially constituted.

If credibility assessments in the refugee context rest on the premise that the individual is telling the truth about their sexual orientation or gender identity, then those assessments must take into account the public aspects of identity formation. These include the expression of gender through performative acts that are visible and legible within a particular social context. To require someone to conceal or suppress these aspects of themselves to avoid persecution is not only unreasonable but amounts to a denial of the very identity that human rights law is meant to protect. In *HJ (Iran)* (2011), the UK Supreme Court famously held that it was not acceptable to deny asylum on the basis that a gay person could avoid persecution by behaving discreetly. Lord Rodger stated that gay individuals are entitled to live openly and to express their sexual orientation through conduct, relationships, and modes of expression. As he put it, "to pretend that his sexuality does not exist or matters less than it does" is to fail to recognize the applicant's right to live freely and authentically (ibid: paragraph 78). Although this judgment formally rejected the notion that gay claimants must "be discreet" in order to avoid persecution, Moira Dustin (2018: 110) observes that Home Office decision-makers continue to operate under the assumption that some LGBTQ+ individuals are inherently discreet—or that concealment is socially, rather than fear based. She further documents how asylum policy instructions and Home Office guidance privilege Western models of identity, effectively penalizing applicants whose lived experiences or

cultural backgrounds do not conform to "openly LGBTQ+" narratives. Janna Wessels (2012) acknowledges that the Supreme Court rejected the "reasonably tolerable test", but argues that the judgment still retains "discretion logic"—by treating openly demonstrated versus concealed sexuality as distinguishable categories relevant to risk assessment and preserving the idea that concealment could be a valid choice. The decision also places undue emphasis on subjective fear, resulting in a stricter well-founded fear standard (ibid: 815-830, especially 815-820).

This reasoning is equally applicable to claims based on gender identity and expression. It challenges any notion that rights to protection are conditional upon the suppression of identity in public life. This can be better conceptualized in the asylum setting as socially located fundamental gender nonconformity that jeopardizes the individual's safety and personhood in a relational context. It affirms that gender identity is a lived experience, not a concealed attribute. Public presentation—clothing, pronouns, gestures, relationships—is intrinsic to that experience. Law must not merely tolerate these acts but protect them. Article 8's notion of private life should be seen as a protective mechanism for moral integrity with public manifestations and impact on transgender and gender nonconforming persons' lives.

The Court has held that the notion of private life covers "the physical and psychological integrity of a person", which includes a person's right to personal autonomy and "the right to self-determination as to how they lead their life" (*Pretty v United Kingdom* (2002: paragraph 61). Gender is an internal experience with constitutive relationality, so as to acknowledge the social aspect of gender in particular where there is a material risk of persecution. Private life should not be seen as a vehicle to minimize the social protection and manifestation of gender, as legal gender recognition cases demonstrate, and understate the need to be one's gender. The extent to which the meaning of "private life" has been interpreted in asylum cases is not justified and creates double standards in the protection of LGBTQ+ noncitizens, by not acknowledging that persecution that targets LGBTQ+ identity is inhumane treatment.

[F] CONCLUSION

The ECtHR has acknowledged that gender identity is part of an individual's personal identity protected under Article 8 of the Convention. It has also affirmed that forced sterilization and mandatory surgery as prerequisites for gender recognition are incompatible with the right to respect for private life (*YY v Turkey* 2015; *AP, Garçon and Nicot v France* 2017).

Nonetheless, the Court has not yet clarified the extent to which these rights apply extraterritorially in asylum contexts. It remains unclear whether deporting a person to a country where their gender identity puts them at serious risk would violate the Convention. While Article 3 offers protection against removal to inhuman or degrading treatment, Article 8 has been relied on with much inhibition where the threshold of Article 3 is not—but the ECtHR's asylum jurisprudence under Article 8 has not yet included transgender claims.

This article has argued that gender identity and expression should be recognized as central elements of moral and physical integrity under Article 8 and that their suppression in the context of asylum may amount to serious harm. In line with Millbank's argument (2012), suppression of gender identity through enforced concealment constitutes a violation of the right to identity and personal development. The Court should not require applicants to erase or hide their gender expression as a condition of avoiding persecution. The UK Supreme Court in *HJ (Iran)* (2010) should be revisited in an affirmative manner so that individuals cannot be expected to exercise discretion about their sexual identity to avoid persecution. That reasoning must be extended to gender identity in line with legal gender recognition jurisprudence. Social manifestations and expression are an integral part of gender identity.

As this article has shown, gender is not confined to internal self-identification. It is lived, performed, and interpreted through social acts and appearances in the public sphere. The ECtHR has already recognized in its trans rights jurisprudence that gender identity involves recognition by others and that failure to legally acknowledge gender harms personal integrity (*Van Kück v Germany* 2003: 51). It must now recognize that failure to protect individuals from persecution based on gender expression is also a denial of dignity. This requires a rethinking of gender rights as they relate to public presence, state recognition, and risk of harm.

The right to one's identity, developed in case law as a fundamental dimension of the right to privacy (Article 8 ECHR), could be conceptualized as a key element in the discourse of gender identity rights in asylum cases. The individual's right to define and perform their own gender identity, free from state-imposed classifications or performative expectations, resonates with a broader conception of dignity and authenticity. As Angelo Calogero has argued, there is a need to frame legal subjectivity not through fixed identity categories but through the right to difference and the openness of subjectivity itself (2020: 88). This understanding would ground legal protection in the lived experience of marginalized

subjects from non-European backgrounds, thereby advancing a queer, decolonial and performative reading of the right to gender recognition under the ECHR.

The Court's analysis has focused heavily on the potential violation of substantive Article 8 at the expense of equality and non-discrimination considerations, as well as the freedom of expression. The absence of analysis on freedom of expression in the ECtHR jurisprudence on gender identity claims is problematic. Social manifestations of privacy rights are very important since they link with the idea of self-definition and the "right to opacity", instead of the state's requirement for transparency and narrativity in asylum proceedings. These are areas that could be incorporated into the Court's analysis, instead of relying solely on the logic of privacy or physical integrity. As Michele Grigolo argues, there is a "liberal management of difference" at play which "turns human rights into a technology of power" by pushing subjects to conform to identity categories that the state recognizes and regulates (Grigolo 2010: 900).

In light of the above, one can draw on Grigolo, who distinguishes two core sexual rights: the right to choose sexual activity and sexual identity, as well as the right to form partnerships and start a family based on that choice (Grigolo 2010: 895). Flowing from this, I identify two core gender rights: the right to be recognized as the gender one experiences and the right to relate and participate in society in the gender one feels (which includes gender performance and expression). When the private sphere of sexual and gender rights is diffused into the public sphere—an essential relational characteristic of sexual preference and gender identity/performance/expression—then the right to privacy and moral integrity, as well as a relational concept of autonomy, invokes the freedom to be respected in the context of a society. It remains to be seen whether the nature of gender identification and relational validation of one's gender expression can have extraterritorial application, and whether a clarified threshold of severity might be established for a violation of the right to be and perform one's gender in a manner akin to protections for religious and political beliefs.

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TACKLING ANTI-LGBTIQA+ COUNCILLOR MISCONDUCT

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Abstract

In Australia, there have been increasing culture wars on the topic of LGBTIQA+ inclusion in local government. *Hely & Lew* concerned comments from a male councillor (Lew) accusing a female councillor (Hely) of inappropriately prioritizing LGBTIQA+ issues that were alleged to be serious misconduct. In its determination, the Councillor Conduct Panel that hears allegations of serious misconduct found that this was simply "an example of vigorous political discourse" and "although being conduct which is to be discouraged, in the context of a 'hot button' political issue it was not behaviour which was unreasonable". Whilst the Panel found that the behaviour of Lew towards Hely was "hostile", "disrespectful", "unreasonable", "inappropriate", "aggressive" and "appalling", it found that the behaviour did not constitute serious misconduct. This article reflects on this decision and how it undermines efforts to improve local government culture and to increase the number of women and LGBTIQA+ people elected to councils, as research shows that prejudice of this kind is a major barrier to lesbian, bi+ and queer women standing for local government—and no doubt affects heterosexual women too. In this spirit, the article rewrites the Panel's determination in ways that are more sensitive and sensitized to issues of prejudice and exclusion.

Keywords: local government; misconduct; LGBTIQA+.

[A] PREFACE

Introduction

In Australia, there have been increasing culture wars on the topic of LGBTIQA+ inclusion in local government. Over 10 local councils have removed books from libraries, including Logan, Brisbane, Scenic Rim, Southern Downs, Cairns, Townsville, Central Highlands, Banana, Gladstone, Somerset, Western Downs, Bundaberg, and Rockhampton in Queensland and Sydney in New South Wales, with Cumberland in New

South Wales reversing its book ban (Bye 2023; Sathicq 2023; Stolz 2023; Bowles 2024; Jackson 2024; Pearce 2024; Russon 2024). Several local councils have legislated trans and non-binary bathroom bans under local laws, including Wellington in Victoria (Allen 2025). Verbal abuse, threats of violence, and intimidation from neo-Nazi protests have led to the cancellation of drag story time events by several local councils (Kermode & Phillips 2025).

The issue of LGBTIQA+ inclusion came to a head at a Stonnington City Council meeting on 7 June 2021. At that meeting, Councillor Alexander Lew accused Mayor Kate Hely of inappropriately prioritizing LGBTIQA+ issues. Councillor Hely made an application for a finding of serious misconduct against Councillor Lew. The matter was heard by a Councillor Conduct Panel which dismissed the application.

In this article, I provide an overview of and then "re-imagine, re-write and re-invent" the Councillor Conduct Panel's decision, in the style of queer judgment (Ferreira & Ors 2025: 3). Taking this approach, the article will "function as both critique and law reform" (ibid: 6), explaining the background to the councillor conduct framework in Victoria and the determination of the Councillor Conduct Panel, rewriting that determination as a method of critique, and then concluding with options for law reform to more effectively address councillor misconduct.

One of the limitations of this approach is that "the form or genre of judgment remains largely the same in order to make the judgment useful for judges who are constrained by the institutional realities of being a judge" (Ferreira & Ors 2025: 7) or, in this case, a Councillor Conduct Panel. What this means is that more creative processes of responding to councillor misconduct are constrained and I "play politely with law—making decisions that toy with discrete legal concepts or identities without overhauling normative ways of writing" (ibid).

That said, I also adopt the approach of theatrical jurisprudence in noticing "what's at stake when law is brought into the realities of being" (Leiboff 2019: 138) to reflect on how decision-makers' personal experiences influence their ability to comprehend the experiences of others and how this is brought into play in their decisions. These dramaturgical details of decision-makers' personal histories—that come out in the article—are needed to understand what drove their thinking and reasoning. In acknowledging these, I also acknowledge my own positionality in the work and my relation to some of the actors in the decision, as recognizing "our personal experience" is part of being a queer jurisprudent (Ferreira & Ors 2025: 11).

Queer judgment also demands that different "formats [are] adopted to express our voices in the judgments and the commentaries that do not always conform to typical, formal judgment" (Ferreira & Ors 2025: 12). As such, the voice used across this article is not always consistent: it starts with a typical legal academic tone summarizing the councillor conduct framework in Victoria and the determination of the Councillor Conduct Panel, with moments of my personal voice interceding to reflect on my connection to some of the characters involved; then it proceeds into a redetermination that slides from the words of the Councillor Conduct Panel as originally written into my own words, taking on the persona of the Panel in "an act of ethical reimagination" (Sharpe 2017: 420); and it then concludes with a return to the typical legal academic voice providing recommendations for change to the councillor conduct framework in Victoria. This includes the incorporation of stories—both historical and personal—as theatrical jurisprudence demands that "we ought to pay attention to these small stories and the lives embedded in them, as a practice of reminding each of us how our lives shape our reading of law" (Leiboff 2019: xi).

The councillor conduct framework in Victoria

In Australia, local governments are constituted and regulated by state parliaments or, in the case of the Northern Territory, its Legislative Assembly. In Victoria, its Constitution enables the Parliament of Victoria to make laws with respect to the responsibilities of councillors (Constitution Act 1975 (Vic) section 74B(1)(h)). In this respect, the Victorian Parliament has legislated a Model Councillor Code of Conduct that includes the standards of conduct expected to be observed by councillors while performing their duties and functions as councillors, including a prohibition on discrimination, harassment (including sexual harassment), and vilification (Local Government Act 2020 (Vic), sections 28(2)(e), 139(1)). A breach by a councillor of the Model Councillor Code of Conduct is misconduct and continued or repeated misconduct by a councillor after a finding of misconduct has been made in respect of them or bullying or sexual harassment of another councillor or member of council staff is serious misconduct (section 3).

Application

A council by resolution, a councillor, or a group of councillors may apply to the Principal Councillor Conduct Registrar, a public servant appointed by the Secretary to the Department of Government Services, for the establishment of a Councillor Conduct Panel to make a finding of serious

misconduct against a councillor within 12 months of the alleged serious misconduct occurring (Local Government Act 2020 (Vic), sections 148, 149(1)(f), 154). The Principal Councillor Conduct Registrar will examine the application to determine if it is not frivolous, vexatious, misconceived, or lacking in substance and if there is sufficient evidence to support the allegation of serious misconduct (section 155(1)). If so satisfied, the Principal Councillor Conduct Registrar will then form a Councillor Conduct Panel to hear the matter by appointing two members from the Councillor Conduct Panel List (sections 149(1)(g), 155(1A), 156), which is a list of eligible persons established by the Minister for Local Government from which members of a Councillor Conduct Panel must be selected (section 153(1)).

Hearing

The Councillor Conduct Panel may then hear the application by a councillor (Local Government Act 2020 (Vic), section 154(1)). The Councillor Conduct Panel must conduct a hearing (section 163(1)) and serve a written notice of the time and place of hearing on the applicant, the respondent, and the council (s 160). The hearing must be conducted in accordance with the following:

- ◊ the proceedings must be conducted with as little formality and technicality as statutory requirements and the proper consideration of the matter permit (section 163(2)(a));
- ◊ there is no right to representation at the hearing except if the Councillor Conduct Panel considers that a party requires representation to ensure that the hearing is conducted fairly (section 163(2)(b));
- ◊ the proceedings must not be open to the public (section 163(2)(c));
- ◊ the Councillor Conduct Panel is not bound by rules of evidence but may inform itself in any way it thinks fit (section 163(2)(e));
- ◊ the Councillor Conduct Panel is bound my rules of natural justice (section 163(2)(f));
- ◊ the procedure of the Councillor Conduct Panel is otherwise in its discretion (section 163(2)(g)).

In addition, the Councillor Conduct Panel may:

- ◊ request a person to attend a hearing and answer questions (section 161(1)(a));
- ◊ request the applicant, the respondent, or the council to provide information (section 161(1)(b)); and

- ◊ direct the applicant or the respondent to attend a hearing or provide information (s 161(1)(c)).

Findings and directions

After the Councillor Conduct Panel has conducted the hearing, the Panel may:

- ◊ make a finding of serious misconduct against a councillor (section 167(1)(a));
- ◊ make a finding of misconduct against a councillor (section 167(1)(b));
- ◊ make a finding that remedial action is required (section 167(1)(c)) and direct the respondent to attend mediation, training, or counselling (section 167(6)); or
- ◊ dismiss the application (section 167(1)(d)).

In addition, if the Councillor Conduct Panel makes a finding of misconduct or serious misconduct against a councillor, the Panel may:

- ◊ direct the councillor to make an apology (sections 167(3)(b), 167(4)(a)); or
- ◊ suspend the councillor from office for a period not exceeding one month in the case of misconduct (section 164(4)(b)) or 12 months in the case of serious misconduct (section 167(3)(c)).

If a councillor has been subject to a finding of serious misconduct, they may be reprimanded (section 167(3)(a)), and if a councillor is subject to two or more findings of serious misconduct, they are no longer qualified to be a councillor at all (section 34(2)(i)).

After the Councillor Conduct Panel has made its determination, it must give a copy of its decision and statement of reasons for the decision to the council, the applicant and respondent, the Minister for Local Government, and the Principal Councillor Conduct Registrar, which must be tabled at a council meeting and recorded in the minutes of that meeting (section 168). The Principal Councillor Conduct Registrar will publish the determination made by the Councillor Conduct Panel and any reasons given for that determination (section 149(1)(i)). The decision is reviewable by the Victorian Civil and Administrative Tribunal (section 170).

Determination of the Councillor Conduct Panel: *Hely & Lew*

The determination of the Councillor Conduct Panel in the matter of an Application by Councillor Kate Hely concerning Councillor Alexander Lew of the Stonnington City Council (hereafter *Hely & Lew*) concerned comments from a male councillor (Councillor Lew) accusing a female councillor (Councillor Hely) of inappropriately prioritizing LGBTIQA+ issues by putting "any left wing woke issue front and centre", including "LGBTI" issues, during debate on an urgent business motion relating to COVID at the council meeting on 7 June 2021 (*Hely & Lew*: paragraph 18). Stonnington City Council comprises the inner south-eastern suburbs of metropolitan Melbourne and has one of the largest LGBTIQA+ communities in Victoria. Councillor Hely was the Mayor of Stonnington City Council at the time.

Based on these comments, and other allegations, on 14 September 2021, Councillor Hely applied to the Principal Councillor Conduct Registrar for the establishment of a Councillor Conduct Panel to make a finding of serious misconduct against Councillor Lew, alleging that he had bullied her. The Principal Councillor Conduct Registrar considered the application and referred it to a Councillor Conduct Panel comprising the Honourable Shane Marshall AM, a former judge of the Federal Court of Australia, and Mr Matt Evans, a former Monash City Councillor, for hearing. Both were—Shane Marshall is no longer—part of the Councillor Conduct Panel List established by the Minister for Local Government from which members of a Councillor Conduct Panel are selected. As queer and theatrical jurisprudence demand thinking through how personal experiences shape judgment, it is necessary to provide some brief biographical details about the Councillor Conduct Panel.

Matt Evans completed a degree in planning at Royal Melbourne Institute of Technology and is a consultant in the telecommunications sector. Not much is known about his family history. However, as myself and a colleague have noted in other work on theatrical jurisprudence, Shane Marshall was:

> The first in his family to attend university, completing a double degree in economics and law at Monash University. He came from a family of waterside workers in Port Melbourne, his mother was a migrant factory worker, and he was a descendant of a leader of the famed Eureka Stockade (Leiboff & Mulcahy forthcoming).

Shane Marshall also graduated as dux of St Bede's College in Mentone, where I also studied, and, like him, I barrack for Collingwood and went on to

study law at Monash University (though I studied it alongside performing arts not economics). He "came into law as an outsider with experiences vastly different from the norm at the time, but also with an attunement to experiences of exclusion forged from his working-class background" and brought this background to bear on his judgments (ibid). However, in this case, there is a notable lack of consideration of the gendered dimensions of Councillor Lew's comments by these two male decision-makers, nor of their impact on LGBTIQA+ and indigenous people.

Serious misconduct

The Councillor Conduct Panel heard the application, made no findings of serious misconduct against Councillor Lew, and dismissed the application. In its reasons for its decision, the Councillor Conduct Panel found that, whilst the comments were "unwarranted", "appalling", and "disregarded normal respectful discourse", they were simply "an example of vigorous political discourse" and "although being conduct which is to be discouraged, in the context of a 'hot button' political issue it was not behaviour which was unreasonable" or capable of constituting serious misconduct (*Hely & Lew*: paragraph 16). Furthermore, the Councillor Conduct Panel cautioned that the comments were made during debate on an issue "that was close to Cr Lew's heart making him emotional on the issue" and reasoned that "rather than being demeaning to Cr Hely it was in some respect an unintended compliment that she is considered to be a person concerned about social justice for the LGBTQI … people" (ibid).

Having regard to the standards of conduct referred to in the Local Government Act 2020, the Councillor Conduct Panel held that "political debate can be robust but at the very least it must not involve behaviour towards another councillor which involves repeated unreasonable behaviour" that is "insulting, threatening or humiliating behaviour" (ibid: 6-7). In so doing, the Councillor Conduct Panel cited the remarks of Kirby J in *Coleman v Power* (2004):

> One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change (paragraph 239).

In making this judgment, Kirby J cited Weston Bate's *Lucky City: The First Generation at Ballarat, 1851-1901*, which quotes Charles Jones, a political candidate running for the electoral district of Ballaarat East in 1864 (and Melbourne City Councillor from 1862-1865) who used a campaign speech to refer to Irish Catholics as "ignorant" "savages" and "specimen of the Cardinal's lambs, whom it was proposed should fatten upon Victorian pastures" (Bate 1978: 139). At that election, Jones defeated John Humffray, a gold digger who played the role of peacemaker in the lead up to the battle at the Eureka Stockade, in which Shane Marshall's great-great-grandfather fought. (Jones later went on to become the Member for Ballaarat West, where I live.) It is notable that Kirby J's conclusion that those who are of the view that political discourse in Australia should be improved "must find another homeland" has resonance with Jones' argument against the "import" of Irish Catholics into Victoria (ibid). Shane Marshall himself attended a Catholic high school in Victoria. What is also notable is that the primary source cited for the claims as to the nature of political discourse is historic, being over a century-and-a-half old and, even at that time, resulted in violence, with an angry mob tearing at the uniform of police guarding Jones after he gave his speech (ibid; see also Kiddle 1967: 251-262).

Some commentators have argued that *Coleman v Power* suggests that "a typical lack of civility in political debate in Australia was protected communication under the implied freedom" of political communication (Gelber 2005: 320; see also Stone 2005: 849-850). It is notable, however, that this case concerned criminal charges for using insulting words against police officers. Theatrical jurisprudence demands attention to "how different lives affect the reading, shaping and interpreting of law … based on the personal and through experience" (Leiboff 2019: 14). Kirby J, a prominent gay jurist and Distinguished Ambassador of the Australian Research Centre in Sex, Health and Society (where I work), would have been acutely attuned to the effects of criminalization, having grown up in an environment in which police enforced laws that criminalized homosexual conduct (Kirby 2011). Nevertheless, the sources cited suggest their application to speech by politicians. Perhaps the reason that Kirby J cited this speech by Jones is because of his belief that "Australians are very sceptical" of legal protections that would protect the speech of religious organizations or their adherents (Karp 2021), but it may be more generally due to a belief that restrictions on speech are fundamentally disempowering, reflected in his conclusion that "history, and not only in other societies, teaches that attempts to suppress … opinions, even when wrong-headed and insulting, are usually counter-

productive and often oppressive and ultimately unjustified" (*Coleman v Power* 2004: paragraph 260).

Misconduct

As Councillor Hely did not invite the Councillor Conduct Panel to consider whether Councillor Lew had committed misconduct by breaching what is now the Model Councillor Code of Conduct and, further, informed Councillor Lew that no issue of misconduct would be pursued against him in the course of the hearing before the Panel, the Panel determined that it would constitute a denial of natural justice if they considered that matter (*Hely & Lew*: paragraph 48).

The determination and accompanying statement of reasons for the decision were tabled at the 25 July 2022 Stonnington City Council meeting and recorded in the minutes of that meeting and published online.

Re-determination of *Hely & Lew*

In what follows, I rewrite two paragraphs of *Hely & Law*: paragraphs 18 and 48. Paragraph 18 concerns some of the Councillor Conduct Panel's findings on the allegation surrounding the urgent COVID motion and paragraph 48 concerns the Councillor Conduct Panel's conclusion on serious misconduct. The words underlined are taken verbatim from *Hely & Law*; the words not so are my own.

In this rewriting, some decisions have been made about terminology and time. First, I use the acronym "LGBTI" rather than the more capacious "LGBTIQA+", which captures asexual and other diverse sexual orientations and gender identities, as "LGBTI" is the term that is used by Councillor Lew that is subject of the claim of serious misconduct. Further research needs to attend to the particular impacts of stigma and discrimination against asexual people in this context.

Second, I also play with the timing by applying the law, including the Local Government Act 2020 ("the Act"), that exists at the time of writing rather than at the time of the decision, including changes made by the Local Government Amendment (Governance and Integrity) Act 2024, most notable of which is the substitution of standards of conduct with a Model Councillor Code of Conduct. The reason for this is to ensure the applicability of the law reform recommendations that follow to the current legislative framework.

[B] *HELY & LEW*

[18] The second allegation relied on by Cr Hely to argue that Cr Lew engaged in unreasonable behaviour towards her was related to Cr Lew's conduct in the course of proposing an urgent motion at a Council meeting on 7 June 2021. The motion sought that the Council write to the State Government in support of ending the COVID related lockdown in Stonnington because of its effect on the large number of small businesses in Stonnington. During the reply comments on his motion (referred to as "summing up") Cr Lew engaged in an unwarranted attack on Cr Hely. This occurred one day after the two Councillors had met to discuss ways of working together in the future. Cr Lew accused Cr Hely of putting "any left wing woke issue front and centre" including "LGBTI" and "indigenous issues". The Mayor (Cr Hely) was just one of six Councillors who did not support the motion. There was no reason to attack her for not doing so and especially no reason to compare her lack of support for the motion to support for "woke issues". Cr Lew's comments in that regard were appalling. They disregarded normal respectful discourse and played the person not the issue.

[18A] It could be argued that Cr Lew's comments were simply an example of vigorous political discourse. The Model Councillor Code of Conduct stipulates that it is not intended to limit, restrict, or detract from robust public debate of issues in a democracy (Local Government (Governance and Integrity) Regulations 2020 sch 1 cl 5). This does not, however, give Cr Lew free rein to breach the standards of conduct. Debate must be done in a respectful manner (ibid: cl 5), which involves using professional and respectful language and keeping criticism focussed on the idea or issues being debated, rather than making it personal. In his "summing up", Cr Lew's comments were not relevant to the motion, being to write to the State Government in support of ending the COVID lockdown in Stonnington and instead became personal.

[I8B] It could also be argued that Cr Lew's comments were reasonable because they were made in the context of a "hot button" political issue, being the COVID lockdown. However, Cr Lew's comments were focussed on "LGBTI" and "indigenous issues", which are not "hot button" political issues and should not be treated as such and, in any case, these comments were irrelevant to the motion being debated about the COVID lockdown.

[18C] Cr Lew's comments were made during debate on an issue that was close to his heart, being assistance to small business because of the COVID lockdown, making him emotional on the issue. As Kirby J in *Coleman v Power* noted, political debate regularly includes emotion and freedom of political communication should protect "the obsessive, the emotional and the inarticulate" [260]. However, Cr Lew's comments were irrelevant to the political debate about the COVID lockdown and, had that debate made him emotional, he could and should have channelled those emotions into comments on the motion under debate, not irrelevant comments about "LGBTI" and

"indigenous issues". These comments were not made in support of his motion, but rather to attack Cr Hely.

[18D] It could be argued that, rather than being demeaning to Cr Hely, Cr Lew's comments were an unintended compliment that she is concerned about social justice for LGBTI and indigenous people. However, this argument is undermined by Cr Lew's use of the term "woke". Whilst the term "woke" was originally used to refer to heightened awareness of social inequalities and injustices, it is now widely regarded as a pejorative term of ridicule and mockery. It was used here to suggest that Cr Hely's concern for these issues is performative or superficial. In this regard, Cr Lew's comments were clearly not complimentary but were, rather, demeaning to Cr Hely.

[18E] Law dictates that the provisions in the Model Councillor Code of Conduct must be read so as not to infringe the implied constitutional freedom of communication concerning governmental or political subjects defined by the High Court of Australia in *Lange v Australian Broadcasting Corporation* [1997] HCA 25 and the right to freedom of expression codified in the *Charter of Human Rights and Responsibilities*.

[18F] Earlier in this decision we cited the remarks of Kirby J in *Coleman v Power* that "Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion" and, on this basis, while "one might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse … those of that view must find another homeland." For that claim, Kirby J cites Weston Bate's *Lucky City: The First Generation at Ballarat, 1851-1901*, which quotes a political candidate running for the electoral district of Ballaarat East in 1864 who referred to Irish Catholics as "ignorant" "savages" and "specimen of the Cardinal's lambs, whom it was proposed should fatten upon Victorian pastures." Whilst these comments may have been considered part and parcel of political debate historically, recent reports bring into question whether such comments are reasonable in contemporary Australian politics.

[I8G] Following extensive consultation with the sector, in May 2022, the Victorian Government's Local Government Culture Project undertaken by PriceWaterhouseCoopers Consluting in partnership with academics Professor Emeritus Anona Armstrong and Dr Yongqiang Li produced an Insights Report that identifies issues that influence council culture and councillor conduct. The Insights Report found that women and LGBTIQA+ people "are often not inspired to stand for election or work in the LG sector. When they do, they may face harassment, lack of formal support and retribution for calling out poor behaviour."

[I8H] Furthermore, in November 2021, the Australian Human Rights Commission's Independent Review into Commonwealth Parliamentary Workplaces produced the *Set the Standard* report that makes recommendations to ensure that parliamentary workplaces

are safe and respectful. The *Set the Standard* report concluded that "while the parliamentary chambers are designed for robust debate, those spaces must also be safe and respectful" and the standing orders of parliament should "require that the language used in the chamber does not contribute to the exclusion of women, First Nations people, LGBTIQ+ people, CALD people, or people with a disability."

[18I] Finally, in August 2021, the Victorian Pride Lobby produced the *Breaking the Rainbow Ceiling* report that surveyed lesbian, bi+, and queer women on their barriers and motivators to stand for office. The *Breaking the Rainbow Ceiling* report found that some respondents "feared public attacks or backlash based on their gender or sexual orientation. This included a fear of stigma, discrimination, bullying, sexual harassment or abuse – and, now, a fear of violence or assaults, including by elected representatives" and political opponents, and that "politics was seen by respondents as a male-dominated environment where women are ignored and, if they do speak up, are marked out and made to move on."

[18J] In short, these reports suggest that while political debate may be robust, it must also be respectful and not exclusionary and, as we have said earlier, must not constitute a risk to the health and safety of another councillor. Whilst Kirby J's remark in *Coleman v Power* must be borne in mind, namely that "public officials are expected to be thick skinned and broad shouldered in the performance of their duties" [258], it is worth remembering that the latter attribute is often imputed to men. These recent reports demonstrate that historical standards of political debate may contribute to the exclusion of women and LGBTI people from public officialdom. Indeed, section 15(3) of the *Charter of Human Rights and Responsibilities* notes that the right to freedom of expression is not absolute but may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons.

[18K] In this case, the Model Councillor Code of Conduct requires that councillors must treat others with dignity, fairness, objectivity, courtesy, and respect (Local Government (Governance and Integrity Regulations) 2020 sch 1 cl 2(1)), and limits behaviour by councillors that is demeaning, abusive, obscene, or threating (cl 2(1)(a)), behaviour that intentionally causes or perpetuates stigma, stereotyping, prejudice, or aggression (cl 2(1)(b)), or behaviour that is discrimination or vilification (cl 2(1)(b)). The purpose of the limitations set out in the Model Councillor Code of Conduct is to ensure that councillors discharge their duties and functions appropriately and in a civil and respectful way. This is undoubtedly important, as the reports above demonstrate that disrespectful debate can exclude women and LGBTI people from standing for or working in local government, thereby impairing their right to take part in public life. In any case, these provisions must be interpreted in accordance with the stated intention of the Model Councillor Code of Conduct to not limit, restrict, or detract from robust public debate of issues in a democracy (cl 5).

[18L] The limitations set out in the Model Councillor Code of Conduct may result in a councillor being suspended from office for up to three months (or twelve months in the case of serious misconduct), being removed from any position in which they represent the council including as chair of a delegated committee, and being ineligible to hold office as mayor or deputy mayor for up to twelve months, in accordance with section 167 of the Act. A councillor would not be subject to a cost order or a criminal penalty for breaching the limitations set out in the Model Councillor Code of Conduct, and therefore the consequences of a finding of misconduct against a councillor are not unreasonably restrictive in consideration of the importance of respectful debate. In sum, the Model Councillor Code of Conduct includes reasonable limits on the right to freedom of expression under the *Charter of Human Rights and Responsibilities* and the implied constitutional freedom of political communication, namely that political debate by and between councillors must be respectful.

[18M] Whether Cr Lew's comments were serious misconduct in the form of bullying requires a finding that his behaviour both: (a) was unreasonable; and (b) created a risk to the health and safety of Cr Hely.

[18N] We find that Cr Lew's behaviour towards Cr Hely was unreasonable. Cr Lew's comments were disrespectful towards Cr Hely and shifted the criticism from the issue being debated, namely the COVID lockdown, to a personal attack on Cr Hely on issues unrelated to the debate, namely "LGBTI" and "indigenous issues". There was no reason for these comments in the context of the political debate, and they were unreasonable.

[18O] We do not find, however, that Cr Lew's behaviour created a risk to the health and safety of Cr Hely. In doing so, we are cognisant that health and safety includes psychological health and safety. Cr Lew's comments understandably could have hurt Cr Hely's feelings, but there is no evidence before us to suggest that they created a risk to her health or safety, psychological or otherwise. Therefore, Cr Lew's comments were not bullying and were thus not serious misconduct. Whether Cr Lew's comments were misconduct (as distinct from serious misconduct) is an issue which the Panel will concern itself with later in these reasons.

[…]

[48] Consequently we make no finding of serious misconduct or bullying in accordance with section 167(1)(a) of the Act. Cr Hely did not invite the Panel to consider whether Cr Lew had committed misconduct. Nevertheless, if we are satisfied that Cr Lew breached the Model Councillor Code of Conduct, we may make a finding of misconduct against Cr Lew, provided that the breach occurred at or after 14 June 2021, being three months before the date of the application, in accordance with section 167(1)(b) of the Act.

[49] Whether Cr Lew's behaviour was misconduct requires a finding that: (a) his behaviour breached the Model Councillor Code of Conduct; (b) the breach occurred at or after 14 June 2021, being three months before the date of the application.

[50] We find that Cr Lew breached the Model Councillor Code of Conduct. As we noted earlier, the Model Councillor Code of Conduct requires that councillors must treat others with dignity, fairness, objectivity, courtesy, and respect, and limits behaviour by councillors that is demeaning, abusive, obscene, or threating, behaviour that intentionally causes or perpetuates stigma, stereotyping, prejudice, or aggression, or behaviour that is discrimination or vilification. We have already found that Cr Lew's behaviour towards Cr Hely was disrespectful, unfair, discourteous, and demeaning. We further find that Cr Lew's behaviour was stigmatising, discriminatory, and vilifying towards LGBTI and indigenous people.

[51] Stigma is a process of labelling and stereotyping that culminates in status loss and discrimination. In his comments, Cr Lew distinguished issues affecting small businesses from what he labelled "LGBTI" and "indigenous issues". He associated negative attributes to those identified differences by labelling issues affecting LGBTI and indigenous people as "woke", which presented a wildly oversimplified idea that these issues are performative or superficial. He separated and distanced small businesses from LGBTI and indigenous people, creating a dynamic of "us" and "them". This culminated in discrimination against LGBTI and indigenous people.

[52] Discrimination occurs if a person treats a person with an attribute unfairly because of that attribute. In this case, Cr Lew treated LGBTI and indigenous people unfairly because of their sexual orientation, gender identity, sex characteristics, and race. He did so by treating the issues of those with these attributes as something that should not be put, in his words, "front and centre". This was unfair as it was unequal treatment compared to others, being small businesses that were the subject of his motion and whose issues, he suggested, by implication, should be put front and centre. In sum, Cr Lew's comments were stigmatising and discriminatory towards LGBTI and indigenous people because of their sexual orientation, gender identity, sex characteristics, and race.

[53] Vilification occurs if a person engages in public conduct that is hateful or seriously contemptuous of, or reviling or severely ridiculing, a person or group of persons because of their protected attribute. In this case, Cr Lew's public comments expressed dislike for and a feeling that LGBTI and indigenous issues are beneath consideration, in a way that was abusive or angrily insulting or disrespectful and dismissive. The comments did not rise to the level of intense dislike to render them hateful, but they seriously expressed the feeling that LGBTI and indigenous issues are beneath consideration in a way that rendered them seriously contemptuous of LGBTI and indigenous based on their sexual orientation, gender identity, sex characteristics, and race. This was reflected in Cr Lew's criticism of issues facing

those with these protected attributes being put "front and centre". His comments were offensive, insulting, disrespectful, and dismissive of LGBTI and indigenous people. This was reflected in Cr Lew's use of the term "woke", being a pejorative term of ridicule and mockery, to describe issues impacting LGBTI and indigenous people, which further underscores his contempt of those with these protected attributes. The comments were angrily presented as evident in his emotionality, but did not rise to the level of extremity to render them reviling or severely ridiculing. Nevertheless, we have found that Cr Lew engaged in public comments that were seriously contemptuous of LGBTI and indigenous people because of their sexual orientation, gender identity, sex characteristics, and race.

[54] We have found that Cr Lew's behaviour was disrespectful, unfair, discourteous, and demeaning towards Cr Hely, and that his behaviour was stigmatising, discriminatory, and vilifying towards LGBTI and indigenous people. This behaviour was a breach of the Model Councillor Code of Conduct. What remains is for us to decide if the breach occurred at or after 14 June 2021, being three months before the date of the application.

[55] What is clear from the foregoing is that there was a pattern of behaviour towards Cr Hely that commenced prior to 14 June 2021, escalated through social media, and continued past that date, as evident in his comments made on 15 June 2021 at "Councillor Only Time" in relation to this same issue. Whilst we have found that his comments at that meeting were not unreasonable and thusly a breach in and of themselves, they do represent an ongoing pattern of behaviour, some of which was a breach, which continued past 14 June 2021. To look at each incident in isolation is to ignore the consistent pattern of behaviour towards Cr Hely that cumulatively formed a breach of the Model Councillor Code of Conduct. In that sense, the breach was connected and contiguous behaviour that continued after 14 June 2021.

[56] There is no evidence before us to suggest that Cr Lew's behaviour towards LGBTI and indigenous people continued after the isolated incident on 7 June 2021. It may have, but we have no evidence before us that it did. Nevertheless, we have found that Cr Lew's disrespectful, unfair, discourteous, and demeaning behaviour towards Cr Hely breached the Model Councillor Code of Conduct and that this breach continued past 14 June 2021. We therefore make a finding of misconduct against Cr Lew.

[57] Cr Hely informed Cr Lew that no issue of misconduct would be pursued against him during the hearing before the Panel. We therefore considered whether this finding – and consideration of whether Cr Lew had engaged in misconduct – would constitute a denial of natural justice in breach of section 163(2)(f) of the Act. In doing so, we are mindful of the enjoinder, in section 163(2) of the Act, that the proceedings must be conducted with little formality and technicality and that the Panel is not bound by rules of evidence but may inform itself in any way it thinks fit and has discretion over

its own procedures. Furthermore, Cr Lew had representation at the hearing despite section 163(2)(b) of the Act stipulating that there is no right to such. Cr Lew was heard and made representations on his behaviour, including through his counsel. Whilst Cr Hely may have informed Cr Lew that no issue of misconduct would be pursued against him during the hearing before the Panel, that only reflected the position of Cr Hely through her representation; it did not preclude the Panel from, at its own discretion, considering whether Cr Law had engaged in misconduct. Section 167(1)(b) of the Act empowers us to do just that.

[58] Having found that Cr Lew committed misconduct, we direct Cr Lew to make a written apology to Cr Hely. That apology is to sincerely acknowledge that Cr Lew was disrespectful, unfair, discourteous, and demeaning towards Cr Hely, and is to be tabled at the next Council meeting. Furthermore, we suspend Cr Lew from the office of councillor for one month.

[59] We also find that remedial action is required. We are aware that Cr Hely and Cr Law previously arranged a mediation and that Cr Hely sought for that process to continue but that Cr Lew felt that the process was being weaponized to stymie dissent. We consider that mediation would be helpful to restore civil relations between the two councillors. We therefore direct Cr Lew to attend the mediation with Cr Hely. That said, we are conscious that whilst successful mediation may redress the impact of this conflict on the two councillors, it will not address the impact of Cr Lew's behaviour on affected communities, including LGBTI and indigenous people.

[60] Earlier, we found that Cr Lew's behaviour was stigmatising, discriminatory, and vilifying towards LGBTI and indigenous people. Whilst we could not find that this behaviour was misconduct, as there was no evidence before us that it continued past 14 June 2021, we may make a finding that remedial action is required regardless of whether a finding of misconduct has been made, as per section 167(1)(c) of the Act. On this basis, we direct Cr Lew to undertake professional development training on LGBTI inclusion and professional development training on indigenous inclusion as it relates to his role and responsibilities as a councillor through training providers determined by the Council's chief executive officer. This training should remedy Cr Lew's stigmatising and discriminatory treatment of LGBTI and indigenous people.

[61] We finally direct Cr Lew to undergo counselling. As we noted earlier, Cr Lew was emotional but seemingly unable to channel those emotions into comments on the motion under debate, instead attacking Cr Hely and, through her, LGBTI and indigenous people. Counselling should enable Cr Lew to control his emotions and resolve social and personal problems he evidently has with LGBTI and indigenous people. We also direct the Council's chief executive officer to make counselling available to Cr Hely to deal with any hurt she may be feeling because of Cr Lew's poor behaviour.

> [62] Exclusionary language of the kind by Cr Lew has its consequences. Cr Lew has faced these consequences through the sanctions described above. The consequences of his exclusionary language are, however, felt by others. Cr Hely is understandably hurt, but so too would be LGBTI and indigenous people. All have been disrespected by Cr Lew. What is perhaps most concerning is that research shows that this kind of conduct dissuades women, LGBTI people, and indigenous people from standing for or working in local government. We hope that the remedial actions we have directed go some way to ameliorating this unfortunate consequence. Local government in Australia should be open to all without exclusion, and women, LGBTI people, and indigenous people who want to stand for or work in this sector should not be compelled to "find another homeland".

[C] POSTSCRIPT

Whilst acknowledging the limits of queer law reform (Adler 2018), in this postscript, I proffer some recommendations to strengthen the councillor conduct framework in Victoria to redress some of the issues encountered in *Hely & Lew*.

The redetermination directs Councillor Lew to undertake professional development training on LGBTI and indigenous inclusion. Under section 33A of the Act, a councillor is required to complete regular professional development training to understand their role and responsibilities. If they fail to complete professional development training, their allowance is withheld (Local Government Act 2020 (Vic), section 33B). It is not, however, misconduct. Therefore, a new subclause should be inserted in clause 1 of the Model Councillor Code of Conduct to require that a councillor must complete professional development training as required under section 33A of the Act. This reform would mean that failure to complete professional development training is grounds for misconduct.

LGBTIQA+ inclusion cannot rely on professional development training alone. In the development of the Local Government (Governance and Integrity) Amendment Regulations, the Government considered including conduct required in relation to "LGBTQIA+ inclusiveness", but ultimately this was not included in the Model Councillor Code of Conduct.[1] In light of the issues encountered in *Hely & Law*, the Government should reconsider this and include a new subclause in clause 2(1) of the Model Councillor Code of Conduct regarding LGBTIQA+ inclusiveness.

Furthermore, as noted in the redetermination above, it is a well-established principle of workplace health and safety laws that health

[1] For further information, see Local Government Reforms 2024.

includes psychological health (Occupational Health and Safety Act 2004 (Vic), section 5). However, this is not explicitly referenced in the Model Councillor Code of Conduct. Therefore, subclause 2(2)(a) of the Model Councillor Code of Conduct should be amended to include specific reference to psychological health and safety. This would be strengthened by the Government's planned Occupational Health and Safety (Psychological Health) Regulations, which will provide necessary clarification on what amounts to psychological hazards.

These recommendations would strengthen the Model Councillor Conduct of Conduct by including provisions on LGBTIQA+ inclusiveness and psychological health and safety, as well as requirements to complete professional development training. However, more needs to be done to tackle discrimination, sexual harassment, vilification, and other breaches of human rights.

Unlike other duty-holders, councillors do not have a positive duty to eliminate discrimination, sexual harassment, or vilification against members of their municipal community (cf Equal Opportunity Act 2010 (Vic), section 15). This is because their duty only extends to other councillors or members of council committees (section 73). So, whilst the Model Councillor Code of Conduct requires that councillors not engage in discrimination or vilification (Local Government (Governance and Integrity) Regulations 2020 (Vic), schedule 1, clause 2(1)(c)) or demeaning, abusive, obscene, or threatening sexual behaviour (clause 2(1)(a)), they do not have a positive duty to eliminate such discrimination, vilification, or sexual harassment—this only extends to fellow councillors or members of council committees and, even then, only to discrimination and sexual harassment, not vilification. Therefore, a new subclause should be inserted in clause 2 of the Model Councillor Code of Conduct to require that councillors must take positive reasonable and proportionate measures to eliminate discrimination, sexual harassment, or vilification within the municipal community.

As noted in the Guidance on the Model Councillor Code of Conduct, "councillors are a public authority under the Charter, and it is unlawful for a Councillor to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right" (Local Government Victoria 2024: 40, referencing Charter of Human Rights and Responsibilities Act 2016 (Vic), sections 4(1)(e), 38(1)). This includes the right to protection against discrimination (Charter of Human Rights and Responsibilities Act 2016 (Vic), section 8(3)). It is not, however, misconduct if a councillor acts in a way that is incompatible with a human

right or fails to properly consider a human right in their decision-making. Therefore, a new subclause should be inserted in clause 2 of the Model Councillor Code of Conduct to reflect this requirement under the Charter of Human Rights and Responsibilities.

These recommendations would again strengthen the Model Councillor Code of Conduct by including a positive duty to eliminate discrimination, sexual harassment, and vilification and a duty to consider and act compatibly with human rights. However, it is also necessary to address structural issues within the councillor conduct framework itself. These include the burden on victims of raising and proceeding complaints of serious misconduct and the limited ability of impacted members of the public to make complaints.

The current situation where councillors have discretion on whether to report serious misconduct, in accordance with section 154(2) of the Act, leads to the perverse scenario that councillors may not exercise that discretion because of the fear of reprisal. If there is an obligation to report, councillors may not experience reprisal for doing so. Therefore, consideration should be given to inserting a mandatory obligation on councillors to report a reasonable belief that a councillor has committed serious misconduct to the Principal Councillor Conduct Registrar under clause 3 or 4 of the Model Councillor Code of Conduct. In such situations, the Principal Councillor Conduct Registrar would still examine the allegation and determine whether to form a Councillor Conduct Panel to hear the matter or dismiss it because it is frivolous, vexatious, misconceived, or insubstantial, in accordance section 155(1)(a) of the Act.

Another significant problem is that serious misconduct investigations by Councillor Conduct Panels are framed as a dispute between two sides trading accusations rather than as an inquiry to determine if a councillor has committed serious misconduct. In part, this is because the complainant is framed as a party to the proceedings, even though the procedures must be conducted with little formality or technicality, as required under section 163(2)(a) of the Act. This means that the burden of raising and proceeding complaints typically falls to councillors that have experienced the respondent councillor's misconduct. Therefore, part 6, division 7 (sections 153-174) of the Act should be amended to clarify that the applicant to a Councillor Conduct Panel need not be party to the proceedings. This would reduce the overly formal, technical, and disputational dimensions of Councillor Conduct Panel proceedings.

There is also limited ability for members of the community to make misconduct complaints against a councillor, even though the Victorian

Ombudsman states that "Councils must have processes in place to manage complaints about Councillors" (Victorian Ombudsman 2021: 5). Therefore, section 107(3) of the Act should be amended to stipulate that council complaint policies must include complaints about dissatisfaction with the conduct of a councillor.

These reforms would redress the burden on victims of raising and proceeding complaints and address the ability of impacted members of the public to make complaints. If complaints are to succeed, however, there is a need for clarity in the Model Councillor Code of Conduct. In this regard, there is some confusion over the application of the Model Councillor Code of Conduct. Clause 2 of the Model Councillor Code of Conduct requires that a councillor must treat others with respect, but clause 5 states that "nothing in the Model Councillor Code of Conduct is intended to limit, restrict or detract from robust public debate of issues in a democracy". These can be read together, as was done in the redetermination, to require that debate must be respectful, but to resolve any potential inconsistency, clause 5 of the Model Councillor Code of Conduct should be amended to clarify that debate must be carried out in a respectful manner.

Poor behaviour and misconduct by councillors can cause significant trauma for individual victims, detrimental impacts on others, and significant expenditure of money, time, and resources for the council. Dealing with these requires a two-pronged approach of legislative reform and cultural change. Failure to deal with these issues, and the prejudice that underpins them, will impact the willingness of women, LGBTIQA+ people, indigenous people, and other marginalized groups to stand for and work in local government.

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Love without Veil or Garland: A Critical Reading of the Judgment on Same-Sex Civil Unions in Brazil

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Abstract

This article offers a critical reading of the 2011 Brazilian Supreme Federal Court decision recognizing same-sex civil unions as family units. While celebrated as a landmark for sexual minorities' rights, the judgment operates through an affective grammar that disciplines as much as it includes. Drawing on critical perspectives on law and sexuality, I argue that the decision mobilizes a heteronormative framework of conjugality, in which the very term "homoaffective subject" functions to produce a domesticated and respectable figure, while silencing more radical forms of kinship, desire, and care. The article advances the notion of "affective coloniality" as a key to understanding the normative costs of recognition.

Keywords: same-sex civil union; Brazilian constitutional law; legal recognition; homoaffective; affective colonization.

[A] INTRODUCTION

The historic decision of the Brazilian Supreme Federal Court ([*Supremo Tribunal Federal*] STF) in May 2011, recognizing same-sex civil unions [*uniões estáveis homoafetivas*] as family entities, was celebrated as a landmark in the process of legal inclusion of LGBTI+ persons. At first sight, it appears to be a forceful affirmation of equality, dignity, and the protection of sexual minorities within the constitutional framework. Yet, a closer examination of the terms of recognition reveals that the gesture does not end with the mere granting of rights. On the contrary, it mobilizes affects, regulates forms of life, and establishes an emotionally normative model of what can be deemed legitimate. The *homoaffective* subject—a

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term that will be further explained in this article—when incorporated into the field of law, is simultaneously disciplined by it.

This article proposes a critical reading of the affective grammar of the STF decision, questioning the type of subject it imagines, accepts, and rewards, as well as the way it mobilizes a certain "affective colonization" of LGBTI+ persons.[1] In other words, this is an analysis that does not limit itself to the legal-formal content of the opinions but rather investigates how affect—especially conjugal love—is invoked as a condition for the recognition of sexual citizenship. I aim to highlight how the notion of "homoaffectivity" emerged in this particular legal and linguistic context. Rather than claiming a radical autochthony, my analysis seeks to show how this term acquired juridical and cultural force in Brazil through the logic of "affective colonization", while resonating with—but not identical to—logics found in other jurisdictions.

The central question guiding this investigation is how the STF, in recognizing the same-sex civil union, reaffirms certain forms of kinship while marginalizing others.[2] I ask how the decision legally articulates the exclusion of non-monogamous and dissident forms of affect, through discursive categories tied to an extension and contemporary reiteration of what Monique Wittig (1992) called the "straight mind". I move between questions of what type of subject the judgment recognizes and at what cost. More precisely, I inquire into how the legal discourse of affectivity—although presented as inclusive—operates as a mechanism of normalization, channelling dissident lives into acceptable forms of intimacy and affectivity. Drawing on queer theoretical frameworks and on my own critical approach to issues of sexual rights (Van Pelt 2025), I argue that the judgment, far from dismantling the "heteronormative logic" (Butler 1990),[3] rearticulates it through the heteronormative language of love, affect, dignity, and mutual commitment.

The text is organized in three sections. In the first, I examine the decision as a judicial performance marked by an affective grammar of purification: affect appears as the foundation of the *homoaffective civil*

[1] Similar critiques of assimilation and respectability, leading to concepts akin to "affective colonization", have been advanced elsewhere (eg Duggan 2003; Edelman 2004; Dean 2009; Adler 2018).

[2] Cf Rubin, "Thinking Sex" (1984), on the "charmed circle" that centres respectable sexualities and marginalizes practices at the outer edges.

[3] Judith Butler describes the "heterosexual matrix" as the principal normative mechanism of Western gender systems, where three dimensions are articulated: the classification of sex (male/female), the binary of gender identity and expression (man/woman), and heterosexuality as the normative orientation (Butler 1990).

union, but also as a disciplinary filter of what can be recognized. In the second, I employ the concept of "affective coloniality" to reflect on the normalizing effects of the ruling and on how it reorganizes the field of intimacy, erasing other insurgent forms of kinship, desire, affect, and care. Finally, in the third part, I sketch—through a critical reading of the key aspects of the decision—a dissonant legal imagination, one that refuses the terms of recognition as they were imposed and claims the right to exist without veil or garland—that is, without adornments that conceal difference, alterity, and sexual-affective disobedience.

Although the decision under analysis was delivered more than a decade ago, its symbolic and normative effects remain central to the field of Brazilian sexual politics—particularly in light of the recent setbacks caused by neo-conservative policies and the fragility of rights won exclusively through judicial rather than legislative channels.[4]

[B] THE CONTEXT OF THE DECISION ON HOMOAFFECTIVE CIVIL UNIONS BEFORE THE STF

Brazil adopts a model of democratic constitutionalism marked by the normative force of the 1988 Constitution, conceived as an instrument of social transformation after two decades of civil–military dictatorship. The STF, as guardian of the Constitution, plays a central role in the interpretation of fundamental rights, including through decisions with general binding effect. This configuration enables the Court to assume a prominent role in affirming new rights, often through interpretative means and without legislative mediation. It is in this context that the category of *homoaffectivity* [*homoafetividade*] emerges—a legal and political neologism coined to designate relationships between persons of the same sex in affective and conjugal terms, seeking both institutional recognition and legal protection in a scenario of deliberate legislative omission.

With a National Congress[5] characterized by a more conservative stance regarding sexual rights, LGBTI+ movements have developed strategies of

[4] On a personal note, I believe that since 2011 I have matured some of the interpretations I had previously developed—in publications, lectures, and teaching—and they appear in a more elaborated form in this article, especially through the instrumental use of the concept of "affective coloniality" to problematize the juridical-interpretative particularity of the Brazilian case.

[5] The Brazilian National Congress is composed of two legislative chambers: the Chamber of Deputies and the Federal Senate. In the case under analysis, it holds legislative competence to enact civil laws with validity throughout the entire national territory.

judicialization for their political agendas.[6] This occurs because, within the Brazilian political–institutional configuration, the STF has stood out for assuming a counter-majoritarian role, refining the modern liberal tradition and the system of protection of citizens' fundamental rights, especially those of social minorities (Coacci 2015; Cardinali 2017).

In 2011, the STF, through mechanisms of abstract constitutional review, jointly adjudicated the actions that equated, for all purposes, same-sex civil unions with heterosexual civil unions (Brazil, STF, ADPF 132, 2011; Brazil, STF, ADI 4277, 2011).[7] The definition of a civil union in Brazil is tied to the existence of a long-term, public, and continuous relationship between two persons living as if married. The civil union is recognized by the Federal Constitution of Brazil (Brazilian Constitution 1988, Article 226(3)) and regulated by the Civil Code (Brazilian Civil Code 2002, Article1.723).

ADPF 132 pointed to possible violations of the rights to equality, liberty, private autonomy, the principle of legal certainty, and the dignity of the human person. The action requested an "interpretation in conformity with the Constitution" of Article 1.723 of the Brazilian Civil Code, declaring that judicial decisions denying the legal equivalence of homoaffective civil unions to other civil unions would violate the fundamental rights enshrined in the Constitution. This interpretative method applies to infra-constitutional legislation and aims to align the normative text with the constitutional meaning most appropriate to the time of interpretation, without declaring its nullity.

ADI 4277, in turn, had as its main objective that the STF recognize homoaffective civil unions as family entities, provided that the same requirements established for the recognition of civil unions between a man and a woman were met, with the corresponding application of the same rights and duties.

Thus, in adjudicating the two actions jointly, the STF carried out an interpretation in conformity with the Constitution of Article 1.723 of the Civil Code, establishing that "the sex of persons, absent an express or implicit constitutional provision to the contrary, cannot serve as a factor of legal 'disequality'" (Brazil STF 2011: 2-10). In one of the rare

[6] For systematic data on the institutionalization of LGBTQIA+ rights in Brazil, see the ILGA World SOGIESC Database (ILGA World 2025), the *Observatória Nacional de Direitos Humanos LGBTI+ Diadorim* (2025), and the recent analytical report by the Brazilian National Council of Justice (CNJ 2025).

[7] These are specific actions within the Brazilian constitutional review process, designed to examine violations of the fundamental precepts that sustain the legal order.

occasions of a consensual judgment, with few argumentative dissents before the STF, all 10 justices participating in the case ruled in favour of the actions, even though the reasoning in their opinions displayed certain divergences.

The Article of the Civil Code expressly provides that a civil union is between a man and a woman. The STF's decision did not amend the text of this Article; it merely carried out an interpretation in conformity with the Constitution, which set aside the sexual discrimination that would otherwise exist in the provision by limiting the institution of the civil union exclusively to conjugal relationships between a man and a woman. Thus, as a result of the decision, registry offices throughout the country were subsequently obliged to register same-sex civil unions, thereby ensuring legal stability in a highly controversial matter in Brazilian society, one that had been marked by conflicting judicial decisions—some recognizing and others denying civil unions for same-sex couples.[8]

As a consequence of the STF's decision, the civil union became a legal institution that would also extend to same-sex couples, now recognized as family entities under the law. The term *homoaffectivity*, used and popularized in the reasoning of the decision, was developed by the jurist Maria Berenice Dias (2011a; 2011b) to present the issue in a form more acceptable to the general public. Affectivity thus served as the rhetorical instrument to affirm the "humanity of homosexual couples",[9] distancing them from the stigmas and moral panic that surround them.

At the same time, it is important to recognize that the notion of *homoaffectivity*, as constructed in Brazilian legal doctrine, has specific contours that distinguish it from other categories employed in different jurisdictions. It is a legal–linguistic concept marked by the valorization of principles such as dignity, love, fidelity, and stability, but articulated in a singular manner within the Brazilian legal field. Although there are parallels with foundations mobilized in other legal systems for the recognition of same-sex civil unions, the category of *homoaffectivity*

[8] Equal marriage has also been available in Brazil since 2013, following resolutions of the National Council of Justice (CNJ) requiring civil registries to celebrate marriages between same-sex partners.

[9] In English-speaking contexts, the term "homosexuals" is historically loaded with juridical and medical pathologization, often linked to criminalization or psychiatric discourses. For this reason, terms such as gay, lesbian, queer, or same-sex couples are generally preferred today, as they are more closely associated with identity, respect, and self-determination. In the Brazilian context, however, the term "homosexual" does not necessarily carry the same pejorative connotations. While the use of gay or queer is widespread, both are sometimes criticized as anglicisms, and even the expression same sex has been increasingly replaced by same gender. Thus, the use of "homosexual" in Brazilian legal and political discourse reflects a different trajectory, which does not erase the ethical responsibility of language choices but situates them in distinct cultural and historical dynamics.

reflects a localized cultural and legal elaboration, whose meaning cannot be fully translated without considering its historical, social, and linguistic embeddedness in Brazil.[10]

From this "affective" context, one of the central grounds for the STF's decision was the right to the pursuit of happiness, implicitly derived from the principle of the dignity of the human person, set forth in Article 1(III) of the Federal Constitution as one of the foundations of the Brazilian Republic. This principle is understood as a consequence of the tradition of liberal ideals, linked to the individual freedoms of subjects and constituting one of the elements for the realization of personal autonomy and liberty in general.[11]

The decision is also related to a broader paradigmatic shift in the legal understanding of the concept of family that has taken place in Brazil in recent decades. Until then, the family was understood as the foundation of society, but especially as a legal institution aimed at protecting the property of its members. This purpose of the family was present in the former Civil Code. The new Civil Code, enacted in 2002, together with the new constitutional principles introduced by the 1988 Federal Constitution, redefined the legal meaning of family, now understood as a space in which its members, united by affectivity, develop as persons and promote the means to pursue their happiness and dignity.

In this way, the family becomes a social institution justified by the realization of affective relationships among its members, a space in which individual, conjugal, and familial happiness is materialized. In this new context, the decision under analysis not only recognized but also shaped gays and lesbians as homoaffective, within a specific matrix of emotional intelligibility and normative affect.

A striking aspect of the judgment is the repeated affirmation of affect as the legitimate foundation of same-sex civil unions. The decision is not structured around equality in abstract terms, but rather on the sentimental content of conjugality. In the words of Justice Ayres Britto, the *homoaffective civil union* constitutes a family unity formed by two persons of the same sex, united by the bonds of affection, mutual respect, and a common life project. He elevates affect to the condition of a constitutional

[10] On the juridical coinage and diffusion of "homoaffectivity" in Brazil, see Dias (2011a; 2011b); Coacci (2015); Rios (2013).

[11] The request for recognition of same-sex civil unions had already been brought before the STF on other occasions and on the basis of different arguments and principles, but was not granted. In 2003, the matter was examined in a Public Civil Action (2000.71.00.009347-0/RS); in 2006, in ADI 3300.

substance, even declaring that love, when sincere, is not evil and cannot be criminalized (Brazil, STF 2011: 21, 23, 39, 47).

However, by projecting a "sanitized" figure of affect, the judgment places affect at the centre of legal legibility, transforming it not only into a basis for inclusion but also into a criterion of acceptability. What the Court embraces is not merely difference, but sentimental normality.

Justice Luiz Fux reinforces this affective framing, arguing that the Constitution protects all family forms animated by affection and reciprocity. He emphasizes the capacity of same-sex couples to mirror heteronormative emotional ideals. For him, love and care are what make a union worthy of protection, thereby excluding—albeit implicitly—those relationships marked by other forms of affect, other rhythms, or other structures of kinship (Brazil, STF 2011: 64).

Fux imparts to his opinion a strong liberal and human rights tone. He emphasizes international jurisprudence and constitutional equality, yet still returns to a recurring motif: homoaffective couples are capable of loving and of leading a family life (Brazil, STF 2011: 65–70). The emphasis on capacity reveals the normative economy at work: affect must be proven, dignified, and recognizable according to heteronormative standards. Recognition, in this context, concerns less the granting of rights than the affective performance itself, generating a kind of emotional audition before the law.

Justice Ricardo Lewandowski, although voting in favour, expressed a certain discomfort. He cautioned against the "judicialization of politics" and defended the primacy of the legislature, insisting that courts should not overstep their constitutional mandate (Brazil STF 2011: 101-102). His position reveals not only institutional caution but also the limits of consensus within the Court: the recognition of homoaffective civil unions was not the result of a unified progressivism, but of a fragile alignment under strict affective conditions, a conquest constantly threatened by conservative positions.

This institutional caution should not be read simply as a conservative hesitation. Rather, it illustrates how the Court, constrained by accusations of "judicializing politics", sought to legitimize its role by working within a narrow semantic and affective frame. Precisely by avoiding the charge of legislating, the Court resorted to a grammar of fidelity, stability, and love that rendered homoaffective unions intelligible only as a derivative of the heterosexual model. In this way, judicial restraint itself becomes part of the disciplinary apparatus: rights are granted, but only precariously,

conditioned on their assimilation into pre-existing normative forms. This tension—between a legislature unwilling to move forward and a constitutional court bound by its own limits—reveals why advances for sexual minorities in Brazil often arrive as fragile judicial concessions, constantly threatened by conservative pushback.[12]

In this vein, Justice Gilmar Mendes understood that the decision did not recognize a "homoaffective civil union [*união estável homoafetiva*]", but rather a "civil homoaffective union [*união homoafetiva estável*]". This semantic inversion, though subtle, reveals the precariousness of the granting of rights, as it indicates that recognition was not achieved on equal footing with the heterosexual civil union, but rather in a derivative and exceptional manner. The result is that the rights guaranteed to same-sex couples remain subordinated, conceived as an extension or adaptation of the heterosexual model, highlighting both the secondary status attributed to homoaffective civil unions and the absence of a general legislation that would protect all family forms on equal terms (Brazil, STF 2011: 132, 147-151, 163-168).

Taken together, these opinions do not merely extend rights. They control the terms under which sexual dissidences may be seen, named, and protected. The homoaffective subject, as produced in this judgment, must be monogamous, emotionally discreet, domestically committed, and rhetorically respectable. Practices and arrangements such as non-monogamous constellations, collective care households, sex-positive communities, or non-domestic intimacies remain structurally misrecognized by a homoaffective frame centred on conjugality and respectability.

In this way, desire is silenced; radical alterity is erased; only domesticated and rhetorically acceptable love is brought to the fore in the Court's decision. As a result, there is little room to inhabit "old" roles in new ways (as spouse, husband, wife, parent, or child), or to reinvent entirely new roles—many of them still unnamed, such as the ambiguous place between partner and lover, or the figure of a friend who performs parental and educational functions without formal kinship ties.

In this sense, the judgment is not merely a space of legal inclusion but also an apparatus of affective disciplining. Its tone is one of benevolent concession rather than structural reparation. The price of visibility is the assimilation of dissidence.

[12] These threats of backlash are not limited to Brazil, as has been recently analysed by various studies. For one example, see Nash and Browne (2020).

[C] AFFECTIVE COLONIALITY AS A STANDARD FOR DECISION-MAKING

The critical reading I develop here does not negate that recognizing the right to a civil union for same-sex couples is a considerable and commendable achievement. In addition, it does not abandon law as a means of affirming meanings of subject liberation; it acknowledges the emancipations operated through law that bring subjects who have been subordinated to a somewhat better situation than the one they previously occupied. I do not contest the judgment's extension of rights as such; my concern is with the affective and conjugal grammar through which rights were granted and delimited.[13]

In this sense, I follow authors such as Sonja Buckel (2014), Elisabeth Holzleithner (2016), Amy Allen (2015), and Wendy Brown (2021). Even so, the critical reading I propose points us toward broader meanings of sexual freedom, which should not be conflated with the very path that law consolidates through its actions of liberating subjects from situations of oppression, exclusion, and domination. My aim with this critique is to convey that there are other interpretive possibilities for the granting and consolidation of rights (Van Pelt 2025).

At this point, I incorporate and adapt two categories from Michel Foucault (1995; 2012). On the one hand, I work with the concept of practices of liberation: collective strategies of institutional transformation that use law as a language of claim and recognition, especially in the context of struggles for sexual rights. On the other, I work with the concept of practices of freedom: everyday gestures of subjective reinvention and normative experimentation that, even at the margins of or against state law, produce other legal grammars and ways of existing. In this case, I am concerned with other possibilities of matrimonial arrangements that are not merely extensions of the hegemonic heterosexual model.

Thus, however much law strives to produce liberations—as in the case of same-sex civil unions—it was created on the basis of a dominant behavioural model in society, here referred to as heteronormative. The

[13] Comparable approaches appear in chapters of the book *Queer Judgments*. For instance, Behara and colleagues (2025) revisit the Indian Supreme Court's landmark decision in *Navtej Singh Johar v Union of India*, queering section 377 litigation through intersectional narratives (trans, intersex, Dalit, sex worker, disabled) silenced in the original case. Similarly, Ferreira and Danisi (2025), in their analysis, highlight that although the Court of Justice of the European Union rejected the "discretion" requirement for asylum, recognition remains normatively constrained by stereotyped expectations of queer suffering and conformity. These readings, like my own, acknowledge the importance of judicial progress while exposing the exclusions embedded in the normative frameworks of recognition.

changes that are promoted in the direction of recognizing other behavioural possibilities are carried out through the expansion of this initial normative core, established on the basis of the hegemonic way of life of various societies. In the case under analysis, I begin from the observation that, even with the changes promoted in the legal models of marriage, they merely expand the possibilities of matrimonial relations from within the heterosexual model. My question is: what other normative formulas of marriage or affects can we accommodate, beyond the heteronormative? This also invites us to consider whether a "reparative reading" (Sedgwick 1997), drawn from queer perspectives, could help expand the normative imagination of affects and care beyond the heterosexual matrix.[14]

In other words, due to the particularities of the legal system, this normalization has as its normative centre the hegemonic meanings of ways of life; or, in the case presented here, normalization is grounded in heterosexual modes of exercising sexuality and matrimonial relations. For this reason, there is a strong tendency to compel LGBTI+ persons either to assimilate hegemonic ways of life or to adapt their own forms of life to models close to the hegemonic behavioural norm, in order to obtain the protection of the legal system.

This process of normalization incorporates into the legal system those sexual dissidences that most closely approximate the heterosexual model, relegating to the background ways of life that are more distant from it (Clavel 2015). Or, in more extreme situations, it will never recognize those ways of life that are unrecognizable or entirely unacceptable according to the dominant parameters of sexuality, affectivity, and marriage. In sum, it is a model of normativity that expands outward from an original normative centre, yet likely fails to reach the most extreme cases, such as those of persons whose lifestyles remain far removed from the heterosexual model.

As Gayle Rubin argued in her seminal essay "Thinking Sex" (1984), sexual hierarchies can be visualized through the metaphor of a "charmed circle", in which practices located near the normative core are marked as legitimate, natural, and respectable, while those at the periphery are stigmatized as dangerous, pathological, or unworthy of protection. This structural diagram of sexual value helps illuminate the Brazilian case: the homoaffective frame expands recognition outward from a heterosexual centre but does so in a way that reproduces the very logics

[14] Sedgwick distinguishes between "paranoid reading", oriented toward exposing and anticipating normative violence, and "reparative reading", which seeks to imagine alternative ways of inhabiting texts, relations, and affects with greater openness and creativity (Sedgwick 1997). In this sense, a reparative approach allows for rethinking how law might expand the normative imagination of kinship and care beyond heteronormative parameters.

Rubin identified, relegating non-conjugal and non-respectable intimacies to zones of structural misrecognition. In this sense, the "charmed circle" provides a comparative heuristic that can be rethought in light of Brazil's particular juridical and cultural configurations.

It is important to stress that not all forms of kinship are legally recognizable as valid. There are situations that must necessarily be rejected within a constitutional and human rights framework, such as cases of physical and psychological violence, sexual abuse, or any other situation of exploitation, domination, and oppression.[15] The distinction between arrangements that may be recognized and those that must be rejected is undoubtedly complex. Nevertheless, despite this complexity, it is the task of law to elaborate sophisticated formulas for social coexistence. Law cannot evade its mission of expanding mechanisms of protection and recognition of diverse kinship forms while simultaneously rejecting those marked by domination, oppression, and exclusion. This normative orientation is grounded not in dominant moral codes, but in constitutional principles, international human rights instruments, and long-standing struggles of social movements—from feminist critiques of gender violence, to LGBTI+ claims against the policing of bodies and desires, to the protection of children and the pursuit of comprehensive sexual education.

Thus, I am not referring to the recognition of any possible form of kinship, but rather problematizing the way in which the legal system develops its sense of normalization from a particular hegemonic model of kinship. What is at stake here is the realization of plural and diverse forms of affectivity without legal normalization being operated on the basis of a heterosexual standard taken as central. As I have argued elsewhere, law may generate important practices of liberation from domination, oppression, and exclusion, yet it also tends to delimit subjectivities through the grammar of recognition (Van Pelt 2025). But at the same time, recent research has questioned the ways in which norms of affectivity and care

[15] These three forms of struggle—against domination, against exploitation, and against subjection—were outlined by Michel Foucault in "The Subject and Power" (Foucault 1995). I further develop this typology in *Encrucijadas queer en el derecho* (Van Pelt 2025) to articulate a queer critique of law in terms of oppression, domination, and exclusion.

are constantly constituted, regulated, and defined both by the state and by capitalist economic dynamics.[16]

It is in this sense that I defend the possibility of a critique of the decision under analysis, without disregarding or denying the advances that have been achieved. What emerges is an emancipation through law combined with a critique rooted in meanings of freedom that lie beyond law itself. This critique is concerned with those who remain outside these legal achievements—whether because they choose to do so, because they cannot embody the subject that law demands for recognition, or because they receive rights only in a precarious and insufficient manner.

When we speak of the acquisition of rights, according to the frameworks of modern Western law, we are referring to a system of norms that recognizes us through a normative artifice of subjection. We are transformed into legal subjects and recognized by this system according to the parameters it itself establishes for our recognition. In this sense, we may say that recognition by law is heteronomous—that is, it is law that designates the characteristics by which we will be validated as subjects of a given right. This is why it is important to pay attention to the details that constitute the subject imagined by law as its addressee, and to think of possibilities for a law that increasingly allows subjects themselves to constitute the forms by which they will be juridically recognized, investing more in an autonomous rather than heteronomous perspective of legal subjection.

Thus, when in the judicial action under analysis we see that the claim is restricted to gays and lesbians—qualified, moreover, by the term "homoaffective", that is, "homosexual subjects" engaged in affective relationships—we limit the debate to the heterosexual–homosexual binary and do not move forward toward seeking the recognition of matrimonial rights for other sexual identities, such as *trans people*,[17] intersex persons,

[16] This article also draws on earlier reflections developed in the collective volume *What is the Future of Sexuality in Law?* (Monica & Martins 2017), which I co-edited. That book gathered empirical research and critical analyses on sexual politics and law in Brazil, serving as one of the main sources of data and conceptual elaboration for my later work (Van Pelt 2025). Another edited volume that develops this approach outside the Brazilian context is *Queer Kinship* (Bradway & Freeman 2022), as well as Part III of *Queer Judgments* (Ferreira & Ors 2025).

[17] I use the term "trans people", while acknowledging that "transgender" is the most common concept in English-speaking contexts. In Brazil, however, "transgender [*transgênero*]" is often regarded as an anglicism, acceptable and intelligible but not widely adopted in activist discourses. In general, the umbrella category "trans people" is used, and there is no major objection to the use of "*transsexuals*", which even appears in the name of the "National Association of Travestis and Transsexuals [*Associação Nacional de Travestis e Transexuais – ANTRA*]". At the same time, the term "travesty" carries a particularly significant political and historical weight in Brazil, marking a distinctive trajectory in the politicization of trans issues, despite ongoing debates about terminology.

non-binary persons, and so forth. We see an advance in law,[18] but without a more complex normative debate on the various sexual identities that, in recent years, have asserted themselves as identities and sought recognition by social institutions.

This analysis resonates with a broader critical literature that has long highlighted the normalizing costs of legal recognition for LGBTI+ subjects. Lisa Duggan (2003) coined the term "homonormativity" to describe how gay and lesbian politics in the United States became aligned with neoliberal and assimilationist values, channelling recognition through marriage, domesticity, and consumer citizenship. Tim Dean (2009) approached similar dynamics from the perspective of intimacy, showing how sexual subcultures and practices that resist conjugality are marginalized in favour of respectable, monogamous models. Libby Adler (2018) further developed these critiques in the legal domain, mapping how reforms often prioritize recognition of the most respectable LGBTI+ subjects while leaving more precarious and marginal groups outside the legal frame. Lee Edelman (2004), in a more radical register, argued that the political order itself is bound to a logic of reproductive futurism, whereby rights are tethered to the promise of family and the figure of the child, making queerness legible only when it conforms to that futurity.

Seen from this angle, the Brazilian category of "homoaffectivity" can be understood as part of a global pattern of disciplining LGBTI+ claims through conjugality. Yet it is not a simple repetition. Unlike the Anglo-American debates, where terms like "same-sex marriage" or "gay rights" dominated, the Brazilian legal field adopted the specifically affect-centred language of "homoaffectivity". This linguistic invention infused the legal grammar of recognition with affect and conjugality at once, producing a juridical subject legible as loving, faithful, and domesticated. Thus, while Duggan, Dean, Adler, and Edelman help illuminate the normative logics at play, the Brazilian case shows how these logics were refracted through a unique juridical neologism, one that both enabled rights and reinforced the boundaries of legibility.

We can include in this discussion the debates on polygamy or other conjugal arrangements that are not limited to couples, whether heterosexual or homosexual. Here, as Daniel Borrillo (2016) suggests, we may return to the principles of private autonomy, non-interference in personal freedom, and the pursuit of individuals' own meanings of happiness. Taking seriously the deeper senses of these principles is a

[18] As already noted, the ILGA World SOGIESC Database (ILGA World 2025) provides a repository of recent developments in gender and sexuality rights in Brazil.

necessary task if we are to confront the moral panic that surrounds human sexuality and to effectively constitute a law oriented toward the harmonization of freedoms and the consolidation of a "democratic law of sexuality" (Rios 2006), rather than the support of a dominant morality that imposes its meanings on the exercise of our freedoms in general, from an assimilationist perspective (Fernández 2003: 410).

Another problem with centring our strategies of rights recognition on LGBTI+ persons is that they—especially those who are white and of high economic status—are the most readily assimilated by the system and, conversely, the ones who most promptly assimilate the behaviours of heterosexual hegemony (Clavel 2015). There is a strong legibility of the legal grammar in relation to white LGBTI+ persons of high economic status. So much so that most of the rights recognized by modern Western legal systems have clear liberal foundations. In fact, what is asserted is the power of the liberal grammar of rights, with a significant reduction in the possibility of constituting other philosophical and political paradigms for rights beyond the liberal one (Monica 2020). This is the process that Encarnación Fernández (2003: 410) called "assimilationism", that is, the predominance followed by the imposition of one culture over others, something that can occur within a given community or in the relation of one community to others.

The major problem here is not the adoption of a model of behaviour that is foreign to us, but the institutionalization of the way of being and living of the majority group, which ends up being presented as the most valid among all.[19] As we see in the decision, same-sex civil unions are made possible only insofar as they meet the same requirements as heterosexual civil unions. A more satisfactory path would be to understand that models of conjugality are multiple, and that what constitutes a conjugal union for non-heterosexual subjects does not necessarily fit the parameters of stability, durability, and publicity, as emphasized in the justices' decision.

As a subalternized group in society, LGBTI+ persons generally live their affective relationships in unstable, non-durable, and non-public ways.[20] This determination of equivalence operates on the assumption that, over time, there will be social acceptance of LGBTI+ to the point that

[19] As I have argued elsewhere, law necessarily operates through forms of essentialism when it seeks to simplify social life into juridical categories. This tension is developed in greater detail in my book *Encrucijadas queer en el derecho* (Van Pelt 2025), particularly in chapter 2, where I examine the difficulties of law in escaping this logic.

[20] Classic works in the sociology of sexuality illustrate this process of subalternization of LGBTI+ lives in their affective and relational dimensions, showing how such relationships are often unstable, non-durable, and non-public (Weston 1991; Plummer 1995; Weeks & Ors 2001).

they will be able to maintain stable, durable, and public relationships; and that LGBTI+ must, in fact, mould their forms of kinship to the heterosexual standard. These two paths are, in my view, specific forms of assimilationism. And they demonstrate the inability—or unwillingness—of the established powers to effectively recognize that we live in a plural society with diverse ways of attaining personal happiness.

This lack of sensitivity to the most varied forms of kinship arrangements and the requirement that civil unions be recognized according to the criteria of heterosexual unions may generate the problem of the "sanitization" of kinship relations—that is, the arrangements of persons who are not heterosexual are read by legal normativity through a romanticized filtering of the notion of affect and love (Van Pelt 2025). Thus, those subjects who exercise their kinship according to the pattern most acceptable to the general culture will be more readily recognized and validated by the legal system. Other arrangements, by contrast, will be read as deviations from the standard, as precarious arrangements, or, in more extreme situations, as kinship aberrations.

In a certain way, the legal system operates an acceptance for same-sex couples when their relationships manifest themselves as forms of kinship closer to the parameters of the general heterosexual culture. In sum, the internal reform of the legal system in relation to marriage is limited to those kinship arrangements that most closely approximate the hegemonic model, translating them into liberal formulas of protection of individuals and individual freedoms, without significant changes to the core values of majority culture.

If we read the 2011 judgment not only for what it affirms but for what it demands, the affective conditions imposed on sexual dissidences become more evident. Recognition there is not unconditional, for it depends on a discursive purification of desire and a public performance of sentimental docility. The homoaffective legal subject must be loving, non-threatening, stable, and discreet. Desire, uncontrollable in its forms, must retreat so that affect may testify and justify—according to standardized affective rules—the achievement of rights.

This is not simply an effect of judicial conservatism. It is a deeper mechanism that structures constitutional imagination itself as a field of affective governance: a colonization of affects in the name of an assimilationism of customs. This affective coloniality does not refer merely to dissident bodies and affects being belatedly recognized by law; it concerns their domestication within the emotional grammars of law. The homoaffective subject must cleanse itself of erotic ambiguities,

non-monogamous inclinations, and public visibility. The Court, in this sense, does not merely adjudicate rights; it disciplines affects, organizing intimacy within a matrix of normative intelligibility.

This affective disciplining is profoundly racialized and classed. The figure of the respectable same-sex couple functions, in Brazil as elsewhere, as a kind of certificate of modernity—a symbol of national progress, frequently used to display liberal tolerance to international observers (Puar 2015). But what forms of sexual dissident kinship are erased in this performance of juridical modernity? Which bodies remain unmournable, unrepresentable, unprotected, "dis-affected"?

Here, Judith Butler's critique of recognizability becomes central. In *Undoing Gender* (2004), they argue that recognition is always shaped by existing norms about what counts as a life. To be recognized is to be legible, but legibility is produced by a prior regime of norms, exclusions, and desires. In the Brazilian constitutional judgment, the legibility of sexual dissident life is conditioned by its proximity to the normative heterosexual form of kinship. The closer the dissident subject comes to "respectable" love, the greater the chances of being recognized.

This is why I resist the language of simple progress or setback in assessing this judgment. The issue is not whether the STF was sufficiently progressive or whether we should position ourselves for or against this decision. The issue is that its affective requirements are symptoms of a deeper machinery that selects, shapes, and produces the types of dissident lives that can appear before the law without scandal.

Recognition, in this sense, becomes a form of colonization. Not the brutal colonization of conquest, but the soft power of juridical affect—what, drawing on Jasbir Puar's (2015) analyses, could be called homonationalist affectability. Rights are granted, but only to those who render themselves affectively acceptable, politically safe, and rhetorically disciplined.

What is obscured in this apparatus is the vast "ecology of sensations" that exceeds the normative couple: friends who become family, lovers who do not cohabit, collectives of care, erotic bonds without kinship, and insurgent intimacies that refuse domestication. These lives remain illegible, not because they are outside the law, but because the law has not yet imagined the vocabulary to name them. Instead of identities affirmed according to a certain sexual and reproductive ideology, we would have an "ecology of sensations", a play of affective energies that would transcend the limits of fixed identities and call for modes of self-organization consistent with this ecological–affective–sexual process.

We should question affective configurations consolidated through ready-made "scripts", presented as if they were fixed structures of our life stories. Instead, these affective configurations should be regarded as consequences of choices and meanings that we inscribe onto our stories, not as determinations given in advance, like roles to be performed in a script already staged. This other "script of the dance of beings" would lead us to understand identity as an "ontological choreography" (Thompson 2005), a "*rara avis*" that dances the cartography of an archipelago (García López 2016: 199), a "queer labyrinth" (López Penedo 2008) of possibilities of being, which demands the normative channels necessary for its realization.

[D] THE RIGHT TO LOVE WITHOUT VEIL OR GARLAND: OUTCOMES OF A CRITICAL READING

What I have expressed thus far is that the 2011 decision must be read not only as a juridical victory but also as a scene of affective sacrifice, of affective colonization. Something was gained, but at the cost of something else: the radical alterity of dissident desire, the scandal of non-normative kinship, the insurgency of erotic presence in public space.

I do not question that the strategy of seeking legal recognition of same-sex civil unions was both interesting and fruitful, given that the legal institution of marriage is still closely tied to its religious meaning and that the request for recognition of equal marriage would have generated considerable controversy in society.[21] After the recognition of the homoaffective civil union, the right to convert a civil union into civil marriage was consolidated in 2013 through an internal Resolution of the Judiciary, thereby resolving, at least momentarily, the matter at hand (Brazil National Council of Justice [Conselho Nacional de Justiça] (CNJ) 2013).

Nevertheless, legal uncertainty remains because we still lack legislative recognition of the right both to civil unions and to civil marriage, whose stability and security are far greater than those afforded by judicial recognition. In extending Sedgwick's (1990) metaphor of the closet, this legislative silence can be read not simply as a lack of knowledge but,

[21] In Brazilian law, there is a differentiation between marriage and civil union, and a determination that the state must encourage the conversion of the civil union into marriage, since the latter is understood as the more perfected model of protection for kinship relations, with stricter and more consolidated legal rules, and bearing a stronger cultural symbolism. Both marriage and civil union are considered family units.

rather, as a form of power exercised through ignorance. The absence of explicit legislative recognition thereby reproduces a structure in which sexual dissidences are tolerated only through conditional judicial concessions, while the law-making body remains closeted in its refusal to openly confront the normative exclusions that underpin Brazilian family law. At the same time, it must be acknowledged that, strategically, much of the struggle has unfolded through the judiciary, precisely because the possibility of bringing the legislature "out of the closet" remains minimal under prevailing morally conservative conditions.

Moreover, an analysis of the justices' discourse indicates that same-sex couples are understood—even if implicitly—as second-class relations. At times they were designated as "new" families; at others as an "alternative" category of family; or by establishing categorical distinctions between "same-sex civil unions" and "civil same-sex unions." According to Wendy Brown (2021: 462), the mark of difference—in this case, being homoaffective/homosexual—when establishing new rights, iterates and reiterates subordination to the normative standard that stands above it.

As much as the term *homoaffectivity* produced positive effects in argumentative rhetoric, facilitating acceptance of the claim by both the justices and society itself (Dias 2011b; Vecchiatti 2019: 53), it also brought into the plane of normativity a concern with meanings of affectivity, generating consequences such as affective colonization, described in the previous section. Affect, also understood as familial love, becomes the principal element to be considered when seeking the recognition of a kinship relation. But what is the content of this affect and this love? What model of affect would serve as the basis for recognition by legal institutions shaped according to the dominant affective and matrimonial model? As Yang (2025) has argued through the notion of the "legal closet", legal strategies that rely on assimilationist rhetoric often remain "closeted" themselves: they secure visibility only by translating dissident forms of life into terms palatable to dominant norms. The Brazilian use of homoaffectivity exemplifies this dynamic, insofar as it makes recognition possible but only at the cost of disciplining affect into respectable, domesticated, and judicially acceptable forms.

The judicialization of the notion of affect has direct implications for the principle of preserving sexual freedom. Sexual freedom would be the "capacity to act erotically without coercion and to express oneself sexually according to one's own choices" (Borrillo 2016: 119). Bringing the notion of affect into the scope of sexual freedom risks limiting it to the parameters of the hegemonic conception of affect and love. From the

critical perspective of sexual freedom defended by Borrillo (2016: 120), the state should become "morally indifferent with respect to the question of sexuality", under penalty of becoming a paternalistic state, determining the very content of affect and love between persons.

As a consequence, it runs the risk of producing a "familist assimilationism" (Rios 2013: 14–15) by conflating sexual freedom with familial kinship.[22] Sexual rights cannot be guided by the notion of family coexistence—hence the use of the term *familism*—since this confusion is inherent to the model of heterosexual kinship relations. This brings serious problems for the promise of diversity and plurality derived from the normative principles of juridical modernity, which end up subordinated to the heteronormative logic (Coacci 2015: 72).

Thus, the best interpretive alternative would not be one that simply repeats and extends to same-sex couples the traditional models of family, marriage, and civil union. What we need is to rethink family law itself and its attachment to hegemonic familist parameters (Coacci 2015: 75). If we fail to take advantage of this opportunity to debate the new directions of sexual rights, we will weaken the interpretive meanings of the principles of private autonomy, sexual freedom, human dignity, and privacy that are most adequate to our present times.

The most appropriate approach would not be the extension of legal protection of civil unions only to same-sex couples, but rather the realization of the deeper meaning of the principles used to sustain the argument that every person, regardless of sexual orientation, gender identity, or other identity factor, should be entitled to establish kinship bonds through the state, independently of the notions of love and affection that may be attached to them. Even if the strategy is coherent with the ways of securing rights within a society marked by strong prejudice against sexual dissidences, a union is not homoaffective, much less heteroaffective; it is a civil union, not necessarily stable, lasting, and public. Likewise, for legal purposes, a marriage is neither homosexual nor heterosexual. It is marriage, it is civil, and it is for all those who wish to constitute, together with others, kinship arrangements for whatever purposes they may desire.

If the scope of recognition of civil unions were limited only to same-sex couples, the state would be reproducing one of its major problems in

[22] One example of this is sexually dissident persons who have been expelled from their homes and decide to constitute a family relation among themselves, without possessing the traditional family bonds recognized by the legal system: ancestry, descent, and adoption. Moreover, they are not in a family relation with the objective of exercising sexual freedom. This is a family configuration with little intelligibility on the part of the legal system.

relation to the addressees of rights: that of establishing a model of legal subject who will receive legal protection, provided that this subjection takes place according to the state's own determination of how we ought to be (Van Pelt 2025).

Finally, the term used in the decision, "same-sex couples", is a common expression in several countries that are also debating this issue. However, sexuality and queer studies have pointed out since the 1990s that sex, like gender, is a concept with cultural nuances (Butler 1990). This breaks with the consolidated sex–gender binary, according to which sex would be a biological term—something given by nature—while gender would be the social construction of our sexual "naturalness". However technical biology and medicine may appear in constructing knowledge about our bodies, their grammar is socially produced.

Consequently, the notion of sex, in its supposed link to what is "natural", is also a cultural construction. In various parts of the justices' arguments, the naturalness of sex and the culturality of gender are affirmed as unquestionable, which does not correspond to the current state of discussion in the field of gender and sexuality studies. Thus, the use of the term "same-gender couples" would be preferable to "same-sex couples", as it is more aligned with the contributions of the more recent gender and sexuality studies.[23]

[E] CONCLUSION: TOWARD AN INSURGENT LEGAL IMAGINATION

The 2011 decision of the Brazilian Supreme Federal Court produced a paradox: it was, at once, a historic affirmation of unions between same-sex couples and a sophisticated apparatus of affective normalization. It did recognize—but did so by taming, filtering, and disciplining. What emerged was not a plural juridical panorama of kinship and affect, but the domesticated traditional figure of the couple: dignified, monogamous, sentimental, and emotionally legible.

This tension lies at the core of the juridical act of recognition itself. As Butler reminds us, recognition is not a neutral act of naming; it

[23] It is important to note that the Brazilian Supreme Court's use of the term "sex" in the 2011 judgment cannot be read through the lens of the current political context marked by the rise of so-called "gender critical" or trans-exclusionary radical feminism debates. At that time, references to "sex" in the decision were not aimed at denying gender or advancing a biologically deterministic understanding of sexuality. Rather, they can be understood as equivalent to "gender" in the constitutional reasoning adopted by the Court, reflecting the linguistic and juridical conventions of the period.

is a regulatory gesture that allows some lives to appear as lives while obscuring others. To be recognized is to enter a grid of intelligibility, one that often demands affective conformity.

The argument advanced in this article does not rest on a claim of Brazilian exceptionalism. Instead, it underscores how the category of homoaffectivity—while overlapping with global logics of dignity and conjugality—was mobilized in a singular way within the Brazilian constitutional order. This specificity helps to explain both the emancipatory effects and the exclusions reinforced by the judgment. In my reading of the judgment, I perceive not only the limits of liberal inclusion but also its affective colonizations. The STF not only affirms rights; it imposes a grammar of affect by requiring same-sex couples to clothe their affects in the language of traditional heterosexual conjugal love.

But what happens to the life that refuses this script? And to those who love without domesticity, who care without legal bonds, who desire without sentimentalism? Law must learn not only to recognize but to host the unknown. Juridical imagination must open itself to forms of life that do not arrive bearing juridical veils or garlands. The task is not to expand the model of marriage but to dismantle it, creating space for the—still—untranslatable, fugitive, or deviant.

I return, then, to the phrase that gives this article its title: "without veil or garland". In the judgment, the sincerity and naturalness of conjugal love between same-sex couples were emphasized. In my reading, I call for a juridical reinvention. To love without veil or garland is to refuse heteronormative adornments, to break with the bestowed ritual legitimacy, and to affirm that love, affects, and life have many other nuances.

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Suspended Agency: Cripping Judicial Ambivalence to Intellectual Disability and Sexuality

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Abstract

This article examines how Taiwanese courts suspend the sexual agency of individuals with intellectual and developmental disabilities in adjudicating consent. Analyses of key rulings demonstrate how judicial ambivalence—oscillating between protection and denial—produces legal reasoning that pathologizes desire while erasing deeper contextualization. Advancing a crip/queer jurisprudential lens, the article rethinks legal personhood beyond binary thresholds of capacity. It advocates for relational forms of agency that, while seeking justice, recognize expressions and embodiments that may be ambiguous and illegible to the law. This offers critical insights into how disabled sexualities are framed in law, expanding the scope of rights-based analysis.

Keywords: cripness as queerness; disabled sexuality; intellectual disability; judicial narrative; law in context.

[A] SEXUALITY AS A SPACE FOR CARE, CONTROL, AND CONTESTATION

Across global disability scholarship, there has been growing recognition of the systematic denial of sexual rights to people with intellectual and developmental disabilities (I/DD). While international frameworks like the United Nations (UN) Convention on the Rights of Persons with Disabilities 2006 (CRPD) envision equal access to intimacy, bodily autonomy, and relationship life, the lived experiences of individuals with I/DD continue to reflect institutional and sociocultural constraints,

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particularly pronounced in jurisdictions where disability rights have gained visibility yet remain entangled with enduring protectionist norms. This article asks how Taiwanese criminal courts suspend sexual agency for persons with I/DD—either by pathologizing capacity or erasing agentic refusal when applying Articles 221, 225, and 227.

Article 221's phrase "sexual intercourse against the will" contains no textual requirement of resistance. Article 224 penalizes "obscene acts" committed against another's will. Yet courts often infer non-consent from proxies—such as clear verbal refusal, physical struggle, or a prompt complaint. Article 225 criminalizes both intercourse/indecency by taking advantage of incapacity to resist or to express will; capacity is read contextually (the person's cognitive/volitional state at the time, situational power relations, and the knowledge of the accused), often via clinical reports. Article 227 is an age-based offence that renders consent legally irrelevant for persons under 16, although some judgments still invoke *willingness*. Where I/DD is present, courts effectively choose between Articles 225 and 227 and should explain the basis for the decision. Typical evidentiary practices include psychiatric/psychological, inferences from behavioural proxies (eg continued contact, delayed reporting) and credibility determinations. The following analyses demonstrate how these practices can operate to suspend agency.

Taiwan is a compelling and underexplored example of a jurisdiction: despite formal commitments to disability rights and inclusion, judicial reasoning in I/DD cases can have the effect of suspending sexual agency and constraining disabled sexualities, a tendency mirrored in legal, clinical, and familial institutions. Focusing on key rulings as cultural–legal artefacts, the article traces how global rights discourses are translated, suspended, or subverted, and how courts' protective/denying ambivalence pathologizes desire and strips away relational contexts. Advancing a crip/queer jurisprudential lens, such an approach invites us to rethink legal personhood beyond binary thresholds of capacity.

Scholarly attention to the sexualities of people with I/DD has increasingly sought to redress their systematic erasure from discourses of rights, intimacy, and pleasure. The longstanding marginalization of disabled people's sexual lives reflects not merely neglect but a deeper biopolitical operation denying sexuality as irrelevant or constructing it as dangerous. Across jurisdictions, individuals labelled with intellectual disability are often considered to lack the capacity for informed sexual agency while being subject to regimes of regulation and control (Turner & Crane 2016; Alexander & Gomez 2017). This contradictory condition,

considered both vulnerable and risky, has prompted researchers to question the structural foundations of such exclusions, including cultural taboos, institutional paternalism, and legal illegibility (Winges-Yanez 2014).

In Taiwan, these tensions are evident in both policy and practice. Chou and colleagues (2019b), evaluating a multi-year sexual health programme for adults with I/DD and their caregivers, reveal that parents and service workers initially held overwhelmingly negative attitudes to the notion of disabled people as sexual beings. Through targeted interventions, including participatory workshops and open dialogue, the study documented a shift from moral discomfort to conditional acceptance of sexual rights—yet such transformation remained precarious and highly context-dependent. The programme underscores that, without sustained engagement, prevailing attitudes tend by default to "sexual surveillance" of disabled subjects. Feely (2016) argues that deinstitutionalization has not dismantled regimes of control; rather, surveillance has become more dispersed and embedded in community-based settings, where discourses of vulnerability and propriety silently structure everyday interactions.

This insight resonates with the findings of Winges-Yanez (2014), who explores through autoethnography how professionals and family members, often under the guise of care, reproduce paternalistic norms restricting sexual expression. She highlights the paradox of support structures that simultaneously protect and infantilize, excluding disabled individuals from full sexual citizenship. Similarly, Kattari and Sherwood (2023) call for a shift towards intersectional, community-informed frameworks focused on disabled people's desires and lived experiences. They critique mainstream approaches that treat sexuality as a site of risk management rather than relational and embodied autonomy.

Such critiques have prompted scholars to turn to crip theory to disrupt normative understandings of ability and capacity. Thorneycroft and Asquith (2019) develop the concept of "cripping criminology" to expose how disabled lives are overrepresented in criminal justice systems yet remain under-theorized and structurally marginalized. Traditional legal frameworks regarding disability—whether grounded in biomedical or social models—fail to consider the complexity and contingency of disabled personhood. Drawing inspiration from queer and feminist criminology, their work suggests that the legal category of "intellectual disability" serves as a proxy for the denial of credibility and voice, invalidating the perspectives of disabled individuals, particularly in cases involving

sexuality, with their accounts being frequently interpreted through the lens of suspicion, deviance, or naivety.

Parallel critiques emerge from Taiwanese scholarship. Chwen-Jen Lin (2010) provides a historical review of how waves of moral panic, eugenic discourse, and policy silence have shaped the sexuality of people with ID. She observes that Taiwanese institutions consistently prioritize discipline and conformity over personal development, considering expressions of desire pathological. Liang (2015) reflects on her professional journey, from enforcing disciplinary norms in disability services to recognizing sexuality as a human right. She notes that despite some progressive efforts—like the establishment of private spaces or partnerships with sexual health educators—most institutions remain paralysed by fear of public backlash, choosing silence over liberation.

These works outline a common pattern: sexuality is acknowledged only to the extent that it can be contained. Rights-based approaches, when adopted, are procedural or rhetorical, rarely transforming the material and legal conditions that enable meaningful agency. As Alexander and Gomez (2017) argue, the dominant framing of sexuality in the disability sector still concerns protection, capacity, and risk, skirting discussions of pleasure, desire, or self-determination. The notion of sexual autonomy is rendered "dangerous" when articulated by the intellectually disabled, reinforcing an episteme where rights are selectively granted and easily withdrawn (Lee & Torres Celis 2024).

This literature also reveals the limits of the global disability rights agenda when local cultures, religious norms, and legal frameworks operate in tension with emancipatory ideals. Even when international conventions, like the CRPD, affirm universal sexual and family rights, their translation into national law remains uneven, and their interpretation in judicial processes ambivalent (Lee & Torres Celis 2024). These studies reveal a profound dissonance between the formal recognition of sexual rights and the continued marginalization of disabled individuals in practice.

Rather than outright denial, what we witness is a suspension of agency—a judicial and institutional hesitation to fully include people with I/DD in sexual personhood. Such ambivalence is not merely conceptual but actively reproduced in legal reasoning, courtroom discourse, and the selective deployment of protective measures. In this article, I first situate Taiwan's context, then critique the victim–perpetrator binary and outline the crip/queer method, before close-reading five judgments, tracing post-CRPD developments, theorizing "suspended agency", and concluding with implications for legal interpretations. By engaging with these critical,

queer, and crip-informed perspectives, we can begin questioning how rights are not only granted but also withheld—strategically, contingently, and unequally.

[B] THE "NEVER-MATURE" IN A VICTIM–PERPETRATOR BINARY TRAP

While human rights research has challenged the erasure and overregulation of disabled sexualities, this critical work still assumes a normative legal subject, capable of making claims and being recognized as a fully "capable" legal subject. However, in local legal contexts, including Taiwan, persons with I/DD have been systematically portrayed as "never-matured" (rather than becoming-mature) subjects: not only denied adult sexuality but also made intelligible to the law only through rigid binaries of victimhood or criminality. These legal and clinical framings often sidestep the complexities of relationality and consent, preferring to adjudicate guilt or harm based on capacity thresholds that obscure the role of interpretive and embodied ambiguity.

This binary is not merely discursive but institutionalized in Taiwan's criminal justice system, where court rulings, forensic assessments, and prosecutorial logic often adjudicate sexual events involving people with I/DD not through contextual analysis but through reductive capacity-based classifications. In this system, individuals with I/DD are frequently framed as passive victims of sexual offences. This legal binary has been constructed and reinforced through a system where state authority, medical discourse, and family protectionism intersect, with sexual agency being suspended rather than affirmed.

This logic is glaringly visible in Taiwan's criminal courts, where Article 225 cases illustrate how legal assessments of consent often reinforce infantilizing assumptions. Research on adjudicated cases highlights the courts' struggle in assessing sexual consent and agency, particularly under Article 225 of the Criminal Code, which penalizes "taking advantage"—opportunistically—of those with limited capacity (Li 2019; Lin 2019).

Here, it is important to differentiate between two key crimes. "Forcible intercourse" (Article 221) applies when the perpetrator uses "force, coercion, intimidation, hypnosis, or other methods against the victim's will". This includes physically restraining a person or making threats. The law specifies that the force does not have to be so extreme that the victim is "completely unable to resist", only that it is against their will.

In contrast, "opportunistic intercourse" (Article 225) applies when the perpetrator takes advantage of a victim who is already "unable to resist or is unaware of how to resist" due to their own "mental, physical, or cognitive disability or similar condition". This means the perpetrator is not the cause of the victim's state of vulnerability but rather exploits it.

Judicial decisions often hinge on ambiguous standards, such as whether the individual demonstrated "clear refusal" or possessed "sufficient knowledge" to decide, leading to uneven protection (Lin 2019). This creates an epistemic tension where courts distinguish between a victim's inherent vulnerability, the basis for prosecution under Article 225, and a perpetrator's overt force, necessary for a conviction under Article 221. This distinction is difficult to make, and courts often interpret a person with I/DD's testimony not as a reaction to a perpetrator's coercion but rather as an inherent state of being "unable to consent/resist". The focus on the victim's vulnerability may overshadow the perpetrator's actions and erase the possibility that the individual was an agent negotiating to make sense of the circumstances and whose expression of consent/non-consent was illegible to the law (Liao 2014).

Studies on individuals with I/DD accused of sexual assault reveal institutional responses grounded more in risk containment than in inclusive rehabilitation or contextual understanding. They expose a system that treats accused individuals as inherently prone to recidivism (Yang 2013; Shy & Ors 2023). Expert commentaries further reveal a lack of consensus on evaluating sexual autonomy in persons with I/DD, with contested forensic criteria concerning consent, volition, and power dynamics, such as the use of developmental age to assess capacity, the reliance on a person's cognitive function over their expressed desires, and the challenge of interpreting ambiguous communication or non-verbal cues as either consent or non-consent (Yang 2013). These Taiwanese studies underscore how legal and medical frameworks constrain rather than enable the sexual personhood of people with I/DD, often undoing their agency in the guise of protection.

The voices and subjectivities of the most affected individuals are absent in these discussions. Few studies consider the narrative agency of people with I/DD in cases concerning their own sexual and intimate experiences. Such omission extends to the courtroom, where representation is often mediated through caregivers, social workers, and experts, reinforcing a dynamic in which people with I/DD are spoken for rather than listened to (Chen 2018). The lack of advocacy mechanisms in the justice system limits the possibility of these individuals being recognized as credible

narrators of their own "feelings", not just safe or unsafe, but somewhere in between (Chen 2018; Liao 2014). This epistemic absence reflects a judicial imagination that struggles to perceive disabled people as sexually agentic subjects beyond risk paradigms.

Thus, it is important to acknowledge the foundational work of Chao-Ju Chen, a journalist trained in anthropology, whose series of investigative writings has significantly shaped public discourse on disabled sexual agency and institutional violence in Taiwan. Among her publications, *Dark Kingdom: Love and Sex of People with Disabilities* (幽黯國度) in 2018, *Innocent Sinner: A Girl's Sexual Abuse Case on Campus in the Mist* (無罪的罪人) in 2019, and *Silence: Collective Sexual Abuse at a Special Education School* (沉默) in 2022 have exposed marginalized experiences and triggered social and policy discussions surrounding the entanglements of consent, vulnerability, and care (Chen 2018; 2019; 2022).

While I approach the topic through a jurisprudential lens, Chen's work remains vital for understanding how these issues unfold in everyday practices and collective experiences. Her interventions, which critically engage the judicial system rather than reject it outright, remind us that movements for sexual justice and sexual rights for people with I/DD must go hand in hand, anchored in both critical legal reflection and lived realities. In her efforts to document cases, demand accountability, and amplify survivor voices, she employed an autobiographical methodology not just as a complement to interviews and field study methods but as a crucial means to narrativize sensitive life events that could hardly be "expressed" consistently and comprehensively (Atkinson & Walmsley 1999).

The binary framing of the victim or perpetrator operates through overt categorization and through what is left unarticulated, unacknowledged, societally neglected, or rendered legally unintelligible. What persists is a juridical atmosphere that demands clarity where ambivalence defines experience, particularly in matters of sexual consent and non-consent for people with I/DD. The marginalization of alternative interpretive frameworks and institutional reliance on reductive expertise contribute to the suspension of disabled sexual subjectivity in the legal process. To move beyond this, we must address what is articulated in judicial decisions and how legal reasoning is constructed and authored.

In this article, "suspended agency" is a concept proposed to capture juridical hesitation about which persons with I/DD are neither fully denied nor fully granted sexual personhood, as courts oscillate between partial recognitions and paternalist defaults. A crip-queer intervention

urges us to stay with complexity—acknowledging vulnerability and non-consent does not have to erase the knowledge and ability to desire, and protection can be the condition of autonomy rather than its negation. To capture this is to unpack the often-omitted ambivalence around crip desire when assessing consent or its absence—without legitimizing any act against a person's will, irrespective of whether "resistance" is overt or not. Suspended agency also names how agency is partly acknowledged yet withheld when affirming narrative legitimacy, a structural effect of legal systems ill-equipped to engage ambivalence and uncertainty. The next section, therefore, outlines how crip jurisprudential analysis can help us read court judgments not simply as verdicts but as cultural texts that narrate the contours of sexual agency (McRuer 2006).

[C] READING JUDICIAL PRACTICES WITH QUEER-CRIP SENSITIVITIES

This study undertakes a close reading of judicial decisions involving persons with I/DD and contested questions of sexual autonomy, drawing from Taiwan's court records accessed through the Judicial Yuan Law and Regulations Retrieving System (司法院法學資料檢索系統). As of 12 June 2025, a keyword search for "sexual autonomy" (性自主) along with "intellectual disability" (智能障礙) on the database yielded 3,206 entries of "criminal cases" (the same number as the initial keyword search on 4 January 2025), including decisions at various stages and levels of the same cases. While keyword searches were used as an initial filter, the five cases featured below were chosen for the jurisprudential tensions they signify rather than their representativeness.

Each judicial case, or even each trial and instance of a case, reveals juridico-epistemic contradictions in how sexual agency is constructed, suspended, or invalidated vis-à-vis persons with I/DD. They were selected because they occurred after Taiwan adopted the CRPD in 2014 (Sun 2019). Notably, while the human rights treaty and relevant provisions were not explicitly cited in the decisions reviewed, except occasionally, their broader normative significance provides a critical analytical frame. Although the Convention on the Rights of Persons with Disabilities Implementation Act 2014 gives the treaty domestic legal effect, citations of specific CRPD Articles in the judgments are patchy.

These judgments were chosen to illuminate interpretive ambiguities, normative tensions, and juridical framings in cases where the sexual personhood of I/DD people is put on trial. Through this interpretive lens, I aim not to generalize across all cases but to examine, meta-

ethnographically (Beach 2023), the judicial narratives that repeatedly fail to sustain the personhood of intellectually and developmentally disabled individuals, especially when they enter the legal record as "victims" of sexual acts (Noblit & Hare 1988).

This study adopts a crip-queer ethnographic reading practice—treating court documents as cultural and institutional artefacts that regulate disability, sexuality, and agency in mediated ways (Durban 2024). This approach, informed by queer and disability theorists, critiques the juridical construction of normativity and the contingent recognizability of marginalized bodies and desires (Kempapidis & Ors 2024; Watson 2025). Crip theory urges us to inquire how disability is rendered legible only through ableist norms of capacity, while queer theory questions the timelines and moralities attached to sexuality and "maturity" (Santinele Martino & Moumos 2024). Reading legal texts ethnographically permits a "thick description" of how judicial reasoning mirrors institutional anxieties about unruly bodies, uncertain subjectivities, and unsanctioned desires (Ferreira & Ors 2025).

This methodological orientation is inspired by Santinele Martino's work on the sexual lives of people with I/DD, which foregrounds relational ethics, narrative dignity, and the critical importance of attending to the material and affective contours of storytelling (Santinele Martino & Ors 2025). While this study involves no direct interviews, it applies the interpretive practice of correctively reading court judgments, inquiring how stories are told about, and on behalf of, disabled subjects in legal contexts (Santinele Martino 2022). Rather than treating court documents as objective factual repositories, I approach them as discursive spaces where sexual autonomy is negotiated or omitted through competing institutional logics.

These logics include evidentiary standards, psychiatric authority, family intervention, and risk discourse, all shaping how disabled individuals are situated in legal and moral orders (Santinele Martino 2017). The selected cases will be introduced in the following subsections. Notably, not all judgments at every procedural level were publicly available or readily retrievable, sometimes due to anonymity requests from a party involved. Through close textual analysis, I trace how persons with I/DD are made legible in the courts, often not as autonomous sexual agents but with juridically ambivalent, thus suspended, subjecthood.

Case 1: contradictions in approaching autonomy (Supreme Court 104-Tai-Appeal-1973)

Suspended agency appears where the court acknowledges hesitation and context, yet discounts narrated refusal through resistance proxies, parcelling agency under the banner of protection.

The first case concerns a young woman with intellectual disability who alleged that a peer with a similar cognitive profile, Mr Liao, had engaged in multiple non-consensual sexual encounters with her over time. The incidents reportedly occurred in both private and public spaces—including the victim's home, the defendant's home, a banana field, a tin house, and a temple toilet. The lower courts accepted the woman's testimony as credible, noting its consistency and specific details about the sexual acts, which provided the basis for the initial convictions. The focus remained on both parties' behavioural evaluations throughout the proceedings of different instances. However, importantly, the Supreme Court explicitly introduced the need for a socio-relational framing, highlighting the "close, long-standing relationship" and "boyfriend–girlfriend" dynamic, which the lower courts had overlooked.

Ab initio, the District Court (南投地方法院102年度侵訴字第34號) treated the complainant as a passive and vulnerable victim, drawing on psychiatric assessments to conclude that she lacked sufficient understanding or ability to judge sexual acts. She was repeatedly described as being unable to distinguish inappropriate from appropriate intimacy and incapable of "effective resistance". These findings provided the foundation for a conviction of five counts of forcible intercourse (強制性交) and two of opportunistic intercourse (乘機性交) under Article 225 of the Criminal Code.

On appeal, the High Court (台中高分院103年度侵上訴字第130號) largely echoed the District Court's rationale, sustaining the division between knowledge to refuse and incapacity to resist. It reiterated that the woman's cognitive impairment denied her active agency despite her statements still being deemed reliable—a duality that characterizes much of Taiwan's jurisprudence on sexual victimization involving persons with I/DD:

> while the female witness testified during the prosecutor's investigation that she had refused the defendant and pushed him away, the said testimony was a general statement that she had refused the defendant and pushed him away, and did not detail each instance of the defendant's sexual assault against her. Thus, it remains questionable whether the female witness, on each occasion of the defendant's sexual assault against her, expressed her unwillingness

> to have sexual intercourse with the defendant by refusing or pushing him away … (Taichung High Court, 2014, Appeal No 130)[1]

However, the Supreme Court (最高法院104年度台上字第1973號) demurred, citing inherent contradictions in the High Court's reasoning, observing that the lower court claimed the victim had refused the defendant's advances on the one hand, implying some level of sexual awareness and volition, while on the other, concluding that she could not (lacking the capacity to) understand or resist sexual acts. This judicial ambivalence hinged on the inconsistent application of the standard of "incapability of knowing to resist", the key requirement for conviction under Article 225—was the victim unaware of her right and capacity to resist, or did she actively reject the sexual advances but was overpowered?

Here, it is important to distinguish "opportunistic intercourse" (Article 225), which applies when a perpetrator takes advantage of a person who is "unable to resist or is unaware of how to resist" due to their disability, from sexual assault cases involving "forcible intercourse", which, however, focuses on a perpetrator's use of force to overcome a victim's lack of consent. The Supreme Court's decision highlighted the lower court's failure to resolve whether the victim was an agent who was actively resisting but overpowered, or if her disability rendered her incapable of resistance, thereby falling under the "opportunistic" category. This trajectory, particularly the Supreme Court's emphasis on "sexual cognition and consent ability" and its reference to international human rights, foreshadowed a growing alignment with principles enshrined in the CRPD.

The remanded High Court judgment (台中高分院104年度侵上更(一)字第12號) sought to resolve this issue by situating the interactions in a more nuanced social context. It was observed that the two parties had known each other through a special education programme and had engaged in behaviours often interpreted as affectionate, such as holding hands and watching television together, thereby raising the possibility of perceived mutual intimacy. This became a primary reason for the acquittal; the court could not definitively conclude her "inability to resist" or the "existence of force", given the relational context. The High Court acknowledged her understanding of sexual acts (eg "fuck" [打炮] and her awareness that others should not touch her) and questioned whether her disability alone meant she was "unaware or unable to resist". Consequently, the

[1] The original text in Chinese: "惟甲女於檢察官偵訊時固證稱伊遭被告性侵害時，有拒絕被告，撥開被告等語…然核證人甲女於檢察官偵訊時所為上開證述，乃概括答稱伊有拒絕被告、撥開被告等語，並未就被告各次對伊性侵害之情節逐一陳述，是被告各次對甲女性侵害時，甲女是否每次均有拒絕被告或撥開被告等表示不願與被告為性交之行為，仍有可疑".

court ruled that the prosecution "failed to prove" her inability beyond a reasonable doubt, considering other evidence.

Throughout these judgments, the woman's voice was mediated through psychiatric reports, institutional testimony, and behavioural inferences, with little effort to situate her desires, intentions, or uncertainties in a spectrum of socio-sexual experience. While she described the acts in concrete, even vivid terms, these accounts were interpreted as evidence of compliance (due to her lack of distress) or dismissed based on perceived cognitive incoherence. Her continued contact with the accused—explained in court as "not avoiding him" and even returning to his house—was interpreted as evidence against the occurrence of trauma, rather than a reflection of the complex social realities she faced in navigating trust, dependency, and constrained relational options.

This case exemplifies how Taiwanese courts construct the sexual subjectivities of individuals with I/DD through an uneasy blend of psychiatric authority, behavioural scripting, and legal formalism. The judicial system appears unable to accommodate ambivalence—sexual uncertainty, mixed signals, or incomplete resistance—particularly when adjudicating individuals deemed *immature*. As such, the possibilities of coercion versus desire collapsed into a paternalistic framework where protection overrides recognition, in which the courts imported a *de facto* "effective resistance" proxy, then using the romantic/relational context to negate incapacity to suspend the sexual agency of persons with I/DD.

Case 2: reluctant/inconsistent framing of consent (Supreme Court 104-Tai-Appeal-3564)

Suspended agency surfaces in the oscillation between status offence (Article 227(3)) and incapacity (Article 225) frames, blurring the complainant's will and the accused's knowledge while toggling standards.

The second case, Supreme Court 104-Tai-Appeal-3564 (2015), involves a teenage girl medically assessed with moderate cognitive disability. At the time of the incident, she was 14 and met the adult defendant through casual social interaction. Describing him as her "boyfriend", the girl agreed to spend time with him at a local motel, where physical intimacy occurred. After learning what transpired, her father filed a report with the authorities. The man later confessed to the conduct.

At the first-instance trial (台中地方法院103年度侵訴字第183號), the defendant was found guilty under Article 227(3) of the Criminal Code, which addresses sexual relations with adolescents aged 14 to 16.

Although the girl's cognitive condition was mentioned, the court did not invoke Article 225, which concerns interactions involving individuals with limited capacity to make sense of the circumstances or make decisions to consent. The court focused on the victim's behaviour rather than her disability status, asserting that she "did not resist" and appeared to willingly go with the defendant to the motel, suggesting her involvement was not entirely involuntary. This focus is visible in the court's reasoning:

> [the alleged defendant], knowing that [the alleged victim] … was between 14 and 16 years old in January 2014, and without mature sexual autonomy and judgment abilities, still acted with the intent to engage in sexual intercourse with her. On 2 January 2014, after inviting her out, he drove her to the Maldives Motel at [address], and without violating her will, he successfully performed a sexual act with her by penetrating her with his penis (Taichung District Court, 2014, Appeal No 183).[2]

This approach shifts the burden of proof onto the victim to demonstrate overt, legible non-consent, an impossible standard for many people with intellectual disabilities. It also illustrates how courts de-emphasize a victim's disability when their behaviour, even if influenced by that disability, seems to conform to the ableist understanding of consent. However, at the Supreme Court (最高法院104年度台上字第3564號), the focus shifted to whether the girl's condition should have altered the legal interpretation. A psychiatric report indicated the victim's limited comprehension regarding personal boundaries, relational risks, and the consequences of intimacy. Nonetheless, the court placed greater weight on the girl's statements during questioning, indicating she had learned about intimate relationships in school, felt affection, and desired to "try" the experience. Although she also expressed hesitation and unease, the court viewed these expressions as minor inconsistencies rather than meaningful indicators of intentionality or behaviour.

The Supreme Court explicitly upheld the lower court's finding that her statements of "voluntariness" and "wanting to try that" were consistent with adolescent development, asserting that her intellectual disability alone was insufficient to prove her having been "unaware or unable to resist". Effectively, the girl's situation was interpreted through a binary framework: either she was fully capable of consenting or fully incapable. Her mixed feelings, partial understanding, and socio-emotional vulnerability

[2] The original text in Chinese: "丙知悉甲…於103年1月間，係14歲以上，未滿16歲之人，無成熟之性自主及判斷能力，竟仍基於對14歲以上未滿16歲之女子為性交之犯意，於103年1月2日邀約甲出遊後,將之載往…馬爾地夫汽車旅館，未違反甲之意願下，以陰莖插入甲陰道之方式，對甲為性交行為1次得逞".

did not fit easily into either category. Eventually, the judicial decision downplayed her diagnosis and affirmed the original ruling.

This case underscores a broader legal pattern: while diagnostic assessments of cognitive conditions are acknowledged on record, they may be marginalized in practice if the individual exhibits behaviour consistent with mainstream expectations of *consenting*. In many jurisdictions, the notion of an adolescent with a cognitive disability consenting to sexual activity with an adult would be considered legally and ethically problematic. However, as the Supreme Court noted, the judicial rationale for the diagnosis not being determinative can be observed in the court's opinion that the definition of "inability to resist" should be based on the "objective physical and mental condition" and "cognitive capacity to consent", not solely on a disability handbook. The court's focus on the girl's behaviour, such as her statements of "voluntariness" and "wanting to try that", was used to support its reasoning (Supreme Court, 2015, Appeal No 3564). This is a crucial point, as the court's legal framing prioritizes a presumed voluntariness over a victim's disability.

Yet, this focus on behaviour can lead to a *de facto* requirement for clear and coherent resistance as indicators of non-consent, which may be impossible for many neurodivergent individuals navigating pleasure in confusing or pressure-filled situations. While Taiwan's law does not explicitly require active resistance in all sexual assault cases, this judicial pattern is heavily critiqued by scholars, as it—portraying and reinforcing a myth of "ideal victims" in sexual assaults—places a disproportionate burden on the victims in complicated, relationship contexts (Lin 2010; Chen 2021). And in the situations where persons with disabilities are involved, such as in this case, the *de facto* requirement imposes an ableist standard for proving non-consent, as also observed in many other jurisdictions (Harris 2018; Esmail & Concannon 2022).

Importantly, Article 225, which is specifically designed to address situations involving individuals with limited mental capacity, was not invoked. Instead, the court found the defendant guilty under Article 227(3), which criminalizes sexual relations with a person between 14 and 16 years old, regardless of whether consent was given. The court's reasoning focused on the victim's behaviour as proof of her understanding. This approach sidelined the possibility that emotional attachment, social imitation, or a desire for acceptance could coexist with a lack of genuine comprehension or readiness.

The court's focus on her voluntariness also appears to be influenced by an assumption that the father's report stemmed from an overprotective

attitude, leading the judges to consider affirming the girl's consenting agency to recognize her autonomy against paternalistic, traditional parenting. The court also observed that the case was reported by a substitute agency of legal guardianship, not the victim herself, and that she did not desire to report the defendant.

This case reveals a form of legal ambivalence that seems to recognize cognitive differences while simultaneously refusing to accommodate the lived ambiguity of decision-making, dependency, and desire among people with I/DD. By interpreting the victim's behaviour as proof of her willingness, the court flattened her complex experience to fit a legal framework that prioritizes a simplistic notion of consent over relational vulnerability. The court's acceptance of the argument relating to the victim's "voluntariness/trying" disregards Article 225. This framework, for the court's convenience, conflates two distinct legal categories of vulnerability: that of minors and that of people with I/DD, who are presumed to have limited or no capacity to consent for different reasons.

Case 3: circling judgments with epistemic tension (Supreme Court 105-Tai-Appeal-2868)

Suspended agency takes the form of evidentiary flattening, as psychiatric metrics and behavioural proxies sit beside expressed refusal without cohering into a clear recognition of consent or its absence.

The third case concerns a young woman with intellectual disability, whose sexual autonomy became the focus of prolonged judicial scrutiny across five rounds of adjudication. At stake was not only whether the sexual act in question was non-consensual but also whether the girl possessed the cognitive and volitional capacities to offer or withhold consent in the first place. At the trial court (101年度侵訴字第14號), the defendant was convicted of aggravated forcible sexual intercourse. The court found the victim's testimony credible, supported by medical reports confirming her intellectual disability and physical evidence of hymenal tears. It concluded that the defendant, aware of her condition, had engaged in sexual acts against her will.

On appeal, the High Court (102年度侵上訴字第466號) reversed this decision, re-characterizing the act as "sexual intercourse by taking advantage of incapacity", finding insufficient evidence of overt "coercion" beyond the victim's inherent vulnerability, despite her initial claims of resistance. The ruling emphasized that the girl's disability affected her comprehension and subjected her to vulnerability, leading to a conviction for exploitation rather than active force. The High Court

further underscored the need to consider the structural power imbalance and whether the girl could truly evaluate the nature of the encounter or resist effectively. This re-characterization by the High Court, moving from "forcible" to "taking advantage", highlighted an early epistemic tension in the judicial process: how to interpret the victim's agency when overt physical resistance was not proven and her cognitive vulnerability was undeniable.

The Supreme Court, in its 2014 judgment (103年度台上字第4570號), echoed this concern and remanded the case. It cited the CRPD to affirm the sexual rights of persons with intellectual disabilities, finding that, while adults with disabilities are entitled to intimate relations, their consent must be based on "actual capacity" and not merely on formal adulthood or physiological maturity. This direct engagement with international norms aligns with the critique of a universal, linear progression to maturity and sexual personhood, instead advocating for recognizing diverse timelines and forms of relationality (Chou & Ors 2019a). The ruling criticized the lower court's assumption that verbal statements automatically indicated agency, instead demanding a concrete determination of "sexual cognition and consent ability", recognizing that a person's ability to consent is not a static trait but a complex, contextual, and sometimes ambiguous state (Lu & Wang 2022; Wang 2025).

In the retrial (104年度侵上更(一)字第5號), the High Court emphasized that although the girl exhibited some sexual knowledge, this did not negate the indicators of compromised judgment or coercion. Her testimony, clinical evaluations, and the context of their encounter suggested a lack of equal footing in decision-making. The court was critical of relying on statements such as "school had taught me about pregnancy" to assert consent, arguing that passive knowledge does not equate to the ability to make a free and informed decision. This judgment demonstrated the court's attempt to reconcile the Supreme Court's directives with the need for victim protection, navigating the complex interplay of a victim's limited understanding and the perpetrator's exploitation. The court's decision was ultimately grounded in the finding that the victim's limited capacity made her unable to give meaningful consent, highlighting that:

> the victim's mental age is at a level of about a 9-year-old person (moderate intellectual disability), and her ability to discern and act is compromised, including in the area of sexual contact; her ability to discern and refuse is extremely low … Therefore, it is impossible to infer that she also had the psychological capacity to consent to sex just because the victim was an adult woman at the time of the

> incident and her sexual development was mature (Taiwan High Court, 2015, Retrial No 5).[3]

The defendant appealed again, but the Supreme Court (105年度台上字第2868號) dismissed the appeal, maintaining that assessing sexual autonomy in intellectually disabled individuals must extend beyond verbal capacity or factual knowledge. The Court supported a holistic view incorporating developmental assessment, expert analysis, and situational context. Despite acknowledging dissenting interpretations (eg the accused claimed their intimacy was mutual and consensual), the Court affirmed that the girl's vulnerabilities—in both general circumstances and in the sexual context—rendered her unable to consent freely under the law, thus upholding the conviction. It recast contested refusal as incapacity via expert deference, shifting focus from agentic non-consent to vulnerability management. This final decision solidified a judicial approach that, while acknowledging the sexual rights of disabled individuals, prioritized a nuanced interpretation of their capacity for consent, especially when exploitation of vulnerability was evident.

Case 4: presumptions for homosexual encounters (Supreme Court 103-Tai-Appeal-3144)

Suspended agency operates behind formal neutrality, where heterosexist scripts shape how same-sex intimacy is read and protection is invoked, while the complainant's expressed will and the extent to which the will is indicated are bracketed.

The fourth case (最高法院103年度台上字第3144號) involves a reported sexual encounter between two men, of whom the complainant (Mr A) had been certified with an intellectual disability. While same-sex relations are not criminalized in Taiwan, their appearance in legal reasoning remains rare, particularly when intersecting with disability and questions of sexual consent. This case, therefore, provides a crucial lens through which the courts handle non-heterosexual interactions under frameworks primarily built around male perpetrator/female victim dynamics. The facts concern an incident after A was invited to the defendant's home under the pretext of socializing. According to A, the defendant initiated bodily contact, with which A did not feel "totally uncomfortable" until later actions with sexual intentions, such as touching his genitals and buttocks, and anal probing.

[3] The original text in Chinese: "A女心智年齡約9歲水準（中度智能不足），其辨識而行為之能力有明顯缺損，性接觸方面亦然，其辨識能力及拒絕能力極低等情，已如前述。是本件自然無法以A女於案發時已為成年女子，其性之發展已經成熟，即推論A女在心理上亦有性的同意能力".

Among all allegations, the High Court acquitted the defendant on the charge of anal penetration due to inconsistent testimony and lack of corroboration. It convicted the defendant of "forced indecency" in an indoor nursery and "sexual harassment" in a vehicle. The court emphasized that these locations were part of a special education day centre, where the defendant worked as an assistant caregiver, thereby framing his actions not as isolated events but as an exploitation of a professional position of authority. The court found that even without overt physical violence, the defendant's actions constituted a "violation of will" because he "clearly knew the victim disliked his touching and had expressed refusal verbally or physically, but still forcibly proceeded against the victim's will" (Taiwan High Court, 2014, Appeal No 32). This interpretation broadened the understanding of coercion to include exploiting a known aversion within the specific context of a caregiving relationship.

The High Court (台灣高等法院103年度侵上訴字第32號), reviewing the District Court's conviction, partially acquitted the defendant on some charges (including the anal penetration claim) due to insufficient evidence but upheld convictions for "forced indecency" and "sexual harassment". In doing so, the High Court framed the convicted encounters as opportunistic exploitation. It underscored A's relational and communicative limitations, pointing to the power imbalance inherent in the situation, and found that the defendant had exploited A's vulnerability. Notably, the court refrained from making the same-sex nature of the encounter legally salient. It treated the facts through a heterosexist interpretive lens—not by explicitly devaluing same-sex relationships, but by failing to acknowledge how the same-sex dynamic might have shaped the victim's experience. The court focused on a universal concept of violation without considering possible internalized stigma or potential relational ambiguities that could be specific to a queer disabled context.

The Supreme Court upheld the conviction but similarly sidestepped any critical engagement with the queer implications of the case. It did not discuss how A's male identity or the same-sex dynamic might shape the interpretive challenges around consent, vulnerability, or social stigma. It is critical to understand that this does not mean the assault itself was different—the act remains non-consensual and culpable; yet, the interpretive challenges arise because a same-sex encounter subverts the traditional legal and cultural scripts of sexual assault, which are often rooted in heterosexist narratives. In this case, the court failed to consider how the victim's responses or reluctance to report might be tied to unique social pressures or internalized stigma.

Instead, the Court validated the High Court's emphasis on cognitive and situational vulnerability, reaffirming that the complainant's partial sexual knowledge did not equate to legal capacity. The ruling strengthened the use of psycho-behavioural assessments as primary determinants of agency, avoiding broader discussions on how homosexual encounters complicate prevailing legal scripts. Though dismissed by the Supreme Court later, the defendant once argued, playing into the stereotypes of male homosexual encounters and highlighting this heteronormative framing by attempting to use his own identity as a defence:

> Actually, the appellant has a wife and children and is a *normal man*. How could he possibly have sexual desires for another man, and he would not gain sexual satisfaction from it? The original trial failed to notice this and convicted the appellant of two counts of aggravated forced indecency, which is a great injustice (Taiwan Supreme Court, 2014, Appeal No 3144, my emphasis added).[4]

This silence is deafening. Mr A's narrative was not a direct account but was instead filtered through the testimonies of professional caregivers and other students with intellectual disabilities. This process was necessary because the case did not originate from A's reporting but from a gas station manager who noticed his abnormal behaviour. Judgments at various levels consistently noted the victims' communication difficulties and that their testimony was "not only inconsistent among themselves but also clumsy with words" (Taiwan High Court, 2014, Appeal No 32). This highlights a significant barrier in meeting the legal system's demand for a clear and coherent narrative of events. This unintelligibility in courtrooms renders A's agency neither recognized nor denied but suspended—awaiting to be made sense of where sexual autonomy was negotiated (cf Lee & Ors 2025).

This case reveals how Taiwan's judicial system, while formally neutral toward sexual orientation, operates with unspoken heterosexist presumptions. The disabled male complainant is protected by the courts declaring queer context legally irrelevant—not as a subject of queer desire but as a cognitively impaired person incapable of resistance. The law's silence on queerness, combined with its procedural reliance on medicalized incapacity, reproduces a regime of suspended agency, where the complexity of identity, desire, and relational nuance is systematically flattened for legal readability.

[4] The original text in Chinese: "其實，上訴人有娶妻生子，係正常男子，豈會另對男人產生性慾，更不會因此獲得性滿足，原審未察，論處上訴人二個加重強制猥褻罪刑，至為冤枉云云".

Case 5: exception and erasure of queer possibility (Supreme Court 108-Tai-Appeal-1318)

Suspended agency persists at the intersection of youth, vulnerability, and queer desire: the judgment affirms harm, yet neglects the queerness of the context, locationally and situationally.

In the final case,[5] the complainant (Mr A) was only 16 and had been medically diagnosed with a mild intellectual disability, characterized by slow reactions, limited understanding, and weak self-protection capabilities, making him easily influenced or subdued, according to his schoolteachers. The encounter occurred in a men's public restroom at Taipei Metro Xiangshan Station, *notorious* as a "gay cruising space". Mr A alleged that the defendant, Mr Qiu, a much older man, engaged in indecent acts, including lifting his clothes, pulling down his pants, touching his buttocks and genitals, and kissing his abdomen.

While initial allegations included anal penetration (sexual intercourse), the first-instance court ultimately reclassified the offence as "indecent assault by taking advantage of circumstances" (乘機猥褻罪) under Article 225, paragraph 2 of the Criminal Code, as anal penetration was not proven. The case traversed multiple levels of the judicial system, reaching the Supreme Court in 2019 (最高法院108年度台上字第1318號). Unlike most cases involving persons with intellectual disabilities, where a man is alleged to have assaulted a woman or a girl and the case is often brought to the authorities by a caregiver, this case involved two men. The victim himself reported the incident to his school counsellors, raising additional legal and cultural questions about how homosexuality intersects with perceived vulnerability and consent.

At the High Court (台灣高等法院107年度侵上訴字第144號), the trial focused on whether A's cognitive limitations rendered him unable to consent or object meaningfully. The judgment, citing psychiatric evaluations, found A as having limited comprehension and situational awareness, framing the sexual act as non-consensual, based on his disability status and the encounter's suddenness. The court placed weight on the argument that the defendant had exploited opportunistic circumstances, invoking Article 225 of the Criminal Code. Key evidence included the victim's consistent testimony, DNA matching the defendant

[5] The case stands out among the search results because the complainant and the defedant were both male. Most cases (over 90%) involved a male defendant and a female complainant, often with the incident reported by a parent or caregiver. Although this case falls outside the core selection period, centred on the years right after Taiwan incorporated the CRPD into its domestic legal system, it was included due to its uniqueness.

found on A's abdomen, and A's immediate and distressed report to his school counsellors and teachers. The defendant's admission to the police that he "felt the victim might have mental problems" further established his subjective awareness of A's vulnerability; however, the defendant also claimed that "I thought he was OK with it when I got closer to him" (Taiwan High Court, 2018, Appeal No 144).

The Supreme Court upheld the Taiwan High Court's conviction and did not engage with the "cruising-ness" of the public toilet. Presence in a space associated with sexual subcultures never implies consent; the analysis here does not seek to lower the threshold for proving non-consent but to show how such contexts are so illegible to courts. This omission imposes an assumed non-queer identity on Mr A, a person with I/DD, foreclosing the layered implications brought by a queer context. While rightly identifying a crime, the Court's reasoning denies Mr A's agency by treating him solely as cognitively impaired and therefore incapable of *cruising*, rather than as a legal subject who may harbour sexual desire and the capacity to refuse.

To be clear, this does not reframe an assault as consensual; it simply urges caution against inferring a lack of sexual agency from intellectual disability. In this case, the courts did not employ pathologizing or discriminatory language toward individuals sexually attracted to others of the same sex; nor did they acknowledge the queer dimension of the encounter, thereby missing an opportunity to inquire how non-normative sexualities are adjudicated when both disability and homosexuality are at play. The silence suggests a juridical discomfort with queerness, not through criminalization but through omission—a passive refusal to consider differentiated understanding, context, or protection regarding queer disabled sexualities.

The judgment reflects how the legal system continues applying universal standards of consent and capacity to complex socio-relational dynamics without recognizing specific power matrices. The particularities of this case—its same-sex nature and the context of a gay cruising space—are collapsed into a generalized schema of incapacity and opportunism. The court's approach avoids the more difficult task of discerning how these unique factors might have shaped the encounter, instead preserving a singular, narrow understanding of the disabled person as a subject legible only through a protectionist lens.

> A's mental capacity is indeed flawed … Although A had received relevant education on sexual autonomy and had been taught to protect himself, on the day of the incident, he was suddenly asked by the unknown defendant to go into the toilet, and subsequently

> allowed the defendant to lift his shirt, pull down his pants … without taking any action or resisting. This is sufficient evidence that A's intellectual disability rendered him unable to understand the meaning of indecent, and how to resist inappropriate indecent behaviour, in a state of being unable to resist the defendant's act, which is very clear. The defence counsel, based only on the psychiatric report that stated A could focus and gave simple yet relevant answers … concluding that A was not unaware or unable to resist was a mistake (Taiwan High Court, 2018, Appeal No 144).[6]

This protectionist framing is evident in the High Court's reasoning, which acknowledges A's vulnerability through a psycho-behavioural assessment while simultaneously disregarding a contextual analysis of the same-sex encounter itself. Instead of exploring the interpretive challenges inherent in this male-on-male interaction, the court focused on A's "slow reactions, limited understanding, and weak self-protection capabilities", and the defendant's admission about the opportunity of committing the assault. The court's focus on A's incapacity and vulnerability serves as the primary basis for the conviction, effectively protecting him while simultaneously flattening the complexities of the queer context of the event.

The final two cases—2014 and 2019—are the only ones involving a male complainant and a male defendant. The courts acknowledged the same-sex context but treated disputes over both parties' sexual orientation as irrelevant. The judgments adopt a formally neutral stance: same-sex desire is neither pathologized nor affirmed, subjected to consent scrutiny. Yet this neutrality is narrow. Sexuality is quickly subsumed under diagnostic and behavioural tests of capacity and "resistance", with little engagement with the affective and social textures of queer disabled desire. Even when willing to see same-sex encounters as potentially non-criminal, the courts ultimately "suspend" sexual agency, recognizing non-normative intimacy only insofar as it is legible within a protective legal logic.

[6] The original text in Chinese: "A男心智程度確有缺陷…A男雖曾接受過相關的性自主課程，也被教導要自我保護，然案發當天突遭非相識之被告要求至大號間廁所，復任由被告撩起其上衣、拉下褲子…卻未為任何之處置或抗拒行為，足證A男應係因心智缺陷，致無猥褻行為之理解力，對於不當之猥褻行為亦不知如何抗拒，處於不知抗拒被告對其為猥褻行為之情狀，甚為顯然。辯護人僅憑鑑定報告書記載A男注意力良好、回答簡單，然皆切題…即認為A男並非不知或抗拒猥褻之行為者，顯有誤會".

[D] HUMAN RIGHTS NORMS INVOKED, SEXUAL SUBJECTIVITY RECAST

While the five cases illustrate how courts routinely suspended sexual agency through clinical ambiguity or evidentiary contradiction, they largely excluded any reference to international human rights. Nevertheless, in 10 criminal judgments between 2014 and 2024 (identified via a supplementary search),[7] Taiwanese courts explicitly cited the CRPD—mostly on legal capacity, non-discrimination, and sexual/family life. Although these references were not always central to the reasoning, their appearance signals a discursive shift: international human rights language began to offer new legal idioms for recognizing complex sexual subjectivities, where personal agency remained contested or unclear.

Consider, for instance, the 2013 ruling by the Tainan Branch of the Taiwan High Court (台灣高等法院台南分院101年度侵上更(一)字第74號), concerning a young woman with mild I/DD in a long-term sexual relationship with a family friend. Whereas the district court found her incapable of giving meaningful consent, the appellate court considered the consistency of her statements, her affectionate expressions towards the man, and her ability to distinguish between different forms of physical intimacy. The judge, while not explicitly citing the CRPD, invoked other international human rights declarations (such as the 1971 UN Declaration on the Rights of Mentally Retarded Persons and the 1997 Valencia Declaration on Sexual Rights) to affirm the sexual rights and dignity of persons with disabilities.

The High Court argued that "general societal values" should not lead to their "objectification" or a "definite prohibition" on their sexual relations, emphasizing that individuals with I/DD possess sexual needs and rights, including the right to consent and marry. Although the defendant was ultimately convicted, the judgment remains significant for partially reframing the woman with disabilities as not merely a passive victim but a person, an agent with desires, albeit interpreted through the lens of relational power dynamics and cognitive vulnerability. In subsequent cases, such as a 2015 decision by the Taiwan High Court, Kaohsiung Branch (台灣高等法院高雄分院104年度侵上訴字第129號) and a 2020 Supreme Court ruling (最高法院109年度台上字第4036號), courts invoked

[7] Supplementary keyword search of the Judicial Yuan database on 10 June 2025, combining "CRPD/身心障礙者權利公約" with "sexual autonomy/性自主" and "consent/同意", filtered to criminal (刑事) decisions; results were deduplicated by case (removing multiple instances/appeals of the same matter).

the CRPD to defend the dignity of complainants with disabilities, citing not only sexual autonomy but also psychosocial well-being.

These international references often coexisted with a more traditional reliance on psychiatric diagnoses and clinical expertise, resulting in hybrid forms of legal reasoning. In Kaohsiung District Court's 2016 ruling (台灣高雄地方法院105年度侵訴字第86號), the court convicted the defendant of forced sexual intercourse against a victim with mild intellectual disability. While the CRPD (Article 17) was invoked to underscore the victim's dignity and integrity in sentencing, the court explicitly found that the victim, despite her disability, was able to understand and express refusal, and thus was not "unable to resist" under Article 225. This instance highlights a judicial effort to recognize the victim's agency in expressing non-consent, even as the rights discourse mainly triggers protective measures.

While the five illustrative judgments show international rights instruments informing judicial reasoning on sexual autonomy, the wider corpus reveals other patterns. In the 2015 Hualien District Court decision (花蓮地方法院104年度侵訴字第13號) and the 2017 Kaohsiung High Court ruling (高等法院高雄分院106年度侵上訴字第43號), CRPD citations sit in prefatory remarks with little effect on the verdict's interpretive logic. Others, such as the 2016 Kaohsiung District Court case noted above, draw on international and scientific sources chiefly to bolster psychiatric expertise or a protective logic, without rethinking core assumptions about sexual capacity, affirmative consent, or the legitimacy of non-normative intimacy.

These judgments show a patchy, often symbolic, uptake of international human rights norms. CRPD citations may signal an aspiration to rights-based reasoning, yet they seldom prompt courts to reimagine legal subjectivity or sexual agency. Tellingly, such references appear chiefly when they bolster protective frameworks. Few rulings treat sexual rights as positive entitlements or as part of a broader affirmation of sexual citizenship. More commonly, the CRPD is invoked to fortify safeguarding, stressing procedural equality or preventing further harm, rather than asking whether persons with I/DD expressed an autonomous will to pursue intimacy on their own terms. The result is a familiar paradox: the vocabulary to support sexual agency exists, but its deployment often reinscribes the paternalism it purports to resist.

This uneven integration of human rights language into judicial practice attracts renewed scrutiny of how legal systems navigate vulnerability and desire. Rather than focusing solely on moments of affirmation or denial, we might instead examine how sexual agency

is suspended, particularly at the intersection of clinical testimony, legal procedure, and familial intervention. What emerges across both the core and supplemental cases is not merely a failure to adjudicate consent but a deeper epistemic impasse: a reluctance to accept that persons with I/DD may contain complex, affectively rich subjectivities. It is within this impasse that a crip/queer jurisprudential lens becomes most urgent. By unsettling normative demands for linear narrative and categorical resolution, such a lens advocates a slower, more situated mode of legal engagement that foregrounds relational ethics, ambiguity, and interdependence, as advocated by feminist legal scholars in Taiwan (Lu & Wang 2022; Wang 2025).

While these rights-aware cases mark a discursive shift, they do not dismantle the scaffolding that suspends agency. Instead, they gesture towards the possibility of a more context-sensitive jurisprudence—one that might, over time, better accommodate both the risks and rights associated with sexual expression among persons with I/DD. These insights deepen our understanding of how Taiwanese courts—and potentially those elsewhere—grapple with the entanglements of desire, capacity, and vulnerability. In what follows, I return to the conceptual terrain to consider how "suspended agency" may not only describe these juridical patterns but also provide a critical tool for reimagining legal responsibility through a crip-queer ethic of relational justice.

[E] "NO ALTERNATIVE?" REPARATIVE FOR THE SUSPENDED AGENCY

The cases analysed above trace more than individual verdicts, revealing a phenomenon of suspended agency—a condition in which persons with I/DD are neither fully denied nor fully granted sexual personhood. The law hesitates: while occasionally recognizing partial capacities and affirming rights to intimacy and sexual autonomy, it rarely sustains such recognition when agency becomes entangled with ambiguity, dependency, or non-normative expressions of desire. This procedural and affective suspension positions individuals between contradictory epistemic demands (Santinele Martino 2020).

The concept of "suspended agency" marks a key intervention in crip and queer theoretical perspectives. Unlike liberal paradigms that seek equilibrium between autonomy and protection, a crip-queer approach begins with the premise that no such balance is fully attainable or normatively neutral (Puar 2017). As Kafer (2013) reminds us, the legal subject is always already racialized, gendered, and able-bodied—a

fantasy of coherence against which disabled, queer, or interdependent lives appear deficient. Thus, suspended agency is not a by-product of legal inconsistency but a symptom of the law's structural incompetence to accommodate differences.

Rather than resolving this suspension through sharper diagnostic thresholds or statutory definitions, a crip-queer intervention—aligned with feminist critiques of liberal autonomy that equate independence with moral and political ideals—urges us to stay with the complexity. In this view, justice must account for individual rights and the social structures that sustain (or fail to sustain) dependency relationships (Kittay 1999). It prompts a rethinking of consent: what if consent is not always affirmative, or refusal explicit? What if knowledge and desire coexist with hesitation, confusion, or attachment? And what if protection were reimagined not as the negation of agency but as its condition of possibility?

Here, relational ethics offers a more generative path forward. Such ethics does not presume a stable, universal model of capacity or agency, but calls for close, case-by-case readings—attentive to narrative, context, personality, communicative style, and affective atmosphere (McRuer 2006). In the legal domain, this means interpreting judgments through not only their formal reasoning but also narrative form: whose story is told, how contradictions are resolved or obscured, and how the disabled subject is rendered either knowable or illegible. Across the Taiwanese cases, courts interpret identical diagnostic labels, psychiatric assessments, or witness statements in divergent ways, producing inconsistent accounts of agency. In one instance, the subject appears emotionally naïve yet physically cooperative, and in another, cognitively impaired yet sexually aware.

This interpretive fluidity is rarely acknowledged as such. Instead, decisions hinge on implicit norms regarding what counts as real understanding, genuine resistance, or proper subjecthood. Hence, in developing the concept of *suspended agency*, this article contributes to ongoing debates in socio-legal and disability studies about how agency is imagined, recognized, or deferred in institutional contexts. Traditional legal approaches tend to frame agency through binary logic—either an individual is fully autonomous and capable of consent or entirely incapacitated and thus requires protection (Lin 2019; Chen 2022). This framework fails to capture the affective and temporally contingent nature of agency experienced by people with disabilities (Thorneycroft & Asquith 2019).

Drawing on queer theory's challenge to normative developmental timelines (Freeman 2010) and crip theory's critique of ableist metrics of coherence and productivity (McRuer 2010; Santinele Martino & Fudge Schormans 2020), suspended agency foregrounds the legal system's discomfort with ambiguity. It names a jurisprudential condition wherein the individual's agency is acknowledged partly (sufficient to render them complicit or intelligible) but simultaneously withheld when affirming desire, autonomy, or narrative legitimacy. This suspended state is not merely the result of epistemic uncertainty or forensic caution, but a product of legal structures ill-equipped to engage with refusal and ambivalence, or consent and hesitation, not due to inadequate knowledge or ability to make sense, but because the relationships complicating the situation are simply too confusing.

Crip-queer approaches invite us to understand agency as something not possessed in isolation but negotiated across interdependencies, affective attachments, and situational supports. In this light, suspended agency is not a deficiency of the disabled subject, but a structural effect of legal systems built around normative presumptions linking knowing and acting. The crip analysis resists the impulse to resolve the ambiguity; it interrogates legal outcomes and the broader conditions of (non)recognition that shape how disabled lives are felt, regulated, and remembered. A crip-queer ethics of judgment does not offer a universal solution but recognizes that justice for individuals with I/DD requires more than protective intention. It demands that we take seriously the diversity in personality emerging through ambivalence, not despite it.

[F] CRIPPING JURISPRUDENCE, RECOGNIZING QUEER AMBIVALENCE

This article examines how Taiwan's criminal courts adjudicate cases involving persons with I/DD and contested claims of sexual consent, knowing and knowability, and vulnerability. Rather than resolving the tension between protection and recognition, courts often oscillate between partial acknowledgments of autonomy and paternalistic default modes, ultimately suspending legal personhood when most needed. The concept of *suspended agency* names this juridical hesitation: a condition where individuals with I/DD are neither fully denied nor granted subjecthood, and where the evidentiary threshold for consent is structurally out of reach.

A crip-queer jurisprudence, by contrast, does not seek universal fixes but invites us to dwell in ambivalence—to make space for uncertainty

without erasure. As disability theorists remind us, legal systems often valorize autonomy, coherence, and productivity—values at odds with the interdependence and unpredictability that shape many disabled lives. Applied to sexuality, such ideals tend to regulate rather than empower. What is needed is not merely a more inclusive legal framework but a rethinking of legal personhood, which centres desire, vulnerability, and relationality.

This is not a call to abandon protection but to reimagine it. As mentioned, journalistic works by Chao-Ju Chen exemplify how lived experience, narrative, and public critique can inform legal change from the ground up. Realizing sexual agency for persons with I/DD requires working both within and beyond the legal system. Addressing how law constructs and collapses/denies sexual personhood simultaneously, this study contributes to broader efforts to rethink justice, not as a destination of clarity but as an ongoing, ethically fraught practice of listening, witnessing, refusing to look away, and thinking otherwise.

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Rewriting *Supriyo*: Unpacking India's Marriage Equality Judgment

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Abstract

This article reimagines *Supriyo v Union of India*, a constitutional judgment rendered by the Supreme Court of India in 2023 that denied the legal recognition of same-sex marriages. The rewritten judgment uses a critical queer lens and recognizes the right to marry as a constitutional guarantee grounded in dignity, autonomy, and equality. It rejects the heteronormative exclusions of the Special Marriage Act 1954 and foregrounds the lived experiences of queer couples. It illustrates how queer relationships can subvert patriarchal norms through consent-based relational models. Simultaneously, it proposes a nomination-based approach to delink legal benefits from marital status, enabling legal protection for diverse kinships. In doing so, the rewritten judgment queers marriage both structurally and substantively, while also ensuring legal recognition for non-marital forms of intimacy and care.

Keywords: marriage equality; Indian Constitution; critical queer theory; anti-discrimination.

[A] INTRODUCTION

On 17 October 2023, the five-judge Constitution Bench of the Supreme Court of India pronounced its verdict in the case of *Supriyo and Others v Union of India* (2023). The petitioners had challenged the constitutional validity of the Special Marriage Act 1954 (SMA) which only permits heterosexual marriages. They had asked the Court to read the SMA in a way that allows for queer marriage as well. The Constitution Bench upheld the validity of the SMA and held that there was no fundamental right to marry that could be located within the jurisprudence of the Constitutional Court. Thus, the Supreme Court denied the legal recognition of same-sex

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or queer couples (terms used interchangeably in the judgment) within the institution of marriage.

The verdict was an exceedingly disappointing moment in the trajectory of queer rights in India. The road to rights for queer persons in India has been a long and arduous one. The Delhi High Court decriminalized consensual same-sex sexual activity, within section 377 of the erstwhile Indian Penal Code 1860 (*Naz Foundation v NCT of Delhi* 2009), only as late as 2009. This decision was unfortunately reversed by the Supreme Court in 2013 (*Suresh Kumar Koushal v Naz Foundation* 2014). Finally, in 2018, a five-Judge Constitution Bench re-heard the challenge to section 377 and authoritatively decriminalized it (*Navtej Singh Johar v Union of India* 2018). Since then, some High Courts have sporadically recognized the right of queer couples to live together and have protected them from violence and harassment by their natal families (*S Sushma v Commissioner of Police 2021; Rohit Sagar v State of Uttarakhand* 2021). However, the Supreme Court in *Supriyo* failed to take this reasoning to the logical conclusion of positively recognizing such relationships in law.

Specifically on issues concerning trans persons, the Supreme Court has expressed more readiness in upholding and recognizing their fundamental rights. In 2014, a Division Bench of the Supreme Court rendered a remarkably progressive decision in *NALSA v Union of India* (2014), where they recognized the fundamental right to self-identify one's gender and recognized gender identity as a protected ground within the equality guarantee in the Constitution. In 2019, the Madras High Court held that the term "bride" within the Hindu Marriage Act 1955 should be read to include transwomen as well (*Arunkumar v The Inspector General of Registration* 2019). This was affirmed by the Supreme Court in *Supriyo v Union of India*, where it recognized the rights of trans persons to enter into "heterosexual marriages" (Bhat J, paragraph 119).

In this article, we imagine ourselves as deciding *Supriyo v Union of India* in 2025 along with the rest of the original judges, that is, as rendering a dissenting opinion in the judgment. Therefore, we rely on the scholarly literature produced even as recently as in the last two years which is relevant to this legal matter. The verdict dealt with a broad range of issues, including adoption; however, in our rewritten judgment, we address the limited question of marriage equality, both from a legal as well as a philosophical point of view.

We adopt a critical queer perspective. An ideological position towards marriage frames it as normatively good or bad, whereas a critical queer perspective evaluates how ideas, norms, and subjectivities are

constructed and navigated (Fischel 2019). This approach enables the rewritten judgment to examine marriage, law, and queer subjectivity not in normative binaries, but as discursive practices that govern, discipline, and unevenly enable access. This perspective is especially valuable for reimagining marriage as a constitutional right shaped by queer values and alternative regimes like nomination.

Although we differ from the majority opinion in *Supriyo v Union of India* by upholding the right of queer people to legally marry, we do not merely facilitate the entry of queer people into the institution of marriage. Rather, through our opinion, we hope to offer one way of "queering" marriage itself, by showing how enfolding queer relationships within a legal institution has the radical power to subvert the basic hetero-patriarchal norms of the institution. Within the scope of the article, we are unable to comprehensively engage with the existing debates on "queering marriage", although we will point readers to the same.

The judgment follows a blended approach, drawing upon the Court's style of reasoning and structure, along with our own language to reflect the urgency and lived realities of queer communities. We deviate from norms of judgment writing where those norms are seen as compromising particular queer values. Notably, we have used the term "queer" more expansively than the Court has, to encompass a wider spectrum of identities, relationships, and kinships that otherwise remain invisible in the dominant discourse. Further, there is a growing trend in Indian court judgments of citing and discussing academic literature. In our rewritten judgment, however, we engage with literature more comprehensively than courts normally do.

We recognize the tangible weight of this judgment on queer lives. It is a shame that the Supreme Court of India has failed to provide a judicial remedy for not only those who wish to get married, but also those who wish to legally share their lives with their partners, loved ones, and other forms of kin unrelated through blood or marital ties.

We hope that our opinion can provide a queer lens to examine this issue legally and also offer a way to incorporate lived experiences into the law.

[B] IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No 1011 of 2022, Writ Petition (Civil) No 93 of 2023, Transferred Case (Civil) Nos 5 of 2023, 8 of 2023, 9 of 2023, 11 of 2023, 12 of 2023, Writ Petition (Civil) Nos 1020 of 2022, 1105 of 2022, 1141 of 2022, 1142 of 2022, 1150 of 2022, 159 of 2023, 129 of 2023, 260 of 2023, Transferred Case (Civil) No 6 of 2023, Writ Petition (Civil) No 319 of 2023, Transferred Case (Civil) Nos 7 of 2023, 10 of 2023, 13 of 2023 and Writ Petition (Civil) No 478 of 2023

Decided On: 30 July 2025

Appellants: Supriyo @ Supriya Chakraborty & Anr

vs

Respondent: Union of India (UOI) and Ors

Hon'ble Judges/Coram: Bhat, J, Narasimha, J, Kohli, J, Kaul, J, Chandrachud, CJI, Anonymous, J.

Supriyo@ Supriya Chakraborty & Anr vs Union of India

JUDGMENT

ANONYMOUS, J (for themself)

1. At the very outset, I acknowledge the uncertainty stemming from the varying judicial opinions surrounding the constitutional question we are faced with. However, I view this opportunity as a manifestation of interpretative judicial diversity. It is in this spirit of plurivocalism that I pen this opinion with due reverence to the Constitution of India.

2. My learned sibling judge, Justice Narasimha, in his opinion, has very succinctly distilled the constitutional questions that lie central to this matter.

a. The status of right to marry for LGBTQ+ couples in India under the Special Marriage Act 1954 (SMA); and

b. The consequent remedy that should ensue.

3. Having deliberated on both these issues, I now list out my conclusions which will be supplemented with reasoning thereafter:

i) I respectfully disagree with my sibling judges on their view about the right to marry as a fundamental right. I firmly view the right to marry as a constitutional right, within the contours of the constitutional guarantee of autonomy and liberty. In the same breadth, denying this

right to non-heterosexual couples is constitutionally impermissible. Firstly, it fails the intelligible differentia and rational nexus test under Article 14 and secondly, it infringes the non-discrimination principle enshrined under Article 15 of the Constitution.

ii) I hold that marriage is not merely a form of social recognition but a site of various legal entitlements and privileges. To deprive non-heterosexual couples of these rights is a tragic betrayal to the ever evolving and transformative promise of the constitutional safeguard. In this opinion, I am not examining the question of adoption and shall confine my discussion solely to the right to marry.

iii) I agree with my sibling Justice Kaul, that the SMA in its current formulation is violative of the Constitution. Since Justice Kaul has elaborately analysed this infirmity, I shall refrain from going into details and will only supplement his reasoning by examining the notice regime.

iv) I analyse the dynamic nature of marriage and present a response to abolitionist voices within the queer community. Marriage need not be a fixed patriarchal monolith, and queer partners already disrupt it through *maitri karar* (a traditional contract agreement, often used between queer people who are not married/cannot be married) (Sanyal 2025), and live-in contracts that insist on constitutional values such as revocable consent, shared care, and the freedom to exit. Legal recognition of these practices could resignify marriage from within rather than merely slotting queer couples into an unchanged, heteronormative script.

v) Finally, I direct the government to consider the disaggregation of rights and benefits associated with marriage from the status of marriage. A statutory nomination regime—modelled on existing EPF, NPS and insurance forms—would let any adult name dependents for pensions, healthcare, tenancy succession and more, whether married or not. This dual-track approach keeps marriage as an expressive option while extending tangible, instrumental protections to single individuals, polycules, friends-as-family, and even kinships such as *hijra gharanas*, thus avoiding the problem of privileging one relational form over all others.

4. In my opinion, there's no more compelling foundation to this opinion than the poignant reflection of this Court in *Navtej Singh Johar v Union of India*:

> "*History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution.*" (2018: paragraph 644)

5. These words are not rhetorics but as my sibling Judge, Justice Kaul rightly suggests, they are an opportunity to acknowledge the ordeals faced by the LGBTQ+ community owing to systematic injustice and casts a "*collective duty upon all constitutional institutions to take affirmative steps to remedy the discrimination*" (J Kaul, paragraph 19). While the opinions penned down by my other sibling judges diverge from this promise, this persuades me to pen down my own opinion.

[C] THE RIGHT TO MARRY IS A FUNDAMENTAL RIGHT

6. I first address the question of a constitutionally protected right to marry. In the *Shafin Jahan v Asokan KM*, this court categorically observed that the Constitution embodies autonomy and liberty as core tenets, which further informs an individual's right to autonomously decide on issues affecting their identity and personhood (2018: paragraph 19). This premise solidified the conclusion that a person has the liberty to marry a partner of their choosing (2018: paragraphs 54, 55, 77). "The right to marry a partner of choice" is thus protected under Article 21 (*Shafin Jahan v Asokan* KM 2018: paragraph 77; *Lata Singh v State of Uttar Pradesh* 2006: paragraph 17; *Shakti Vahini v Union of India* 2018: paragraph 44).

7. This constitutional understanding can further be supplemented by this Court's notable pronouncement in In *Re: Indian Woman says Gang-raped on Orders of Village Court published in Business & Financial News* 2014, where the Court affirmed the State's duty-bound obligation to protect the fundamental rights of choice in marriage to its citizens (2014: paragraph 16). This affirmation makes it abundantly clear that the right to marry a partner of choice is not a negative right, but also positively obligates the State to secure conditions necessary for the meaningful fructification of the right.

8. However, this constitutional understanding in this case, has been exclusively extended to heterosexual individuals, excluding LGBTQ+ individuals from its remit. This denial of equivalent entitlements to non-heterosexual couples creates a distinction between two classes (heterosexual and non-heterosexual). Such classification is not

permissible under Article 14 unless it satisfies a two-fold test: *firstly*, the classification of groups must be based on intelligible differentia and, *secondly*, the differentia must have a rational nexus with the object sought to be achieved (*Dipak Sibal v Punjab University* 1989: paragraph 9; *Navtej Singh Johar v Union of India* 2018: paragraphs 408 & 637.2).

9. The difference between the two classes in the current case is based on the ground of sexual orientation, which was recognized as a protected ground of discrimination under Article 15 of the Constitution. This Court in *Navtej Singh Johar v Union of India* held that "the natural or innate sexual orientation of a person cannot be a ground for discrimination." (2018: 637.3). Thus, the exclusivity surrounding the treatment of the right to marry, based primarily on allowing one class of persons (heterosexual individuals) to marry fails the intelligible differentia test under Article 14 (John 2011). Further, the differentiation between the classes does not have any rational nexus with any legitimate aim of the state. There exists no constitutionally valid object that is sought to be achieved by restricting marriage to "one man, one woman". (Bhogle 2019). The government of India has argued that the object of marriage is procreation by heterosexual partners (CJI Chandrachud, 42). The government of India's submission is not grounded in constitutional values, but instead reflects moral judgments rooted in prevailing social norms. This imposition of social morality has been declared impermissible by this Court. As the then Chief Justice held in *Navtej Singh Johar v Union of Indi*a, "In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society" (2018: paragraph 122). Further, this Court has recognized that social repugnance towards non-traditional marriage, does not warrant intervention with individual liberty (*S Khushboo v Kanniammal* 2010: paragraph 46.). Thus, this distinction fails the litmus test of Article 14, owing to the discriminatory distinction rooted in sexual orientation (*Navtej Singh Johar v Union of India* 2018) and gender identity *(NALSA v Union of India* 2014) and thence further violates Article 15. I thus hold that there exists a fundamental right to marry and declare that the terms "husband" and "wife" within the SMA must be read as "spouse", to allow same-sex couples the right to legally marry.

10. Against this backdrop, I now proceed to discuss how my sibling judges have erred in their assessment and articulation in the matter. I will offer rebuttals to two opinions (J Bhat – majority and CJI Chandrachud – minority) as they both discuss the heart of the matter – i.e., the interplay between the judicial recognition of a right and the state intervention to effectuate that right.

The fallacy of the majority opinion: J Bhat and J Kohli

11. Justice Bhat, who penned the majority judgment, denied constitutional recognition of the right to marry on the ground that the marital institution has existed even before the state was conceptualized as an idea, rendering it both external and independent to the state. Thus, he opined that this court could not create a fundamental right to it (J Bhat, paragraphs 45-46). However, this reasoning contradicts the precedents of this very Court on numerous occasions, which recognized rights like travel (*Satwant Singh v Passport Officer* 1967: 57), development (*G Sundarrajan v Union of India* 2013: 184), and clean environment (*RLEK v State of Uttar Pradesh* 1985) as fundamental, despite their pre-state origins (Kalra 2023).

12. The Indian constitutional architecture embodies a golden triangle of Article 14 (right to equality), 19 (right to freedom) and 21 (right to life and personal liberty). While each right embodies a specific foundational virtue, namely, autonomy, liberty and dignity respectively, these rights function in concert to create a normative bedrock for the constitutional discourse on what it means to be a human. These rights enable each individual to have the free will to determine the course of their lives. CJI Chandrachud highlights the necessity to speak of the right to intimacy, informed by the intersection of dignity, autonomy, and privacy before conceptualizing a right to marry. Choosing a life partner is not merely a personal preference, but a defining act of selfhood and identity which emanates from the interplay of these virtues. He further opines that some individuals might choose not to have a partner, however, this must stem from the active exercise of decisional autonomy, not a deprivation of agency (CJI Chandrachud, paragraph 233). In India, where marriage is the only legally sanctioned form of intimacy, to deny access to it is to deny a dignified life, often forcing individuals into secrecy and isolation. The golden triangle thus provides a framework to recognize a right to marry as fundamental, irrespective of sexual orientation.

13. In this regard, Justice Bhat's denial of marriage equality on the ground that it would require horizontal application and that the State has no obligation to legally recognize queer relationships (J Bhat, paragraphs 62, 67) cannot be sustained. Emanating from the German term "*Drittwirkung*", horizontal applicability has been conceived as the enforcement of human rights against private individuals, not just vertically between the state and its citizens (Hunter-Hennin 2007). This Court on various occasions has already affirmed that autonomy, dignity, and liberty are not only central to the lives of queer persons (*NALSA v Union of India* 2014: paragraph 2; *Navtej Singh Johar v Union of India*

2018: paragraph 255) but also to the institution of marriage (*Independent Thought v Union of India* 2017; *Joseph Shine v Union of India* 2019; *Shilpa Sailesh v Varun Sreenivasan* 2023). Since these values are foundational to both these domains, they inevitably inform the right to marry for queer persons (Bhogle 2019). The guarantees of Articles 14, 19 and 21 thus impose positive obligations on the State to ensure that these rights are not violated even by private actors, as recognized by the Supreme Court itself (*Kaushal Kishor v State of UP* 2023; Bhatia 2015). If these values thus apply in horizontal contexts, then there is no bar in recognizing the right to marry merely on the ground of it requiring horizontal application.

Chief Justice's state intervention paradox: CJI Chandrachud

14. Chief Justice Chandrachud's premise is that because marriage is largely structured through statutes and the benefits attached to it are "non-constitutional", the claim to a fundamental right to marry lacks the pedigree for constitutional elevation (CJI Chandrachud, paragraphs 160-161, 183). That premise is flawed. Many interests are implemented through statute and yet attract constitutional protection. Consider maternity benefits: although the Maternity Benefit Act 1961 is a statutory scheme, the Supreme Court has grounded maternity leave and allied entitlements in constitutional guarantees—treating them as facets of reproductive autonomy, dignity, privacy and equality under Article 21 (and Article 14). In *K Umadevi v State of Tamil Nadu* (2025), the Court set aside a denial of maternity leave for a "third child" under a legislation, reasoning through Article 21 and the jurisprudence on reproductive rights to constitutionalize maternity benefits beyond mere service conditions. By parity of reasoning, the fact that marriage is presently organized and incentivized by legislation cannot be a reason to withhold constitutional protection. If anything, state involvement and structuring of the marital regime warrants heightened constitutional scrutiny to ensure inclusion. Recognizing marriage as a fundamental right would supply precisely the constitutional lens through which to test whether the state's distributive choices comply with equality, dignity and autonomy, instead of insulating a heavily regulated institution from review merely because it is heavily regulated.

Recognizing transgender persons' right to marry

15. I partly concur with both the majority and the minority opinions in the conclusion that transgender persons can marry under the existing

formulation of SMA. However, this holding comes with a caveat, according to my sibling judges. They held that such marital unions would have to be "heterosexual marriages" to warrant validity (CJI Chandrachud, paragraph 277).

16. This partial recognition solidifies the heteronormative construction of marriage and exposes the arbitrary nature of excluding same-sex couples. If a transgender woman may marry a cisgender man but not a cisgender woman (J Bhat, paragraph 149; CJI Chandrachud, paragraph 277), the law creates classifications based solely on the partner's gender rather than any compelling state interest. This differential treatment cannot survive constitutional scrutiny under Articles 14 and 15, as argued previously, as it highlights that both gender and sexual orientation remain the impermissible barrier to marriage equality. Thus, the right of trans persons to marry whomever they wish to, regardless of their partner's gender, is upheld as constitutional.

[D] MARRIAGE: A GATEWAY TO LEGAL PROTECTIONS

17. Having firmly established the fundamental nature of the right to marry, I now proceed to examine how the institution of marriage acts as a conduit to a multitude of entitlements, which in their current form, remain inaccessible to queer citizens excluded from formal recognition under existing matrimonial frameworks. It must be reiterated that marriage is not merely a static institution but is evolving in response to both societal progression as well as transformative constitutional mores (Balaji 2025). This evolving journey is reflected in judicial pronouncements. Courts typically do two things: *one*, they positively influence high-level jurisprudence about liberty, autonomy and dignity within marriage (*Independent Thought v Union of India* 2017; *Joseph Shine v Union of India* 2019; *Shilpa Sailesh v Varun Sreenivasan* 2023). *Two*, in individual cases of vulnerable couples, especially those facing harassment because they have loved outside their caste or religion, the Court has intervened to protect them from harassment and reaffirmed their right to choose a partner of their choice (*Shafin Jahan v Asokan KM* 2018; *Shakti Vahini v Union of India* 2018).

18. The flipside of this is that *first*, the role of courts is limited in influencing the everyday lives of people, and, *second*, the sanctity accorded to marriage, both by courts and society exposes unmarried and cohabiting couples and partners who cannot marry (such as queer persons) to heightened risk and discrimination. The conservative Indian society has ordained

the marital institution, enabling social approval to any action under its remit. This sacrosanct attribution even makes non-married heterosexual couples vulnerable in both the expressive and tangible realm of the relationship. Public displays of affection (Buzz Staff 2025) are frowned upon, and even met with violence (Flock 2018). Unmarried partners are often faced with barriers to cohabitation (Bhattacharya 2022), and they struggle to secure housing or even access basic hospitality services in hotels and other travel-related sites as a couple (Menon 2012; Das 2015). For queer individuals, these issues are compounded further; they are not only deprived of societal legitimacy but also respect and visibility within the public sphere (Sarang 2013; *Rituparna Borah v Union of India* 2020: paragraph 29).

19. At this juncture, it is imperative to foreground the lived experiences of the queer community, so that the burdens borne in the absence of marriage are not left abstract. The petitions before this Court reveal a consistent pattern: lesbian and gay couples approach law enforcement seeking protection from natal violence, yet their pleas are met with disregard or persecution. In the Rituparna Borah petition (*Rituparna Borah v Union of India* 2020), for instance, the parents of a cisgender woman in a relationship with a transgender man filed a missing persons complaint, alleging abduction. When the couple approached the police, they were met with indifference, verbal abuse, and even exhortations to the father to "discipline" his daughter through violence. Such accounts are not aberrations. Authorities frequently refuse to register complaints, pressurize petitioners to reconcile with their families, or return vulnerable couples to their natal homes in direct contravention of judicial orders that recognize their right to co-habit. In other instances, false criminal complaints, public shaming through posters, and vigilante threats have been deployed to intimidate and isolate queer couples from one another and from society (Shakti Shalini 2023: 23; Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates 2023). The consequence is stark: without access to marriage, queer couples are left uniquely exposed, denied both social legitimacy and the legal protections that heterosexual couples take for granted (Sanyal 2021).

20. These accounts are not anomalous; they reflect a systemic pattern which thrives on the deprivation of protection. They reflect patterns of violence and marginalization that intensify at the intersections of caste, class, and religion (Semmalar 2020). Queer relationships challenging caste endogamy face compounded violence (Abhyankar 2025). Such intersecting vulnerabilities reinforce the policing of intimate relationships that defy dominant norms.

21. Marriage in its legal form, confers entitlements central to everyday life. When queer individuals are excluded from this institution, they are not merely denied a ceremonial recognition, but they are policed and denied access to the legal protections that any heterosexual couple may take for granted. In light of this evidence, I hold that exclusion from marriage constitutes the State's abdication of its protective obligations toward a population already rendered vulnerable. The Constitution's command that "no person shall be denied the equal protection of the laws" in Article 14 demands that this Court mend precisely such structural deficits. Marriage equality is thus a jurisprudential necessity that completes the trajectory charted by *Navtej*, *Puttaswamy*, *Shafin Jahan* and *Lata Singh*. The extension of marriage rights to queer persons thus serves not only to redress historical exclusion, but to affirm the constitutional guarantee of dignity, autonomy and liberty to all citizens in the site where it matters the most: the intimacy of human relationships.

[E] CHALLENGING THE NOTICE REGIME UNDER THE SPECIAL MARRIAGE ACT 1954

22. Currently, an impediment to safeguarding autonomy among couples desiring to marry is the notice regime under the SMA. I concur with the opinion of my sibling judge, Justice Kaul, on the front that the SMA in its current formulation is violative of the Constitution. I will only provide my supplementary analysis to fortify his reasoning. In particular, I found the notice requirement under the SMA to be an anomalous construct. It formalized the bizarre phenomenon of what can be considered consent *in rem* under the SMA. The Marriage Officer is allowed to conduct an inquiry into the marriage if anyone raises an objection to the marriage (SMA, sections 7, 8, 9). The notice requirement legitimizes consent from the families and communities for the marriage of majors (Bhandare & Karwa 2020). It enables these actors to track down those who wish to have a "love marriage" (Mody 2002). This violates the decisional and sexual autonomy of those wishing to get married (Agarwal 2022) and can expose them to violence and harassment. The SMA was historically designed to bypass caste-endogamous norms, yet this notice regime permits the (often violent) policing of inter-caste and inter-faith couples. It is likely that the same would happen to queer couples as well (Sheikh & Samuel 2024). This is simply not permissible. The autonomy, privacy and dignity of all couples ought to be safeguarded in the law. The notice regime under the SMA is thus held to be unconstitutional.

[F] MARRIAGE EQUALITY CAN RESIGNIFY MARRIAGE WITH QUEER VALUES

The argument of abolitionists

23. In this judgment, I will not just engage with those who are opposed to the idea of marriage equality for conservative and moral reasons, such as the state or certain religious organizations. Rather, I will also engage with the normative position of abolitionists (Warner 1999; Arasu & Thangarajah 2012; Ruskola 2018; Jain 2023). The abolitionist stance lies on a spectrum. To illustrate a couple of positions: i) some urge that we should focus our energies beyond queer marriage to advocate for the recognition of families based on kinship and care; ii) others argue that the institution of marriage is problematic and that queer critics and feminists should be engaging with it primarily on a first-principles basis; iii) a few call for the abolition of marriage altogether as a legal institution, as it goes against the fundamental project of queer politics to decentre heterosexuality and patriarchy.

24. In this judgment, I engage with one standard version of the argument made by abolitionists, which I phrase in this manner: marriage is a problematic institution, and queer lives should not get entangled in this project. Recognition of same-sex marriage may not pose a significant threat to compulsory heterosexuality. Compulsory heterosexuality orders society through a strict enforcement of rigid sex and gender roles, with strictures on the object of desire (Meeks & Stein 2006; Narayan & Gupta 2011; Banerjie 2019). Compulsory heterosexuality propounds the belief that unless explicitly called out otherwise, everyone is heterosexual, and everything is and ought to be heteronormative (Rich 2003). Marriage as an institution in India is argued to be at the root of compulsory heterosexuality, furthering heteronormativity and patriarchal assumptions about gender, sex, sexuality, and sexual ordering (Menon 2005).

25. Currently, Indian marriage statutes construct a four-part "sex-consent matrix" that privileges social control and sexual obligation over meaningful choice (Balaji 2023).

> (1) Absent affirmative consent to marry: under both the Hindu Marriage Act 1955 and SMA, a marriage is presumed valid unless vitiated by fraud, coercion or severe mental incapacity; the law never requires an express, continuing "yes" from the spouses.
>
> (2) Public-notice consent *in rem*: the SMA's 30-day notice, complete with pasted photographs and address details, invites families

and communities to approve or obstruct adult unions, thereby outsourcing state authority to caste, religion and kin (Mody 2002: 223).

(3) Restitution of conjugal rights: Courts may compel a spouse's return to the marital home, treating cohabitation—and by implication sexual access—as an enforceable duty; lack of desire or incompatibility rarely qualifies as "reasonable excuse" to deny conjugal union (Hindu Marriage Act 1955; SMA)

(4) Sex as a legal prerequisite: non-consummation, impotence or wilful refusal to have intercourse are grounds to annul a marriage (Raj 2014; *The Hindu* 2016; FE News Desk 2022), presuming a permanent entitlement to sex once married (Hindu Marriage Act 1955, section 12; SMA, section 25; Balaji 2025). Together these provisions erase individual autonomy and tether marital legitimacy to heterosexual intercourse (Sanyal & Ghosh 2022), culminating in the marital-rape exception that still exempts forced sex by husbands from criminal sanction.

26. Therefore, one may argue that the idea of marriage is premised on (hetero)sexual subordination and expectation on spouses, especially wives, to not deny sex to their partners. The worry is that mere assimilation of queer people into this institution will not challenge the idea of compulsory heterosexuality and patriarchal scripts.

Challenging the structure of marriage: a reply to the abolitionists

27. It is my belief that marriage is a dynamic institution. It evolves according to changing societies (Reddy 2009: 341). Although it may be several steps behind some progressive social practices and norms, it is certainly not frozen. The structure of marriage and the meaning of marriage is constantly challenged and changed by those who are marginalized by the same in the first place.

28. An assumption that marriage is oppressive and will always be oppressive in the same way forever is an unreasonable conclusion (Sheikh & Samuel 2024). This argument is ignorant of the ways in which reverse-discourse and counter-hegemony operate (Boellstorff 2007: 234). As Boellstorff writes, the question should not be about whether to have queer marriage or not. Rather, it ought to be, "in what ways can our acts from within a system of power do more than sustain or not sustain that system?" (Boellstorff 2007: 234) We must place a premium

on the possibility of subjects transforming systems of power from within in tangible ways. Butler argues that there is no "I" that exists prior to discourse and that the "I" is constituted through discourse (Butler 1993: 18). However, since a norm or identity is upheld and performed through discourse, post-subjection, the subject may be in a position to offer resistance and resignify the norm (Butler 1993). Butler shows this through the resignification of the term "queer". They argue that "queer" can be redeployed, twisted and queered from a prior usage in furtherance of present politics (Butler 1993). There is, however, a caveat that this resignification is already complicit with and cannot be disassociated from its historical constitution. "To recast queer agency in this chain of historicity is thus to avow a set of constraints on the past and the future that mark at once the limits of agency and its most enabling conditions" (Butler 1993: 20).

29. The possibility of resignification thus happens through performance, bringing about unanticipated challenges to the dominant and historical understanding of certain terms and norms (Butler 1993). I believe that such resignification can occur, and is already occurring in India, through not only the rendering of progressive judgments but also the recognition of queer lived realities in law.

Re-signifying marriage through queer lives and values

30. The concept of resistance indicates that dominant norms can be contested, resisted and threatened through reverse-discourse and performativity. The consent-sex matrix can be brought into sharp focus when examining queer relationships through *maitri karar* agreements and live-in relationship agreements between working-class queer people in rural India (Maya Sharma & Indra Pathak Collection Organisational Documents 2023). There is a rich history of archival material on queer lives at the Queer Archive for Memory, Reflection, and Activism in India. The queer couples featured in the "Maya Sharma" collection from the Archive are generally from marginalized backgrounds in and around Gujarat (a prominent state in India), with little to no family support for their relationships. They have created legal affidavits, affirming the consensual nature of the relationship as well as the contours, duties, and rights and responsibilities of the partners, similar to a marital contract. These affidavits serve primarily to protect couples from both the violence of families and society and that of the police. Families routinely file complaints of abduction and kidnapping as well as *habeas corpus* petitions, claiming that their child has been illegally detained by the queer partner (Arasu & Thangarajah 2012: 413; Banerjie 2019). The formal

record of relationships by queer couples, emphasizing their consensual nature, thus served the end of securing their relationship from scrutiny and attack.

31. The institution of marriage, as it predominantly exists currently, has much to learn from these queer couples. In their relationship agreements, they repeatedly and emphatically stress on the presence of consent. They expressly mention that no one has coerced them to be in this relationship with their partner. They have "very carefully" (Maya Sharma & Indra Pathak Collection Organisational Documents 2023) decided to live together, leaving their family and home, willingly and voluntarily. In one case, the couple mentions that they have signed the agreement in sound mind, in a state of complete alertness (ibid). They affirm that they have not been driven away or kidnapped. In some cases, the couples have also commented on how they have left their families and communities willingly. They have also recorded voluntarily renouncing their parents and family with "full pleasure and mutual consent" (ibid).

32. Since this is a relationship based on the consent of parties, they record that they are free to cancel or terminate the relationship in the future (ibid). Some parties also mention that if their family members use any coercion to take them back home, they will not hesitate to take appropriate legal action against them. The parties willingly consent to share all rights and responsibilities with each other, including household labour, medical care, and maintenance (ibid). Since these are clauses which are incorporated into legal documents, they fold back into the law. They reflect a nuanced understanding of consent to the relationship, to obligations within the relationship, and respect for the boundaries of the relationship. If such an idea of consent were to be incorporated into the statutory understanding of marriage as well, it could challenge the foundation of any arranged or forced marriages. It would require that the parties deliberate, introspect, and only then give their informed consent for marriage. This practice of establishing consent prior to the legal recognition of the relationship cements the decisional and sexual autonomy of individuals, prioritizing their rights over the governance mechanisms of family, caste, religion, and community.

33. That the relationships can be terminated at the behest of the parties is extremely significant. There are no obligations of sex that inherently flow from the relationship, and the right to terminate the relationship means that the sustenance of the relationship is inherently based on care and consent. A clause such as restitution of conjugal rights would not make sense under such a framework, as any action taken by the

parties to the relationship is not externally imposed or mandated, but performed with willingness. This is not a claim that all queer relationships are perfectly egalitarian and respectful in practice. But the weight of the argument comes from the fact normatively, there is a sincere emphasis on consent—both to the relationship as well as for activities within the relationship. The legal recognition of such a relationship, through *maitri karar* and live-in relationship agreements, means that the normative has the power to take a legal form. Thus, law is capable of acknowledging such a relationship that challenges the hegemony of the consent-sex matrix.

34. By recognizing these practices in the law, queer individuals and couples can offer resistance from within the law and from within the institution of marriage. The examples discussed above can help us think about Boellstorff's provocation on how subjects can act within a system of power to not sustain that system. The Rituparna petition highlights this clearly (*Rituparna Borah v Union of India* 2020). The petition does not ask for mere assimilation of sexual queer couples who will privatize care and raise children. The petition highlights different forms of queer relationships, intimacies, and formation of families which can challenge the heterosexual or heterosexual-like unit envisaged by marriage. If the values underlying the queer relationships are incorporated into the law, read with the recent jurisprudence on autonomy, this may not just enable a challenge in the future of problematic legal provisions, but even of problematic social values currently intrinsic to marriage. It can enable a more expansive recognition of individual autonomy within marriage (contesting existing scripts of sex and sexuality) and relationship autonomy in society (defying social norms to live with one's partner or chosen family).

35. Complementing such a lived reality, queer lives have always played a significant role in advancing constitutional jurisprudence in India. The prohibition of same-sex sexual intercourse in the Victorian section 377 of the Indian Penal Code rendered queer persons criminals and outlaws in their own country. The Delhi High Court's judgment in *Naz Foundation v Union of India* and the Supreme Court's judgment in *Navtej Singh Johar v Union of India* decriminalizing section 377 were both born out of decades-long queer activism and litigation. These judgments developed the concept of "analogous grounds" within equality law. Sexual orientation was recognized as an analogous ground to "sex", which is currently recognized as one prohibited ground of discrimination (among five) in the Constitution. This has positively impacted the architecture of discrimination law in India by allowing Courts to go beyond the list of

grounds, enabling the possibility of wider recognition for more groups in the future.

36. Further, another transformative moment in this trajectory is the Madras High Court's poignant verdict in *Sushma & Seema v Police Commissioner & Ors*, which was a case of natal violence against a young lesbian couple. The High Court ordered that the police close complaints filed by parents or others against consenting queer adults, without subjecting them to harassment. This direction is significant as it establishes the relationship autonomy of queer couples, recognizing their liberty even in the face of judgmental social mores. The judgment mandated sensitization of the police and opening up shelters for queer persons in need of protection and prohibited "conversion therapy" or "attempts to cure" queer persons (2021). Further, the continuing mandamus of the Court culminated in the rollout of a Transgender Policy for the state of Tamil Nadu. It also initiated discussions on the creation of a "deed of familial association" within the state, through which same-sex relationships could potentially be recognized. Reinforcing this inclusive approach, the Madras High Court recently reflected that although precedents like "*Shakti Vahini*, *Asha Ranjan* and *Shafin Jahan* were rendered in the context of inter-caste and inter-religious marriages, the ratio laid down therein would apply with equal force to same sex relationships also" (*M A v Superintendent of Police, Vellore* 2025: paragraph 10) This judgment exemplifies how queer relationships and issues have been used by courts as a vantage point to infuse the values of consent, autonomy, and chosen kin into legal architecture more broadly. This responds positively to the abolitionist argument outlined above, by showing how such infusion can become transformative, affecting both overall jurisprudence and the executive action of the state and the police.

[G] BEYOND MARRIAGE: TOWARD A NOMINATION-BASED REGIME

37. Even as I dissent from the restrictive holding of the *Supriyo* majority, I heed a valid warning against privileging one relational form to the detriment of others. Scholars caution that tying all legal security to marriage super-imposes same-sex unions onto existing caste-class hierarchies and eclipses non-dyadic or celibate care-relationships (Singh & Ramkumar 2024). Marriage, then, has two aspects—one, the expressive aspect which enables those in a marriage to declare their love for one another, and two, the rights associated with it (Scott 2000; Sunstein 2004). Radically queering equality would mean allowing sexual minorities to also access

and legitimize their love and intimacy through legalizing their expression and allowing them to get married and, at the same time, removing the benefits that are associated solely with marriage and disaggregating them. Only if the benefits and rights associated with marriage are separated from it and are disaggregated will the institution of marriage no longer be privileged, and sexual minorities will be benefited.

38. If queer persons are merely allowed to get married with no attendant legal changes, it will result in homonormativity (Duggan 2002), ie the assumptions made by the heteronormative institution of marriage will not be contested by queer people and the privatization of certain benefits in themselves will not be questioned. It simply means that more persons will be allowed to enter into the still exclusionary and privileged institution of marriage. Allowing queer people to get married without challenging the fundamental values reflected in marriage laws will result in heterosexuality being considered the norm for marriage and queer people being allowed to access the same as an exception, resulting in "normative hierarchies of intimacy" (Fischel 2019; Singh & Ramkumar 2024). The power relations between straight persons and queer persons and the hetero-queer divide will remain intact because marriage as an institution explicitly rewards heterosexuality. However, if the rights that are now available to marriage are radically redistributed, heterosexuality as the default sexuality will no longer matter as it would not be a qualifying feature to access those rights.

39. The queering of marriage law and the disaggregation of rights will instead hugely benefit not just sexual minorities, but all persons, as they would have multiple options of accessing and redistributing rights and benefits. For example, transgender persons in a Guru-chela system currently do not have the right to define their family under the Transgender Persons (Protection of Rights) Act 2019. This could adversely affect them if the benefit of insurance were still linked to the legal natal or marital definition of family. In the proposed model, the Hijra community or the Guru, who are considered as family by a lot of trans individuals, may be nominated as the receivers of insurance. Hence, the queering of marriage here would mean that the parties who wish to enter into the insurance scheme can have the option of nominating whomever they consider as family, to avail the benefits of the same. The mere reliance on marital status to define the beneficiaries of insurance would thus be eliminated, thus decentring marriage as the primary and privileged site in the "normative hierarchies of intimacy" (Fischel 2019).

40. An implementation of the proposed solution will mean that the various legislations which are based on marriage as a licence will have to be amended. Judges will also have to be made aware of the changing nature of family and the role of marriage. Rewriting the scheme of such legislation is a task whose burden will be placed on the State as it will primarily undertake the role of disaggregating the rights and benefits of marriage through re-imagining and reinventing the law.

41. Indian statutes already recognize voluntary nominations—ie having one's rights and benefits being transferred to a person of one's choice, rather than on the basis of marital status, to one's spouse or natal family. The Employees' Provident Fund subscribers can list any person as a beneficiary of the employment savings, regardless of their relationship with the individual (Employees' Provident Funds and Miscellaneous Provisions Act 1952). Life-insurance and National Pension System forms do the same. Similarly, this logic can be scaled across sectors —by allowing nominees for medical decision-making (Yachu & Ravindran 2025), tenancy succession, accident compensation, etc. I direct the government to strongly consider this model and develop a workable framework for enabling a nominations-based regime for all. The nominations model can be undertaken alongside the recognition of queer marriages (Vidhi Centre for Legal Policy 2024; Mukherjee & Ors 2025). Thus, even if queer couples are allowed to legally marry, there can be a more comprehensive nominations regime put in place for all individuals and couples across the board.

42. A nominations regime honours the constitutional commitment to decisional privacy by also serving citizens who do not marry. Family law in India "continues to centre a binary, heteronormative model" (Goyal & Ors 2025), thereby excluding "non-dyadic relationships, non-conjugal families … and caregiving arrangements between friends" that nevertheless involve "deep financial and emotional inter-dependence" (Goyal & Ors 2025). Further, family law also marginalizes persons with disabilities, who may find the institution of marriage exclusionary not just for themselves but even for distributing rights and benefits to their non-marital caregivers (Ghai 2015: 140; Devassy 2021; Murthy 2024). Allowing every adult to designate a "primary dependant" (or multiple co-dependants) for benefits such as hospital visitation, housing succession and pension commutation would extend legal protection to unmarried elders, caregivers of people with disabilities, polycules and other formations outside the matrimonial frame. Crucially, nominations are revocable at will, embodying the queer insistence on consent as a continuing practice rather than a one-time gateway. They also relieve

the Court from adjudicating private ontology (whether a group is really "marriage-like") and focus instead on distributive justice.

43. Thus, I answer the institutional anxiety: equality need not be a zero-sum game. Marriage equality secures one path; the nominations regime keeps all other paths open, ensuring that constitutional fraternity is not conditioned on subscribing to any single model of intimacy.

[H] CONCLUSIONS AND FINAL ORDER

44. In light of the foregoing analysis, I conclude as follows:

A. The Constitution guarantees the fundamental right to marry a partner of one's choice and obligates the State to create necessary conditions for the meaningful exercise of this right.

B. This right extends to all individuals, regardless of their sex, gender identity, or sexual orientation.

C. The SMA is unconstitutional in its current form and, to correct the constitutional infirmity, it must be read expansively in a gender-neutral manner to allow queer couples the right to marry.

D. The notice requirement under the SMA is held as unconstitutional.

E. The state is directed to institute a comprehensive nominations regime that delinks legal rights and entitlements from marital status alone and further redistributes them across the spectrum of relationships that individuals value and rely upon for support, dignity, and care.

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Muted Queerscapes: Intersectional Resistance Queering of Workplace Law Using Poetry

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Abstract

This article interrogates the dissonance between India's post-377 legal promises and the lived realities of queer-trans communities navigating casteist, ableist workplaces. Through 27 participatory poetry workshops (2020–2022) in Hyderabad, Bengaluru, Visakhapatnam, West Bengal, and Wayanad, disabled, and able-bodied, Dalit-Bahujan, Adivasi trans participants redrafted the Transgender Persons Act 2019 and Industrial Disputes Act 1947 via erasure poetry, body-mapping, and crowdsourced protest verse. Framed by Akhil Kang's critique of Savarna queer movements (2021), Gee Semmalar's trans labour praxis (2020) and Sudipta Das's *Cripping the Margins* (2022), this work positions poetry as "jurisdictional counterpractice"—a neurodiverse, caste-conscious challenge to legal and corporate "inclusion". Case studies from Sayantan Datta's workplace audits, the Centre for Law and Policy Research's intersectionality report (Kothari & Ors 2022), and the Queer Tech Workers' Demand Charter (2022) reveal how poetic subversion queers judgments like *Navtej Johar* (2018) and *Dr Malabika Bhattacharjee* (2020), centring disabled, Dalit-Bahujan futurities beyond pink capitalism.

Keywords: poetic resistance; caste; disability; neurodiversity; POSH Act; Navtej Johar.

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[A] PROLOGUE: THE LOCKED GATE AND THE DUPLICATE KEY

In a cramped room in Hyderabad, a Dalit trans woman holds a black marker over India's Transgender Persons Act 2019. She strikes through the hollow promise—"No establishment shall discriminate"—until only two words remain: "Discriminate employment". For her, this erasure is not destruction but revelation. "Your law is a locked gate," she writes. "Our poems are duplicate keys cut from stolen iron."

This act of poetic defiance mirrors Agyeya's prison writings in *Shackles* (1946), where he reworked colonial censors' redactions into revolutionary verse:

> *These walls cannot hold syllables.*
>
> *What you blacken with ink, we bleed into song.*

The verdict that changed everything—and nothing

When the Supreme Court decriminalized homosexuality in *Navtej Johar* (2018), Savarna pride parades erupted in celebration.[1] Yet in Bengaluru's tech corridors, a Dalit gay IT worker found himself cornered by human resources personnel after reporting homophobic slurs. "Changing teams didn't heal the PTSD", he says. "Therapy came from my savings." His story mirrors the Centre for Law and Policy Research's chilling statistic: 63% of Dalit queer workers *avoid* reporting harassment, knowing that grievance committees are stacked with Savarna managers (Kothari & Ors 2022).

The *Navtej Johar* judgment (2018), while historic, echoes the global paradox of legal victories divorced from material change. As noted in *Queer Judgments* (Ferreira & Ors 2025), decriminalization often becomes a "Savarna alibi", masking how caste hierarchies persist in queer movements. The UK's *HJ (Iran) & HT (Cameroon)* asylum case (Powell 2025) reveals similar fissures: queer refugees face state-sanctioned erasure when their identities do not fit colonial binaries. In India, the Transgender Persons Act 2019, hailed as progressive, became a cruel paradox for many. A trans healthcare worker in Visakhapatnam, forced

[1] "Savarna" refers to Hindu castes historically included in the fourfold varna hierarchy (Brahmins, Kshatriyas, Vaishyas, Shudras). B R Ambedkar, in *Who Were the Shudras?* (1946), critiques the Brahminical framing of this system, arguing that the Shudras—though classified as Savarna—were originally Kshatriyas degraded through Brahminical sanctions and exclusion from Vedic rituals (eg *upanayana*). This exclusion entrenched their subordinate status *within* the varna order, distinct from *Avarna* communities (Dalits, Adivasis) positioned entirely outside it.

to handle toxic chemicals without protective gear during her transition, recounts:

> *Termination (of employment) left no paper trail—just scars from their 'inclusive' workplace.*

Poetry as legal surgery: cutting through the lies

Erasing the state's fiction

In workshops, participants performed radical surgery on legal texts. The Industrial Disputes Act 1947's edict—"Workers shall maintain discipline"—became a damning indictment when redacted to "*Shall discipline.*" For neurodiverse participants, this exposed how "discipline" criminalizes ADHD rhythms and autistic sensory needs under capitalist productivity.

These acts mirror the *Queer Tango Futures* anthology's call to "dance the image of our imagination" (Batchelor & Ors 2021). Just as tango's embrace disrupts gendered hierarchies, poetic redaction unmasks the law's violent choreography. A nonbinary participant in Chennai rewrote the Factories Act 1948: "*Overtime is not a choice when your bones are clock hands.*"

Disability justice frameworks, as Mia Mingus insists, demand "moving together at the speed of trust". Yet workplaces pathologize neurodivergence, as seen in Esmé Weijun Wang's *The Collected Schizophrenias* (2019), where psychosis is framed as a "productivity defect". A workshop participant with schizophrenia scribbled on the Minimum Wages Act 1948:

> *My hallucinations are more honest than your HR policies.*

Body maps: where the law leaves scars

Using crimson paint on stick figures etched in Bengaluru, workers mapped violence onto their bodies:

- ◊ "Wage theft" marked as "amputation" at the wrists.
- ◊ "Deadnaming" etched as burns across the chest.

A Muslim trans teacher in Hyderabad drew arrows pointing to her throat:

> *Every "DEI workshop" feels like swallowing broken glass. They praise my resilience but deny me pronouns.*

These maps resonate with *Queer Judgments*' analysis of *Re Imogen* (Stagg 2025), where Australian courts pathologized trans youth autonomy. Both

contexts reveal how legal systems reduce marginalized bodies to sites of surveillance, not sovereignty.

The Savarna saviour complex and the cure

Corporate India's rainbow capitalism, argues Akhil Kang's PhD thesis *Caste in the Rainbow* (2024), reduces inclusion to "diversity lanyards and pronoun pins" while maintaining casteist hierarchies. Their fieldwork exposes how Dalit queer employees are funnelled into "pinkwashed" CSR roles—tokenized, underpaid, and barred from leadership. A poem from the workshops skewers this hypocrisy:

> *Your allyship is a yagna*
>
> *where we're the sacrificial dal.*
>
> *My labor is your CSR trophy—*
>
> *polished, displayed, uneaten.*

Telugu feminist poet Jupaka Subhadra's *Kongu* (2022) echoes this critique, reframing Savarna feminism's co-option of Bahujan labour:

> *You wear my hunger as pendant gold—*
>
> *a curated ache for your museum shelves.*
>
> *But my calluses write histories*
>
> *your silk cannot smother.*

Rewriting the Constitution in margins

The Calcutta High Court's *Dr Malabika Bhattacharjee* ruling (2020), extending POSH Act (Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013) protections to queer individuals, offered fragile hope. But as a disabled Dalit trans participant notes: "Laws see our bodies as checklists—*caste* + *gender* + *disability*—never as whole humans."

The Queer Tech Workers Demand Charter (2022) reframes justice through collective poetics:

1. Amend POSH: "*Hear our screams, not just whispers.*"
2. Redistribute time: "*Let deadlines dissolve into dandelion clocks.*"

This charter aligns with *Queer Judgments*' vision in *X, Y and Z* (Danisi 2025), where the Court of Justice of the European Union expanded refugee protections beyond heteronormative trauma narratives. Drawing from Sudipta Das's analysis of *Begumpura*—the 15th-century Dalit

utopia of caste-less equality—the demands reimagine workplaces as sites of radical interdependency. As Das writes, "Begumpura is not a place but a verb: the act of dismantling gates" (2022).

[B] EPILOGUE: THE POEM AS PICKAXE

In a final workshop, participants buried copies of the Transgender Persons Act 2019 and planted verses in the soil. One line, borrowed from Chand's "What is Queer?" (2020) and *Tedagadu* (2019), became their manifesto: "Queer is the resistance to epistemological violence."

Telugu feminist Volga's *The Liberation of Sita* (2016) reverberates here:

> *We are not footnotes in your epics.*
>
> *Our rebellions seed forests where your laws crumble.*

For these poets, the true verdict lies not in courtrooms but in the act of rewriting—a reminder that the law, like poetry, is malleable. As the *Queer Tango Futures* contributors dance "like it matters" (Batchelor & Ors 2021), Bahujan trans communities wield verse as a pickaxe, chipping at casteist-ableist capitalism until new worlds emerge.

About the author

Yerram Raju Behara *is a non-binary disabled poet and expressive arts practitioner whose work centres queerness, disability, and anti-caste resistance through hybrid forms like blackout and found poetry. Their practice focuses on chronicling and re-imagining erased histories of queer-trans communities via community-led initiatives, including a trans-led expressive arts cohort with the Piravi Art Community. In 2022, they initiated Redefining Queerscapes, a movement using workshops to transform legal texts into protest poetry, archived in the Queer Judgments Project,* Reframe Journal *and multiple anthologies. Their debut collection,* Withering Tempests *(2021), explores queer isolation, and their writings on queer-trans journeys in urban spaces in India appear in journals and queer collectives. As an EQUAL fellow and a collaborator with the Asia Pacific Trans Network, Raju documented systemic healthcare barriers faced by trans youth and led Queer & Quarantine, a crisis-intervention initiative, during the pandemic.*

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Equali-T

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Abstract

Equali-T is a song written in response to *For Women Scotland Ltd v The Scottish Ministers* (2025). In this accompanying text, I provide a background to the case and a reflection on the events, texts, pictures and thoughts that inspired them. You can listen to the song: *Equali-T* by SJ Cooper-Knock.

Keywords: trans rights; queer legal judgment; equality; justice; solidarity.

[A] AUTHOR'S NOTE

Primarily, I am indebted to Surabhi Shukla, whose legal knowledge, analysis, and support have fundamentally shaped and catalysed everything that has followed in the wake of the judgment. I also want to thank the wonderful folk at the *Law in Context* podcast (Anna Ventouratou, Sotirios Lekkas and Kitty Turner) who provided Sandra Duffy, Surabhi Shukla and myself with the space to process this judgment together.

This piece was written following the encouragement of Katie Jukes, whose own artistic practice continues to be moving and generative in countless ways. Working with Katie Jukes and Surabhi Shukla on the Queer Parenting lecture by performance in 2024 led to my first songs about queer life, love, and law. This has since culminated in a Queer Musical Storytelling project (funded by the AHRC Hub for Public Engagement with Music Research), which also includes Fiona Moorcroft. Our project is a constant source of joy and hope in troubled times.

The harmonies on this piece were inspired by the gorgeous lines that Scoobz riffed with me in an earlier jamming session. The recording that you can hear above was hastily made on my iPad during travels between the UK and South Africa, and the recording is the poorer for missing her voice and her musicality. Hopefully, there are echoes in here of her inimitable style.

My thanks also to Radhika Govinda and Laura Hirst, for reading this draft and for their treasured friendships. Thanks also to the Editorial Team for their support and guidance. All mistakes are my own.

[B] NOTES ON THE SONG

> "This doesn't seem real," is so common a phrase that one has to wonder – what sort of reality did everyone expect?— Ryka Aoki (2022)

I saw the picture first. In the foreground: microphones push aside a spray of flowers to inch closer to the action. In the centre: Susan Smith and Marion Calder beam at each other as they raise their champagne glasses for a toast. Beneath them, quotes from the judges who had decided that—in the name of clarity and coherence—the definition of "woman" in the Equality Act 2010 was determined by a person's "biological sex". Later, I saw the picture tweeted by JK Rowling: cigar in one hand, drink in the other. Rowling was reportedly toasting the news from her superyacht in the Bahamas with the caption, "I love it when a plan comes together. #SupremeCourt #WomensRights."

The carnivalesque cruelty of these images—and the irony of women celebrating a verdict that would roll back feminist freedoms—could have been lifted from a Brechtian play. When politics insists on being a perverse theatrical production, the need to speak back through art is clear.

In the warm and rainy days that followed the judgment, I wrangled personally, politically and academically with the verdict, and its implications. This was not a solitary journey. I mourned with friends whose lives, identities, loves, and occupations were thrown into question. I connected with communities building support and understanding in a shifting legal landscape.

The judgment landed in the midst of termtime. As the Equality and Human Rights Commission (2025) issued its "interim update", I frantically re-penned the lecture I was preparing for my undergraduate class on solidarity. In the evenings, Surabhi Shukla and I pored over legal judgments and political commentaries as we prepared for a podcast with *Law in Context*. At the same time, we were putting the final touches to a grant proposal to run queer musical storytelling workshops in Bradford and Sheffield with Katie Jukes (a poet and lecturer at Manchester Metropolitan University) and Fiona Moorcroft (from Sheffield's LGBTQ+ charity for young people SAYiT). At a time when solidarity within and beyond queer communities was fracturing, we hoped that poetry, music, and song could create new spaces for understanding and action. With the discourse around trans folk sharpening to a knife's edge, our proposal had never felt more relevant or more daunting.

This was the context in which I wrote *Equali-T*. When artists are asked for a personal reflection on their work there is often a sense of what

"personal" should sound like: a singular, poetic voice. The insides of my mind are far messier: fragments of images, legal judgments, poetry, scholarship and song are tangled together: a jumble of recitation and argumentation. Below I offer a brief background to the Supreme Court case, so that readers who are unfamiliar with the judgment can understand the broader context. Beneath that, my lyrics are accompanied by some of the texts, pictures, and ideas that influenced them. This queer knot of things, which veers at times between the obvious and the abstract, offers you an insight into my thoughts. Artists always relinquish control over the meaning of their art when they release it into the world. Do not feel you have to read these words to engage *Equali-T*: you are free to listen and to make the song your own.

The music for this piece developed as a counterpoint to my words: a reflection of jarring juxtaposition we have seen throughout this case where talk of "equality", "clarity" and "safety" is used to justify discrimination, uncertainty, and harm.

[C] BACKGROUND

In *For Women Scotland Ltd v The Scottish Ministers* (2025), the Supreme Court was asked to determine the meaning of "woman", "man", "male", "female", and "sex" in the Equality Act 2010. This case had evolved in response to a seemingly innocuous piece of legislation: in 2018, the Scottish Parliament passed the Gender Representation on Public Boards (Scotland) Act 2018. It gave public authorities a "gender representation objective": 50% of the non-executive members on their public boards should be women. It stated that "women" included cis women and trans women. The latter were defined as those "living as a woman and proposing to undergo, is undergoing, or has undergone a process (or part of a process) for the purpose of becoming female" (Gender Representation on Public Boards (Scotland) Act 2018, asp 4). In other words, trans women who were protected under the category of "gender reassignment" within the Equality Act 2010.

In a different context, this Act may have gone unnoticed or unopposed. But this was 2018. The previous year, the Scottish Government had held public consultations around its proposed reforms to the Gender Recognition Act 2004 (Scottish Government 2020). That Act, responding to the *Goodwin* (2002) judgment in the European Court of Human Rights, enabled trans men and women to have their gender legally recognised "for all purposes" through a Gender Recognition Certificate (GRC) (Gender Recognition Act 2004). This legal recognition had material consequences.

Prior to this Act, for example, a person's birth certificate permanently stated the sex they were assigned at birth. This paperwork could cast a long and inescapable shadow over trans people's lives, potentially outing them at every bureaucratic turn. It also impacted the rights and recognition they could access, from protection against discrimination to pensions and marriage (*Goodwin* 2002).

The shift was significant but limited (Renz 2020).[1] As UK documentation only uses the categories "male" and "female", the change did not accommodate non-binary and gender queer folk. The process of obtaining a certificate could also be emotionally and materially taxing (ibid; TransActual nd). As of March 2025, 9633 of the 96,000 trans men and women in the UK had obtained a GRC (Jones 2025).

In light of these difficulties, the Scottish Government announced its intention to make the process for obtaining GRCs more accessible and "less bureaucratic and intrusive" (Scottish Government 2017). One proposal it explored was to enable recognition through self-declaration rather than medical assessment (Government Equalities Office 2018):[2] an approach successfully taken by many other countries, starting with Argentina in 2012 (Nathanson & Outright Team 2024).

While their proposals received majority support (Scottish Government 2018), they also sparked resistance, from the halls of Holyrood to the discussion threads of Mumsnet. It was in the latter that Trina Budge, Marion Calder, and Susan Smith met, forming "For Women Scotland" in June 2018 (Rhodes 2024). For Women Scotland argued that "woman" was defined by biological sex, that there are only two sexes, and that biological sex is immutable. Recognising this, they argued, was key to protecting (cis) women's rights. For Women Scotland are opposed to what they termed "gender ideology". This means that they oppose people determining their own gender identity and they also deprioritize the importance of gender in contrast to biological sex (Rhodes 2024).

[1] See also (Whittle 2006). Whittle focuses on the question of marriage in the context of the Act, but this is an excellent article for highlighting the compromises made in the act—including around the language of sex and gender.

[2] The demand for medical testimony has been criticized for pulling an intimate, personal truth into the realm of psychiatry in a way that introduces medical "gatekeeping"; casting trans lives as a psychological problem; and reinforcing rigid, binary sex/gender distinctions (Cowan 2025). That said, it is critical that clinicians and clinical processes are seen as the diverse and complex processes that they are, remembering that "clinicians" and "trans people" are not two mutually exclusive groups and that many clincians have provided important advocacy for trans rights (Richards &Ors 2014).

Those who argue for self-identification, however, argue that medicalization cannot shed its long associations with transphobic and homophobic stigma nor its tendency to assume power, rather than to cede or enable it in others (Cowan 2009).

When the Scottish Government issued its statutory guidance in 2020, For Women Scotland mobilised. In 2022, they filed a petition for a judicial review, stating that the definition of "woman" in this guidance did not match that found in the Equality Act 2010. They concluded that the Scottish Government had gone "outwith the legislative competence of the Scottish Parliament" by including trans women (*For Women Scotland Ltd v The Lord Advocate & Ors* 2022: paragraph 1). This was initially dismissed on the basis that the definition of "woman" had not been changed. Instead, trans women were included. This was supported by European Union law on the basis that "in discrimination matters, trans people are to be included as being of the sex to which they have reassigned" (ibid: paragraph 16). On appeal, however, For Women Scotland were successful. Lady Dorrian concluded that the statutory guidance "conflates and confuses two separate and distinct protected characteristics" and, in doing so, the Scottish Parliament had gone beyond its legislative competence (ibid: paragraphs 39, 40).

In response, the Scottish Government narrowed its inclusion of trans women in its statutory guidance, including only those who held a GRC. For Women Scotland subsequently filed another petition for judicial review, arguing that the Scottish ministers had made an "error in law" by including trans women with a GRC in their definition of women. Their petition was dismissed and their appeal was also dismissed, after which they took the matter to the Supreme Court.

This, then, was what the Supreme Court was asked to decide: what were the meanings of "woman", "female", "man", "male", and "sex" within the Equality Act 2010 (*For Women Scotland Ltd vs The Scottish Ministers* 2025: paragraphs 8, 25)? And, more specifically, should a trans woman with a GRC be included as a "woman" within the Act (ibid)?.

The Court decided that, within the Act, the terms "man" and "woman" referred to "biological sex" (*For Women Scotland Ltd v The Scottish Ministers* 2025). Three findings were at the heart of the judgment: Firstly, the judges stated that protection against sex discrimination was originally introduced in the Sex Discrimination Act 1975 in which "man" and "woman" were defined by biological sex (ibid: paragraphs 51, 265). Neither the subsequent amendment to this Act (1999) nor the amendment and consolidation that occurred with the introduction of the Equality Act 2010, they stated, had changed the meanings of these terms (ibid: paragraphs 62, 167, 265). Secondly, they found that the Gender Recognition Act 2004 meant that the GRC applied in all cases unless there was a stated exception in that Act or in "any other enactment or any

subordinate legislation" (ibid: paragraph 75). They found that while the Equality Act did not explicitly state that the Gender Recognition Act 2004 should not apply, it was "incoherent and unworkable" if it was applied (ibid: paras 197, 210, 264). Therefore, it could be seen as an exception to the Gender Recognition Act 2004. Finally, they stated that trans people were still protected from direct and indirect discrimination through the Equality Act, so that this ruling would not "disadvantage" trans people or weaken the protections they received (ibid: paragraph 264). As this case dealt with an interpretation within the Equality Act 2010 its full impact upon other laws, policy and practice still need to be determined.

This judgment was followed by "interim guidance" by the Equality and Human Rights Commission (EHRC) (2025) stating that trans women should not be admitted to single-sex spaces for women and trans men should not be admitted to single-sex spaces for men. Likewise, associations of gay men should exclude trans men and associations of lesbians should exclude trans women. Furthermore, there could be instances in which trans women can be excluded from spaces for men and trans men could be excluded from spaces for women. Decisions should be made on the basis of whether they are a "proportionate means for achieving a legitimate aim"—the basis upon which discrimination is defensible in the Equality Act (2010). However, "trans people should not be put in a position where there are no facilities for them to use" (ibid). The Good Law Project and others have asked for a judicial review arguing that this is either "unlawful" or constitutes a "breach" of the Human Rights Act 1998 (*The Good Law and Ors v the EHRC* 2025: paragraphs 1-3). This was the situation as of August 2025, when this article was finalised: it is likely that the legal and policy landscape will continue to shift.

You said you wanted clarity, so let me make it clear
You won't get equality through persecution, dear
They asked for definitions, here's what you should have said:
Trans women are women, trans men are men

As Lord Hodge reads his handing-down speech in slow, deliberate tones, images of other courts reel through my mind.

The court is well aware of the strength of feeling on all sides.

How many people have been forced to listen to officials patiently explain the reasonableness of injustice in carefully articulated syllables?

On the one hand, women … On the other hand … the trans community …

How many people have forced themselves to stay in place for long enough to learn about *their place* in society? How many have willed their wilfulness[3] away so that they could witness how the cutting edge of the law would be sharpened to *keep* them in place?

> *The E[quality] A[ct] must be interpreted in a clear and consistent way …*

How many people have watched as technicalities are deftly used to shave away the substance of law and justice?

In the wake of the judgment, commentators have highlighted the interpretations that could have paved the way towards a trans inclusive judgment (eg Wigley 2025). Instead, the judgment wielded words within the Equality Act against the purpose of the Act itself.[4] It did so in the name of clarity and coherence, but the Court's arguments created empirical and legal contradictions of their own (Good Law Project nd). The result is an Equality Act that undermines equality.

> No-one's equal until we're all equal
> No-one's free till we're all free
> You can't ignore the T in equality

> *Later that night*
> *I held an atlas in my lap*
> *ran my fingers across the whole world*
> *and whispered*
> *where does it hurt?*
> *it answered*
> *everywhere*
> *everywhere*
> *Everywhere.* (Warsan Shire nd)

Struggles for justice in our world are not just ubiquitous, they are interconnected. Intersecting forms of oppression weave their way from our intimate lives to the overarching political institutions within and around which we live (Mohanty 2005; Crenshaw 2013). Concepts such as equality are either expansive or they are empty. If we are striving for an

[3] On wilfulness, see Ahmed (2017).

[4] For more on this and the purposive interpretation of the Equality Act that was possible, listen to Surabhi Shukla's contributions to Ventouratou and Lekkas' *Law in Context* podcast (2025).

equality that excludes other people or rests upon their subjugation, what we are actually striving for is not equality at all: it is power and privilege.

What is true of equality is also true of freedom. The lyrics in my refrain echo the words of Fannie Lou Hamer, "nobody's free until everybody's free" (Hamer in Brooks & Houck 2011). Like many Black activists across the globe, she knew the urgency of resisting forms of subjugation made in the name of other people's freedom (Kelley 2022).

As I write the lyrics, an image of the iconic "Pits and Perverts" poster flashes through my mind: a testament to beautiful, challenging, messy, and powerful solidarity offered by Lesbian and Gays Support the Miners (LGSM) in the midst of the miners' strike of 1984-1985. Alongside other groups, like the Black Delegation to the Mining Communities and Women Against Pit Closures, LGSM recognized the transformational potential of different communities coming together, highlighting the interests they shared in the distinct struggles they faced (Kelliher 2021).

What was true then, is true now. The struggle for trans recognition cannot be separated from the struggles of the wider LGBTQ+ community, just as the struggles for trans women's liberation cannot be separated from the struggles of women's liberation more broadly. Both of these struggles also deeply intersect with struggles such as those against racism, class oppression, and ableism.

To believe that equality is a zero sum game—that you have more when someone else has less—is not just to miss an opportunity for collaboration. It is to misunderstand the very nature of the concept itself.

> You said biology defines a woman and a man
> Sex is complex these ain't boxes that we all fit in
> You trash intersex rights; ignore how things shift
> What matters is the lives we lead, not some box a doctor ticks
> But if certification, dear, is your grounds for legal fact
> Why ignore the gender recognition act?
>
> *Not a boy Not a girl*
>
> *You are my precious honey-drop.*
>
> *Grow beyond the checkered boxes*
>
> *Fill yourself as much with yourself*
>
> *And be the reflection of truth*—Vijayarajamallika (2020: translation of *Aanalla Pennalla Kanmani—Neither a Boy Nor a Girl*—a lullaby for an intersex baby)

The Supreme Court implies that relying on biological sex makes matters simple and scientific: we come into the world with a clear status as "male" or "female". They reinforce this idea by referring to those with a GRC as having a "certificated sex" (*For Women Scotland Ltd v The Scottish Ministers* 2025: paragraph 6). In practice, cis people also have a "certificated sex": the one recorded on their birth certificate.

Biological sex is not a simple, unassailable truth that exists beyond the ideologies and whims of society. Science is a social process: what it pays attention to, the categories it creates, and the biological markers it uses to signify those categories have always been "tangled with our ideas about gender" (Fausto-Sterling 2000: 4; Butler 2003). We have decided as a society to divide people into "male" and "female" and we have decided "what counts" in that definition. We have done this in the same way we have decided "what counts" when we label an object as a lamp, a bed, or a chair. That is why the categories we use to describe biological sex are called a "social construct".

In reality, all of the elements included in our definition of biological sex—including gametes, genital appearance, chromosomes and hormones—vary across the population. By some estimates, 1.7% of the population—nearly two in every hundred people—do not neatly fit with society's categorization of sex (Sax 2002).[5] This was not considered in the judgment. Intersex people were not mentioned in its 88 pages, despite the consequences its words will hold.

Just as biological sex is complex, it is also mutable. From hysterectomies to genital reconstruction and hormonal treatment, people can remove or change most of the biological sex characteristics they have at birth. This happens for a whole range of reasons, for both trans and cis folk. In some cases, interventions may help people to feel more aligned with their gender identity: breast surgery for cis women and trans women alike can be seen as "gender-affirming care". In other cases, people's gender identity may remain stable *despite* shifts in their body that represent unwanted loss or change.

To decide what someone else's body means—and to categorize their life accordingly—is reductive, inaccurate, and harmful. Feminists have been struggling for centuries to be free from the idea that biology encompasses women's identity, destiny, and worth.[6] To root the struggle for women's liberation in a biologically bounded notion of "a woman" is to reconstruct

[5] Sax (2002) argues that "intersex" covers a smaller number of people: approximately 0.02% people who have chromosomes associated with a different sex to their visible sex characteristics or visible sex characteristics that do not easily fall into the category of "male" or "female".

the frames that feminists have fought to dismantle. I disagree with Catherine McKinnon on several issues,[7] but a clip from her interview with Cristan Williams stays with me: "male dominant society has defined women as a discrete biological group forever. If this was going to produce liberation, we would be free" (McKinnon 2015).

> *This body is my last address* (Ocean Vuong 2021).

Our bodies are far from unimportant. We live an embodied existence. But this is what matters: the meanings that people find in their own bodies; the lives they live through (or despite) them; and the way that society facilitates, frustrates, or curtails them in doing so. The European Convention on Human Rights supports this focus on lived experiences and identities (Wigley 2025).

Trans people are a problem for those who are committed to ordering society by "biological sex". Social structures are at their most powerful when they appear natural and, therefore, unquestionable. Some have read the Supreme Court judgment as an attempt to forcibly assimilate trans folk into the sex they were assigned at birth. They focus on the exclusion of trans women from spaces and services designated for women. But the judgment goes further: it also legitimizes the exclusion of trans men from women's services on the basis of their "masculine appearance" (*For Women Scotland Ltd v The Scottish Ministers* 2025: paragraph 221). This means trans women may be excluded from a service for women on the basis that they were not assigned female at birth. Meanwhile, trans men may be excluded from that same space because they look "too masculine" (ibid). This is more than forcible assimilation, it is forcible exclusion: a punishment of trans people for their refusal to conform.

> The question is how we all thrive, not if some of us exist
> There were answers, there was evidence, why did you resist?
> No trans voices in your court room, while trans folk die on the street
> from the hate and fear you're fostering, let me repeat ...

Robert Jones Jr (2015) once said: "We can disagree and still love each other unless your disagreement is rooted in my oppression and denial of my humanity and right to exist."

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6 This line of argument can be drawn through a diverse array of writers, including Wollstonecraft (1792); de Beauvoir (1997 [1949]); Oyewumi (1997); Menon (2012).

7 For example, on sex work, my views align with Smith and Mac (2018).

That is why talk of the "trans debate" is damaging: it suggests that it is acceptable to debate the legitimacy and existence of trans people.

Questioning the legitimacy of trans existence is both harmful and futile. The disbelief of gender-critical thinkers is not going to change the identity of trans people. The reality of another person's gender is not dependent upon our delight or disgust. The same is true for their sexual orientation. Our emotions and actions cannot create or destroy these identities and desires. All they can do is help, hamper, or destroy the lives of the people who hold them.

The stakes for trans people in this case were clear: transphobia is on the rise in the United Kingdom (UK). It is fed by a moral panic that suggests that trans identities are not real and that trans people represent a threat to the rights and safety of others. In reality, trans people have always existed and they frequently do so in the face of disproportionate rates of violence. Between 2018 and 2023, transphobic hate crime statistics increased 186% (Stonewall 2023). Perhaps the most marked indicators of harm, however, are the disproportionately high rates of suicidality amongst trans people, in contrast to their cis counterparts (Bassetti 2024).

And yet, the judges did not hear from any trans voices in their courtroom. Instead, they took written submissions from Sex Matters, "the lesbian interveners" (the LGB Alliance, The Lesbian Project, and Scottish Lesbians), the EHRC, and Amnesty International. They allowed oral submissions from Sex Matters and the EHRC. Both Sex Matters and the Lesbian Interveners took an unambiguously gender-critical approach to the case. The Lesbian Interveners argued that their capacity to gather—and their identity as lesbians—was threatened by the recognition of trans women as women (Lesbian Interveners 2025). The neutrality of the EHRC on trans rights has also been brought into question.

The judgment took for granted that the gender-critical perspectives it heard were representative of women and lesbians more broadly. It also overlooked the trans-inclusive stances of practitioners and service users in key spaces, such as domestic violence shelters (Pain 2021; Stonewall & nfpSynergy 2023).

Lesbians feature heavily in the judgment, being referenced 23 times in total. This is not the visibility that most lesbians are fighting for. I think of my friend sauntering into our local Pride with her "butches against transphobia" T-shirt. She is emblematic of the fact that cis lesbian and cis bisexual women have the most positive view of trans people in the

country (Just Like Us 2023; YouGov 2023).

Following the judgment, spaces designated for lesbians exclude trans women. The "lesbian interveners" entered the case with the aim of defending the capacity for lesbians to identify and associate on their own terms. Their testimonies are responsible for one of the most significant legal limits on lesbian gatherings in the country's history.

Rather than questioning the existence of trans people, we need to ask: How can we build a world in which everything "we value and have reason to value" is recognized and allowed to thrive (Sen 1999)?

> For those with 70k to spare, I've got ideas for that
> Tackle violence, poverty, healthcare, and the gender pay gap
> Build solidarity with all the struggles going on
> 'Cause cis women they have problems, but trans women ain't one

Black leather tie, black leather gloves. Laverne Cox is on a talk show making points as sharp and resplendent as her crisp suit jacket and her blunt-cut bob.

> At the end of the day, trans people are less than one percent, trans people are not the reason you can't afford eggs … I think they are focused on the wrong 1%.

In a world where everyone is equal and everyone is free, there would be no billionaires. Diversifying the demographic of those at the top is no substitute for eliminating the inequality they represent. Unfortunately, this is not the world in which we live.

And so, in 2019, J K Rowling could give £70,000 to fund For Women Scotland's legal appeal (Baska 2024). She has since established the JK Rowling Women's Fund to support similar cases. Now, when I open Instagram, I see post after post making appeals: trans folk are having to take the money that could have been used to build community spaces or pay the rent, and pour it into fighting funds to defend their basic freedoms.

There are many threats to women and girls in the UK today. Misogyny is on the rise (Victims' Commissioner 2025), violence against women and children affects one in 12 women in England and Wales (National Police Chiefs' Council 2025), the successful prosecution of rape has dropped from 25% in 1981 to 2% (UK Parliament 2025), and women are disproportionately affected by our housing crisis (Foster 2017).

Meanwhile, the funding for organizations run for and by women and girls is in crisis (Rosa Fund 2024).

Excluding trans women is not going to help us tackle these issues. Instead, it is going to ratchet up the harms that trans people face and close down their access to safe spaces and services. It is also going to have a negative impact on cis women. This judgment—and the interim guidance that followed—encourages people to socially police who looks "like a woman" and who looks "like a man". Cis women who are tall, hairy, muscular, or masc-presenting are particularly at risk. Already, we are seeing people being questioned, intimidated or rejected from the spaces they use in their everyday lives (*The Independent* 2025).

Cis women and cis girls are justified in feeling unsafe and unequal. Cis lesbians are justified in feeling that they lack the recognition, visibility, and spaces for community that they deserve. Trans people are not the source of these injustices and persecuting them is not the solution.

> The roots of injustice they are tangled, they are deep
> And scapegoats ain't no shortcut to the work of love and peace
> But we can do this work together and the ending will be sweet
> Where everyone is recognised, where everyone is free

> *not back, let's not come back, let's go by the speed of*
>
> *queer zest & stay up*
>
> *there & get ourselves a little*
>
> *moon cottage (so pretty), then start a moon garden* …—Chen Chen (2020)

> *… There's a dream I have in which I love the world. I run from end to end like fingers through her hair. There are no borders, only wind. Like you, I was born. Like you, I was raised in the institution of dreaming. Hand on my heart. Hand on my stupid heart* …—Cameron Awkward-Rich (2019)

Hope can be a hard thing to hold in a hostile world. As Lalitha Kamath argues, we "need to be inspired by the messiness—indeed the muddiness—of being caught between estrangement and reclaiming, hope and hopelessness."[8]

[8] Written on the climate crisis, but applicable to this case (which is, of course, also in the context of that same crisis) (Kumar & Ors 2025).

Writing at the end of the 1970s, Stuart Hall (1979) encouraged activists to think about the specifics of the struggle they were facing and build the political imagination that they would need to fight them. These words remain relevant today. What he asks of us is challenging, transformative work. It requires us each to confront the scapegoats and spectres that we have held onto and the harms in which we have been complicit. We cannot, as Audre Lorde (1984) reminds us, "settl[e] for anything less than the hard work of excavating honesty". This is true within and between communities of struggle. Then, and only then, can we play our part in creating "Freedom Dreams" that are worthy of their name (Kelley 2022).

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> For those of us who write, it is necessary to scrutinise not only the truth of what we speak, but the truth of that language by which we speak. For others, it is to share and spread those words that are meaningful to us. But primarily for us all, it is necessary to teach by living and speaking those truths which we believe and know beyond understanding. Because in this way alone we can survive, by taking part in a process of life that is creative and continuing, that is growth (Lorde 2017 4-5).

[A] INTRODUCTION

Writing is never a neutral act. As reflected in the words of the visionary Black, lesbian, warrior poet Audre Lorde above, writing is not only an effort to claim space for one's vision of the world, it is also a deeply emotional and relational process that involves connecting with others and building the sense of community that is necessary to undertake shared struggles. Writing is, therefore, profoundly political.

* **Authors' note:** The authors would like to acknowledge the precious contributions of other members of the group who were involved in the earlier stages of co-editing the Special Section but did not contribute to this editorial, namely: Dhruv Bhatt, Jeshis Jamarkatel, Purnima Bhattarai and Samikshya Dahal.

For those of us who have been involved as guest editors for this Special Section of *Amicus Curiae*, coming together as a group of children and young people and more seasoned adult allies has been an attempt at continuing to build our community around the values that we share and our perspectives about the most pressing issues facing children's rights today. In 2024, we explored these as co-authors in a submission to the Special Section of *Amicus Curiae*, "Poetry for Rights! Intergenerational Co-creation for Child Rights Scholarship" (Hope & Ors 2024). Using poetry and collective, reflective analysis, the article unpacked co-authors' feelings of powerlessness, hopelessness and erosion of mental health in the face of the polycrisis, alongside children and young people digging deep to find strength to continue to act towards positive social transformations, even in the face of repression by powerful adults. It also argued that poetry and other arts-based methods enable forms of embodied, emotional and relational expression that should be recognized by adults in the child rights space as legitimate forms of knowledge in their own right; forms of knowledge that are important starting points for beginning to dismantle the colonial, Eurocentric tropes of knowledge that continue to dominate child rights scholarship.

Building on that piece, we were delighted and humbled to be invited to act as co-editors for a new Special Section of *Amicus Curiae*. We were particularly grateful that we were given complete freedom to decide on the theme of the Special Section and decide how we would like to invite contributions. To respond to this task, we convened a series of online meetings in autumn 2024 in order to share ideas about what the topic of the Special Section could be. Together, we landed on the idea of "Pushing the Boundaries of Intergenerational Activism in an Era of Polycrisis", which would focus on the actions that children and young people are taking in the face of the compounding crises facing our world today, including economic, political, social and ecological instability caused by conflict and climate change, and the complexities involved in experiences of intergenerational activism. We encouraged artistic submissions and gave priority to featuring the perspectives of children and young people from minoritized groups or who had faced adversity.

In terms of inviting contributions, we debated the advantages and disadvantages of going with an open call compared to a closed call where we invited specific people to contribute. Given that for most of us, it was the first experience of co-editing a Special Section of an academic journal, we decided that a closed call would be more manageable. We drafted an "everyone-friendly" version of the invitation to contribute and circulated it to children, young people and adults in our respective networks. We

collectively reviewed the abstracts and then later the manuscripts, and also organized online meetings to share our feedback with each other.

This process generated three poignant pieces from contributors. The first piece, "Story" by Rolex Odhiambo, a young person from Kenya, is a poem that eloquently captures the visceral experiences of being a young person taking part in a public demonstration. In doing so, it pays homage to previous generations of civil rights activists across the globe who have engaged in peaceful protest for social justice. The second piece is an article by Ornella de Barros and Claire O'Kane which questions what makes for "successful" intergenerational partnerships in the face of systemic marginalization. By reflecting on work conducted in the scope of a global campaign that aimed to provide working children with a platform to shape policy dialogues, the article examines the challenges that emerge in attempting to sustain intergenerational partnerships over time, particularly as children "age out" of childhood. The final piece consists of an interview between one of the co-editors of this Special Section, Amrit Rijal, and a youth activist from Nepal, Susan Sapkota. Reflecting on his experience working with young people in Nepal to claim their rights, for example in the context of sexual and reproductive health, Susan highlights how multiple forms of stigma and discrimination create significant barriers for change, and emphasizes that building solidarity amongst young people is crucial for positive changes.

Echoing Lorde's words above, the process of gathering together to create this Special Section and inviting others to contribute to join this journey with us has been an attempt to extend the boundaries of our community. We are deeply appreciative for all the time and energy that contributors have dedicated to the submissions that feature in our Special Section.

In preparing this editorial, each individual co-editor was invited to share how they have felt about working on the Special Section and to highlight key reflections about taking part. The perspectives of the co-editors touch on three topics: firstly, reflections about being a co-editor for the Special Section; second, reflections about the contributions; and third, reflections about the current historical moment in which this Special Section takes shape. They are shared below as direct quotes in order to preserve the authenticity of our voices. These segments viscerally capture the immediacy of what it means to write about intergenerational activism in the context of some of the most pressing social and political issues of our times. As such, they highlight one of the key ideas that has informed the design of this Special Section: that writing intergenerationally entails letting go of the illusion of objectivity and the "view from nowhere". Instead,

it demands that we locate ourselves in relation to the different struggles that we pursue, and that we engage with the messiness of emotions that influence our positionalities at a given moment in time. In doing so, our intention is to highlight the ways in which intergenerational scholarship takes us out of the comfort of established academic traditions of writing with emotional distance. This, as Lorde urges us to consider throughout her work, is how we come to cultivate mutual care through the process of collective writing.

[B] REFLECTIONS ABOUT THE PROCESS OF CO-EDITING

Amrit

Serving as guest editor for this Special Section of *Amicus Curiae* has been both a privilege and a learning journey. The diverse contributions reflect the urgency, creativity, and resilience of youth and intergenerational movements confronting today's intersecting crises.

Januka

As a first-time editor, the process was both challenging and a big learning experience for me. When I first sat to review the article with a pen and a paper, I was not sure about where and how to start. I was unsure of the language, and the structure. I even doubted myself, but my fellow co-editors helped me balance my personal reflections with the academic framing. Sometimes editing and publishing can be as powerful as campaigning, and I am grateful towards the *Amicus Curiae* for this opportunity to contribute as an editor in this Special Section.

Brian

I felt privileged to be an editor, a guest editor of this particular piece, mostly because it reflects not just the current state of the world but my current context. It gave me the opportunity to actually share what my current lived experience is relative to what's going on in the rest of the world. It gave me a voice and it gave me power; it made me feel like I had influence and I could actually, you know, I had some level of power. As for the challenges I faced as an editor: some of the biggest challenges I faced were in navigating the language and style of academic writing, as well as the power dynamics. As a creative writer, I am used to writing what I feel, how I feel, and just letting it come together in its own creative, holistic

kind of way. Now I was supposed to just help curate content in a very structured and formal setting, and it kind of made me doubt my capacity, it gave me imposter syndrome. But then again, I had a very supportive team, people who kept reminding me that, "Hey, you are a young person and you should go about it in your own way."

Osish

This Special Section of *Amicus Curiae* brings together the urgency, creativity, and resilience of youth and intergenerational movements, especially in contexts like Nepal where traditions, caste, and harmful practices often silence young voices. In amplifying these voices, the section captures both the challenges and the hope of building a more inclusive and equitable future, where young people are recognized as equal partners in shaping society.

Siroun

Being a guest editor was more than being a literature reviewer, rather it was about understanding and internalizing the situation of the youth today. Working on this Special Section allowed me to get real life testimony of what someone from the Global South goes through on a daily basis just to be seen and heard. Apart from learning what it takes to be an editor for *Amicus Curiae*, working on this section has taught me that the world will move on from an issue as soon as the cameras stop flashing a light on them; therefore it is our responsibility to fight for change and see it through. This Special Section creates a framework for the same.

Kristen

While being part of this team of co-editors feels like being part of a community, it would, however, be a mistake to assume that a community is homogeneous, and that everyone always agrees. So, although there was a broad consensus on the topic of the Special Section and ways of inviting contributors, there were moments where we did not always see eye to eye. Our lengthy debates about the use of generative artificial intelligence (AI) in writing and academic publishing were a case in point. For most of the young co-editors, using generative AI such as ChatGPT and other tools has become second nature, particularly in helping to make writing more concise and punchy, and especially for those of us (the majority) working in English as a second language. For others, and particularly the more seasoned adults, it is crucial to critically evaluate the dangers of everyday use of AI and to reckon with multiple negative

consequences. At the individual level, these include a growing body of research suggesting that casual use of AI can reduce cognitive function and critical thinking (Gerlich 2025). At a broader societal level, these touch on ethical questions around breaches of copyright to train large language models. In the end, given that the current policy of the journal is to not allow AI in its publications, it was decided that the use of generative AI was discouraged and, instead, young co-editors and co-authors were offered personalized support. In this respect, it could be said that the views of seasoned adults in the academic space prevailed over the young people in the group. Nevertheless, it is fair to say that these debates are still open, and in fact we all aspire to write a specific piece on the use of AI in intergenerational academic publishing in the future. This example highlights an important aspect of intergenerational collaboration: staying with disagreements in an honest and transparent way instead of attempting to sweep them under the carpet. This process invites us to remain with the importance of the question instead of seeking a premature answer, and to let the question nurture further collective reflection and creativity.

As Judith Butler reminds us, the act of letting questions remain open is a commitment to a process of radical inclusion: "by letting the question remain open, even enduring, we let the Other live, since life might be understood as precisely that which exceeds any account we may try to give of it" (Butler 2001: 28).

[C] REFLECTIONS ABOUT THE CONTRIBUTIONS IN THE SPECIAL SECTION

Amrit

Each piece offers a unique lens, yet together they form a tapestry of commitment to justice and inclusion. Susan Sapkota's reflections on intergenerational advocacy illuminate the power of solidarity across age groups in sustaining movements and amplifying marginalized voices. His work reminds us that meaningful change is rarely the product of one generation alone. It is built through shared struggle, mutual respect, and the courage to envision a more just future.

Januka

When reviewing the article by Ornella de Barros and Claire O'Kane, it felt very personal. Their insights echoed my own journey as a child rights advocate which I started at the age of 12.

Osish

Susan Sapkota's reflections highlight the power of solidarity across generations, showing how meaningful change is rarely the work of one generation alone. Each contribution in this section reflects lived experiences and the courage to act despite limited resources, reminding us that authentic activism grows from empathy, shared struggle, and the commitment to justice.

Prathit

It was an immense pleasure to be a guest editor for this issue of *Amicus Curiae*. As a part of this journey, I had the chance to connect and work with talented and honest young academic voices from around the world. The papers submitted as part of this section are representative of the work being done by and for children and young people, together with adult allies in local and global advocacy for children's rights. More importantly, in my opinion, it represents efforts towards building intergenerational trust and participation across communities.

Rodoshee

The pieces I reviewed for the Special Section are authentic pieces by some great authors who have the potential to create an impact in their communities. It actually impresses me a lot that they used their very own creativity and ideas to present their words structurally. Firstly, Rolex Odhiambo's literary piece was one of a kind to me as it presented and included the voice of children and youth in a symphonic manner, besides drawing the attention of the reader to the activism of children and youth, and its history behind the scenes, all that goes on out of sight of the general population. This piece was a solid one, capturing the attention of a wide audience and acknowledging the activism of youth by presenting every occurrence at a glance. Barros and O'Kane's paper holds great potential as it is one of the very few pieces that managed to highlight the core tension between younger and older generations and pinpoint the solution—through children's and youth participation in the community. Similarly, the interview with Susan was an immersive one which was

actually able to take us on a journey of the kind of activism that can shake up cultural and generational barriers so as to finally bring some positive changes. Both pieces succeeded in pointing out the importance of children's and youth participation in their community and in decision-making processes which will ultimately be a great asset in creating the foundations for meaningful inclusivity and empowerment.

Siroun

Each submission harbours within it a piece of the writer and to see them weave their emotions, thoughts and experiences into an advocating voice has been as unprecedented experience. In this age of AI-influenced work these pieces are uninfluenced and unfiltered which allows them to have a voice of their own which for me personally evoked a sense of pride. Pride that young people choose to stand up for what they believe in, pride for the unbridled sense of urgency that they create brought on by the lack of solutions and pride that their activism today will allow future generations to live better lives. It is a profound reminder of the resilience, creativity and integrity that continues to define this generation, and of the hope their voices inspire for a more just, inclusive and empathetic world. Their words echo beyond the page, stirring conversations and challenging complacency, while reaffirming that meaningful change begins with empathy and courage. This collective expression of conviction stands as proof that the next generation is not only aware of the challenges facing society, but actively shaping the solutions with passion, vision, and unwavering resolve.

Kristen

I would like to echo the appreciation expressed by the co-editors above for the generous insights conveyed in the three pieces of this Special Section. In parallel to this, I would also like to reflect on what does not appear in the following pages: I would like to draw attention to the silences that shape the contours of this Special Section. What voices are not present here? Why? And what do these absences tell us about the power relations that structure how knowledge comes to take shape around the topic of intergenerational activism? When we shared our invitation with potential contributors, we received significant interest from a range of different authors, including young people with lived experience of the care system in northern Europe and two siblings from Gaza who managed to share a poignant narrative about surviving in the face of genocide and man-made famine. Both groups of young people were supported by adults in their circles to respond to the invitation to contribute. Unfortunately, despite

our best efforts as co-editors, neither piece made it into the final version of the Special Section.

The young co-authors from Europe were deeply involved in a project to contribute to reforming the care system in their country and did not feel able to continue the writing process according to the timelines we had requested. Put simply, their daily activism at that moment in time rendered the process of writing about activism impossible for them.

For the siblings in Gaza, at the time that they submitted their pre-final draft in August, Israel had begun to intensify its targeted assassinations of journalists who were speaking out about the genocide in Gaza, such as Anas Al-Sharif and Mariam Abu Dagga. Following this, the siblings withdrew their consent to have their piece published, even anonymously, for fear of retribution.

This is an extreme example of the climate of fear faced by countless children and young people who live in contexts of systemic violence when they attempt to raise their voices and tell their stories. Therefore, despite two very different contexts and chains of events that led to each piece not being completed, I think that they both draw attention to the ways in which the power dynamics in academic publishing facilitate certain voices to be heard and render others unheard: that the labour of writing invariably takes away from the labour of activism; that struggles to speak out against oppression carry the risk of death. I feel strongly that future scholarship on the topic of intergenerational activism requires giving more attention to these questions and calls for further collective thinking about alternative approaches to create more inclusive and protective spaces for scholar-activism.

[D] REFLECTIONS ABOUT THE HISTORICAL MOMENT IN WHICH WE WRITE

Januka

I also want my voice to echo the human rights violations that happened on 8 September 2025 in Nepal. During the peaceful protest by Generation Z against corruption and failing governance, there were serious breaches of international human rights law, specifically under the Convention on the Rights of the Child (such as Articles 6, 19 and 37) and the International Covenant on Civil and Political Rights (such as Articles 6 and 24). At least 19 (8 September) people, including students wearing school uniforms, were shot to death when security forces executed the use of lethal force. It

was really horrible to witness people losing their lives when the only thing they were doing was raising their voices against the wrongs. The peaceful protest then turned destructive and deadly. As a young person from the same community, I closely felt the impact of it when lives, rights, and the dignity of children and young people were at grave risk.

I have been advocating for child rights for over 10 years, and I can strongly voice my concerns, but I still felt speechless. Because of the nationwide chaos and the crimes and destruction that happened during the protest, I felt helpless. I felt unsafe and mentally disturbed. I could not sleep. Though I have space and a network to seek support, the fear and mental trauma I carried could not be expressed in words. What about those with no support system? My experience is only a representation of how young people may feel during times of war or crisis. Even when they are given platforms to speak, they may end up being unable to voice their problems. It is not enough just to provide spaces or empower young people: their mental health and wellbeing must also be protected and supported.

Brian

As a Kenyan youth watching what happened in Nepal in September 2025, it is devastating, but also inspiring. I do not condone the loss of life or the violence being enacted on the young people. I do not pretend to understand the full context of the circumstances, but as a young person who is also from a country that was in conflict with its Government, I believe that if a government does not serve its people, then it ceases to be a government. It loses its power and becomes oppressive and unlawful. If the institutions that are meant to protect and solve problems do not do so, then they should not benefit from the privileges the people have bestowed upon them. The people, at all times, reserve the right to reclaim, retake, and redistribute power because, ultimately, it is theirs. “We the people” is the foundation of every democratic constitution in the world. When a government stops being democratic, it becomes a criminal organization. It is no longer a government. I keep saying that elected presidents are not leaders; they are representatives. It is not their job to make decisions for the people. It is their job to simply amplify the decisions of the people.

Prathit

Recent political movements led by young people in countries including Sri Lanka, Bangladesh, Nepal, and Indonesia represent the eroding intergenerational trust in electoral democracies in Asia, where young people are frustrated with a generation of political order driven by

corruption, lack of economic opportunities, and inequality (Singh 2025). This is evident in the recent political events led largely by young people in Bangladesh and Nepal. While we are in the process of editing this section of the journal, young people continue to take to the streets of Indonesia, expressing their dissent towards the Government's lack of responsiveness to inequalities and economic opportunities for young people. At such a moment when millions of young people, particularly in South and Southeast Asia, continue to take to the streets, building intergenerational trust becomes important not only to rebuild trust in democracies but also to ensure that accountability is ensured in granting children and young people their rights.

[E] CONCLUSION

By way of conclusion, we warmly invite readers to discover this Special Section, and we hope that it nurtures new ideas, invigorates old debates and catalyses further efforts to cultivate intergenerational scholarship.

About the authors

Kristen Hope *is a PhD candidate at the University of Bath. Her research is shaped by her childhood in a white settler colonial Caribbean community, studies in Arabic and 15 years working in the international development and humanitarian child protection sector, particularly in South West Asia and North Africa. As a "seasoned adult", she has used participatory, action-oriented approaches in her work with children and young people affected by displacement and violence, alongside passionate young activists, to support their efforts to claim their rights and drive positive changes in their communities. Her doctoral research adopts feminist and decolonial perspectives to explore child protection in humanitarian contexts.*

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Amrit Rijal *is a Young Child Rights Activist from Nepal engaged in the field since 2015. He is a medical student at Kathmandu University, a research enthusiast, and a Climate–Health Advocate working to emphasize the interconnectedness of a healthy planet and healthy people. He has been passionately promoting intergenerational partnership, health and child rights-based research and advocacy in response to global challenges and compounding crises.*

Prathit Singh *is a child and youth participation consultant, working for the past four years with universities, United Nations Agencies, and international non-governmental organizations in areas of violence against*

children, climate change, child protection, meaningful child participation, and justice. He finished his Master's in International and Development Studies at the Geneva Graduate Institute, specializing in Human Rights, Humanitarianism and Climate Change. He has been passionately promoting meaningful child and youth participation in decisions concerning children's wellbeing and intergenerational partnerships between children, young people, and adults. Prathit is passionate about working to uphold children's rights and to ensure that every child around the world gets the future they deserve.

Januka Jamarkatel, *22, is a child rights activist from Nepal, advocating for children's rights since the age of 12. She served two years as President of the Municipal Child Club Network of Itahari Sub-Metropolitan, ensuring children's voices were heard in local government decisions, and has worked to prevent child marriage and support other child protection initiatives. She has also contributed to global advocacy as a Peer Mentor for the #CovidUnder19 led by Terre des hommes and currently serves on the executive board of Lakshyadeep, a youth-led network driving climate action and sustainable development goals-focused initiatives.*

Brian King Wangari *is a child rights advocate, storyteller and emerging systems leader passionate about advancing justice, equity and youth empowerment. He is the Founder and Director of Mtoto Na Sheria, a community-based initiative equipping children and vulnerable groups with legal awareness and advocacy tools. Brian also leads the Watoto Innovations and Solutions Hub (WISH), an ideation lab where children co-create solutions to challenges they face. He has served as Chairperson of the Africa Children Summit and advises child-led platforms globally. His work bridges legal awareness, civic education, and climate justice with creativity and innovation.*

Siroun Thacker *is a dedicated advocate for children's rights and social justice with extensive experience in international relations, leadership and community engagement. She has led international youth conferences, chaired global forums, and built cross-cultural partnerships advancing dialogue on critical issues. Beyond her leadership roles, she has volunteered widely in education, child-focused initiatives, and grassroots programmes, offering mentorship, support, and creative content to amplify underrepresented voices. With a background spanning legal, editorial and community service work, Siroun blends professionalism and empathy, transforming complex challenges into practical solutions that strengthen communities and ensure inclusive participation on a global stage.*

Rodoshee Sarder *is a senior high-school student from Bangladesh who has been actively working as a determined Child Rights Activist since 2020, mainly focusing on creating a better future by interconnecting human rights, science and rationality. She has been actively studying societal and humanitarian crises by conducting thorough research in her community and working with the organizations to mitigate the crisis through authorized data and policy briefing with the local organizations, ministries and the UN; thus, promoting healthy intergenerational partnerships and preventing child abuse and misogyny besides mitigating generational and communal violence crises. For her sheer passion towards science and technology, she is researching biodiversity and environment and developing her app-based solution to create a green and healthy economy that ensures every child's environmental rights as a part of her goals to tackle global crises.*

Osish Niraula, *17, is a child rights and human rights activist from Nepal who has been passionately advocating for children's voices for more than seven years. Having just completed high school, he envisions blending technology with advocacy to create opportunities for young people like himself to access global platforms. As a co-founder of Learn2Lead, he has mentored over 1,500 students, helping many secure placements in good high schools with scholarships, and continues to work toward a future where education and empowerment go hand in hand.*

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Legislation, Regulations and Rules

Convention on the Rights of the Child 1989

International Covenant on Civil and Political Rights

Story

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Abstract

The poem is about a young person's vision and their recollections of their life in activism. They yearn to include children, so that they can start defending their rights and join the field, but they debate about whether it's too early for them or rather whether there is no actual right age for activism. The poem tries to explore the various forms of oppression in which young people have lately been embroiled in Kenya and their activism against it. It also dives into the various ways in which young people can be a part of a movement in order to get their stories written and voiced, based on the strong assertion that he who controls the stories controls history and how people come to know it.

I walk down the sun filled path

Rained on, sun scorched, dust filled, it looks worn out

But on the side the grass is green and the bushes thick

I stare at the children playing on the grass

Carefree, laughing off into the skies

Chasing lone dragonflies and rolling on the cool grass

Oblivious of what the world holds for them

They don't care; all they care about is their game

I smile, maybe I'll get to tell them my story.

Maybe I'll tell them of the streets

Chanting, singing, dancing

Donned in red, black, green and white

Freedom is coming, freedom is coming

Today, not tomorrow

I still remember the chant we sang
Children, as “they” said we were
Marching down the empty streets
Trying to get a better country for ourselves
Save our generation, save our country, save us
Still, they called us terrorist, labelled us as thieves
Idle children with nothing to do
But I smile, one day I’ll get to tell them my story.

Maybe I’ll tell them of all the days dressed in red and white
Marching down streets with our moms
Our sisters and our friends
No woman has to die for any reason
No girl has to miss school for any reason
“End femicide and any form of gender violence
Menstrual shaming should stop
Better health care for our mothers and sisters
Teenage moms should be allowed back in school”
We walk and chant
Braving the hot sun, the police batons and bullets
Government unleashing its strengths on its children and mothers
We don’t stop we go on
One day they will get to tell my story.

Maybe it will be told like that of Wangari Maathai
Remembered for brains and brawn
Standing tall even when doing it alone
Or maybe like Rosa Parks
Defiant in the face of oppression

Sticking to what I believe in

Ready for whatever might happen, not flinching

Or maybe Martin Luther king Jr.

Speak out irregardless

Be staunch courageous and brave

Or maybe everyone will have their own unique way

Of telling my story.

Unless, I let them play

They are still young, barely in their twenties, they should live a little more

But who will fight for us young people?

If we don't do it ourselves?

Who will be the next Willies Oeba

Fighting impunity through art and using creativity

Who will be the next Hanifa Adan

Rally the masses against oppression

Who will be the next Nelson Amenya?

To not keep quiet when they come across corruption

Who will be the next Kerry Mwita?

Fight for the marginalized groups?

Who will control our history?

If we don't do it ourselves

Who will tell our story?

About the author

Rolex Odhiambo *is a 21-year-old Kenyan from Suba, Mfangano Island. She is currently completing her time in law school and is a passionate child rights activist.*

Bridging Participation: Child-led Advocacy and the Transition to Adulthood in an Era of Polycrisis

Ornella Barros

Claire O'Kane*

Abstract

The transition from childhood to adulthood is a critical stage in child-led advocacy initiatives, offering opportunities to reflect on how young people can continue to engage meaningfully in addressing the world's most pressing challenges. This article draws on insights from Dialogue Works,[1] a global campaign that supports working children in shaping policy dialogues, to explore the actions children, young people, and adults—particularly in the so-called Global South—are taking in the face of overlapping global crises. It examines the experiences of Children's Advisory Committee members as they navigate the shift from child advocates to mentors and resource people, reflecting on what makes intergenerational partnerships "successful" amidst intersecting forms of marginalization and discrimination. The article also addresses the challenges of sustaining intergenerational advocacy, including strategies to overcome barriers, such as pervasive adult-centrism, and the critical role of those who have "aged out" of childhood in nurturing advocacy efforts. By anchoring participation in sustainable and inclusive platforms, the article envisions a future where intergenerational collaboration amplifies children and young people's voices and strengthens the collective resilience needed to promote children's rights in an era of polycrisis.

Keywords: children's participation; child-led advocacy; aging out; adult-centrism; transition; childhood youth; adulthood; mentor; intergenerational partnership.

* Note of appreciation: We express our appreciation of experiences and insights on age transitions that were shared by current and former members of Child Advisory Committees (CACs), and from adult collaborators in India (Vigyan Foundation), Kenya (WCY), Nepal (CWISH), Peru (CESIP and IFEJANT), the Philippines (CAJDEN and Kaugmaon), Rwanda (CVT), and Zambia (JCM). Thanks also to Dialogue Works colleagues from Kindernothilfe and Terre des Hommes. We also extend our thanks for the additional feedback from Neneng Mirasol, Innocent Ntakirutimana, Mulenga Chikontwe, Sangwani Mulubwa, and from the reviewers that helped us refine the article.

[1] See the Dialogue Works website for full details of this project.

[A] INTRODUCTION

The significance of child and youth participation in contemporary global crises, particularly within the Global South, underscores the necessity of amplifying child and youth perspectives and influence in policy dialogues. As the world grapples with polycrises—including the climate crisis, rising food prices, economic instability, and social inequalities—the participation of children and young people is no longer a matter of symbolic inclusion but an imperative for transformative change (UNICEF 2024). Child-led advocacy and activism, though conceptually distinct, coexist as critical frameworks for understanding how children organize themselves to navigate these crises.

Both advocacy and activism can take place in a variety of settings, from local to global levels, and children and youth can engage with institutions such as schools, governments, corporations, or broader cultural narratives. Furthermore, both may occur in restricted, invited, or self-created spaces. While both advocacy and activism play crucial roles in advancing children's rights, advocacy tends to work within systems to promote change, whereas activism seeks to disrupt and redefine those systems to more fundamentally reshape power structures to secure social and/or ecological justice (Taft & O'Kane 2023). An activism approach has been defined as one that is collective, challenges existing expectations, and works toward transforming power structures of justice (Taft & O'Kane 2023). Activism often challenges or bypasses formal systems, employing disruptive or extra-institutional tactics such as protests, strikes, and direct action to demand change, to create new spaces for children's participation and/or new roles for children within existing spaces. In contrast, advocacy typically operates within existing systems and structures, seeking to influence decision-makers through formal channels such as lobbying, letter writing, and speaking at government hearings. Despite these differences, both activism and child-led advocacy share a commitment to collective action and structural transformation, highlighting the need to expand participatory governance spaces that are accessible, equitable, and empowering for children and young people.

This article aims to examine the transition from childhood to adulthood in child-led advocacy, focusing on how young people can sustain meaningful engagement in addressing global challenges. Drawing on insights from the Dialogue Works campaign, it seeks to explore the evolving roles of children and young people—particularly in the Global South—as they navigate intergenerational advocacy spaces. By emphasizing the importance of inclusive and sustainable advocacy platforms, this article

envisions a future where intergenerational collaboration strengthens the collective resilience necessary to advance children's rights in an era of intersecting global crises.

Dialogue Works is a collaborative campaign led by Kindernothilfe and Terre des Hommes, aimed at fostering sustainable and meaningful participation of working children in subnational, national and international policy discussions. The project supports over 30 Children's Advisory Committees (CACs) across 15 countries in Africa, Asia, Latin America and the Middle East, to realize working children's right to be heard.

Since their establishment, CACs have actively engaged in participation spaces to share the lived realities and experiences of their members as working children and to develop skills in evidence-based and collaborative advocacy. At the community level, CACs have developed and led their own advocacy initiatives on priority issues affecting them, and they have contributed to practice and policy dialogues from local to global levels. For many CAC members, their journey began as far back as 2016 within the framework of the "It's Time to Talk! Children's Views on Children's Work" research and campaign project.[2] Over time, numerous CAC members who initially joined the project as children have transitioned into young adulthood.

[B] THE TRANSITION FROM CHILDHOOD TO YOUNG ADULTHOOD IN CHILD-LED ADVOCACY

Too old to lead, and too young to know …

One of the most significant challenges and opportunities in child-led advocacy is the transition from childhood to young adulthood. Adolescents and young adults who have been engaged in advocacy from an early age often face difficulties in redefining their roles within these spaces as they become adults (Theis & O'Kane 2005). As they age out of the formal category of childhood, they risk being excluded from child-focused advocacy initiatives while simultaneously struggling to gain recognition and establish credibility within adult-led organizations. This transition presents a critical gap that requires greater attention to ensure sustained and meaningful participation in advocacy efforts. The transition can also be identified as an opportunity as there is evidence that children who

[2] Some young people were part of children's associations that existed before Dialogue Works and the "It's Time to Talk" campaigns, especially associations that were part of broader working children's movements.

actively engage in social action and advocacy initiatives from a young age are more engaged as active citizens as young people and as adults (McGill & Ors 2015; Terriquez 2015).

The CACs have focused their participation experiences on meaningful spaces that allow working children to share their views and experiences while engaging in learning, accountability, and decision-making processes. Understanding the realities of children's daily lives, from their own point of view, is helpful in exploring solutions to address their concerns (Dialogue Works 2023). Recognizing and valuing the range of childhood experiences is only possible when policymakers and practitioners communicate information in ways that are easy for children to understand, engage in dialogue with children from various backgrounds, and actively listen to and act upon children's views and suggestions at every level, from local to global (O'Kane & Ors 2018).

In line with the United Nations Convention on the Rights of the Child 1989, children's civil and political rights should be respected which includes Article 12 on children's right to be heard, Article 15 on "the rights of the child to freedom of association and to freedom of peaceful assembly", and other civil rights. Children's inherent capacities to express their views and feelings and to contribute meaningfully to the social and political spheres of their communities and wider society should be valued and nurtured. Their interactions, whether social, cultural, or political, are an indication of their potential to influence and be influenced by the collective aspirations of their communities (Daly 2016).

Informal and formal avenues for participation often require individuals to possess expertise, resources, and strategic-thinking abilities. Such knowledge and abilities are cultivated over time and enhanced through experience (Taylor & Percy-Smith 2008). The more time children actively engage in participation spaces—like the CACs—the more knowledge, skills, and opportunities they acquire to shape their own growth and development, and to influence decisions that affect them:

> Young people know now how to articulate issues, and to present agenda to duty bearers and key stakeholders. They are now able to get the buy-in of the leaders and the community because they have built credibility by participating in such a process since an early age (Welfare of Children and Youth (WCY), Kenya).

The pursuit of personally meaningful goals allows children and young people to engage in "self-directed development" (Dworkin & Ors 2003) and acquire or practice personal and interpersonal skills within a supportive setting (Larson 2020). However, their goal pursuit depends

on opportunities afforded by their environment (Massey & Ors 2018) and family expectations (Massey & Ors 2008). Young people's ability to strive for and attain their ambitions is, therefore, deeply intertwined with the support and resources that their immediate and extended environments can provide, reinforcing the idea that a supportive ecosystem is crucial for the holistic development and empowerment of children as they grow into young adulthood:

> Thank you, CAC, for being our voice and giving us the chance to speak, share, and shine as working children. You believed in us when others didn't, and you helped us grow into brave, kind, and confident young leaders. Because of you, we know our ideas matter and our dreams are possible. Thank you for listening, guiding, and always standing with children. You made us feel important, and we'll never forget that (Former CAC member, 19 years old, Rwanda).

> One of the main successes is the growth we have seen in young people as to who they are and how they feel about themselves and the world around them. Many of them have been motivated to pursue human rights related careers (Jesus Cares Ministries (JCM), Zambia).

Transitioning roles

Most CACs supported by Dialogue Works engage with working children between the ages of 12 and 17. However, since the launch of Dialogue Works, a significant number of members have turned 18, with some having actively participated in the CACs for five or more years. Across nine partner organizations, an average of up to 30% of CAC members have reached adulthood since the project began. Their continued participation varies by country, influenced by personal aspirations, work commitments, and the availability of opportunities to remain involved in advocacy.

Child-focused organizations have long championed children's participation, establishing and supporting safe spaces and groups where children can share experiences, co-create initiatives, and lead advocacy efforts. However, there is limited documentation on how these organizations support young people as they transition into adulthood. While many of these spaces aimed to introduce transformative participation experiences through approaches that centred children as active agents in shaping their lives and communities (Tisdall 2013), some young people struggle to sustain meaningful engagement once participants turn 18. While many are still motivated to continue their active engagement, they need to navigate new opportunities and evolving roles and responsibilities in order to contribute while also ensuring that the children under 18 years remain the key protagonists and decision-makers of child-led initiatives (Cussiánovich 2013).

To address such challenges in the Dialogue Works campaign, consultants supporting the campaign collaborated with its implementing partners and with CAC members to examine the evolving roles of former CAC members as they transition into young adulthood (Barros & O'Kane 2024). The three main roles that facilitated the meaningful engagement of former CAC members included: *co-facilitators and mentors*, *advisors*, and *champions and resource people*.

Co-facilitators and mentors

One of the primary roles that young people took on after turning 18 was co-facilitation and mentorship. Former CAC members who wished to remain engaged often transitioned into co-facilitators, assisting in the planning, coordination, and implementation of CAC meetings. Their responsibilities extended beyond session moderation to include logistical support such as registration, documentation, and follow-up with younger participants and their caregivers.

Mentorship is another crucial aspect of this role, as young people provided guidance and moral support to new members. By sharing their experiences, they helped younger CAC members navigate advocacy spaces, develop confidence, and understand the broader objectives of their participation. In Latin America, for example, young mentors supported child delegates by helping them lead sessions while ensuring the children remained central to decision-making processes:

> Being part of the Child Advisory Committee has shaped who I am, and turning 18 didn't take that away. Instead, it gave me the opportunity to guide, inspire, and share the knowledge and experiences I've gained with the younger members. I believe that age doesn't remove your purpose in fact it strengthens your role in helping others grow (Former CAC member, 18 years old, the Philippines).

To formalize these roles, organizations are increasingly developing structured transition plans that involve intergenerational collaboration and capacity-building initiatives. JCM in Zambia has implemented a structured youth mentorship programme that enables former CAC members, aged 19-22, to remain engaged in advocacy. Recognizing the need for continuity in youth participation, the organization has developed a co-facilitation model where young people work alongside adult facilitators to design and lead CAC meetings. These young mentors undergo training in facilitation skills, ethical participation standards, and thematic advocacy topics before taking on leadership roles. The young people are also trained to apply tools included in the Dialogue Works toolkit "Supporting collaborative and child-led advocacy" (O'Kane

& Barros 2019) and the *Article 15 Resource Kit* to strengthen child-led organizations (Children's Environments Research Group 2012). Applying participatory tools from such toolkits increases their confidence to help younger CAC members navigate complex issues while fostering an intergenerational learning environment. Furthermore, after each session with CAC members, the young people collaborate with coordination teams to evaluate discussions and refine future approaches. Such reflection and learning not only enhances the capacity of young mentors but also strengthens the sustainability of child-led advocacy in Zambia:

> Transitioning out was emotional. It felt like saying goodbye to a family. But the CAC taught me leadership, teamwork, and confidence. I now mentor younger members and support them to do more than I ever could (Former CAC member, 19 years old, Rwanda).

Reflecting on such experiences, a female youth who is a former CAC member and a resource person in JCM, suggested that the structured youth mentorship programme should expand to include young people up to the age of 24 years. She felt this would allow young adults to continue receiving guidance and support during a critical period of career exploration and self-discovery. By the age of 25, they would be better equipped to make informed decisions regarding their careers and personal lives.

She also recommended that there should be additional skills training for the cohort to enable them to better support their peers. This could include topics such as: the effects of peer pressure; healthy relationships and boundaries; and career development and goal-setting.

Advisory role

For young people who wished to stay connected to the CACs but not engage regularly, an advisory role provided an avenue for continued participation. As advisors, they offered strategic insights based on their lived experiences, supporting the CAC members with advocacy planning and stakeholder engagement. However, a key distinction in this role is that advisors did not make decisions; instead, they encouraged child members to take ownership of their own advocacy efforts.

By serving as a knowledge base for CACs, advisors contribute to the sustainability of child-led groups and movements. Their insights help shape advocacy strategies while ensuring that children remain at the centre of decision-making. In some contexts, advisors also facilitate intergenerational collaboration by bridging the gap between children and policymakers:

> The young people understood that they are adults already. The decision making is on the children. They help provide relevant information that could help the children decide (Adult collaborator, Kaugmaon, the Philippines).

Champions and resource people

Some young people transitioned into the role of champions and resource persons, especially those who had less time to engage due to education and/or work commitments. As champions, they amplified children's voices in their communities, advocating for inclusive decision-making processes. Their role often involves raising awareness, mobilizing networks, and reinforcing the importance of child participation in governance structures.

Resource persons also acted as connectors between CACs and broader advocacy platforms. They provided occasional training, shared expertise in specialized areas, and facilitated engagement with key stakeholders. For instance, in Rwanda former CAC members living in different cities for work or studies have returned to their former CAC to offer workshops on reproductive rights or provide artistic training, leveraging their professional skills to enrich advocacy efforts:

> One child who participated in It's Time to Talk four years ago, later came to train the children on reproductive rights based on the studies he pursued at boarding school. Another former member is now an artist, and he comes every week asking about how to support the CAC to train for free (Adult collaborator, Children's Voice Today (CVT), Rwanda).

Bridging participation: tackling adult-centrism and the key role of the "aged-out" in intergenerational partnerships

Collaborations between children, young people and adults require a commitment to intergenerational partnerships, and respect for the contributions of individuals of different ages, abilities, genders, ethnic or other diversity factors. Yet, adult-centrism is prevalent across different societies. The terms "adult-centrism" and "adultism" have been used as synonyms (Biswas & Ors 2024; Fletcher 2013), describing a form of social organization that is based on relations of domination in which the classes of adult age define and control the space occupied in society by those defined as "under age" (Duarte 2000). Children and young people are often mistreated and disrespected simply because they are young, and such mistreatment is reinforced by laws, institutional, political, social and cultural practices and attitudes (Bell 1995). Adult-centrism is based on the social order of patriarchy and hierarchies based on age,

where adults' views, needs, and priorities are considered more important or valid than those of children. This bias manifests across informal and formal settings, especially in policymaking, where the unique perspectives and voices of children are overlooked or undervalued (UNICEF 2023). Age-based discrimination also intersects with other forms of structural discrimination based on gender identity, sexual orientation, ethnicity, race, socio-economic status and the like (Rizzini 2024; Brando 2025).

The oft-cited Lundy model of participation (2007) and Roger Hart's (1992) ladder of participation have both been widely used to conceptually and practically inform the meaningful participation of children and young people. However, both models have their limitations—especially when viewed through the lens of adult-centrism.

While Laura Lundy's model outlines the importance of space, voice, audience and influence to ensure children's right to be heard, there is a risk that spaces will be designed and controlled by adults with insufficient attention to power dynamics, thus unintentionally reinforcing adult control. Furthermore, the audience and influence elements assume that adults in power will listen and respond to children. However, the prevalence of adult-centrism means that adults may be reluctant to act on children's perspectives, especially if those perspectives do not align with adults' own goals and interests (O'Kane & Barros 2020):

> Sometimes we felt challenged when our ideas weren't taken seriously by adults. I recommend that decision-makers not just listen to us, but act on what we say (CAC member, 16 years old, Rwanda).

Hart's ladder of participation promotes child and youth-led initiatives and shared decision-making with adults. It also outlines forms of participation that must be avoided, outlining ways that adults misuse their power by engaging children and young people in tokenistic ways, as decoration and/or manipulating them for their own agendas. However, it does not explicitly critique the broader adult-dominated systems that enable such negative practices.

Moreover, neither the Lundy nor the Hart model accounts for ways in which adult-centrism intersects with other power imbalances—such as race, disability, or socio-economic status—which can further marginalize the views and suggestions of children and young people. To challenge adult-centric norms, we need frameworks, such as "childism", that centre the agency of children and young people and recognize intersecting forms of marginalization. Childism is a philosophical and political orientation that critiques adultism and reimagines children as full epistemic agents.

It calls for intergenerational justice and centres children's voices in education, policy, and ethics (Biswas & Wall 2023):

> My biggest hope is that all children in Rwanda, even in remote areas, get a chance to participate like I did. Every child deserves to be heard and involved in shaping their future (CAC member, 14 years old, Rwanda).

As described in this article, collaboration with CACs also provides structural spaces and processes towards transformational change where children and young people work alongside adult allies to design, plan, implement and evaluate their own initiatives. When done well, such collaborations shift power dynamics and embed children's perspectives into institutional decision-making (see O'Kane & Barros 2020; Siemon Marques & Ors 2023; Rizzini 2024).

Rather than assuming that they know best due to age, adults need to become collaborative partners with children and young people, to recognize and value the competencies of children and youth, be open-minded and be ready to listen to and learn with and from children and young people from diverse backgrounds. Adult collaborators play a pivotal role in ensuring the sustainability and ethical integrity of intergenerational partnerships.

While young people take on increased responsibilities, adult collaborators provide the necessary institutional support, safeguarding mechanisms, and strategic guidance to ensure meaningful participation of children and young people. Intergenerational collaboration is not solely about children stepping into adult roles; rather, it is a dynamic, ongoing process of mutual influence, where children, youth and adults shape each other's perspectives and actions (Mannion 2010). In this sense, transformative participation requires addressing structural inequalities, power imbalances, and cultural attitudes that often marginalize children and young people (Lansdown 2010):

> The experience I got is extremely valuable to me, and I am very grateful for the knowledge I gained in every CAC meeting and every interaction we had. This really helped me boost my self-esteem, and it has contributed in university when it comes to giving presentations. With the interactions we had with different stakeholders, it really boosted my self-confidence. I am really honoured to have been part of the advocacy group where we had to amplify children's voices and their rights. Thank you for believing in me and providing a supportive environment that allowed me to grow, and I appreciate the guidance and mentorship I received through the journey of child participation (Former CAC member, 21 years old, Zambia).

Children and young people bring unique perspectives, creativity, and energy to addressing community challenges. However, for

their contributions to be effective, it is crucial to provide supportive environments that recognize their agency and foster genuine collaboration between generations (Percy-Smith & Burns 2013). In many contexts, civil society organizations act as critical facilitators, offering training, logistical support, and advocacy platforms that enable children and young people to continue engaging effectively. However, the role of adult allies must be carefully balanced to avoid tokenism or unintentional power imbalances. Best practices from various CACs highlight the importance of allowing children to maintain decision-making authority while receiving mentorship from adults who act as enablers rather than directors. By fostering intergenerational collaboration grounded in mutual respect and shared decision-making, adults can help amplify children's voices while ensuring that advocacy efforts remain sustainable and impactful.

Christian Advocates for Justice and Development in Negros (CAJDEN) is a non-governmental organization (NGO) in the Philippines that has developed a natural transition process for young advocates, ensuring their continued engagement beyond childhood. Initially, young members of CACs began informally taking on leadership roles as co-facilitators and animators. Recognizing the value of this organic shift, CAJDEN formalized these positions, allowing young people to actively contribute as facilitators while maintaining children's leadership at the core of advocacy initiatives. Today, at least five former CAC members remain actively involved in this capacity. Additionally, the organization collaborates with local governments to ensure the participation of younger children in CACs, maintaining the advocacy cycle across generations. This structured yet flexible approach allows young people to remain engaged while respecting the evolving nature of their participation.

Building intergenerational collaboration

Intergenerational collaboration in advocacy relies on trust, shared power, and mutual accountability (Freeman & Ors 2015). The experience of Dialogue Works showed that meaningful partnerships require adults to step back and create spaces where children can take the lead while still benefiting from guidance and support, and where youth can also guide and support. Intergenerational partnerships often suffer from power imbalances, with adult-led institutions undervaluing children's and young people's perspectives, or with youth claiming too much decision-making power in relation to children. Addressing these barriers requires systematic efforts to reduce adult-centrism, ensuring not only institutional reforms but also political and cultural shifts to recognize

and respect children and young people as equal partners in advocacy and policy development (Bell 1995; Rizzini 2024; UNICEF 2024):

> Accepting that I am now the adult we talked about back then has been a little difficult but a necessary step in my journey. I have learned that even as a child standing up for myself and advocating for change must start with me, I aim to be a leader who inspires others showing them that their voice matters (Former CAC member, 19 years old, Zambia).

Shared power involves structuring participation in a way that acknowledges and respects the evolving capacities of children (Lansdown 2005). When children transition into young adulthood, they need to figure out the limitations of their decision-making power in children's groups while keeping a supporting role that is not relegated to tokenistic participation (Hart 1992). This is why mutual accountability becomes key in making sure both younger and older participants uphold their commitments to effective and ethical participation (Lundy 2007).

In Peru, the NGO CESIP (Centro de Estudios Sociales y Publicaciones) has adopted an approach to ensure that young people remain engaged in children's rights work even after aging out of CACs. One of its key strategies has been to create a flexible and inclusive participation model where young people feel valued regardless of their age. For some members nearing 18, the fear of exclusion initially led them to avoid mentioning their age in meetings. However, when CESIP introduced opportunities for them to stay involved as mentors, they regained confidence in their role. The organization has also integrated younger children (aged 5 to 8 and 9 to 12) into its "Rights Clubs", with older CAC members leading monthly sessions and facilitating art workshops. This model not only reinforces intergenerational mentorship but also ensures that younger participants view older members as role models, fostering a culture of continuity and empowerment:

> My experience getting older and transitioning from the CAC has been challenging yet transformative. I realized that it's not just about me anymore, the younger children look up to me (Former CAC member, 19 years old, Zambia).

Building resilience amidst marginalization and discrimination is another crucial aspect of intergenerational collaboration. The process of meaningful participation often results in increased connectedness, a sense of belonging, more trusting relationships, and increased self-confidence and self-esteem, each of which enhances children's resilience (Oliver & Ors 2006). Many children, particularly those from marginalized communities, face systemic barriers that limit their participation in

decision-making (O'Kane & Barros 2021). The experience of CACs highlights the importance of creating inclusive advocacy platforms that recognize the unique challenges these children and young people face:

> Being part of the CAC in Rwanda changed how I see myself. I used to be shy, but now I can speak in front of leaders and advocate for the issues affecting other children. Growing older, I want to keep standing up for children who feel voiceless (CAC member, 15 years old, Rwanda).

Intergenerational partnerships can provide children and young people with the tools and support needed to navigate complex social and political environments while also protecting themselves and their peers from risks. In this sense, organizations play a crucial role in ensuring that participation opportunities remain accessible to young people facing intersecting forms of discrimination, such as gender-based exclusion or economic hardship (O'Kane 2018).

Overcoming challenges in intergenerational collaboration

Despite its potential benefits, intergenerational collaboration in advocacy faces significant challenges, including lack of organizational support, insufficient budget and human resource investments, insufficient training, and safeguarding concerns (Barros & O'Kane 2024). Effective planning, budget allocations and organizational support are critical to sustaining youth participation beyond childhood. The experience of CACs showed that, when organizations take a proactive approach in structuring participation by offering young people opportunities to define their roles as they transition into young adulthood, they do not experience abrupt disengagement when they age out of child-led spaces.

Safeguarding policies are essential in maintaining ethical intergenerational collaboration. Young people transitioning into mentorship, advisory, or resource person roles require training to navigate their new responsibilities effectively. Some best practices for safeguarding include requiring young participants to sign a code of conduct and providing ongoing training on safeguarding policies and mechanisms. These measures can help protect younger children while ensuring that young people are not placed in situations where they are expected to assume responsibilities beyond their capacity.

Finally, investing in training and capacity-building is fundamental to overcoming barriers to intergenerational collaboration in advocacy and activism. Children and young people benefit from structured training

on advocacy strategies, leadership development, and policy engagement (O'Kane 2020). Former CAC members highlighted the importance of ensuring that training programmes extend beyond their roles within their groups, as these can also strengthen their own professional profile as part of a broader incentive package that recognizes their time, expertise, and experience (Barros & O'Kane 2024).

Young people's participation and the sustainability of intergenerational advocacy and activism in an era of polycrisis

In an increasingly complex global landscape, sustaining intergenerational advocacy and activism requires intentional strategies that recognize the evolving roles of children and young people. To ensure that intergenerational partnerships are truly equitable, it is crucial to address adult-centrism and systemic barriers and to promote platforms where young voices are not only heard but also valued in shaping policies and initiatives:

> The biggest challenge is figuring out how to gather and engage the youth; and more importantly, how to sustain their involvement. It's easy to invite them at first but keeping them consistently active and committed is the real challenge (Former CAC member, 18 years old, the Philippines).

Some key conditions for sustainability of intergenerational advocacy and activism identified through Dialogue Works include the following.

Understanding the political, social, and cultural context

It is essential for children and young people and adult collaborators to understand the political, social, and cultural context and how it shapes opportunities for children and young people's participation and influence (O'Kane & Barros 2020; Rizzini 2024). This includes attention to intersectionality, understanding both barriers to and practical strategies that can overcome structural discrimination based on age, gender, race, ethnicity, socio-economic status or other forms of identity (Brando 2025; Josefsson 2025).

Readiness to analyse power and to identify relevant strategies

Effective advocacy requires children and young people (and adult collaborators) to recognize the power dynamics shaping decision-making spaces and to develop strategies for navigating them (Lansdown 2010). Even in child-led advocacy, power is often held by external actors, such as policymakers, NGOs, and donors, who may limit young people's

influence beyond consultative roles. To sustain long-term advocacy, children and young people should be supported to gain skills in political analysis, negotiation, and movement-building. In Dialogue Works, for example, CACs were provided with tools to assess institutional power structures—such as mapping stakeholders and identifying leverage points—so that they could develop strategies to maintain influence beyond the project term.

Anchoring participation in institutional structures

Many advocacy initiatives struggle with sustainability because they are linked to short-term projects rather than embedded within long-standing governance mechanisms. Dialogue Works' partner organizations and CACs made significant efforts toward institutionalizing children's participation within their organizations, and also at municipal councils, national policymaking forums, and international advocacy bodies (O'Kane & Barros 2022). A critical step in this process is ensuring that children and young people have designated seats for child and youth representatives within decision-making bodies, allowing them to contribute consistently rather than being invited only for symbolic consultations. Institutionalizing children and young people's representation and participation ensures that their perspectives are not lost when funding cycles end or leadership transitions occur. However, careful attention to issues of inclusion and equity are required to avoid exclusive participation that reinforces existing systems of privilege and bias (see Brando 2025; Josefsson 2025).

Establishing differentiated roles

The effectiveness of intergenerational advocacy depends on structuring participation in a way that accommodates children, youth and adults. Rather than seeing child advocacy as an isolated phase, advocacy platforms should create pathways that allow young people to shift from being direct campaigners to mentors, advisors, and champions. Dialogue Works found that, when young people were supported to develop structured mentorship roles—guiding children, providing institutional memory, and helping shape policy recommendations—they remained engaged while supporting the sustainability of advocacy efforts. Differentiating roles ensures that young people do not feel forced to "step aside" from advocacy upon reaching young adulthood but can instead transition into new, meaningful functions.

Promoting inclusive membership

A critical aspect of ensuring sustainable child-led advocacy is the structured integration of younger members. As older members transition into new roles, it is essential to create inclusive spaces where younger advocates of different genders and backgrounds can gradually assume responsibilities within their groups (Percy-Smith & Ors 2023). Many CACs have recognized the importance of early involvement, noting that children who join at a younger age develop a stronger sense of group identity and ownership over advocacy initiatives. To maintain this continuity, organizations have adopted several strategies, including open dialogue about transitions, milestone celebrations, and peer mentorship programmes. Creating safe spaces for children to voice their concerns and aspirations fosters confidence and prepares them for leadership roles in advocacy (Barros & O'Kane 2024).

Ensuring organizational commitment and adult support

Intergenerational advocacy requires more than children and young people's enthusiasm—it also depends on adults within organizations who are willing to share power and invest in sustained child and youth participation. Dialogue Works illustrates that organizations with strong adult mentorship models, structured capacity-building programmes, and flexible funding mechanisms are more successful in retaining young advocates over time. Taking a holistic approach to child development and investing in supporting age transitions is essentially making a commitment to nurturing community leaders who lead by example. However, it is crucial to strike a balance between empowerment and exploitation (Larkins 2020). While young people are encouraged to learn and share to the best of their capacity, availability, and interest, they should not be expected to replace the roles and responsibilities of adults. By providing tailored support during this transition period, organizations can help young people navigate their roles effectively, ensuring their continued growth and development as role models within their groups and the broader community.

For intergenerational advocacy to thrive, advocacy spaces must be resilient and adaptable. The Dialogue Works experience underscores the importance of fostering cross-generational collaboration where young people and adults work together to amplify children's voices. Ensuring that advocacy platforms remain flexible, well resourced, and connected to institutional structures will be key to navigating the ongoing global crises. Ultimately, sustaining child and youth participation in advocacy requires a shift from temporary, project-based initiatives to long-term,

institutionalized frameworks. By anchoring advocacy in resilient and inclusive systems, young people can continue to play a transformative role in shaping policies and addressing global challenges, ensuring that their voices remain integral to the activism and advocacy for children's rights.

[C] CONCLUSION

Intergenerational advocacy in an era of polycrisis is not just an ethical imperative—it is a strategic necessity. As demonstrated by the experiences of CACs, sustaining meaningful child participation requires structured pathways that support the evolving roles as children transition into young adulthood. This article has highlighted the challenges young people face as they transition from child advocates to mentors, advisors, and resource persons. Without clear strategies for role differentiation and long-term engagement, there is a risk of losing valuable child and youth voices in decision-making spaces.

To address these gaps and to maximize opportunities for sustainable engagement, intergenerational advocacy efforts must be anchored in institutional structures that recognize and sustain child and youth leadership. The Dialogue Works campaign illustrates how anchoring child and youth participation in formal governance mechanisms—whether municipal councils, policy dialogues, or advisory bodies—enhances sustainability. However, this requires more than just symbolic inclusion; it demands a commitment to ensuring children and young people have access to resources, training, and decision-making powers.

Additionally, fostering intergenerational collaboration needs a shift in how adults engage with children and young people. Adults should act as enablers, creating spaces where children and young people can lead while at the same time benefiting from mentorship and support. The experience of CACs in the Philippines, Peru, and Zambia demonstrates that when young advocates are given structured mentorship opportunities and transitional roles, they remain engaged in advocacy while ensuring that children's voices remain central.

Looking ahead, the sustainability of intergenerational advocacy and activism largely depends on three key factors: (1) institutionalizing children and young people's participation within governance and policy structures; (2) ensuring differentiated roles that allow children and young people to transition without being excluded; and (3) minimizing adult-centrism and fostering a culture of collaboration that values youth leadership while addressing power imbalances. By embedding

these principles into advocacy frameworks, intergenerational advocacy and activism can move beyond fragmented, short-term projects to become a resilient force for systemic change. Understanding adult-centrism helps illuminate the structural depth of the challenge and the complexity of dismantling adult-normative systems. Systematic and systemic strategies by adults, children and young people are required to cultivate new norms, as well as institutional and political practices where children and young people are recognized, engaged and taken seriously as social and political actors.

As the world faces overlapping global crises, children and young people must not only be included in policy conversations but positioned as key stakeholders in shaping solutions. Strengthening intergenerational partnerships ensures that advocacy efforts remain dynamic, inclusive, and responsive to the realities faced by children and young people worldwide. The challenge ahead is not merely to sustain children's and young people's participation but to expand and institutionalize it in ways that redefine power structures and create a more just and participatory world.

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Legislation, Regulations and Rules

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Weaving Wisdom and Will: Intergenerational Partnerships, Rights, and Resilience in the Global South

Susan Sapkota
in conversation with

Amrit Rijal

[A] INTRODUCTION

This is a transcript of a conversation between Susan Sapkota and Amrit Rijal. An audio recording is also available.

Amrit Rijal

Susan Sapkota

[B] CONVERSATION

Amrit

Hi, everybody. Namaste. My name is Amrit Rijal. And I'm working as guest editor for a special section of the academic open access journal, *Amicus Curiae*, entitled "Pushing the Boundaries of Intergenerational Activism in an Era of Polycrisis". This special section is set for publication in autumn 2025. As a part of this today I'm interviewing Mr Susan Sapotka from Nepal.

Hi, Susan. Could you please briefly introduce yourself?

Susan

Yes. Hi, Amrit. Thank you so much. So, hi, everybody, I am Susan Sapkota, a youth leader and activist from Nepal, working at the intersection of human rights, youth empowerment, and environmental justice.

I focus on breaking harmful taboos, promoting children's and sexual and recreational health and rights, and building intergenerational partnerships to create inclusive, sustainable chains.

And I've also recently been titled as a Global Teen Leader in 2025 for the "We Are Family Foundation", and I collaborate globally to amplify youth voices and drive transformative action.

Amrit

So, that was wonderful, and thank you so much for that.

Let's start the interview. So my first question for you would be—what makes a successful intergenerational partnership, particularly when you think about multiple and intersecting forms of marginalization and discrimination that children and young people in the so-called Global South can experience?

Susan

Thank you for the question, Amrit. For me, successful intergenerational partnership is rooted in authentic relationships, trust, and shared accountability.

It goes far beyond older people simply supporting young people. It's about co-creating spaces where both generations can bring their lived experience, pain, hope, and ideas and shape solutions together. In the so-called Global South, I think young people often face intersecting barriers, including gender inequality, caste-based discrimination, harmful cultural norms, and economic hardship. Many, especially girls, are silenced by taboos and excluded from discussions about their own lives.

Meanwhile, adults hold valuable experience and social influence, but may underestimate young people's leadership. When these realities meet in a space of mutual respect, powerful things happen.

I remember a session in Sinja on sexual and reproductive rights to health where elders and youth came together. It was a session I led and included an open Q&A discussion about menstruation and sexuality which are deeply stigmatized topics there. But through honest dialogue, the participants collaboratively questioned harmful myths and found practical, culturally sensitive solutions.

This is what success looks like—true partnership, power shared, everyone seen and heard. Solidarity transforms barriers into bridges. It takes empathy and courage to challenge our biases, but it's worth it because no generation can do its work alone.

Amrit

So, thank you for that critical reflection of yours, and I love the way you have your own experience regarding this topic and how you connected your example of Sinja, working out there.

So, thank you for all the work you have been doing around child rights, activism, and, in particular, human rights. So, my next question for you would be—what are your hopes for the future of intergenerational activism to protect and promote children's rights in the face of multiple and compounding crises?

Susan

So, in a world where crises—ike climate disaster, conflicts, pandemics, economic shocks—are overlapping, the rights of children and young people are under constant threat.

My hope is that intergenerational activism will keep growing as a movement rooted in shared leadership, empathy, and courage with compassion. I envision a future where adults see young people as equal partners in social change, not just the future's, but active architects of the present.

Adults have networks, influence, and historical knowledge. Young people bring innovation, lived experience, and fearless determination.

And, as I said, together, they can build more resilient and just systems. My dream is for an intergenerational model to become the norm. Where youth voices share decisions, discussions on policies, budgets and accountability structures, not just in

a tokenistic way. I hope every child, no matter their identity, where they come from, where they belong, can see themselves as a rights holder and changemaker, supported by elders who believe in them.

Intergenerational solidarity—something very important—is our greatest hope in these compounding crises, because it weaves together wisdom from the past with possibilities for the future.

And, I really love this line: I have noticed that with empathy and humility, we can protect and advance children's rights, even in the hardest times.

Amrit

Thank you so much. That was again a great answer and again a critical one, the way you have analysed and the way you want to connect how children, young people should be connected with adults out there. So that's actually a great example you are trying to set out, and I hope that really happens out there, that really works.

Let's again jump to another question. So, this would be our last formal question from my side to you.

What lessons have you learned from young people and children that have changed your own view about what meaningful activism and human rights work should look like?

Susan

Working alongside children and young people has profoundly changed me. I am who I am because of my experience working with children and young people in the rural part of Nepal and many more places in the world.

And one of the biggest lessons is that meaningful activism is not about speaking for others, but about creating spaces where they can speak and act for themselves. It's all about providing a safe space where everyone can talk and share.

Young people are already powerful. They just need an environment to realize their own agency. I've been humbled by the courage of young people who challenge injustice and

imagine a fairer system. Even when it feels impossible. This has shown me that meaningful activism must be rooted in hope.

In Karnali, the province I come from, during our intergenerational dialogues on menstrual taboos and all the related programmes, I saw girls and boys challenge harmful practice together while elders showed openness to the change. Sometimes it's not the case, but mostly they're open to understanding and supporting young people.

That reminded me that activism must be collective and intergenerational to protect human dignity.

And recently, at the Just Peace Summit in Sweden. I met 19 other Global Teen Leaders whose work, and stories of vigilance and triumph inspired me deeply. They reminded me that young people everywhere have lost the capacity to innovate, heal and build peace. They taught me that empathy and solidarity must sit at the heart of human rights work.

And most of all young people have taught me to lead with my heart as much as with my mind because real change grows from compassion, trust, and partnership. And that lesson will stay with me for the rest of my life.

Amrit

Thank you so much again and congratulations for representing Nepal at the Just Peace Summit. And for all the wonderful work happening around activism and advocacy. Your thoughts are truly inspiring.

So, that's all about the formal interview from my side. At the very end of this conversation, would you like to say anything or would you like to share anything before we wrap up?

Susan

Yes, about activism and being a child and representing them, representing a community, something that always comes to my mind when sharing is that I see a lot of young minds, children, trying to do activism, trying to bring change. But I think there are a lot of things that limit them. They start looking for big funding, they start looking for big networks at the very

beginning, and I think that might not actually be the right way to start it because, I think, when you are truly honest in your cause and truly determined about the change you want to bring, it doesn't matter what you have. Even though you have some scarcities, limitedness, and all, you can start. And when you start, it actually grows if you are honest about your cause.

And I suggest young people who want to bring change: just start, believe in yourself, believe in your cause, be true to yourself.

And that's how we start, and that's how we bring teams together.

That's it.

Amrit

Thank you so much, Susan, for your time and contribution, in such a short conversation.

It was great talking to you, and you are such an inspiring person, and you are such a great fuel for our future generations, and thank you for all the efforts you have been putting in around advocacy to change this world, to make this world a better place for all the children and young people out there. Thank you for all the work you have been doing.

So, let's keep in touch, and let's keep on talking.

And I hope you continue to work for families and communities for positive change.

Bye bye.

Susan

Yes, just to add, I'm really thankful that you provided me this opportunity and recognition. Thank you so much for that.

Amrit

It's my pleasure, thank you so much.

About the authors

Amrit Rijal: *please see page 347 for Amrit's author bio.*

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Special Section:
Law's Spaces and Places, edited by
Andrew Benjamin Bricker, pages 385-432

Introduction

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Abstract

This Special Section presents a conceptual walking tour of law's places and spaces in Central London, created by members of the Law and the Humanities Hub (LH*ub*) at the Institute of Advanced Legal Studies. By mapping diverse sites—from bookshops and cab shelters to courthouses and administrative offices—this map explores how law and place are mutually constitutive, shaping and reshaping one another. Combining legal geography with historical and cultural analysis, it invites readers to see law beyond formal institutions, tracing its often-hidden spatial inscriptions across the city. The result is both a guide and a provocation to rethink law's spatial—and temporal—dimensions.

Keywords: law; space; place; legal geography; Central London; lawscapes.

Where does law happen? Where does it take place—and also shape space? This deceptively simple question underpins the entries presented in this Special Section, a conceptual walking tour of law's places and spaces in Central London. It asks us not only to think about the *where* of law—its physical sites and spatial arrangements—but also to confront the ways in which place and law make and remake each other. As Timothy Hyde (2020) has written, "law and space are mutually constituting; law has a spatial aspect and space has a legal aspect" (236). Together, they weave "a complex fabric of dependencies and reciprocities between the practices of spatial organization … and those of law" (Hyde 2020: 236). Law always happens somewhere: it is not some ethereal abstraction, floating above the material world, but is instead a powerful agent that shapes space itself—by drawing boundaries, producing jurisdictions, designating uses, and inscribing meanings. The spatial,

social, cultural, and historical contexts in which law unfolds shape how it is made, interpreted, enforced, and resisted.

In December 2024, members of the Law and the Humanities Hub (LH*ub*) at the Institute of Advanced Legal Studies (at the School of Advanced Study, University of London) began exploring these connections through a deceptively simple exercise: by mapping a spider's web of law's places and spaces. Each member of the LH*ub* team selected a site within roughly a mile of IALS—located in Bloomsbury across from Russell Square—and drafted a short entry, which we have collected here and which will also be published online as an annotated digital map.

The resulting collection is as diverse as it is revealing: from the establishment of the Cabmen's Shelters in the late nineteenth century to the partially mummified remains of philosopher and legal reformer Jeremy Bentham on display at University College London today; from the 1984 police raid on Gay's the Word bookshop for conspiracy to import "indecent or obscene" materials, to the establishment of the General Register Office at Somerset House in 1836, which oversaw the documentation of births, deaths, and marriages and which marks the birthplace of modern bureaucracy in Britain. Moreover, these entries are not simply legal trivia pinned to the urban landscape. Instead, we might view our walking tour as an embodied form of legal geography—a real-world experiment, in and through these spaces, in tracing the "co-constitutive relationship of people, place, and law" (Braverman & Ors 2014: 1). Scholars working at the intersections of law and geography have devised various terms to conceptualize those connections—think of Nicholas Blomley's (1994) "splice", Nicole Graham's (2010) "lawscapes", or David Delaney's (2010) "nomosphere" (see also Bennett & Layard 2015)—but all offer both a theoretical and even practical vantage point for our tour wayfarers, who might witness these sites not as mere backdrops for distant legal events, but as active participants in those events: places and spaces that shaped and have continued to shape various legal legacies.

Such a perspective also entails a shift in focus for those moving through Central London. Instead of seeing law only in its formal expressions—through parliamentary statutes, court judgments, administrative rules—we begin to witness how law itself is quietly hidden in plain sight, sometimes invisibly spatialized and materialized, not only in the courthouse, the prison, and the police station, but also in various offices, bookshops, and park squares. One of our aims is to make this co-constitution visible. By walking the tour—which takes approximately 1.5 to 2 hours in total—wanderers will not only encounter sites of legal significance but will also

see how these sites have been shaped by various legal instruments and how, in turn, these spaces and places have shaped the law. Each entry also includes plenty of recommended detours for the *flâneur*, including other relevant things to see and do near each site, encouraging users to situate these legal spaces and places within the broader life of twenty-first-century London: the pubs where lawyers met to plot strategies, the streets where protests erupted, the cafés where legal aid volunteers worked late into the night.

The resulting map is also therefore an exercise in thinking about law beyond the courtroom. Many of our selected sites remind us that law happens in places we might not initially recognize as "legal". The bookshop Gay's the Word was, in 1984, the target of a police raid that reflected broader legal anxieties about obscenity, sexuality, and morality. Its location, clientele, and stock all played a role in the raid, as did the broader geography of queer life in London at the time. In this sense, the legal significance of the site cannot be disentangled from its spatial and social contexts. By situating law in place, we can open up questions about inequality and exclusion. The co-constitution of law and space is rarely neutral. Laws can be used to create exclusions—think of vagrancy laws that enable the removal of unhoused people from public areas or planning regulations that limit the construction of affordable housing. Conversely, spaces can resist or reshape law, as in the case of occupations, protest camps, or community gardens established in defiance of zoning rules. Our map necessarily includes sites of both oppression *and* resistance, reminding us that the spatial dimension of law is always contested.

In making visible these connections, this walking tour contributes to a body of scholarship that insists on the inseparability of law and space (Braverman & Ors 2014). At the same time, rather than reifying notions of the pure spatiality of law, we might follow Mariana Valverde (2020), who has reminded us that the spatial dimensions of law are themselves inextricably bound up with law's temporality, constituting a kind of "spacetime" of law. For each of the contributors to this Special Section, shifting spatial arrangements intersect with particular and overlapping moments across time. In urban contexts like London, this spacetime dynamic is intensified by not only the city's long history but also its diversity and density. The city is a kind of palimpsest of legal accretion: every street corner carries traces of these legal layers if we know how to read them. Think only of Lincoln Inn's Fields, a perhaps unexpected epicentre for linking the long history of the abolition movement to more recent battles for suffrage and women's rights. Our mapping project is

thus in part a lesson in reading spatialized history. It trains us to notice the plaques, the architectural features, the street names, and the less visible spatial arrangements—CCTV coverage, restricted access points, protest exclusion zones—that reveal law's inscription in space.

The entries in this walking tour cover a wide range of sites. From the 1870 trial of the cross-dressers "Fanny and Stella", which exposed Victorian anxieties around gender and sexuality (Laurie Bashford, "Traces of Gender Transgression in the West End"), to Jeremy Bentham's publicly preserved remains, where utilitarian philosophy meets the material body (Andrew Benjamin Bricker, "What Should You Do With a Dead Body?"), London's legal spaces reveal how law shapes—and is shaped by—society. At Somerset House, the birth of civil registration in 1836 redefined identity through state documentation (Jess Connolly-Smith, "From Birth to Death: Archiving the Nation"), while the monumental Senate House embodies law's claim to permanence and even Orwell's dystopian vision (Ogulcan Ekiz, "Outside the Senate House: Reflections on Timelessness and Law"). More modest structures, like the late-nineteenth-century Cabmen's Shelters, combined regulation, philanthropy, and everyday labour (James Campbell, "Shelter from the Storm: The Story of London's Cabmen's Shelters"), just as London's squares have evolved from aristocratic preserves into contested public arenas of democracy (Jonah Miller, "Fighting for London's Green Spaces"). In Lincoln's Inn Fields, the legacies of William Blackstone, Chief Justice Mansfield, and Margaret MacDonald connect various histories of common law, abolition, and women's rights (Jake Subryan Richards, "A Transformative Square"), while the libel case of *Hunter v Sharpe* shows how courts have sought to police the porous boundaries of medical knowledge (Anat Rosenberg, "What Is the Difference between Medicine and Quackery?"). The story of Congress House traces the shifting fortunes of the trade union movement (Parashar Kulkarni, "The Rise and Fall of the Congress House and the Trade Union Movement"), while the Government's raid on the bookstore Gay's the Word underscores the selective weaponization of obscenity law against queer communities (Shekinah Vera-Cruz, "The Shadow of the Tiger: Law and the Literary"). Finally, the 1934 founding of the Progressive Writers' Association in Bloomsbury demonstrates how London also became a crucible for anti-colonial literary movements, tying its streets to struggles for global emancipation (Raghavi Viswanath, "Writing Against Empire: A Bloomsbury Manifesto").

Taken altogether, these entries and this map will, we hope, serve not only as a guide for walking Central London but as an invitation to see these places and spaces differently: to notice where law has happened, to

ask how those places shaped and were shaped by the law, and to imagine what those spaces might become in the not-so-distant future.

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Traces of Gender Transgression in the West End

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To stand at the convergence of Strand and Aldwych, facing west towards Trafalgar Square, is to gaze upon one of the busiest stretches of London's theatreland. Once the site of many aristocratic residences—most notably Somerset House, named for the Duke of Somerset—the area flourished as a theatre district during the nineteenth century, with several large theatres constructed on either side of the thoroughfare: the Adelphi (1819), Gaiety (1864), Vaudeville (1870), Savoy (1881), Terry's (1887), and Tivoli Music Hall (1890).

It was nearby at the Royal Strand Theatre, on the night of 28 April 1870, that an incident occurred that shocked the Victorian press and public alike. After the evening's show, two individuals were arrested by the Metropolitan Police. The pair, known to their friends as "Fanny and Stella", were taken to the Bow Street police station, where their identities were revealed to be, in fact, Thomas Boulton and Frederick Park. They were kept overnight at the station before being escorted to the Magistrates' Court the next morning, still made up and dressed in their evening gowns. A crowd of onlookers and reporters had gathered to witness the scene, as the two men were led inside and charged with "outraging public decency", buggery, and conspiring to incite others to their unnatural crimes (McKenna 2013).

While awaiting trial, Fanny and Stella were held with male inmates at Coldbath Fields Prison in Clerkenwell for two months. Both were subjected to invasive examinations, firstly to determine their sex, and subsequently to ascertain whether or not they had engaged in anal intercourse. The results of these were presented by the prosecution as evidence, along with findings from an extensive police investigation that pre-dated the arrest itself by more than a year (Kaplan 2002). This included correspondences between Boulton and Park and a number of

"The arrest of Boulton and Park, aka Fanny and Stella", unknown author, public domain, The Illustrated Police News, *Saturday 7 May 1870, 1: Wikimedia Commons.*

their acquaintances, as well as photographs of "Fanny and Stella", and reports from surveillance officers who had been posted to stake out their shared lodgings on Wakefield Street.

In the end, the prosecution was unable to prove that Boulton and Park had committed the "unnatural crimes" of which they were accused. The pair were acquitted of all charges by a jury, and so were the other men who had been implicated in their alleged crimes while presenting as ladies. The case of Fanny and Stella foreshadowed the notorious trial of Oscar Wilde in 1895. The prosecution's failure is widely understood to have influenced the passage of the 1885 Labouchere Amendment, which made "gross indecency" between men a criminal offence, punishable with up to two years' imprisonment with or without hard labour.

The Royal Strand Theatre was demolished in 1905, and in its place was built the Aldwych Tube Station, now disused.

While at the Aldwych …

… wander up Wellington Street into Covent Garden to visit the Bow Street Police Museum, housed within the former courthouse where the trial of Fanny and Stella famously took place (now inside the NoMad Hotel).

About the author

Laurie Bashford *is a writer and PhD candidate in Theatre and Performance at Columbia University in New York City. Through ongoing ethnographic research in London and the United Kingdom, they learn from trans artists and activists, focusing on the constitution of contemporary trans experience through encounters with built infrastructures, public space, and the urban sensorium. Their work has been featured by the American Society for Theatre Research, Performance Studies International, the Society for Social Studies of Science (4S), and the* International Quarterly of Asian Studies.

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Legislation, Regulations and Rules

Criminal Law Amendment Act 1885, section 11 (Labouchere Amendment)

What Should You Do with a Dead Body?

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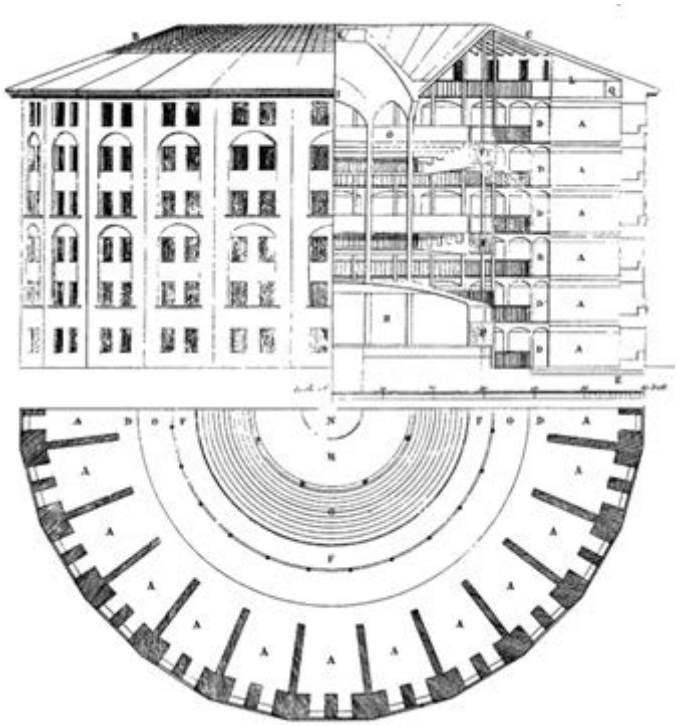
The philosopher Jeremy Bentham (1748-1832) is today known as the founder of utilitarianism, the ethical theory that actions should be evaluated based on their outcomes and, specifically, the extent to which they promote happiness or reduce suffering. On its surface, utilitarianism promotes the maximum amount of happiness for the greatest number of people, but it also potentially leads to further ethical consequences. For instance, if a doctor has five patients in need of organ transplants, and one healthy individual can provide all of the necessary organs, then from a strict utilitarian perspective sacrificing the one healthy person to save the five patients would (theoretically) maximize overall happiness.

Bentham's emphasis on the "principle of utility"—the idea that the moral value of an action is determined by its ability to maximize pleasure and minimize pain for the greatest number of people—shaped his ideas across numerous domains beyond ethics. From ontology, logic, and political economy to education, religious beliefs, and government, no field was beyond his philosophical reach, including, most notably, the law. As he wrote in *Theory of Legislation* (1840: volume I, 96), "The more perfect enjoyment is in all these respects, the greater is the sum of social happiness: and especially of that happiness which depends upon the laws." Throughout his writings, Bentham returned again and again to law, whether it was legal reform, judicial administration, and international law or policing, punishment, and prison reform. The latter led to one his most famous—and even infamous—ideas: the "Panopticon", a cylindrical prison with a tower at its centre, which permitted the warden to observe the prisoners at all times. Later, the French philosopher and historian Michel Foucault came to view the Panopticon as something much worse: a "laboratory of power" and a symbol for the modern "society of surveillance" defined by its repressive and disciplinary regimes (1985: 208).



"Plan of the Panopticon" by Willey Reveley, public domain, in Bentham (1843 [1791]: vol IV, 172-173). Source: Wikipedia Commons.

Today, you get to catch a glimpse of not only Bentham's wide-ranging ideas, but also of Bentham himself, who died in 1832. His will contained peculiar instructions for his remains: "My body I give to my dear friend Doctor Southwood Smith … He will take the requisite and appropriate measures for the disposal and preservation of the several parts of my bodily frame … The skeleton he will cause to be put together in such a manner as that the whole figure may be seated in a chair usually occupied by me when living." His will even contained some winking suggestions for how to use his so-called "Auto-Icon" (or "self-image"):

> If it should so happen that my personal friends and other disciples should be disposed to meet together on some day or days of the year for the purpose of commemorating the founder of the greatest happiness system of morals and legislation my executor will from time to time cause to be conveyed to the room in which they meet the said box or case with the contents therein to be stationed in such part of the room as to the assembled company shall seem meet (Bentham 1832)

Not all went to plan. Bentham's head was preserved using a Māori mummification technique, but the process failed, rendering it unsuitable for display, and a wax head was substituted. The Auto-Icon is today located on the ground floor of University College London's Student Centre in a cabinet with Bentham's preserved skeleton, dressed in his own clothes, seated in his customary chair, and topped with the wax head (the real head, which had been kept in a wooden box first on top of the cabinet and then on a plinth over the door to the Cloisters leading to the

"Jeremy Bentham's 'Auto-Icon' at University College London" (2003), photographer Michael Reeve, public domain: licensed by author under GNU Free Documentation License (CC BY-SA 3.0). Source: Wikimedia Commons.

eastern staircase, was prone to student pranks over the decades and is now stored safely at the Institute of Archaeology).

The Auto-Icon is both a tongue-in-cheek curiosity and an embodied testament to Bentham's unique philosophy, one that challenged prevailing religious norms and showed the utilitarian value one could have, even in death, through public anatomy and medical donation.

While at the Student Centre …

… also check out the great exhibits and events going on at the university at "UCL Culture", including free art exhibitions, the Grant Museum of Zoology, and the Bloomsbury Theatre & Studio. And for more information, explore UCL's entry on the Auto-Icon and the *Stanford Encyclopedia of Philosophy*'s entry on Jeremy Bentham.

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Birth to Death: Archiving the Nation

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In Modern Britain, there are few experiences that escape registration. We are used to filling out forms, presenting legal documents, evidencing our age, marital status, and nationality. From birth to death, our life course is recorded by the state, kept by archivists, and examined as data. Each of these activities can be traced back to Somerset House. Today, Somerset House is a cultural institution bringing creativity and art to wider society. In 1836, it was the birthplace of modern bureaucracy in Britain.

As the Victorian era of invention entered the horizon, the General Register Office (GRO) was established at Somerset House as the central headquarters for civil registration. The GRO was responsible for archiving the state's documentation of the life course. To manage this complex web of administration, the GRO was divided into departments for correspondence, accounts, and indexing certified copies of the registers. The GRO also opened a room which could be used by the public to search the records. The GRO was keen to engage the public in its activities. Journalists on several publications were invited to explore the building between the mid-to-late nineteenth century. One such account describes Somerset House as "the most lasting record of the three great epochs in the existence of our great family of twenty odd millions of English people – the births, the marriages, and deaths – of the nation" (Hunt 1850: 235).

Why did the GRO begin in 1836? The reasons for developing a civil registration are complex, multifaceted, and contested. We can identify, however, three broad concerns for the shift from parish to civil registration. Firstly, civil records of birth and marriage were deemed essential in securing property rights for the wealthy, as they could be used as evidence in court. Secondly, civil registration would provide a remedy for non-Anglicans and non-Christians facing exclusion from

"The Strand Front of Somerset House and St Mary-le-Strand Church": print published by Ackermann & Co in 1836, artist unknown, public domain. Source: Wikipedia.

the legal system, given that parish registration was controlled by the Church of England. And, finally, there was a growing desire for statistical knowledge which could be used to measure the health of the population. The parish registers were designed to record the passage of the Christian soul, rather than the physical body, and so tended to include only the name(s) of those involved in the ceremony and the date of the ritual.

Today, there is much debate about what should be recorded by the state. Should birth certificates have more narrative options to describe parenthood? Is it necessary to designate a legal sex at birth? Could physical records be replaced with digital archives? Can a political anarchist reject the state's documentation of their child altogether?

Whilst at Somerset House …

… visit an exhibition, listen to an audio history of the building, or if it's winter, have a go on the skating rink.

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Outside the Senate House: Reflections on Timelessness and Law

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Senate House: photograph by the author.

The Senate House is the administrative centre of the University of London as well as the home of a 14-storey library. The art deco building, situated in Bloomsbury, London, was constructed between 1932 and 1937. Looking for a word to capture its impact on me, a pedestrian walking on Store Street towards the Senate House, I venture through mixed feelings. Is "imposing" the word I am looking for? Senate House is neither the tallest nor the largest building I have faced. But it does make me feel small. After all, I am very tiny compared to it. I have to "look up" to see it. Yet "imposing" is not the word I am looking for.

"Timeless". This feels better. The architectural historian Arnold Whittick described the building as a "static massive pyramid … obviously designed to last for a thousand years" (1974: 515). Although the art deco design

Signs of decay on the Senate House building: photograph by the author.

of the building gives away its "time" as in the period the building was planned and constructed, the first impression of an observer is that they are in front of a monument that was intended to be there for centuries to follow. William Beveridge, then the vice-chancellor of the University of London, put forward an ambitious task for the architectural design of the building:

> the central symbol of the University on the Bloomsbury site can not fittingly look like an imitation of any other university, it must not be a replica from the Middle Ages. It should be something that could not have been built by any earlier generation than this (1928: 6).

The timelessness is not literal. A closer look gives away signs of decay on the surface of the building. But it is the ambition in its making that freezes an observer. The timelessness of knowledge, perhaps, or the desire to be a symbol like the Great Library of Alexandria, are too big of an ambition to see its fruition in a single lifetime. It is the building's "permanence" as opposed to my temporariness that makes me feel small.

The Senate House was used by the Ministry of Information during the Second World War. The governmental department responsible for publicity and propaganda during the conflict inspired two British literary works. The first of these is Graham Greene's *The Ministry of Fear* (1943), where a spy network built by the Nazi regime in London gathers information on citizens and blackmails them into co-operation. The second is George Orwell's *Nineteen Eight-Four* (1949). Orwell's wife, Eileen Blair, worked for

the Censorship Department of the Ministry of Information at the Senate House during the Second World War. The Ministry of Truth in Orwell's novel, which is responsible for providing the official narration of historical events that is in line with the party's agenda, is based at a grandesque pyramidal structure of white concrete, rising 300 metres (980 feet) into the air, containing over 3000 rooms above ground.

It is clear that the Ministry of Information's activities in gathering, controlling, and manipulating information inspired both Greene and Orwell in fictionalizing totalitarian regimes. However, I cannot help but wonder if the architectural features of the Senate House did not play a role in reinforcing the power those fictional regimes claim in regulating people's lives. Notice Orwell's choice of a "pyramidal" structure as a base for his Ministry of Truth and Whittick's description of the Senate House as a "static massive pyramid … obviously designed to last for a thousand years" (1974: 515). It is the connotation of timelessness that likens the Senate House to the Egyptian pyramids that have survived for millennia. At its core, legal systems share the same ambition of timelessness. The notion of timelessness has a role to play in the theories of natural rights. Aquinas's natural law theory centres the notion of "eternal law", which he defines as God's rational purpose and plan for all things. As rational beings, humans partake in eternal law, according to Aquinas. And the said participation is natural law. For Aquinas, the timeless quality of all human legal systems, however transient they may seem, is that true law derives from this eternal and natural law, whereas law which lacks these timeless qualities is classified as a "perversion" or "corruption" of law—or even no law at all (Aquinas 1915 [1274]: Q 92)

The idea of timelessness plays other, equally significant, roles in legal positivism. For Hobbes, sovereignty is a right bestowed by people upon the sovereign. While it is possible to create a time-limited monarch, the "power" is retained even when the sovereign is "very thoroughly asleep" (Tuck 2016: 91). For legal positivism, timelessness does not refer to eternity but to permanence. The French jurist Jean Carbonnier states that: "Continuity is one of the postulates of positive law: permanent as well as general, legal rule is a sun that never sets." (2001 [1969]: 61) H L A Hart, in his work *The Concept of Law* (1961), also emphasizes the continuity of law, despite discontinuity in terms of the human beings who make and follow it, as one of the essential features of law as such. It is this continuity that (partly) justifies the rule of recognition—Hart's master meta-rule underlying any legal system that defines what counts as law within that system. Continuity and permanence could also be observed in Kelsen's "*grundnorm*", translated to English as the "basic

norm" (2008 [1967]: 193-195). Kelsen structures the legality of rules in a chain of authorization, where the validity of a legal rule derives from another, higher legal norm, which eventually leads to the *grundnorm*. The legal validity of the *grundnorm*, the first, historical constitution of a given legal system, is presupposed. And, hence, a necessary form of permanence is established for the legal system's validity and continuity.

After your visit to Senate House …

… check out the University of London website's entry on the history of the building.

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Shelter from the Storm: The Story of London's Cabmen's Shelters

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"Cabman's Shelter, Russell Square" by N19±, CC BY-SA 3.0.

At first glance, this structure might resemble a misplaced garden shed. Unimposing and bijou, many Londoners will have passed one like it without a second thought for its purpose or history. This is the Cabmen's Shelter, and it holds a curious antediluvian quality in the metropolitan landscape, seemingly "mysteriously antedating London itself, and having been plonked down there for two long millenniums while the concrete and clay built up around them" (Self 2012).

On closer inspection, these huts epitomize Victorian eccentricity. Like many utility buildings of that age, they are practical in purpose whilst ornate in design. Architecturally, they exhibit pride in housing the apparently mundane, such as sewage pumping stations which were at once monumental and beautiful.[1] However, it is worth remembering that these were often true innovations, revolutionary for residents' quality of life, and built to last. As such, these were not simply utilitarian structures but architectural celebrations of the inventions within.

The Cabmen's Shelters first appeared 150 years ago amidst a late-Dickensian cityscape of slums, factories, workhouses, and stark social-stratification. It was an era of gas-lamps, fanciful gin palaces, and the "London particular" (Dickens 2003: 42)—a thick, choking yellow-green smog from which we derive "pea-souper". For cabbies of the time, life was not easy. Pay and working conditions were poor and law contributed significantly to their hardship. Drivers of Hackney carriages and coaches had been subject to regulation of various forms since the early seventeenth century, with legislation including the Hackney Coaches, etc Act of 1694 and numerous statutes following in the years to come. From the age of carriages and coaches to hansom cabs (cabriolets) and growlers, national and local regulations imposed increasing requirements on drivers concerning licences, plying for hire, cab ranks, fees and fines, dispute resolution, and more. Despite this, little was provided for the welfare of drivers.

Under section 62 of the Town Police Clauses Act of 1847, no driver could leave their cab "whether it be hired or not, without some one proper to take care of it" and police constables held authority to drive away any cab in breach. This presented a dilemma to drivers: stay cold or hungry whilst often exposed to rain, pay someone to guard their cab, or risk theft and other troubles by leaving their cab unattended. Although some MPs recognized this lack of shelter as a "privation" (Hackney Carriages (Metropolis) Bill[2] no meaningful action was forthcoming.

The first to take the initiative was George Armstrong, a newspaper editor, who on a particularly foul night in 1875 was unable to locate a driver at the stand. They were eventually found taking cover in a pub and the worse for wear (Chesher 2023: 129-130). Armstrong, infused with the Victorian ethic of betterment and sobriety, sought to remedy this situation with the help of the Earl of Shaftesbury. Thus the Cabmen's Shelter Fund (CSF) was established, and work commenced to provide

1 "Infrastructure: Utilities and Communication: Listing Selection Guide". Historic England 2011.

2 HC Deb 19 May 1853, cols 428-429.

"The Cab-men's Shelter, Acacia-Road, St John's Wood": engraving in The Illustrated London News*, 20 February 1875.* © Illustrated London News/ *Mary Evans Picture Library.*

shelters where cabbies might legally rest, eat, and escape the weather. Viewed less charitably, shelters would also ensure drivers could always be found without delay. Whilst Shaftesbury was a true philanthropist, Armstrong may have been more self-interested—the first shelter built (above) was serendipitously placed on the street where Armstrong himself lived. Likewise, MPs welcomed a shelter in Palace Yard not for cabbies' welfare but as it "may induce cabmen not to leave hon. Members, at all hours and in all weathers, to find their way home as best they can".[3]

Questions of altruism aside, the CSF quickly succeeded in its mission of providing a refuge for cabbies. Various architects designed the earliest shelters, all sadly since lost, but the form of shelter still visible today was the work of Maximilian Clarke in 1882. Clarke's design introduced more wooden panelling, overhanging eaves, an ornate chimney for ventilation, and, at some point, all shelters were painted their now iconic Dulux Buckingham Paradise 1 Green. As to why, despite different architects and designs, shelters remained so diminutive—with seating for around 13 cabbies—the answer lies in the requirement that shelters occupy the

[3] HC Deb 4 May 1876, vol 229, col 48.

same footprint as a horse-drawn hansom cab given they were placed in the middle and to the side of roads. Metal tethering posts remain on some shelters where horses would have been secured at troughs, but these bars were of other value—offering some protection from errant vehicles, especially for those shelters which sat in the middle of the street.

In total, between 1875 and 1950, 61 shelters were built across London—of which 13 now remain. Over time, shelters were lost to neglect, vandalism, and bombing during the Blitz. Changes to the urban landscape, particularly to road layout, were also impactful. But it was technology that had the greatest effect on cabbies' work and, by extension, the place of shelters. First the automobile, and thereafter radio communication, allowed cabbies to roam freely over greater distances, regardless of weather conditions, and still accept passengers. London's last horse-drawn hansom cab stopped operating in 1947, shortly before construction of shelters ceased. The CSF, eventually operated by taxi driver trustees, would continue to fund the upkeep of the remaining shelters. Gradually, the shelters' architectural and historical significance would come to be recognized, and in 2024, the St John's Wood shelter became the thirteenth, and final, survivor to be awarded Grade II listed status.

Built in 1897, Russell Square's Shelter—with its ornate 'CSF' filigree—is a later variant of Clarke's.[4] Like other shelters, it has had an exciting career. It began life outside Haymarket Theatre, whose manager paid for its construction, and a plaque reading "Presented by Sir Squire Bancroft 1901" remains on its door today. Thereafter, it was moved to Leicester Square, where it survived a Blitz bomb blast which destroyed all the cabs that waited beside it. With pedestrianization in the 1980s it relocated to Russell Square, where, prior to the 2012 London Olympics it was moved slightly again (and perhaps for the final time) to where it stands today at the north-west of the Square.

If at the Shelter …

… between 7am and 2pm weekdays why not grab a coffee? But be warned, the inner sanctum has always been a space exclusively for cabbies—for civilians takeaway is permitted from the hatch.

4 Historic England, "Cabmen's Shelter, Russell Square".

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Fighting for London's Green Spaces

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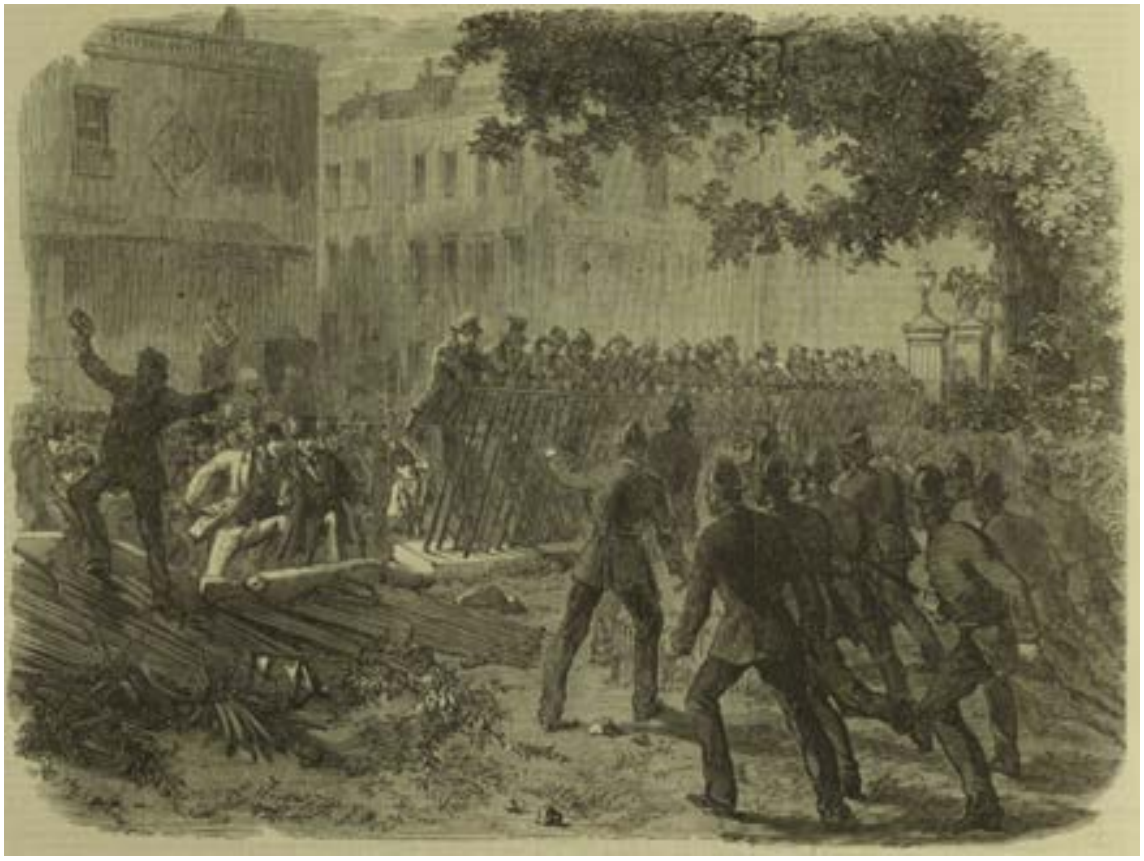
From where you are standing, you can see three green spaces: Woburn Square, Gordon Square, and Tavistock Square. All three are open to the public—take a walk through them.

London is unusual in having a large number of public green spaces in the centre of the city. The capital's squares and parks feature in films and novels about London life and decorate a huge range of tourist merchandise. You can buy mugs and t-shirts, caps and keyrings, toys and teddy bears displaying black railings and lush greenery, with Georgian townhouses somewhere in the background.

How did these spaces come into being? How did they survive the city's expansion from a medieval town to a modern metropolis? The story of London's parks and squares is a story of three powerful forces which made the capital what it is today—aristocracy, popular movements, and law.

Almost all of London's green spaces were once part of aristocratic or royal estates. These squares, like the rest of Bloomsbury, once belonged to the Russell family. The Russells were hereditary Dukes of Bedford, one of the most powerful landowning families in Britain from the sixteenth century to the twentieth. The family's history boasts Tudor generals, Victorian prime ministers, and twentieth-century philosophers. When London was still a small town hugging the river Thames, the Russells owned most of the land to the north-west of the city. In the eighteenth century, as the capital expanded, they turned this land into a huge private property venture, laying out the squares we see today, surrounded by high-end houses for rent which brought the family an enormous fortune. The green squares were reserved for residents, who were granted keys along with their tenancies.



"The Mob Pulling Down the Railings in Park-Lane": artist unknown, public domain, Illustrated London News, *4 August 1866. Source: Wikimedia Commons.*

This followed a model established by the British monarchy further to the west. The royal parks—Hyde Park, Green Park, St James's Park—were once royal hunting grounds. Henry VIII and Elizabeth I hurtled around them on horseback. The parks were fenced to keep the deer in and the common people out. When civil war broke out in the seventeenth century, the parks were opened to the public by Parliament in a deliberate attack on royal privilege. After the civil war, the parks remained open, but only to those who paid for entry or were given their own keys—mostly members of the royal family and aristocrats who lived nearby.

In the nineteenth century, these exclusive green spaces were opened to the people by law. A royal commission declared that access to parks and squares was necessary for London's physical health and moral rectitude. Wholesome outdoor recreation would keep the poor out of trouble and push them to behave respectably in the presence of their social superiors. But once they were granted access, Londoners used these spaces for more than leisure. Radical political groups organized open-air meetings of thousands of people to call for the right to vote and protest against

unpopular legislation. The parks of the royals and the Russells became the people's parks.

This popular takeover was not without a struggle. Police were frequently ordered to prevent public meetings in parks and squares, leading to violent clashes with protestors. Punches were thrown and railings pulled down to secure the right of public gathering for political purposes. Eventually, governments gave up the fight. In the early twentieth century, legislation was passed guaranteeing the continued existence of London's squares against infringement by property developers, for the benefit of the city's residents.

From Gordon Square …

… why not stroll down to Torrington Place and visit Waterstones, which has an excellent selection of books on the history of London?

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Jonah Miller *is a research fellow at the University of Westminster. He is the author of* Gender and Policing in Early Modern England *(Cambridge: Cambridge University Press, 2023), as well as articles and essays on a variety of topics in British history from the seventeenth to the nineteenth century. He is currently working on migration, housing, policing, and political campaigning in Victorian London. His next book,* The Police Outrage*, will be published by Penguin.*

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Further Reading

For more about the Victorian battle for London's public spaces, see:

Taylor, Antony. "'Commons-Stealers', 'Land-Grabbers' and 'Jerry-Builders': Space, Popular Radicalism and the Politics of Public Access in London, 1848-1880." *International Review of Social History* 40(3) (1995): 383-407.

A Transformative Square

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Sir William Blackstone. Source: New York Public Library.

Although they were never neighbours, the two most famous lawyers of eighteenth-century England lived in adjacent houses in Lincoln's Inn Fields. At No 55 lived William Blackstone (1723-1780) between 1768 and 1779. While living there, he completed his *Commentaries on the Laws of England*. Most English law is common law: rather than written codes, court decisions regulate what is lawful and what is not. How, then,

Jean Baptiste van Loo, William Murray, 1st Earl of Mansfield (c 1737).
© National Portrait Gallery London.

could people know what the law was and how it developed? Blackstone answered that question in his *Commentaries* in four Books: *The Rights of Persons*; *The Rights of Things*; *Of Private Wrongs*; and *Of Public Wrongs*. His *Commentaries* became the standard work on the common law in England and in places that adopted English law, including the United States.

At No 56 lived William Murray (1705-1793), between 1739 and 1740 and 1755 and 1756. Here he entertained many friends "with elegant hospitality and genuine kindness". A few days before his death in 1744, the poet Alexander Pope asked to be carried from Twickenham to Lincoln's Inn Fields to dine with him. Murray became Lord Chief Justice in 1756 and gained the title of Baron Mansfield. Chief Justice Mansfield decided the famous *Somerset v Stewart* case (1772). James Somerset escaped from Stewart, the person who claimed him as a slave. Somerset refused to be shipped from England to Jamaica. Abolitionists supported Somerset's legal case by claiming that he was unjustly imprisoned. Mansfield's decision marked an important step in limiting the legality of slavery in

Detail of sculpture of Margaret MacDonald at Lincoln's Inn Fields by Richard Reginald. Source: Bengt Oberger.

England as part of the long course of abolition. In Mansfield's ruling, an enslaved person could not be removed from England against their will.

Lincoln's Inn Fields was also important in the fight for women's rights. Margaret MacDonald (1870-1911) lived with her family at No 56. Her husband, Ramsey later became the first Labour Prime Minister. Margaret MacDonald was a dedicated socialist. She was a student of politics under the tutelage of the suffragist campaigner, Millicent Fawcett (who lived in nearby Bloomsbury). She served on the executive of the National Union of Women's Suffrage Societies, the leading suffragist organization. She is honoured with a statue and alcove seat inside Lincoln's Inn Fields.

While you're at Lincoln's Inn Fields …

… visit the Sir John Soane's Museum. Entry is free. Soane was a prominent architect who had a wonderful collection of antiquities, furniture, sculptures, architectural models and paintings, including a model for a monument to William Murray.

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Cases

Somerset v Stewart (1772) 98 ER 499

What is the Difference between Medicine and Quackery? How Law Performs Boundary Work

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Did you know that law was involved in establishing the status of medical science as we know it today? In the nineteenth century, the medical scene was a confusing mix of professional doctors and a medical market. Anyone could concoct and sell any medicine they imagined; and, with the spread of mass advertising, the market for these so-called proprietary medicines became big business in Britain. The medical establishment worked hard, with the aid of law, to distinguish scientific medicine from this market, despite being involved in it. This process shaped modern understandings of medical science and the medical market as distinct spheres of activity. We can revisit one legal case to get a sense of this history.

In 1864 Robert Hunter, a doctor certified in New York and Canada, began to advertise his book on tuberculosis and its cure by oxygen inhalation in a series of column publications in the *Times*, *Standard*, *Morning Post*, *Daily Telegraph*, *Star*, and other newspapers in Britain. Britain had seen a surge of tuberculosis with the spread of industrialization and urbanization. The medical profession was groping in the dark against the foremost killer of the nineteenth century. The search for a cure was an industry, with treatments, health tourism, ventilation solutions, medical books, and brochures in wide circulation. At this point, no one—including Hunter—had a cure, yet he claimed to have found it.

According to medical ethical codes, doctors were not supposed to advertise, but Hunter was not impressed. He attacked the medical establishment for ignoring his treatment against rational explanation and argued that doctors had breached their duty of instruction by shunning publicity.

In 1865 the *Pall Mall Gazette* attacked Hunter under the title "Impostors and Dupes" calling him a quack who advertised as no "reputable physician"

would. Hunter sued the publisher for libel. *Hunter v Sharpe* (1866) was an event, one of the few c*auses célèbres* of the year in the courts according to the *Law Times* (Hunter 1867: 169). But it was also just one of a run of cases that turned courts into public forums asking: what is quackery, and how can we tell the difference from scientific medicine?

It was no trivial question. Doctors qualified in British institutions often worked with and for commercial medical sellers, were directors and shareholders in their businesses, prescribed their medicines, and published their adverts in medical magazines. Sellers of medicines on the market competed with qualified doctors for clientele, but even worse was the existential fear that medicine could degenerate into quackery under the pressures of big money. In other words, a doctor was always in danger of turning into a quack. The medical establishment and its supporters therefore described the market as everything that scientific medicine could not be—its cultural Mr Hyde. *Hunter v Sharpe* revealed how this logic worked. Here is how the Lord Chief Justice Cockburn put the question to the jury:

> Is Dr. Hunter's system one which he has propounded to the public as an honest medical writer or practitioner, for the purpose of enlightening the profession or benefiting the public? Or is it a system of quackery, delusion, and dishonesty put forward – no matter at what cost to the victims … for the purpose of putting money into his own pocket (*Hunter v Sharpe* 1866: 983).

Cockburn posited a sharp distinction between scientific enlightenment and private profit. According to the judge, the "system" was illuminated by the advertising campaign. He exclaimed: "Gentlemen, we are not in America; we are in England … Empirics advertise; professional men do not" (Hunter 1867: 355).

The jury decided for Hunter, yet the damages were one farthing. This was an ambiguous outcome, but the medical establishment celebrated. The president of the Royal College of Physicians presided over a ceremony in which *The Lancet* and the *British Medical Journal* gave Sharpe a silver vase worth over £25,000 in 2025 terms, decorated with the crowning of science. He was praised for efforts "to expose the social evil of barefaced systematic quackery, especially the degrading practice of self-laudation".

The question of science became, simply, to advertise or not to advertise. Advertising was associated with exaggeration and excess driven by the profit motive. It was contrasted with modesty and reserve that stood for the truth delivered by science. Science was celebrated as a philanthropic

Vase presented to the owner of the Pall Mall Gazette, Illustrated London News*, 17 August 1867, 12. © Illustrated London News Ltd/Mary Evans.*

exercise characterized by methodological reticence, positivistic minimalism, and personal humility.

Hunter was driven out of England. In his fury he unwittingly demonstrated the exaggerative bent. If what was done to him had been done to other discoverers, he wrote:

> the world might still have been a plain resting on the back of a turtle; the Archean spirit would certainly have reigned supreme in the arterial tubes; the smallpox have served to prune and keep down our redundant population; while Newton would never have been such a fool as to notice the 'fall of the apple' (Hunter 1867: 368).

What was the significance of this legal battle? The use of market mechanisms—particularly advertising—and the distinction between exaggeration and restraint that law attached to this use, did not always

identify curative value correctly. In 1909, the distinction between restraint and exaggeration led courts and Parliament astray when an advertiser truly had an effective medicine for tuberculosis, which was still fatal 50 years after Hunter. This advertiser was accused of quackery by the British Medical Association, but lost when he sued for libel. For many years, he continued to lobby medical authorities, continued to advertise, and continued to sell. It took almost a decade before the cure was rehabilitated by a Swiss scientist. It became a lucrative medicine, with a sales turnover of €80 million in 2006 (Brendler & van Wyk 2008: table 2).

Some medical providers collapsed in the wake of legal battles while others continued to thrive. The historical significance of these cases was not their ability to identify curative value; it was their cultural impact as public forums that distinguished between science and the market. Through multiple legal events, the nineteenth century established the idea that science was defined by restraint and the market by its lack. Advertising medicine became a suspicious realm of exaggeration, but also a free realm in which fantasy and wild imagination were liberated from the restraints of rationalism. This process was so successful that the distinctions came to seem axiomatic, when they actually have a legal history worth knowing!

For the full account of *Hunter v Sharpe* (1866), see Anat Rosenberg (2022).

While at the Wellcome Institute …

… you could examine its collections of ephemera, particularly for drug advertising. You will find print and digital options. If you have time, check out the Wellcome Collection's events, the galleries, and cafe.

While at the British Medical Association House …

… check out the garden, historical building, and café.

About the author

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The Rise and Fall of the Congress House and the Trade Union Movement

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In 1944, at its 76th Meeting in Blackpool, the Trades Union Congress (TUC)—today a federation of 48 trade unions representing 5.5 million members—adopted a resolution to establish a memorial:

> This Congress, having in mind the conspicuous part played by the British Trade Unions and the successful prosecution of the war to overthrow the yoke of Nazi domination and the annihilation of the nazi creed, and the supreme sacrifice made by thousands of Trade Unionists in the field of battle, the air, on the sea and among the civilian population in the blitzed areas and elsewhere, believes that a fitting memorial to their heroism and gallantry should be erected in the name of the British Trade Union Movement (TUC 1944).

The plan expanded to create a TUC Headquarters at Great Russell Street in London. David Aberdeen won the architectural competition. He proposed a central courtyard, conference hall, memorial hall, training college, library, and offices; the "Congress House" was officially opened in 1958.

The building is a consecration of the ideologies of the labour movement at the time. All workers on the site were unionized. The construction material, Cornish granite, was sourced from various quarries as part of a scheme aimed at reducing unemployment (Mathison & Powers 2024). The architecture is believed to be inspired by the public works of Le Corbusier—the people's architect. In contrast to the colourful street where terracotta and red bricks appear in a range of pre-war styles, the Congress House is modern, simple, and functional.

Bernard Meadows, a British sculptor, won a competition to create "The Spirit of Brotherhood", the bronze statue that sits atop the entrance. Inside the Congress House, in the Bevin Room, is Jacob Epstein's famous sculpture, a mother cradling her dead son, commemorating the sacrifices of trade unionists in the two world wars.

The TUC was established in Manchester. A meeting of a large number of trade unionists across the United Kingdom took place at the Mechanics' Institute in June 1868, where they resolved to hold an annual congress.[1]

Since June 2025, the Congress House has ceased to function as the TUC Headquarters and is now for sale. It represents the site of negotiations that had global implications. These included conflicts of interest between blue-collar and white-collar workers, where the TUC generally moderated more activist positions; between different types of workers' internationalism, where the TUC resisted the influence of the global left; and between workers in Britain and the empire, where the TUC resisted solidarity.

While at the Congress House …

… At a 10-minute walk is The Red Lion (20 Great Windmill Street), where Karl Marx and Frederick Engels wrote the *Communist Manifesto*, and the British Museum (Great Russell Street), where Marx worked on *Capital*. Those interested in the history of labour are better served with a three-minute walk to 1 Bloomsbury Street, where you will find Bookmarks. This left-leaning bookstore offers new and used books and pamphlets, and regular events.

About the author

Parashar Kulkarni *studies religion, political economy, and utopias in colonial and contemporary India and the British Empire. His work appears in literary and academic journals such as* Granta, Boston Review, The Sociological Review Magazine, Social Science History, *and the* British Journal of Political Science. *He has a PhD from New York University. See also his* profile page.

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[1] The text uses primary sources TUC (1968) and TUC (2024) for much of the historical information.

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The Shadow of the Tiger: Law and the Literary

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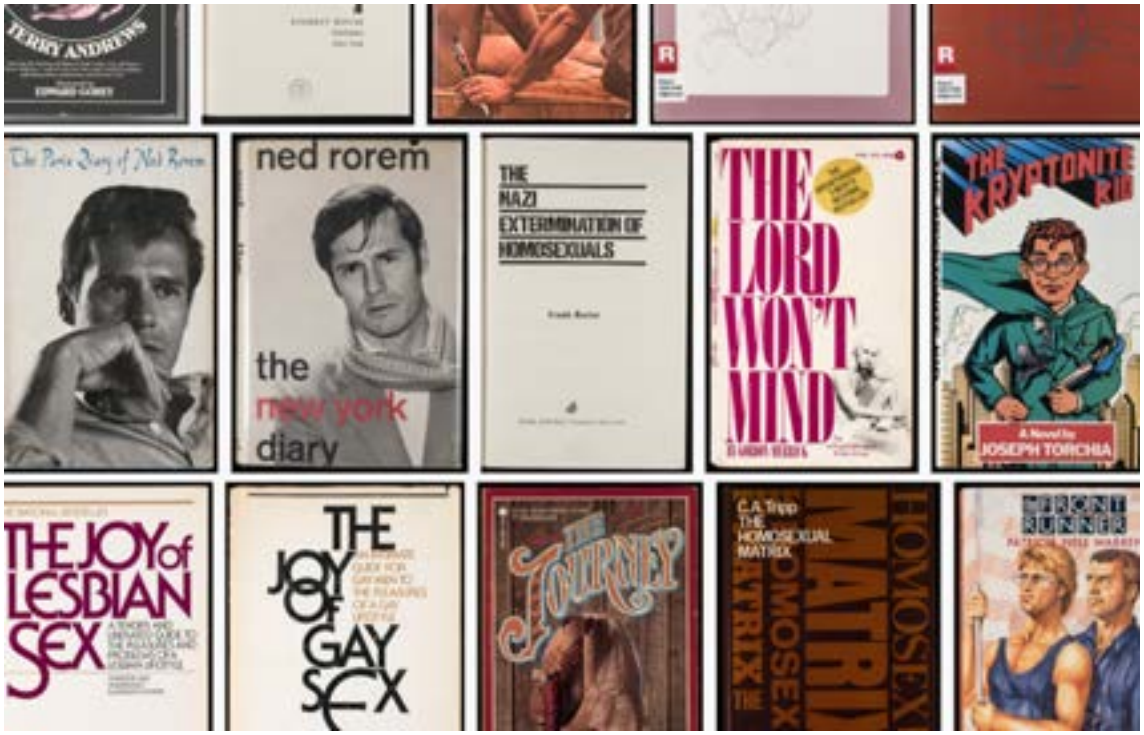
Exterior of Gay's the Word bookshop: CC BY-SA 4.0, via Wikimedia Commons.

Five years after Gay's The Word was established in 1979, it was raided by Her Majesty's Customs and Excise department on 10 April 1984. The booksellers were accused of illegally importing "indecent and obscene" materials in contravention of the 1876 Customs Consolidation Act. This raid, the seizure of over 140 titles, and the subsequent prosecution of Gay's The Word directors and staff on over 100 charges for conspiracy to import indecent books, was known as "Operation Tiger". Police also raided the directors' homes and seized additional materials at ports of



Seized Books! exhibition, Senate House Library, University of London

entry. Operation Tiger also affected Lavender Menace, an LGBT bookshop based in Edinburgh.

Following the promulgation of the Obscene Publications Act of 1959, neither the publication nor the possession of "obscene" material was criminalised outright. However, the protections of this Act only extended to works with literary or artistic merit which had been published in the United Kingdom (UK). The majority of the stock at Gay's The Word had been imported from American institutions, such as the bookstore Giovanni's Room in Philadelphia, since the LGBT publishing industry in the United States was much larger than that in the UK. Some of the seized titles included educational books and academic reference works, like *A Family Matter: A Parents' Guide to Homosexuality* by Dr Charles Silverstein, *The Nazi Extermination of Homosexuals* by Frank Rector, and Christine de Pisan's *The Book of the City of Ladies* published in 1405. The raid also targeted works of fiction, including Nancy Garden's *Annie on My Mind*—one of the first lesbian young adult novels with a happy ending—and *Bodies and Souls*, a novel by the Mexican-American novelist and essayist John Francisco Rechy.

Over £9,000 of stock was seized on 10 April and thousands of pounds more in stock would be taken over the two years Operation Tiger ran. As a result, Gay's The Word faced serious financial hardship. The incident

was reported in the LGBT newspaper *Capital Gay*, which also advertised the inaugural meeting of a community action and fundraising group to support the shop's legal defence. At the initial meeting on Sunday 15 April in South Bank, the community raised £500 for the shop's legal defence. Over the next 24 months, more than £50,000 was raised. Newspapers like *Gay News* and *Gay Scotland* also encouraged their readers to apply political pressure to their local Members of Parliament and to the Conservative Government in general. The prosecution initially appeared to progress when Giovanni's Room was named as a co-conspirator in 1985, but all the charges, including those against Gay's The Word, were dropped by HM Customs and Excise the following year.

Although this case was nominally about illegal imports, it obviously speaks to the relation between homosexuality and the legal definition of obscenity. For instance, *The Joy of Gay Sex* (Silverstein & White) was seized, but distribution of the heterosexual equivalent, *The Joy of Sex* (Comfort 1972), continued uninterrupted. No one was ever convicted in connection with Operation Tiger, but the bookstore, its books, its employees, and directors were nevertheless harmed by the selective application of the law. Indeed, above all, this incident evidences the ways in which censorship laws were, and often still are, preferentially weaponized as tools of control and repression against already marginalized groups.

If you're visiting during opening hours…

… why not go inside and purchase a book? Browse the shelves or ask a member of staff for a recommendation.

About the author

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Writing against Empire: A Bloomsbury Manifesto

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Zaheer at a 1936 meeting of the Association in Lucknow (taken from the Sajjad Zaheer Digital Archive with permission): no attribution (photographer), Photograph of Sajjad Zaheer at the Progressive Writers' Association, University of Texas Libraries Collections, undated.

Only a couple of streets down from Bloomsbury's Russell Square, one can find the ever-bustling Denmark Street. Also known as London's "Street for Sound" and "Tin Pan Alley", Denmark Street has historically been a hub for music shops and producers. The storied musical legacy of Denmark Street happens to be rather well documented. Nestled at the edge of Denmark Street, however, is a lesser-known chapter of its history.

Beneath the famed Regent Sound Studio stands an almost unnoticeable door, number 4, now one amongst few residential properties on the road. In 1934, this door led to the Nanking restaurant where the All-India Progressive Writers' Association was first conceived (Jalil 2014).

On 24 November 1934, leading London-based Indian socialist thinkers and writers Sajjad Zaheer, Mulk Raj Anand, Mahmud uz-Zafar, Ahmad Ali, and Jyotirmaya Ghosh huddled together in the back room of the Nanking restaurant and drew up a rather radical manifesto for the organization. They wrote:

> we believe that the new literature of India must deal with the basic problems of our existence to-day – the problems of hunger and poverty, social backwardness, and political subjection. All that drags us down to passivity, inaction and un-reason we reject as re-actionary. All that arouses in us the critical spirit, which examines institutions and customs in the light of reason, which helps us to act, to organize ourselves, to transform, we accept as progressive (Anand 1976: 6).

The Association was set up soon after the publication of an Urdu anthology titled *Angaarey* that Zaheer and colleagues had edited in 1932. The anthology—consisting of nine short stories and one play—explored themes of sexual desire, Marxism, the cultural perversions of imperial rule, and domestic abuse. Presumably because of its *avant garde* form and its scathing indictment of religious conservatism and imperial sycophancy, the book was met with violent outrage. *The Hindustan Times*—a popular national daily—lambasted the anthology for being mutinous. Religious groups convened in the towns of Lucknow and Aligarh to burn copies of the book. In 1933, four months following the book's publication, the Government of the United Provinces of India recalled all copies of the book, finding that it offended religious feelings and warranted a penalty under the Indian Penal Code 1860. The authors of the anthology remained unshaken, famously running a piece in the *Leader*, an Allahabad-based newspaper, announcing that "they refuse to apologise for it" (Mahmud 1996: 450).

The outrage caused by the book prompted socialist-Marxist writers like Zaheer to set up the All India Progressive Writers' Association. The Association's founding members saw the Association as a space where the revolutionary potential of modernist literature could be channelled to generate anti-colonial protest and critical theory. When he set up the Association, Sajjad Zaheer was studying law in Oxford; it was his father's dream that Zaheer become a barrister. Having recently relocated from India where embers of protest were only beginning to spark, Zaheer quickly found his feet in the ecosystem of critical, anti-capitalist and anti-colonial

thought in London. He joined the Communist Party of Great Britain, gaining the distinction of being one of its early South Asian members. Together with Anand, he would also frequent meetings of the Bloomsbury Group, a modernist, anti-Victorian collective of writers including Virginia Woolf and E M Forster. These cultural and political influences, as Zaheer would later acknowledge, made a progressive literary and political association for South Asia not only possible but urgent.

Bloomsbury remained a protagonist in Zaheer's work even outside of the Association. In 1935, Zaheer started writing an Urdu novella titled *London ki ek raat* (*A Night in London*). The story unfolds over one night in London and follows an intimate evening shared between a young Indian revolutionary and a British woman. Set in Bloomsbury's youth hostels and foggy streets, the novel tells a story of the disorientations of colonial subjects in the metropoles and is hailed for being a milestone in Urdu fiction. Couched in the romance is a moving account of the challenges of navigating cultural alienation, ideas of revolution, and racial shame. Zaheer had to return to India in 1936, but he completed the novella and published it in 1938 (Hashmi 2011).

The Association found a fresh lease of life upon Zaheer's return. Its first Indian meeting in Lucknow in 1936 was presided over by the eminent writer Munshi Premchand. The Association quickly shot into action, facilitating the publication of a string of subversive texts, including a translation of Rabindranath Tagore's *Gora* ("White Man"), and Zaheer's own anthology of progressive Urdu literature, *Roshnai* ("Light") (Open University 2010), and even inspiring the founding of the Afro-Asian Writers' Association.

While at Denmark Street …

… you could also make a short trip to the British Library where one of the copies of Zaheer's banned anthology *Angaarey* is stored (you can find it in the India Records of the Library).

About the author

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Legislation, Regulations and Rules

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Visual Law

On Law, Aesthetics and the Camera

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[A] THE OMNIPRESENT

The camera, as a tool for making photographs and motion pictures, has played a central role historically, and its relevance has increased to the extent that it is deeply embedded in our everyday lives. It has not only been seen as a mode for artistic expression but also as a journalistic device chronicling personal and socio-political memories, and as a medium through which evidence is adduced in courts. While its uses are manifold (Sontag 1977; Berger 2013), I particularly wish to focus on the camera's socio-legal role.

Like the camera, the law manifests in many parts of our lives. This quality of the camera and the law of being *omnipresent* is what I wish to explore in this visual essay (see Figure 1). I will specifically focus on broad intersections between law and the camera through the various segments of this essay.

I will situate my research in this area under the larger realm of aesthetics. I will use and analyse visuals created by the camera, as well as paintings and sketches made by me. By doing this, I will note how the law interacts with the visuals captured by the camera in a plethora of unique ways. From the law's role and response towards memories created by the camera to the impact of the camera in the criminal justice system or on subjects being photographed and their privacy, the intersection is profound and complex. The state, through the law, not only operates to prohibit and restrict the visuals (and their dissemination) created by the camera but also employs the law as a means to use the camera to regulate society for security and other reasons. While the law is omnipresent, it is also absent (and sometimes conspicuously silent) in emerging technological developments, where keeping pace with the widespread use of dynamic visuals is often challenging.

Figure 1: "The Omnipresent" by Hamsini Marada.

Against this backdrop, my work can be viewed through the underlying lens of:

a) the *photographer* as the artist, activist and journalist;
b) the *viewer* of the camera visuals;
c) the *law* that regulates the visuals, as well as the creator and viewer of these visuals.

In Figure 1, I explore the idea of *responsibility* and *ethics* that the photographer, viewer and the law must employ towards the subjects the camera captures and the overall photographic or cinematic representation. While many connections can be drawn between law, aesthetics and the camera through diverse perspectives, in this visual essay, I am exploring select aspects of my research and teaching in my elective module Law, Art and the Camera.

[B] THE MEMORY KEEPER

A photograph is a memory keeper. From its early stages of invention, the camera has been used to preserve personal moments and document journalistic events (Berger 2013: 49). I am interested in looking at the camera as a mnemonic device that helps in building collective memories of communities and the nation. Collective memory is often used as a broad term to understand how people recollect and remember events of the past as

groups, communities and even as a nation (Kekki 2024). This social construction of memory might produce different socio-cultural realities in different identities (Halbwachs 1992). Therefore, it is important to assess *what*, *why*, and *how* people *remember* the moments, especially through photographs and cinema, as well as the legal implications that can ensue from them.

Often, reality has been evidenced through the reports given by images (Sontag 1977: 153). As Susan Sontag says, "Something we hear about, but doubt, seems proven when we are shown a photograph of it" (Sontag 1977: 5). Since photographs are seen as the embodiment of truth, events captured by images gain authenticity, legitimacy and become a passage to building a narrative around that image. When the Argentine Marxist revolutionary Che Guevara died in 1967, the photograph that was transmitted to the world of his corpse was seen as definite proof of his death, and the purpose of this photograph was to put an end to the long speculation of his whereabouts (Berger 2013: 4). However, the photograph of Guevara that was taken by Korda in 1960 is perhaps one of the most reproduced images in this world and has become a symbol of resistance (Lazo 2016). It is photos like these that become a part of the collective memory of future generations.

Like photographs, cinema contributes to cultural and popular memory (Kuhn 2002). Oishik Sircar meticulously analyses and discusses how a legal and cinematic representation of the grave atrocities committed during a pogrom would continue debates on justice and minority rights and further help in building collective memory and producing ways of remembering (Sircar 2024: 3). Additionally, law, as a regulatory tool, plays an important role in overtly protecting photographs and films, by not censoring or imposing unreasonable restrictions on them, especially when they are voicing dissent against a particular institution or regime (Marada 2022). Therefore, the law also aids in preserving collective memory.

While the camera helps in the persistence of memory, it also has the potential to obfuscate the memory. In assessing the relationship between a photograph and truth, Sontag concludes by stating that "photographs are as much an interpretation of the world as paintings and drawings are". She makes this assertion after explaining how photographers such as Dorothea Lange and Walker Evans take multiple shots until they get a photograph that meets their notion of how a certain social issue must be represented (Sontag 1977: 6). Therefore, the image can easily be curated to the satisfaction of the photographer by carefully

Figure 2: "Collective Memory" by Hamsini Marada.

editing, omitting and manipulating a given scenario. I will look at two case studies to substantiate this point.

First is the story of Ashok Mochi, dating back to the communal riots in Gujarat, India, in 2002. To protect himself from the Hindu right-wing rioters who were attacking Muslims, he grabbed a saffron cloth and tied it around his head in fear of being mistaken for a Muslim man. According to Ashok's account of the events, Sebastian D'Souza, a photo-journalist, asked Ashok to pose for a photo. Ashok grabbed an iron rod nearby and posed with outstretched arms that looked like a war cry against Muslims. This image was published in the newspaper. The next day, Ashok Mochi became the face of the Gujarat riots and was misconstrued to be a rioter. He eventually was also charged under sections 435 and 436 of the Indian Penal Code 1860 for crimes of arson and causing destruction by fire and was arrested and served 14 days in jail. After this, he was released on bail (Mander 2016).

The second is the movie *The Photographer of Mauthausen*, which I have screened in my class (Targarona 2018). It is based on real events that took place in a Nazi concentration camp where a Catalan prisoner used his office job to steal the photo negatives of the

atrocities committed there. These photos later played a crucial role in the prosecution of higher-rank Nazis during the Nuremberg trials. But the movie also depicts how an SS officer tries to manipulate some images by editing them through light and says: "This is art. Some pictures have to be touched up, some others, only the staging." The movie also depicts encounter killings that were staged as escapes and were documented with the camera for official records (Targarona 2018).

While the notion of the most truthful image affirms our faith in the camera as a mnemonic device, manipulations made to images make us question the veracity of the documentation process and the memory we are made to remember. With artificial intelligence, deepfakes and other technological advancements, the apprehension only worsens.

I would end this segment with a quote by Jacques Derrida from *Archive Fever*:

> … an archive is not a question of the past, …
>
> [rather], It is a question of the future, the question of the future itself, the question of a response, a promise and of a responsibility for tomorrow. (1995: 36)

Therefore, photographs as sites of memory need to be made and preserved with a lot of care, consideration and empathy towards the subject and the shared meaning and narrative that will be built for the future. Law and ethics, as independent and interrelated disciplines, play an important role in the preservation of memory.

[C] THE JUSTICE SYSTEM

The camera holds an interesting place in the justice system. On the one hand, photographic records are extensively used in sites of investigation and adducing evidence in the courts. On the other hand, severe apprehension exists regarding the use of cameras within courtrooms and on court premises. While the former can be justified, given the sensitivity of some cases, the latter seems to be an unfounded fear couched in the garb of security. This becomes particularly fascinating when mobile photography is not frowned upon, but carrying a camera can attract attention.

There is another dimension to photography, especially in the criminal justice system—namely, the emotions that the images of a person under trial or a convict evoke in the minds of the public. I wish to focus on the nature of these images and the ethics of viewing them.

For example, mugshots have become a part of popular culture through film and media. They

Figure 3: Aerial view of the mural pasting, Tehachapi, California—art and photo courtesy of JR-ART.net.

are obsessively romanticised to the extent that auctions and exhibitions are held for mugshots (Finn 2009: 1). Most importantly, mugshots are photographic records created to indicate criminality. This leads to the immediate "othering" of the subject in the mugshot by the viewer. The gaze towards the carceral system has always been of fear and exclusion.

Against this backdrop, it is interesting to see the case study of the mural artist JR, who undertook a project in 2019 in a maximum security prison located in Tehachapi, California (JR 2019). He worked on a collaborative art project with the inmates along with formerly incarcerated individuals and prison staff, by photographing them and creating a magnanimous mural installation in the central yard (Figure 3). He also recorded their individual stories and published them in a podcast. This project reconnected many prisoners with their families and was life-changing for some of them (JR 2022). This is a great example of how the gaze towards the inmates can be softened with sensitivity as opposed to the hardened approach adopted towards the visuals from the carceral system.

[D] THE GAZE

Taking photographs is a voyeuristic act; it encompasses keen observation and is also a form of passive participation in whatever is happening (Sontag 1977: 11). The gaze of the photographer is inevitably linked to their positionality and identity vis-à-vis their subject's identity. Lalla Essaydi, a Moroccan photographer, created a series of photographs called *Harem* (Jansen 2019), in which she "mimics and subverts Orientalist tropes". In an interview she stated:

> I am using the female body to complicate assumptions and disrupt the Orientalist gaze. I want the viewer to become aware of Orientalism as a projection of the sexual fantasies of Western male artists, in other words, as a voyeuristic tradition, which involves peering into, and distorting private space (Nysten 2017).

Guerilla Girls, an anonymous group of feminist artist activists have criticised the gender and ethnic bias and the "male gaze" in art, film and pop culture (Guerilla Girls 2021). Annie Leibovitz, despite being an acclaimed female photographer who is well-known for her dramatic celebrity portraits, has been criticised for not doing her subjects justice in capturing their dark skin tones due to her white gaze (Bero 2022).

Amidst these debates over identity and gaze, I want to also address the concept of gaze from the perspective of privacy and consent. The celebrity phenomenon and the paparazzi culture have spiralled debates on privacy, personal space and ethics in photography. One of the cases that shocked the world was a photograph taken at the scene of the death of Diana, Princess of Wales (an event often linked to the car in which she was travelling being aggressively chased by the paparazzi in Paris). The legalities surrounding the invasion of privacy versus media outlets' contention of public interest in the publication of the photograph have been dealt with in many studies (see, for example, Rolph 2014).

Douglas v Hello! is an important case that discusses privacy and breach of confidence with respect to photographs of actors Michael Douglas and Katherine Zeta Jones leaked by the paparazzi to the media outlet *Hello!* magazine. In this case, the Court of Appeal differentiated "photographic information" from verbal description and asserted that:

> Special considerations attach to photographs in the field of privacy … They enable the person viewing the photograph to act as a spectator, in some circumstances a voyeur would be the

> more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive (*Douglas v Hello!* 2006: 157).

The notion that a photograph is information and thereby superior to the spoken word has been contended by various theorists who have written on photography, and, admittedly, more nuance can be brought to the reading of a photograph (Rolph 2014). Nevertheless, it does not take away from the fact that photographs can be intrusive and violative if snapped without consent.

The issue of lack of consent often surfaces in street photography. Street photography is candid photography done in public spaces. While it is not necessarily so in all cases, human subjects are usually an integral part of this genre. There are some ambiguities surrounding the legalities of street photography because it is not explicitly prohibited in many countries. However, ethical concerns often arise, especially in situations when a subject is apprehensive or uncomfortable about being photographed. Photographers like Bruce Gilden have taken the concept of candid photography a notch higher by aggressively confronting the subject from a close distance and taking their picture to capture so-called "authentic expressions" (Helm 2024). This makes us question at what cost photography is creating art or documenting facts.

This brings me to the work of the photographer Arne Svenson, who further pushes the definition of street photography. In the series titled *Neighbours*, Svenson used a telephoto lens to take photos of his neighbours through the expansive glass windows of Manhattan. The faces of the subjects were not usually visible, but it still makes us reflect on the process of peering into the domestic spaces of people to capture particular moments. When his neighbours learnt that they and their children were the subjects of Svenson's photography, they filed a legal suit for breach of privacy. Both the district court in 2013 and the Appellate Court in 2015 dismissed the action in favour of Svenson (*Foster v Svenson* 2015). While the court stressed the First Amendment of the Constitution of the United States (1789) on freedom of expression, Justice Renwick made an observation that photography can be legitimately intrusive and offensive, and complaints about it would be best addressed to the legislature (*Foster v Svenson* 2015). This case reminds me of the Alfred Hitchcock movie *Rear Window* (Hitchcock 1954). The protagonist photographer picks up his camera and uses it to watch his neighbours and keep himself entertained because he is confined to his house due to a broken leg. In

Figure 4: "Windows" by Hamsini Marada.

the film, his actions were shown to be frowned upon by both his nurse and his girlfriend. However, the fact that he was able to detect a crime due to his incessant observation through the camera seems to be the only redeeming factor in the movie for this dubious behaviour.

In this context, I position the artwork *Windows* (Figure 4) as a metaphor for one's personal space, be it the confines of their home, where the window acts as a means for the inhabitants to look outside but not the other way round, or for people or celebrities occupying public spaces but in a private sense,

where the metaphorical window exists as a barrier to unhinged access—which technically means that not everything or everyone can be photographed at all times. I have purposefully made the buildings in the painting look like the film rolls of a camera.

Noting the reaction of the law in the abovementioned cases, it becomes imperative to look beyond the law and reflect on the ethical considerations involved in photography. Therefore, one must employ nuance and context to take photographs in public spaces.

[E] THE POWER

Being in possession of a photograph is power.

Although paparazzi, photo-journalists, or anyone in possession of the photograph and the knowledge can thereby command power, I wish to focus particularly on the role of the state and its agencies, including the police. In this segment, through the painting *Pieces of Power* (Figure 5), I visually represent how the state promotes or suppresses photographs. I also highlight the state's use of the camera to survey and monitor individuals, communities, and so forth, which in turn impacts their behaviour.

The painting *Pieces of Power* is inspired by the lines from George Orwell's *Nineteen Eighty-Four*:

> Power is in tearing human minds to pieces and putting them together again in new shapes of your own choosing (Orwell 1949: XX).

I depict a cubist human head cut into multiple pieces and re-arranged to the liking of the state and its agencies. This painting portrays the level of control the state has over our minds, our behaviour and our activities. I link this control to how the state treats the images or visuals from the camera. Costas Douzinas propounded the phrase "regime of visuality" to articulate how every epoch, depending on the political power in dominance, supports a certain kind of imagery and rejects or represses the ones that harm its political aesthetics (Douzinas 2000). Drawing from the regime of visuality, it can be clearly seen how state authorities have suppressed photographs emerging out of political movements or photographs that shed light on government failures during the pandemic in countries like India, by censoring them and subjecting photojournalists to arbitrary travel bans (Hassan 2022). This, I argue, also impacts and manipulates the collective memory of the nation in the long run (Marada 2022).

The "eye" in the painting is an adaptation of the Orwellian Big Brother, which is a synecdoche of mass surveillance by the authorities. Visuals through

Figure 5: "Pieces of Power" by Hamsini Marada.

surveillance cameras with inbuilt face recognition technology, social media or even smartphones are constantly used by the state to monitor activities that are not of the state's "own choosing" and are used to suppress dissensus (Melgaco & Monaghan 2018: 2).

This painting laments the use and misuse of the camera by powerful state authorities which results in the alteration of individual behaviour as well as distorting the collective memory.

[F] CONCLUDING NOTES

Ever since the creation of the first camera, still and motion photography have perpetually struggled with establishing a serious place for themselves in the realm of fine arts (Berger 2013:17). This gatekeeping stems from the argument that the camera merely replicates reality rather than creating it, *albeit* subjectively, which is what "real" art seems to

be doing. However, despite this ongoing debate, the camera has not only been seen as an instrument for artistic expression but has also become a device without which we cannot conceive life in this contemporary world.

Looking at the law and the camera through the lens of memory, justice, gaze and power, the overarching theme in this visual essay has been that of developing ethical and responsible ways of engaging with the camera. The essay also reflects on the role and responses of law in various scenarios. It concludes that ethics, as a field, can play an important role in filling the gaps in understanding and interacting with the camera where the law is ambiguous or silent.

About the author

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Rethinking Family Mediation: The Role of the Family Mediator in Contemporary Times by Rachael Blakey

Marian Roberts

Rachael Blakey (2025) *Rethinking Family Mediation: The Role of the Family Mediator in Contemporary Times*, published by Bristol University Press, ISBN 978-1529232967

[A] INTRODUCTION

The emergence of mediation in the West in the late 20th century exemplifies the radical and remarkable rediscovery of an ancient process of dispute resolution. A large, cross-disciplinary body of dispute resolution literature now valuably informs understandings about the nature of mediation, its conceptualization confirmed by scholars across a variety of disciplines and across fields of practice (Douglas 1957; 1962; Stevens 1963; Stenelo 1972; Gulliver 1979; Menkel-Meadow 2012; Palmer & Roberts 2020; Moscati & Ors 2020; Menkel-Meadow 2022). These accounts link mediation definitively to a decision-making process with negotiation at its core, where the parties are themselves engaged as negotiators and as decision-makers. Cross-cultural empirically based research delineates the universal features of the negotiation process which mediation serves—the interlocking cyclical process of communication exchanges that drive the linear process of information exchange, learning, option consideration and evaluation leading to joint party decision-

making (Gulliver 1979).[1] An outcome may well flow from the process itself with improved understanding of the relative positions of the parties as a result of information exchange and learning—transpiring, in fact, there could be no issue in dispute, or in the creation of a fresh option rather than from any modification of either party's perceived interests or need to compromise. The defining characteristic of the mediator in fulfilling the role of a non-aligned facilitator of other people's negotiations is the recognition that s/he is not partisan, acting neither as partisan supporter nor in exercising determinative authority (Simmel 1950 [1908]). Simmel's primary analytic distinction clarifies the structurally intermediate position that the mediator occupies, whatever their style, range or strength of intervention, from the minimally unobtrusive to the more directive.

Recent ethnographic research highlights the radical transformation that has occurred in the formal civil justice system in this country where the primary responsibility of the court is now explicitly identified as one of sponsoring settlement (S Roberts 2013). Consequently, judicially endorsed negotiation leading to the settlement of the justiciable issue increasingly supersedes the historic primary adjudicative role of the court acting as the agency of rule-based trial and judgment. Official endorsement of what is termed non-court dispute resolution (NCDR) relegates access to court to a last resort (S Roberts 2009; 2013; Family Procedure (Amendment No 2) Rules (FPR) 2024).[2] This transformation highlights the importance of distinguishing judicially imposed settlement processes from independent and voluntary out-of-court dispute resolution processes such as mediation, and, in particular, of clarifying their respective institutional locations. As a relatively newly emergent dispute resolution process, family mediation has had a struggle to establish its identity as a discrete and autonomous dispute resolution process, distinct from the formal justice system as well as from other professional interventions (legal, judicial, welfare, advisory or therapeutic) (M Roberts 2014a). The Family Mediation Council (FMC) *Code of Practice and Guidance* (2025), which governs the accreditation requirements for family mediators, embodies the professional and ethical

[1] Negotiation is not to be confused with or conceptualized as bargaining in accordance with North American understandings and Harvard Negotiation Programme in particular. Gulliver's processual understanding of negotiation locates bargaining in a proper context, as a particular, mostly late phase in some negotiations (Gulliver 1979).

[2] The FPR 2024 (part 3) require the court to consider, at every stage of proceedings, whether non-court dispute resolution is appropriate and, if so, the court will adjourn proceedings or a hearing in proceedings. See also the Civil Procedure Rules 1998 which enacted the procedural framework of the Pre-Action Protocols (promoting settlement through negotiation) and the later phase of case management involving the direct judicial sponsorship of settlement along the litigation track.

principles and delineates the boundaries of practice in place to protect the integrity of the family mediation process and to safeguard the public.[3]

The largest body of empirical mediation research has been focused on family mediation, encompassing a range of perspectives and conclusions which throw light on theoretical and practice issues.[4] Early research conducted in the West largely focused on settlement rates, cost-effectiveness, process benefits and client satisfaction.[5] Acknowledged methodological and other difficulties (for example, variations in research populations, measures and dispute settings and the proliferation of practice models and styles) have made generalized findings or reliance on single studies problematic (see Dingwall & Greatbatch 1993; 1995). Notwithstanding, convergence has emerged on many questions over the decades that indicate the robustness of some major findings in the field of mediation practice. Such findings show, for example, the complex interaction of different factors such as the pre-existing characteristics of the dispute, the disputants, and the qualities of the mediator, as well as those pressures such as power imbalances that negatively affect the experience of mediation and the quality of outcomes.[6] Research has shown that addressing underlying tensions and obstacles to agreement in high-conflict family disputes is more likely to achieve improved co-operation between parents and better outcomes for children and that what is essential for success above all is the skill, knowledge, empathy and experience of the mediator (Thoennes & Pearson 1985; Kelly 2004; Trinder & Ors 2006; Kressel & Ors 2012; Walker 2012).

In the past, the relationship between the theory and the practice of mediation has been portrayed as a problematic one, characterized by a theory/practice divide (Rifkin 1994). However, nowadays, an alternative narrative posits a less oppositional experience of the interaction between theory and practice in respect of mediation. This is a field acknowledged

[3] The four fundamental principles of mediation have been identified as the voluntariness of the process, the confidentiality of the relationship between the mediator and the parties, the impartial role of the mediator and the procedural flexibility of the process (McCrory 1981). McCrory goes so far as to say that, if these principles are altered or if one or more is absent, then the process cannot be characterized legitimately as mediation.

[4] See, most recently, for example, Barlow & Ors (2017); Moscati & Ors (2020); Roberts & Moscati (2020); Busch (2023); Barlow & Ewing (2024).

[5] For example, Thoennes & Pearson (1985); Walker & Ors (1994); Kelly (2004); Emery & Ors (2005).

[6] Power in negotiations, defined as the capability of one human actor, or group of actors, to make others do things they would not otherwise have done, has long been recognized to have always been "there" structurally and systemically, with studies identifying the many sources of complex power dynamics (such as money, love, truth, personal qualities) that complicate all negotiations including mediation (Palmer & Roberts 2020).

to be "experiential", one that exemplifies the concepts and practices of the "theories-in-use" school in the development of professional education (for example, Schőn 1983; Menkel-Meadow & Ors 2005). The importance of "grounded theory" also highlights the recognition that good practice and the reflections of experienced practitioners constitute a rich resource for the development of the best models and theories (Jones 2001). Family mediation in this country has been the beneficiary of close collaboration between researchers and practitioners, leading to the construction of a range of policies and practice guidelines on domestic abuse, the role of children in mediation, and cross-culture, gender and communication strategies (see, for example, Garwood 1989; Astor 1994; Keshavjee 2013; Stokoe 2013: Allport 2020; Moscati 2020). Far from theory posing problems for practice, new intellectual and experiential insights generate, on the contrary, fresh and imaginative directions for thinking about the field. Research and theory, taking many forms, can interweave constructively with practice in a recursive relationship of mutual influence and significance, informing understanding and therefore practice experience. While the interests of researchers and practitioners do not necessarily coincide, common understanding and the co-operation, trust and confidence of practitioners is essential for research to be informed by practice and for practice to be informed by research.

[B] RECENT FAMILY MEDIATION RESEARCH

This review focuses on Rachael Blakey's monograph, *Rethinking Family Mediation: The Role of the Family Mediator in Contemporary Times*, which, while posing "a simple question—what is family mediation?", has an ambitious aim, namely, to investigate the development of family mediation in the United Kingdom over the last 5 decades (3). Its overarching focus is on both the role of legal norms and expectations in the mediation process and on the role which family mediation plays within the contemporary family justice system (3). Within this legal framework, the monograph sets out to explore mediation as a form of "non adversarial justice" in the context of the English and Welsh family law systems (13).

The monograph posits two opposing propositions: first, that of a "dominant" understanding of the mediator as promoting a "restricted and facilitative role" in comparison with that of the judge or the evaluative advisory role of the lawyer: and, second, that this "limited role" now fits poorly into the current vastly different contemporary family justice landscape, unable to address both family law matters and a new and varied client base (4-5). The defining landmark of change is said to be marked by the implementation of the Legal Aid, Sentencing and

Punishment of Offenders Act 2012 (LASPO) which removed legal-aid funding in various areas and, in particular, access to legal aid for private family law proceedings (other than in exceptional circumstances such as domestic abuse). In denying legal aid for legal advice and representation, LASPO removed what had been the primary legal route for settling family disputes, namely, by the bilateral negotiation of lawyers.[7] In tracing the changes that have occurred, the monograph draws a distinction between what it terms "informal mediation" and "formal mediation", the latter a process described as still in its infancy and which the monograph seeks to uncover (5).

As its "key driving force", the monograph aims to provide a "richer, multifaceted and nuanced understanding of justice that takes into account the contemporary family law landscape" (12). While mediation has "the potential to become a family justice apparatus", it is, "put simply, an unfair process" because of the inability of "the limited mediator archetype" to address issues of power imbalances and domestic abuse (12). Here, the monograph introduces two mediator archetypes, a "limited mediator" archetype and a "flexible" mediator archetype.[8] The former is confined by "facilitative" constraints in adopting a "circumscribed set of practices, such as information provision" to ensure that "decision-making power rests with the parties at all times" (69). This "limitation" is attributed to a strict view of mediator neutrality" (90). The "flexible mediator" archetype, on the other hand, "openly evaluates" as an "authentic" part of her practice (90). The fundamental premise of the monograph and what it considers to be the main problem is that, since LASPO, there has been a change from a facilitative to an evaluative mediator role, now embodied in the flexible mediator type, which has not been openly acknowledged. One of the central arguments of the monograph is that this transition, characterized by a fundamental lack of transparency, has been "covered up" by the family mediation profession and its regulatory bodies (108, 110, 114, 181). Child welfare excepted, it is stated that evaluation has been historically concealed under the guise of facilitation by a "facilitative proxy" (108). Based on this premise, the monograph argues that family mediation should now acknowledge this "cover up" (90, 108, 202). The intention of the monograph is to expose, as "the real issue", this unacknowledged and unregulated transformation of practice in family mediation (139).

[7] Most family disputes were settled in the recent past by bilateral negotiations between lawyers with relatively few cases having to resort to court. With that negotiation option now denied for many post-LASPO, mediation is promoted, misleadingly, as the alternative to court rather than, more accurately, as the alternative to lawyer negotiation.

[8] See below for examples of the way the abstract archetype will transition into an actual practice intervention.

While the monograph states that it is "more concerned with invigorating the debate on family mediation and family justice than pushing a particular agenda" (212), its concluding recommendation is that the family mediator now needs to be recognized as a legal professional, to be regulated like other legal professionals in providing a legal service. This is necessary in order for the family mediation profession to better support "contemporary family justice" (212).

The monograph is divided into two parts. Part 1 describes government policy concerns and how access to justice has changed from its traditional understanding of access to the court to a different contemporary conceptualization of justice alongside which family mediation has evolved and become aligned as a "family justice apparatus". The approach to the data is considered in three sections: first, on screening by family mediators for suitability for mediation by means of the mediation information and assessment meeting (MIAM), attendance at which is now a court requirement for making a family proceedings application: second, on neutrality and how it is perceived as "unconditional" by the regulatory bodies and by its members; and, third, on how those conceptions and practices support family justice in respect of the quality of mediated outcomes in the light of the impact of "the shadow of the law" on mediation practice (153; see Mnookin & Kornhauser 1979).[9]

Part 2 covers an empirical study of the flexible mediator archetype in relation both to what are described as the four mediator functions—helper, referrer, assessor and intervenor—and to understandings of family justice. Its concluding section makes recommendations for family mediation to be recognized as a legal service, highlights barriers to the reform of family mediation and its regulation in the light of the impact of LASPO, and identifies important areas for further research.

The policy-driven and socio-legal method adopted by the monograph is based on the recognition that the law and family mediation, which, while the latter is stated as having "no single meaning", are both legal and social phenomena (16). Two core theories underpin this study: first, a critique of mediator neutrality; and, second, a theory of mediator roles

[9] Mnookin and Kornhauser recognized that the shadow of the law was only one factor that had an impact on settlement outcomes, with other factors such as uncertainty in the law, parental preferences, transaction costs and strategic decisions playing their part. Notwithstanding the ideal of equality of formal justice before the law, exploitation of the weaker party by the stronger party is recognized to be endemic in the civil justice system and also where new inequalities can be created depending on a party's wealth, status, legal endowments, etc (Auerbach 1983; Ingleby 1994; Mather & Ors 1995; Woolf 1996). Concerns about equality and fairness apply particularly for those financially disadvantaged in divorce proceedings, such as vulnerable mothers and older women (see, for example, Hitchings & Ors 2023).

along a facilitative–evaluative continuum based on the Riskin grid (73). The central claim of the monograph is that its empirical data demonstrate that a fundamental transition in the practice of family mediation has occurred, and that what is termed the "contemporary family mediator", now acts in a "quasi legal role" and in "an ever-increasing space for legal norms"(14). Empirical data are also drawn on to substantiate the argument that the current regulation of family mediation is insufficient to meet these new demands.

The empirical method is based on a two-stage study: first, of the perspectives of the regulatory bodies overseeing the practice of family mediation; and, second, of the perspectives of family mediators themselves. A critical question the monograph asks is whether the views of the practitioners had changed over the years (22). The study of the regulatory bodies consists of a content analysis of family mediation codes of practice. The thematic analysis adopted is qualitative and subjective.[10] Six codes of practice are examined in two groups: a) between 1985 and1998; and b) between 2018 and 2019. Stage 2 of the study consists of semi-structured qualitative interviews, taking place in 2019, of 17 family mediators lasting on average just under an hour (59 minutes). The interviewees were identified by their different professional backgrounds, described as "legal", "therapeutic" and "hybrid". No gender differences were noticeable and the interviewees represented different regions in the country. More than half (59%) had over 20 years of experience of family mediation practice, 12% had 10 to 19 years of practice and 29% had under 10 years of practice in the field.

The findings from Stage 2 were subsequently analysed "in light of a particular hypothesis rather than a wholly objective standpoint" (24-25). The particular hypothesis is not elaborated but it is acknowledged that "[T]hese limitations do not negate findings but rather demonstrate the effects of one's lived experience upon the interpretation of data" (25). While Blakey's footnote 29 cites how "incredibly difficult" it is for mediators to maintain neutrality in the light of power imbalances:

> [S]imilarly, it is difficult for a researcher to remain completely objective as they become acquainted with their research participants … and will have subconscious views about a participant, the purpose of the data as well as the participant's responses (25; see also footnote 26 below).

[10] The problematic nature of an objective and quantitative content analysis is acknowledged.

[C] COMMENTARY

The overarching legal theoretical framework this monograph adopts, with its exclusively family law and justice focus, may be contrasted with the broader interdisciplinary, cross-cultural dispute resolution paradigm which frames all major scholarly studies of negotiation and mediation.[11] Notwithstanding, the monograph provides a valuable exploration of important developments in the family justice system: first, by foregrounding for debate the significant question about the proper institutional location of family mediation in relation to the formal justice system; and, second, by seeking to track developments in family mediation practice in the context of the damaging changes imposed by LASPO with its removal of legal aid for family proceedings.

In viewing mediation through the lens of family law and not through the lens of the dispute resolution discourse, it is not surprising that questions of ambiguity arise, as exemplified in the fundamental question the monograph aims to investigate: "What is family mediation?" (3). Alongside early attempts of professional groups such as lawyers, family therapists and probation officers to lay claim to family mediation as part of their existing practice, some academic studies also struggled to get to grips with the nature and purpose of family mediation (see, for example, Murch & Hooper 1992; Walker & Robinson 1992).[12] Simon Roberts addressed prevailing misunderstandings as follows:

> [The] difficulty in locating family mediation seems to lie in the fact that … [Murch & Hooper] inhabit a mental universe dominated by the now aging dyad of "justice" and " welfare" so they find it difficult to conceive of a form of intervention which is neither part of "the family justice system" nor part of the "auxiliary support services". Their proposed institutional destination for mediation seeks to continue "the dynamic synthesis of justice and welfare which is fundamental to a modern family justice system" (Murch & Hooper p129). While there is obviously nothing wrong with either justice or welfare, mediation is about something else. It is primarily directed towards the support of private ordering in seeking to facilitate joint decision-making through party negotiations; so we should not be surprised that Murch and Hooper experience difficulty in fitting it into either of the principal boxes they have in mind. … While vigorous efforts are being made … to establish mediation as an autonomous form

[11] See Simmel (1908); Douglas (1957); Stevens (1963); Gulliver (1979); Abel 1982; Felstiner & Ors (1980-1981); S Roberts (1993); Gulliver (1997); Menkel-Meadow (2005; 2012; 2020); Moscati & Ors (2020); Palmer & Roberts (2020); Busch (2023).

[12] See also Marian Roberts (2014b; 2016) for an analysis of the evolutionary phases, characterized by importations from different professional groups and by governmental pressures, that have shaped the development of family mediation.

> of professional intervention with carefully circumscribed boundaries, parallel attempts are being made … to co-opt mediation and absorb it into existing practice (S Roberts1993: 6).

More specifically, the referential and methodological framework of this monograph is informed, first, by the assumption of an "absolute vision of mediator neutrality" (69) and, second, by a theory of mediator orientations along a facilitative–evaluative continuum based on one of the two dimensions of the 1996 Riskin grid. The two mediator archetypes are devised to align both with the Riskin grid continuum and in relation to LASPO—the facilitative "limited mediator" (pre-LASPO) and the evaluative "flexible mediator" (post-LASPO), the former characterized by "her absolute commitment to neutrality"(108). The integration of these two theories—of mediator neutrality and of the facilitative–evaluative mediator role continuum—underpins the core hypothesis of the monograph and its interpretation of third-party involvement in family mediation: "[P]rimary attention is placed on the idea of mediator neutrality, which is then situated on a continuum of facilitative to evaluative mediator *practices*" (69, emphasis added—note how language here transforms an archetype into a practice; see also footnote 8 above).

This methodology, the conceptualizations and the empirical data relating to family mediation raise three main concerns. First, the reliance on a methodology, the 1996 Riskin grid, which was discredited by Riskin himself and others, because of the false dichotomy it created between facilitation and evaluation. This false polarity informs the binary archetypes adopted by the monograph to describe mediator roles, despite the monograph's own acknowledgment both of this fundamental flaw and of the way it has been misapplied in other research studies (see 74 and 75, footnote 6 in Blakey). Second, analytic categories and abstract concepts are conflated with skills and practices, for example, in conceptualizations of "neutrality" and of "facilitation" and where abstract archetypes transition into actual practice skills (69: see above for examples of such critical terminological confusion). Third, assertions about family mediators' changing understandings and practices are unsubstantiated by the empirical findings.

[D] THE RISKIN GRID

This grid, devised by Leonard Riskin in 1996 in North America, aimed to make sense of the "chaotic reality" in respect of the enormous range of diverse processes all being called mediation at that time. The grid consisted of two intersecting continuums, anchored at each end, one by facilitation

and evaluation and the other by a problem definition continuum, ranging from narrow to broad. Where these two dimensions intersect, a quadrant is produced representing, overall, a mediator's "orientation" (Riskin 1996).

The Riskin grid very soon faced serious and widespread criticism which pointed to its several weaknesses and limitations, in particular, that the facilitative–evaluative continuum structure created a false dichotomy. Leonard Riskin, invited in 2003 to revisit the grid by Yale Law School, admitted that he was himself troubled by several aspects of the grid *and* the way it was being used and that "15 minutes later it began to dissolve" (Riskin 2003: 7, 8). Riskin acknowledged that what had occurred was the conflation of ideal types with actual practices, with concepts treated as real, actual orientations in practice—"I am sure that my contribution contributed to the reification and dualistic thinking" that resulted (Riskin 2003: 7, 14). The main criticisms of the 1996 grid, identified three key deficiencies: 1) the failure to distinguish different kinds of decisions in and about mediation; 2) its limited focus and static quality; and 3) the fundamental idea that the grid can depict overall mediator orientations as it takes account of only two dimensions of mediator behaviour (ibid: 10). A narrow construction of evaluation (ie evaluation of the legal position, its strengths and weaknesses with a prediction of the likely court outcome) omitted any reference to disputants' own evaluating role. An equally narrow construction of facilitation (assisting with negotiations without evaluation) omitted the essential evaluation of options phase inherent in all mediated negotiations. Thus, a false binary resulted in a "limited, dualistic and formalistic reading of the facilitative and evaluative role of the mediator dimension of the grid …":

> an unrealistic notion that excludes attention to many other issues in mediator behaviour, obscures much about what mediators do, and ignores the role and influence of the parties … Mediators engage in behaviours that fit both categories all within the same time block and decide on the moves at least partially in response to the personalities and conduct of the parties. … and the interactive and dynamic process through which most thoughtful mediators tend to decide what to do in mediation. … a particular move can have both facilitative and evaluative aspects or objectives or effects … *It seems clear that labelling a mediator's approach to the role of mediator as either facilitative or evaluative which offers convenience and perhaps a comforting belief that we understand what's going on – may obscure what is really going on* (Riskin 2003: 14, 30, 17, 15, emphasis added).

In 2003 Riskin devised a new grid (refined in 2005), intended to facilitate good mediation decision-making and to bring two matters to attention—the huge range of potential decisions in and about mediation and the extent to which various participants could affect those decisions (Riskin

2003). This new grid, rather than focusing exclusively on the mediator, gave equal attention to all other participants, particularly the parties, as well as to their lawyers, taking account of time and the dynamic nature of decision-making (ibid: 34).[13]

Other critics highlighted the additional factors that the old Riskin grid had failed to take into account, for example, differences between the facilitative focus on *process* and the process benefits of mediation such as improved mutual understanding, communication and co-operation; and the narrower goal focused on substantive *outcomes* and a purely settlement approach to the legal issues.[14] Furthermore, the old grid failed to distinguish between the *nature* of the mediator's intervention and the *level* of intervention in which the mediator engages. As noted, this is not the same thing and a mediator "who is facilitative in style can be either active (interventionist) or passive (non-interventionist) while an evaluative mediator can vary equally in her respective style" (Gewurz 2001: 143). This active/passive distinction is an important consideration in assessing how a mediator addresses power imbalances. Riskin himself conceded that the terms "directive" and "elicitive" better described the impact of the mediator on party determination than those of "evaluative" and "facilitative". Even so the complexities and ambiguities of actual practice continue to complicate the change of terminology—"nearly any move by a mediator can have both directive and elicitive aspects, intents or effects" (Riskin 2003: 32). Critics noted too the crucial impact on their intervention of the very identity of the mediator and the manner through which they enter the process in addition to their style or level of

[13] Gulliver's empirically based cross-cultural processual model of mediation as serving a negotiation process makes clear that an evaluation phase is inherent in any negotiation process as essential for the parties to be able to assess the pros and cons of available options in order to be able to make informed decisions (Gulliver 1979). Gulliver also describes the range of strengths of intervention of the mediator as "useful indices" on a continuum, from virtual passivity to "chairman" to "enunciator" to "prompter" to "leader" to "virtual arbitrator": "This, of course, says nothing about the effectiveness of the strategies" (ibid: 220).

[14] Lon Fuller's definition of mediation is of a process whose core quality is the "capacity to reorient the parties toward one another, not by imposing rules on them but by helping them achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions towards one another" (Fuller 1971: 325).

intervention (Gewurz 2001: 144).[15] The old grid also took no account of the relevance of voluntariness of participation of the parties, a cornerstone principle of mediation and a critical safeguard against mediator pressure or coercion. Voluntariness applies too to the participation of the mediator whose ethical duty it is to withdraw from the process where there are serious concerns about imbalances of power and other inequalities.

In adopting the discarded old Riskin grid, the methodology of this monograph is problematic not only because it lacks the grid's second dimension, the narrow–broad problem definition, both dimensions of which informed a mediator's "orientation", but also because it perpetuates the false facilitation–evaluation dichotomy.

[E] NEUTRALITY AND FACILITATION

The alternative dispute resolution (ADR) literature adopts the term "neutrality" as an umbrella concept where the terms "third party neutral" or "professional neutral" refer to the general, non-aligned, non-partisan stance of the mediator or arbitrator. Scholars have long recognized that maintaining an intermediate position between the disputants is one of the most essential attributes of the effective mediator (see Simmel 1950 [1908]; Gulliver 1979; Fuller 1971; McCrory 1981; 1985; Cobb & Rifkin 1991; Menkel-Meadow & Ors 2005; Palmer & Roberts 2020). As mentioned, Simmel contrasts the non-aligned role of the mediator with that of the partisan because the mediator stands either outside the interests of the parties or because, although engaged, they stand in a structurally intermediate position between the parties (1950 [1908]: 49-50). "A mediator has no ability to give a judgement or to make a decision binding on the disputing parties; that is, he is a facilitator but not an adjudicator" (Gulliver 1979: 209).

Complex applications of neutrality also emerge in the cross-cultural literature that reveal a more nuanced and explicit understanding of

[15] Kressel & Ors' study, exploring mediator stylistic variations in a sample of professional and novice mediators, used observational data and multidimensional scaling to identify two dimensions underlying mediator performance: a) stylistic orientation (relational versus settlement-oriented); and b) level of empathic "attunement" (Kressel & Ors 2012). Qualitative analysis identified facilitative and evaluative variants of the settlement orientation and transformative and diagnostic variants of the relational orientation. The facilitative and diagnostic mediators performed more skilfully than their evaluative and transformative counterparts (ibid: 135). While this finding is consistent with several prior investigations in which disputing parties were found to be more satisfied with the facilitative approach than a more evaluative one, another interpretation highlights that the results are best explained not by particular stylistic approaches but by the characteristics of competent mediator performance distributed across orientations (ibid: 160). These include mediator energy, warmth and optimism, a nonjudgmental stance and a willingness to adapt to the needs of the parties.

neutrality (Busch 2023). In the West, for example, neutrality is generally distinguished from impartiality where the intervener is carefully distanced from the dispute and from the interests of either party (Gulliver 1979: 212). The United States Model Standards of Conduct for Mediators (published by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution) require the mediator to conduct mediation in an impartial manner, free "from favoritism [sic], bias or prejudice" (Model Standards 11, A, 2005). In this country the FMC *Code of Practice and Guidance* (2025) (adopted by the Law Society) distinguishes between neutrality as to outcome (including guidance on how to protect fairness where such an outcome might be in breach of the judicial framework) and impartiality in respect of the fair and even-handed management of the process (sections 6.2 and 6.3.1; see also the Family Justice Council and FMC 2024, court guidance for judges). The FMC Code (section 9.18) also incorporates an explicit expectation to ensure that outcome decisions have to be fully informed and freely made.[16] For final outcome decisions to be fully informed and fair therefore, there needs to be an accurate appreciation by parties of the implications of those decisions, impossible without an evaluation of their relative merits. Where those issues have legal consequences (not always relevant to the subject matter of the mediated negotiations), access to separate, independent legal advice is recognized to be necessary before final agreement is reached.[17] [18]

As Palmer and Roberts highlight, the image of the "neutral" third party intervening in the affairs of others—"whether out of altruistic goodwill, social responsibility or professional calling—is a very powerful one" (2020: 154). Furthermore, analytically distinct roles are not to be confused with the strategies and techniques of actual practice. As Gulliver highlights, "'[I]t should be emphasised that these different strategies are sometimes

[16] See FMC Code of Practice and Guidance (2025), "Conduct of Mediation", sections 9.11-9.14 in particular.

[17] The gap that LASPO opened with its removal of publicly funded access to legal advice and representation has been filled by other sources of legal support, eg RCJ Advice Bureau, Children's Legal Centre, the Family Law Hub (South Bank University), Advice Now, National Family Mediation's LegalEyes resource, etc. Local solicitors also offer free consultations in some areas. Help with Mediation can provide legal aid during mediation for legal advice but this is severely restricted largely because so few solicitors are now willing to provide legal aid services. Resort to a variety of other sources of legal information and advice such as government websites has become common for most people although recent research shows that the majority of divorcing couples (52%) reach financial arrangements themselves anyway, while 17% reach agreements with lawyers (ie resort to "expensive" lawyers being rare) and only 13% reach agreement through mediation (see Hitchings & Ors 2023).

[18] Codes of practice, by definition, set out ideal aims, professional and ethical principles, standards of conduct and guidelines of practice. They do not detail the kinds of processes, practice models or skills necessary to realize those objectives in practice.

less clearly and easily distinguishable in practice than an analytic exposition might suggest" (1979: 227; see also M Roberts 2020). Not only are there a range of mediator interventions and strategies but in any particular case a mediator may and frequently does vary their strategies in response to the dynamics and the stage of negotiations.[19] [20]

Family mediators have long distinguished neutrality from impartiality, both in principle and in practice (Haynes 1993; M Roberts 2014; Parkinson 2016). Impartiality in terms of the even-handed management of exchanges is, combined with voluntary participation and structural and procedural requirements, an essential means of safeguarding a fair process. Being explicitly even-handed throughout, by not taking sides and by treating all parties fairly, enables support to be given to each party (invariably bringing different strengths and vulnerabilities) whenever needed in the process. Even-handed interventions are intended to ensure equal participation in the communication exchanges and in the decisions that are made. Impartiality is also acknowledged to be one of the principal sources of inherent tension in the mediator role derived from interrelated sources: the "lofty" and at times contradictory and ambiguous demands of the role itself; the lack of power of the mediator to impose an outcome; the intermediate position the mediator occupies between the parties; and the objectively difficult circumstances in which negotiations typically occur (Kressel 1985). Thus, impartiality can be seen to constitute a principle of practice, an essential attribute, a duty and a skill (M Roberts 2014a). The credibility of the mediator, essential for achieving the trust of all parties, depends not only on being impartial but on being perceived to be so.

This is not just a terminological issue. Assertions of neutrality by the mediator can bring their own problems for two main reasons: first, accuracy—a mediator cannot claim neutrality as inevitably they have their own values, prejudices and views; and, second, fairness and safety. Claims to neutrality lay the mediator open to legitimate challenge and can be dangerous in situations of serious inequality. Cultural sensitivity notwithstanding, it would be unethical for a mediator to tolerate behaviour that is clearly unacceptable to one or other parties or that breaches their human rights or those of persons affected by the outcome (see National

[19] Practitioners, mediating in a variety of contexts, confirm the range of styles and strengths of interventions that they might deploy within and throughout a single mediation session (M Roberts 2007).

[20] It is well recognized in the literature that untested theories, themselves dependent intrinsically on limiting and simplifying conceptual assumptions, cannot apply to real-life situations, characterized as they are by the complexity and multiplicity of variables and uncertainties. "The proper study of joint decision-making must, however, take full account of multiple criteria and of the ways by which actual negotiators attempt to cope with them" (Gulliver 1979: xviii).

Family Mediation, *Cross-Cultural Mediation Policy and Practice Guidelines* 1998: section 2).

Neutrality can be claimed by the mediator only in affirming no vested interest in any particular outcome, in having no personal or financial connection with any of the parties nor with any government or other relevant institution. Neutrality can be claimed too in respect of the independent location of the provision of mediation, one free from stigma (eg social services), free from coercion (eg court premises) and free from confusion with other forms of intervention (eg legal practice, welfare investigation or therapy).

In its belated recommendation "that it may be preferable to replace 'neutrality' with the concept of 'impartiality'", the monograph fails to acknowledge that the importance of this distinction, in theory and in practice, has long been recognized by family mediators (her own sample included) over decades (206).

One critical question raised in the monograph is whether the views of practitioners have changed over the years (22). The monograph claims its findings substantiate two hypotheses: first, that family mediators practising in the 1970s and 1980s (pre-LASPO) were bound by orthodox approaches to practice underpinned by an absolute, inflexible, unrealistic, binding and restrictive exercise of neutrality; and, second, that family mediators had a "limited conceptualization" of their role—"If a mediator exhausts all facilitative techniques at her disposal, she is, under *her limited conceptualization*, prohibited from moving into evaluation" (107, 126, emphasis added).[21] One of the chief advantages of the mediator

[21] In the early 1990s this reviewer oversaw the development of the first national training programme for family mediators under National Family Mediation (NFM) whose then 60 services were the main providers of family mediation in the country. This training programme, based on Gulliver's processual model of mediation, explicitly distinguished neutrality in principle from the exercise of impartiality in practice (Gulliver 1979). Embodied in the training programme was the understanding that the primary function of the mediator was to facilitate constructive and accurate communication exchanges between the parties that would lead to learning, improved understanding and an informed decision-making process which necessarily involved the evaluation by the parties of the feasibilities, practicalities and the possible consequences of competing options and proposals. Before agreeing to any joint decisions, the taking of legal advice was considered necessary where legal issues were at stake (for a full account of the Gulliver model in relation to family mediation, see M Roberts 2020).

This monograph creates four functions—helper, referrer, assessor and intervenor—of mediation practice without clarifying what precise process these functions serve. These functions are analytically and practically unrecognizable as functions of a mediator orchestrating a negotiation process. The helper and intervenor functions are generic, applicable in relation to any professional intervention, while the assessor function could apply only to the conduct of the MIAM where suitability for mediation is assessed not only by the mediator but by the participating party as well. While mediators may well signpost parties to support, advice or legal services, they do not make referrals.

sample was the length of practice of the majority of its mediators (up to 20 years of practice pre- and post-LASPO). The findings demonstrate, on the contrary, their capacity and skill both in addressing difficult or unequal party dynamics and in not hesitating to be direct, even "blunt" where a proposed agreement might be unfair or unjust (205, 207).

It is not surprising that change may be perceived to have taken place if the original hypothesis of the monograph, in failing to include its evaluation phase, consists of a limited and therefore inaccurate conceptualization of the mediation process. The monograph's "discovery" of evaluation appears to have been mistaken for a change in practice. Nor is evidence evinced to demonstrate either that the practice attributed to the post-LASPO "flexible mediator" is different from that of pre-LASPO practice, or that family mediators now exceed their mediatory role by providing expert legal oversight, namely consultancy or advice. The empirical findings, with one exception,[22] do not demonstrate therefore that there has been any fundamental change in practice post-LASPO or that this had been concealed (91; 182).

[F] CONCLUSION

The underpinning argument of this monograph is that the dominant traditional understanding and practice of family mediation has changed and that the now extended practice of contemporary family mediators, in providing "legal oversight", should be classified as an "apparatus" of the family justice system. The recommendation of the monograph is therefore that this change needs to be acknowledged and that family mediation be regulated as a legal service (200-201). This is a recommendation that does not address the fact that it contradicts existing government and professional policy guidance as well as the statutory requirements under the Legal Services Act 2007, all of which refute unequivocally that mediators provide legal services.[23]

In asking its first critical question—What is mediation?—the monograph creates the very problem of ambiguity and "cover-up" about

[22] Only one of the interviewees openly claimed to give legal advice to parties when acting as a mediator. The problems of conflicts of interest or that his practice breached the FMC Code of Practice were not addressed.

[23] The question of whether or not mediation constitutes a legal service, triggered originally by the advent of legal aid for family mediation in the 1990s, was addressed and resolved by government guidance. This was issued specifically in the light of the implications for mediators under the Proceeds of Crime Act 2002. Government guidance clarified unequivocally that mediators do *not* provide legal services, a view supported by all the mediation bodies across fields of practice, the Bar Council and the Law Society (Home Office 2004). The Legal Services Act 2007, part 3, section 12(4) now explicitly embodies the provision that mediators do *not* carry out legal activity.

which it complains. The key to an analytical understanding of what is or is not mediation lies in the purpose for which an intervenor activates the flow of information (Palmer & Roberts 2020). Where information is elicited for the purpose of establishing communication between the parties, ensuring that the issues are identified and communicated, ensuring that all the options are identified and evaluated, and helping with clarifying and formulating any ensuing agreement, that is mediation. On the other hand, where information is primarily elicited as the basis for evaluating that information in order to reach a diagnosis, issuing advice on the basis of that diagnosis and persuading the parties to accept that solution, then that is no longer mediation (ibid 162).

In asking its second critical question—Has family mediation practice changed fundamentally since LASPO?—no evidence emerges to suggest that the evaluation of options as part of mediation practice is newly introduced or that it has been transformed into the provision of legal oversight, whether expert consultancy or advice. The major concerns that this review highlights relate to the validity of the theoretical and methodological framework of the monograph—in particular, its adoption of a false dichotomy between facilitation and evaluation; its conflation of ideal types with actual practice; its restricted conceptualizations of "neutrality"[24] and "facilitation", plus the unsubstantiated allegation of a professional cover-up over evaluation.[25] Another concern relates to the attitude expressed about the views of some interviewees where those views do not corroborate the hypotheses of the research.[26] A dismissive or patronizing approach does serious disservice not only to those interviewees but also to expectations for mutual trust and respect necessary for future constructive collaboration between researchers and practitioners.

As the formal justice system now officially sponsors settlement and actively promotes out-of-court dispute resolution processes (NCDR), and

[24] As Palmer and Roberts note: "Such a claim [to neutrality] is rarely advanced without qualification by mediators themselves and in some contexts appears as a construct by researchers intent on knocking it down" (2020: 178).

[25] The monograph acknowledges that its data "does not comprehensively capture the practices of the flexible mediator type and that observational data is required to make an even more substance contributions [sic] to ongoing discussions" (see 87, footnote 19 in Blakey).

[26] See, for example, these comments about the responses from the interview sample: "The mediator sample regularly spoke about how they would intervene, though many of their responses were underdeveloped …" (149); the mediator sample "did not seem to grasp how their evaluative actions implicated their neutrality" (213); the interviewees might not themselves realize that "reality testing could be incredibly evaluative" (138); "The study indicates that … family mediators struggle to recognize the intricacies of their role" (151); and a reference to "the significant shortcomings" of one interviewee's view of justice which in fact corresponds accurately with the Western common law conceptualization of justice as state-sponsored judicial authority (171).

if access to justice, in its widest sense, means the right of disputants to have access to a range of dispute resolution processes, then the unequivocal delineation of the nature and purpose of those different processes becomes imperative.[27] Clarity and rigour in respecting their distinctive professional and ethical boundaries are essential to protect the integrity and benefits of each dispute resolution process.

Recent developments in the family justice system confirm the growing challenges to the distinctive status of family mediation as an independent, informal and discrete dispute resolution process that provides a genuine alternative to litigation and to formal judicial determination (see Ministry of Justice, *Family Justice Review* 2011; FPR 2024). These developments risk distorting family mediation into becoming a form *of* legal process rather than an alternative *to* legal process, damaging both judicial authority and party control (Effron 1989). The recommendation of this monograph that mediation be recognized as a legal service adds to the current dangers to family mediation of co-option and domination by the family justice system.[28]

Research, framed by a theoretical paradigm informed by the rich body of scholarly literature on ADR and mediation, which includes observational studies of mediation practice, the experiential input of practitioners, as well as the consumer perspective, will all contribute to mediation practice becoming better understood and advanced.

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 child inclusive mediation, and a professional practice consultant with the FMC.*

[27] A two-tier system is already manifest when the court adjourns for NCDR under the FPR 2024. For the majority of disputants, access to most NCDR processes such as collaborative law, arbitration and early neutral evaluation is unaffordable. Mediation with its unique availability of legal aid becomes the only possible NCDR option, one which may already have been deemed unsuitable at the original MIAM.

[28] Unprofessional demands, thankfully resisted, are already being made by courts on family mediators, for example, to report on children's views. In addition, the lack of provision of services for children (such as counselling, therapy, guidance and advice) results in inappropriate expectations being imposed on family mediation to meet children's needs under the label of child inclusive mediation (known as CIM).

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 Master's 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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Law and Social Policy in the Global South: Brazil, China, India, South Africa

edited by

Ulrike Davy and Albert H Y Chen

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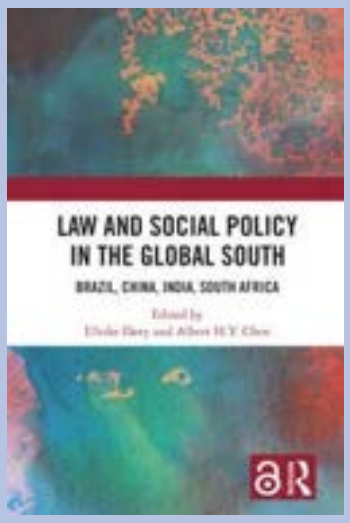

Ulrike Davy and Albert H Y Chen (eds) (2022) *Law and Social Policy in the Global South: Brazil, China, India, South Africa*, published by Routledge, ISBN 9781003242826

The book, *Law and Social Policy in the Global South*, edited by Ulrike Davy and Albert H Y Chen, brings a legal perspective to the study of welfare systems in the Global South, exploring the historical and ideological forces that shape social policies in these regions. This collection of essays, authored by legal scholars, delves into the evolution, unique characteristics, and impact of social policies and their legal frameworks in Brazil, China, India, and South Africa. Together, the policies and laws of these states influence nearly half of the global population and are shaped by distinct ideologies, political dynamics, and historical contexts.

The book highlights each state's individual path while offering comparative insights that contrast their policies with the European welfare state model. The various chapters provide an indepth analysis of a specific country's policy trajectory, culminating in a reflective comparative study by Ulrike Davy, a Public Law Professor in Germany at the University

of Bielefeld. Her concluding analysis draws out shared themes and key differences, enriching the discussion with a nuanced understanding of the diverse legal and social landscapes in the Global South. This volume's chapters together offer a valuable comparative exploration of the ideologies, legal underpinnings, and practical challenges shaping social policy in the Global South.

The Chen and Davy edited volume makes a notable contribution to the field of comparative legal studies by shifting focus from the traditionally dominant Euro-American legal frameworks to the legal systems of four influential BRICS[1] nations. These states, with their diverse legal traditions, offer unique perspectives on the intersection of law and social policy. By analysing these emerging economies—home to a substantial portion of the world's population—the edited book delivers valuable insights for legal professionals working in international contexts, especially as the BRICS member states continue to grow in economic and political influence globally. The volume explores the multifaceted ways in which disparate legal systems confront common social issues, showing the patterns of legal pluralism and hybridization prevalent within these regions. It scrutinizes the intricate interplay between legal transplants and indigenous legal doctrines, examining how the often-emergent legal frameworks in the Global South navigate the delicate balance between local traditions and global legal models. This indepth analysis offers a new understanding of the ways these states use law as a tool for shaping social policy.

Ulrike Davy's introductory chapter, "Law and Social Policy in the Global South: Setting the Stage", examines the foundational concepts and historical contexts shaping social policies in the Global South. With a focus on intellectual influences—examining how underlying ideas, concepts, and philosophical traditions shape legal systems and social policies across these nations—it offers a comparative framework for understanding better the distinctive evolution of social policies in Brazil, China, India, and South Africa, despite parallels to European models. It is an important contextualising chapter for the rest of the book and argues that historically all four states have moved from a rather narrowly conceptualised "social insurance" framework to a more encompassing regime of "social security". Southern societies have prevailed in conceptualising the meaning of "social security", so that the term epitomizes core elements of Southern welfare and the aspirations of non-European countries in a post-colonial era.

[1] BRICS is an acronym referring to an intergovernmental organization comprising five major emerging economies: Brazil, Russia, India, China, and South Africa.

In Chapter 2, "Brazil's Social Policies since the 1930s: From Fragmentation to Universalism", Octávio Luiz Motta Ferraz traces the development of Brazil's social policies over nearly a century. He examines the pivotal role of various Brazilian constitutions and landmark programmes such as Bolsa Família.[2] The chapter highlights the key ideas driving social policy legislation while addressing the persistent gap between legal frameworks and their practical implementation.

Albert H Y Chen's essay (Chapter 3), "Law and Social Policy in the People's Republic of China: From Communism to Marketisation", provides a powerful analysis of the transformation of China's social policies from the republican era through the reform period. It charts the shift from communal systems to more market-oriented approaches, noting key milestones such as the 1951 Labour Insurance Regulations and the 2010 Social Insurance Law. The essay offers a nuanced assessment of China's progress in building a more effective social welfare system. Professor Chen characterizes the history of the People's Republic of China in terms of three distinct phases: the Maoist era (1949-1977), the initial reform period (1978-2001), and the subsequent reform period (2002-present). Each era is characterised by distinctive policies towards social welfare. First, during the Maoist era, welfare was administered directly by state enterprises in urban locales and by communes in rural regions. In general, however, the urban sector was given much stronger support than rural areas, and it has been hard for China to dislodge itself from this policy position. The initial reform period—that is post-late 1970s—witnessed the disbanding of these systems, leading to the establishment of new social insurance frameworks. Social policies in the early reform era were largely reactive to emerging problems created by economic liberalization, rather than proactive planning. Social welfare then progressed from *ad hoc* policy measures to increasingly sophisticated legal frameworks, culminating in the 2010 Social Insurance Law and draft Social Assistance Law.

Chen traces the evolution of China's philosophical underpinnings, transitioning from Confucian ideals of benevolence and compassion for the vulnerable to contemporary interpretations of social welfare and security. This transformation involves a significant reconfiguration of social values and priorities, in which historical influences nevertheless

[2] The Bolsa Família programme provides monthly cash payments to low-income families, with benefits conditional on meeting specific requirements related to education and healthcare. Families have to ensure their children attend school regularly and receive routine medical check-ups and vaccinations. The programme targets families living in extreme poverty and those in poverty, with benefit amounts varying based on family size and composition.

continue to inform modern policy frameworks involving new ideals of social responsibility and the state's active role in safeguarding its citizens.

The chapter's primary strength is its comprehensive historical analysis of the evolution of China's social policy and legal frameworks across different eras. It effectively demonstrates how China moved from traditional welfare concepts through Maoist collective welfare to the current mixed system of social insurance and assistance. The most significant contribution is Chen's careful documentation of how social policies were shaped by and responded to major economic transitions, particularly the shift from a planned economy to a market-oriented system. China's approach has been one of "experimental gradualism", with social policy development following a pattern of local experimentation, gradual scaling-up of successful models, and eventually national legislation. This historical perspective helps readers understand why China's social welfare system developed the way it did, with its distinctive characteristics and continuing challenges. Chen argues that China's trajectory of welfare reform differs from post-communist states (which typically reduced social welfare) and East Asian developmental states (which improved welfare only after democratization). Unlike India, China's judiciary has played at best a limited role in constitutional interpretation of social rights, with development driven primarily by Party–state policy. And there has been significant progress, moving from enterprise-based welfare to a modern social insurance system serving a billion-plus people. Professor Chen's analysis focuses primarily on the political economy factors driving change: ideology, economic development strategies, institutional changes, and the relationship between market transition and social policy needs. In this reviewer's eyes, the essay might perhaps have benefited from more attention to demographic pressures (population growth, family size, rural–urban migration, ageing population, and so on). These typically play major roles in shaping social security system development, particularly regarding pension design and intergenerational equity worries that are important in China's current social policy challenges. And while coverage of issues is necessarily limited, as Professor Chen does not, of course, seek to provide an overall picture of social development, I take the view that some attention to consumer protection analysis would have strengthened the essay by showing how market-oriented social policies require robust consumer protection frameworks to achieve their social welfare objectives.

Other essays examine the distinctive welfare trajectories of major developing nations through detailed case studies and comparative analysis. Sarbani Sen's contribution (Chapter 4) on "Law and Social

Policy in India: From Growth-based Welfare to Welfare Entitlements" traces India's transformation from colonial-era social policies to its contemporary framework of welfare entitlements. This chapter considers India's constitutional structure, particularly examining the Directive Principles of State Policy and how judicial interventions have fundamentally shaped the country's approach to welfare entitlements. Sen explores the significant ideological evolution that has occurred within Indian social policy, documenting the shift from traditional economic growth-based welfare models towards more comprehensive rights-based approaches that recognize welfare as an entitlement rather than merely as a byproduct of economic development.

In Chapter 5, "Law and Social Policy in South Africa: From Untold Suffering and Injustice to a Future Based on Human Rights" by Letlhokwa George Mpedi, the South African experience receives thorough treatment. This analysis spans the entire arc of South African social policy development, from the colonial period through the devastating apartheid era and into the post-apartheid governance structure. Mpedi examines how racial and class disparities became systematically embedded in welfare provision systems, analysing apartheid's enduring legacy on contemporary social policy formation. The chapter gives particular attention to how South Africa's Constitutional Court has influenced the country's current human rights-centred approach to social policy, representing a significant departure from the exclusionary and discriminatory practices of previous eras.

Ulrike Davy's concluding chapter "Southern Welfare: From Social Insurance to Social Security", as noted above, provides a comparative analysis that ties together the experiences of all four countries examined in the volume. Davy identifies both commonalities and significant distinctions among these states' social policy approaches while considering them in relation to established European welfare state models. Her analysis reveals how a range of distinctive factors operating within these Southern contexts have produced social welfare trajectories that diverge from traditional European patterns, developing distinctive approaches to social welfare that reflect their particular historical experiences, cultural contexts, and developmental challenges.

The significant contribution of this work lies in its integration of legal perspectives into welfare state studies focused on the Global South. By incorporating both historical and ideological dimensions, the book illuminates how these states' social policies have been shaped by complex interactions between legal frameworks, political ideologies, and historical

circumstances so that they differ substantially from the European experience that has traditionally dominated welfare state scholarship.

About the author

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High Wire: How China Regulates Big Tech and Governs its Economy by Angela Huyue Zhang

Mei Ning Yan
Institute of Advanced Legal Studies, Queen's University Belfast, University of Hong Kong

Angela Huyue Zhang (2024) *High Wire: How China Regulates Big Tech and Governs its Economy*, published by Oxford University Press, ISBN 978-0-19-768225-8

Professor Angela Zhang's new book, *Hire Wire: How China Regulates Big Tech and Governs its Economy*, provides a timely and comprehensive account of a significant topic: why and how the Chinese authorities cracked down on the country's home-grown technology giants and large online platforms between late 2020 and the spring of 2022 (the Tech Crackdown 2020-22). It also examines the changes and impacts, both evident and potential, that such a crackdown has caused to these entities and the general public, as well as the country's economic and technological developments and the effects on foreign investors and competitors alike. In addition to the Tech Crackdown 2020-22, Zhang's book also makes a valuable contribution to the existing literature, probing how the Chinese Communist Party (CCP or the Party) governs the country's digital economy and regulates its major players. Zhang is a competition lawyer by training, but *High Wire* caters to a much wider audience than just lawyers and legal scholars.

In the book's title, *High Wire*, is borrowed from an earlier observation by Professor Andrew Nathan, who noted that "the authoritarian regime must perform constantly like a team of acrobats on a high wire, staving off

all crises while keeping its act flawlessly together". In addition to likening Chinese leaders and officials to acrobats on a high wire, Zhang also refers to previous studies by scholars that described policymaking by the CCP ruling regime as "guerrilla-style" adaptive governance, which dates to the CCP's revolutionary years before it came to power in 1949.

High Wire has a straightforward and uncomplicated structure, making it easy to follow. In addition to the introduction, the book is divided into four major parts. The introduction highlights Zhang's own "dynamic pyramid model", which facilitates the explanation and understanding of the Tech Crackdown 2020-22. Three aspects of the model have been emphasized: hierarchy, volatility and fragility.

Consisting of three chapters, Part I details the book's analytical framework, namely the dynamic pyramid model. Chapter 1 elaborates on hierarchy, Chapter 2 on volatility, and Chapter 3 on fragility. Part II provides details of China's platform regulation, comprising three chapters. Chapter 4 focuses on antitrust regulation, Chapter 5 on data regulation and Chapter 6 on labour regulation. All three chapters share a similar structure, and each has four sections. In section 1, Zhang writes about regulatory challenges and their causes. In section 2, she applies her dynamic pyramid model to explain challenges and causes. In section 3, Zhang projects the future trend. To ensure readers grasp what has been written, section 4 provides a summary of each chapter.

Part III, which comprises Chapters 7 and 8, details self-regulation by large online platforms. Part IV expounds on "the path forward" and is composed of three chapters. Chapter 9 explores a critical theme: is China exceptional? The chapter examines recent trends of regulating online platforms in the West, focusing on antitrust, data protection and labour protection aspects in the European Union (EU) and the United States (US), and whether these developments have influenced the regulation of tech giants and online platforms in China. Chapter 10 assesses the effects of the Tech Crackdown 2020-22. It highlights two significant consequences of the crackdown: the retreat of the private sector and the advancement of the administrative state. Some unintended but crucial consequences are also mentioned. The book concludes with a forward-looking Chapter 11, which addresses a highly significant and topical issue: regulating generative artificial intelligence (AI). In this chapter, Zhang once more applies her dynamic pyramid model to explain the special features of China's generative AI regulation. She again poses a key question: is China exceptional in its generative AI regulation?

This is followed by Zhang's prediction of the country's future regulatory trends in the hard-tech sector.

Zhang meticulously writes not only about the crackdown but also about the rise of Chinese tech giants and large online platforms, which have been primarily driven by intense and often unruly competition set in a lax regulatory environment. Until late 2020, these enterprises thrived by providing consumers with a wide variety of services, including communications and messaging, video and game entertainment, online shopping, food delivery, ride-hailing, and even private banking services and personal loans. Many of these online services and businesses were eventually concentrated in Alibaba and Tencent. The two giants became a duopoly at loggerheads, with their online payment systems purposely excluding each other and often forcing customers to choose between the two.

As Zhang's book describes it, the Tech Crackdown 2020-22 was characterised by a sudden and intensive enforcement campaign relying on antitrust, data protection, labour protection, and national security laws, policies and measures, many of which were hastily introduced. Zhang examines the crackdown in detail, including many high-profile incidents. The crackdown sent shockwaves throughout China and beyond, with the share prices of tech giants plummeting. Explanations and arguments about the crackdown have been put forward by both critics and supporters of the campaign, but Zhang regards them as incomplete. She therefore introduces her dynamic pyramid model. Indeed, her analytical framework helps readers navigate the maze of information, events and twists concerning the crackdown and tech regulation. Zhang goes further, arguing that her model is also applicable to many other regulatory and governance issues, such as the crackdowns on the private tutoring industry and the property market, as well as the policy twists in the "one-child policy" and "zero-Covid policy". In so doing, she not only sets the scene for her exploration of the roots of problems in the Tech Crackdown 2020-22 and the country's tech regulation but also provides those readers who are less familiar with China with broader perspectives and a deeper understanding of how the CCP has been running the country.

Zhang argues that there is a remarkable resemblance between the Chinese style of regulation and a "pyramid on high wire" circus act, in which a team of acrobats form a human pyramid navigating a tightrope. The two share three strikingly similar features: hierarchy (referring to the structure of the regulatory institutions), volatility (referring to the erratic

nature of the regulatory process) and fragility (which characterizes the outcomes of regulation).

Zhang views the system of tech regulation as a pyramid with four major players forming a hierarchy. At the apex are the top Party leaders, whose legitimacy has been derived from several factors that can sometimes be conflicting, namely, economic growth, political stability and nationalism. At the outset, top leaders preferred to allow more freedoms for home-grown tech companies to nurture a tech industry that could have a competitive edge. However, Zhang adds, these top leaders often suffer from information time-lag when making decisions and issuing instructions. The second tier in the pyramid is the regulators, who are government officials from various ministries and departments. Problems with their coordination and cooperation prevent smooth and concerted regulatory efforts. Moreover, officials often prioritize their own bureaucratic or personal interests over the public interest, leading them to focus on short-term goals and narrowly defined objectives. Making things worse has been the rampant corruption among officials, which often caused inertia and inaction in regulation. In recent years, anti-corruption efforts initiated by the current top leader, Xi Jinping, have led officials to adopt a "lazy governance" approach. Additionally, local protectionism towards large online platforms also played a significant role in the enforcement inaction. As a pattern, regulators would only intervene when crises erupted or when they were hard-pressed by top leaders. As such, officials either do too little or too much. Regulation in China has never been a routine, day-to-day matter; instead, it occurs in waves of enforcement campaigns, which Zhang vividly describes as swinging like a dramatic pendulum. Indeed, people in China have long complained about the CCP policy twists causing numerous unnecessary "tosses and turns" (折腾 *zheteng*) in their everyday lives.

Tech companies constitute the third tier of the pyramid. Zhang outlines the key strategies employed by these companies for their survival and development. They grew and prospered by circumventing existing laws and regulations and by taking advantage of legal loopholes. They also devised various tricks to quickly establish their reputation and outdo their competitors, while seeking to appease officials to work in their favour, either through bribery, offering jobs to children or family members of officials, or hiring retired officials to lobby on their behalf. Platform participants, composed of consumers and small businesses, form the lowest tier of the pyramid. In Zhang's opinion, this tier has the least influence on the regulatory process and enjoys weak protection, with

the Chinese judiciary appearing to favour large online platforms in its adjudications.

As such, tech companies in China enjoyed an initial period of lax regulation, driven by top-down initiatives from top Party leaders aimed at minimal intervention and buttressed by regulators' inertia. During this period, market malpractices and unfair competition have accumulated, and data breaches have been widespread. Online platform workers have suffered from a severe lack of labour protection, and frequent traffic accidents caused by food delivery workers who try to meet harsh deadlines have also put the lives of ordinary Chinese in danger. When criticism and crises reached a tipping point, the next phase of harsh crackdown ensued. During this second phase, when officials sought to appease top Party leaders and wished for quick solutions, they tended to overreach in their regulatory measures. Then, phase three of regulatory easing soon followed. The Tech Crackdown 2020-22 ended abruptly 18 months later.

In sum, the regulatory process in China has historically been volatile, and, in this crackdown, tech companies have borne the brunt of adverse outcomes. Moreover, little has changed in the duopoly scenario, and China's tech industry remains highly concentrated in ownership. In her conclusion, Zhang remarks that China's regulatory process has created a vicious cycle of regulatory interventions, with each intervention sowing the seed for the next. Thus, Zhang's dynamic pyramid model, highlighting three main features—hierarchy, volatility and fragility—sheds light on the causes of China's pendulum regulatory swings.

Nonetheless, Zhang is not entirely negative about the Tech Crackdown 2020-22. She notes that the crackdown has led to diversity in innovation endeavours. The Chinese authorities managed to redirect capital from "soft tech" towards more sophisticated "high tech", and Chinese tech giants have also been experiencing a push to pivot their commercial strategies towards high-tech. Zhang regards this as a significant shift amid the escalating Sino–US tech rivalry. Also, Zhang is quite diplomatic towards the crucial role played by Xi Jinping in masterminding the Tech Crackdown 2020-22 and other crackdowns in recent years. She stops short of criticizing Xi directly, but points to the fact that Xi has preferred centralized decision-making relying on a small group of top leaders and trusted advisors. In answering the key question, "Is China exceptional?", Zhang is brief and does not give any definite answer. She notes that the EU and other Western countries have been moving towards *ex ante* regulation of online platforms, that the Chinese authorities have been

closely watching this trend, and that China's regulatory approach provides a salient lesson for other countries aiming to control big tech.

In addition to devising and applying her dynamic pyramid model to the Tech Crackdown 2020-22, Zhang also collected and studied over 1000 Chinese court judgments involving tech giants or large online platforms—antitrust litigation brought by competing companies, unfair competition claims raised by consumers, and claims pursued by platforms against default loan repayments and so on. However, findings based on these court judgments only occupy minimal space in her book. If Zhang had devoted more space to analysing such findings, her contributions to the study of the topic would be significantly larger.

Interestingly, in her book, Zhang uses some terms loosely, such as the Chinese regulatory state, regulatory pendulum swing, regulatory campaigns, regulatory attack, regulatory crackdown, regulatory competition and regulatory headache. While their meanings can be taken at face value, adding the word "regulatory" does not necessarily mean that these terms are closely related to the Western sense of "regulation". Indeed, the terms "regulation", "self-regulation" and "co-regulation" mentioned in Zhang's book often carry meanings very different from those usually found in the West. They are, at best, regulation, self-regulation and co-regulation with "Chinese characteristics".

I conclude with some recollections from my research conducted in China more than a decade ago, before the Cyberspace Administration of China came into being. At the time, workers in online service providers (OSPs) closely followed daily censorship instructions sent to their mobile phones by Party propaganda officials to avoid trouble or interruption of their operations. However, it was typical for OSPs to maintain a police room in their offices. The police presence was not regular, and police officers usually only came before festivals (to collect gifts or red packets from OSPs), during politically sensitive periods (such as anniversaries of the 4 June Crackdown and annual meetings of the national legislature and consultative body), or when they sensed trouble. The easiest and most extreme way for the police to gain immediate control of an OSP office was to unplug the broadband connection and terminate online content transmission. Yes, the police resorted to naked force. Such a practice could be traced to the "command-and-control" mentality of a totalitarian regime and had no connection whatsoever to the Western concept of regulation. Sadly, things have changed very little over the years, as reflected by Zhang's brief comment in the last but one sentence in *High Wire*—"the absence of a robust rule-of-law system". Moreover, it

has become mandatory in recent years for companies in China, whether domestic or foreign, to establish a CCP branch directly controlling companies' major operations and decisions, and this practice renders regulation in the Western sense largely redundant.

About the author

For further information, see **Yan Mei Ning***'s* profile page.

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News and Events

Compiled by Eliza Boudier

University of London

IALS News

Sir Wiliam Dale Centre

The Sir William Dale Centre is delighted to announce that its Associate Research Fellow, Professor Nicoletta Rangone of the Università di Roma LUMSA has won the selection for a Jean Monnet Centre of Excellence on "Sustainable Artificial Intelligence for Regulation".

The Sir William Dale Centre for Legislative Studies is a partner of the new Jean Monnet together with The Good Lobby, HEC, Barcelona, the OECD's Regulatory Delivery Programme, the AI Observatory of the Astrid Foundation, and the IRIDE Institute of EPLO. Partners will be involved in the following activities:

- ◊ A book edited by the Centre, which will be discussed in two events (a planning event and a final presentation event), named "Open Fora":
- ◊ Open Forum on "Innovation for Regulation": this specific Forum will serve as a structured platform for interdisciplinary dialogue on the use of AI in regulation and its environmental and rule-of-law implications. The discussions will explore AI's role in legislative drafting, regulatory reviews, impact assessments, and enforcement controls, and environmental sustainability.
- ◊ Open Forum on "Sustainability in Innovation": This Open Forum will serve as a high-level platform for interdisciplinary dialogue, engaging academics, regulators, industry experts, and civil society to explore the interplay between AI, regulation, and sustainability. It will act as a structured, interdisciplinary platform to discuss the environmental impact of AI applications and infrastructures (eg data centres, network infrastructures, processing units). The Forum will directly contribute to the development of a methodology for assessing AI's environmental footprint, bridging academic research, regulatory needs, and industry expertise. The discussions will help establish an evidence-based strategy for regulatory and methodological development in sustainable AI governance, while also strengthening collaboration amongst academia, industry, and policymakers to formulate practical recommendations for

sustainability metrics in AI for regulation.
- ♢ The annual organization of a contest for best practices in public administration.
- ♢ An annual special issue of a scientific journal, based on the results of the contest.
- ♢ The publication and constant updating of a "transparency register" on the website, regarding the use of AI in the regulatory cycle.
- ♢ A quarterly newsletter and podcast episodes.
- ♢ An annual summer school on "Sustainable AI Literacy" (as well as two courses).

Inside the Law and the Humanities Hub (LHub)

What happens when law meets literature, history, theatre, philosophy, art, media, and performance? At the Law and the Humanities Hub (LHub) at the Institute of Advanced Legal Studies, this question marks the starting point for an ongoing, cross-disciplinary conversation.

LHub embraces a vision of law as something far beyond systems of rules, statutes and courtrooms, which is shaped by and shaping cultural, political, and everyday life. It explores how law influences the stories we tell, the identities we form, and the histories we inherit—and how, in turn, these shape law itself. By connecting legal research with methods and themes informed by the humanities, LHub creates space for ideas to move across disciplinary boundaries.

This year, LHub welcomed 10 Visitors—an inspiring group of scholars and artists whose work pushes the boundaries of law and the humanities. Their projects span a wide range of topics, including rituals in Roman law, trans urban experience, law and satire, responses to police violence, copyright in visual culture, colonial utopias, nomadic epistemologies, histories of enslavement, and movement in law. Each of them offers a different way of thinking about where law is found and how it functions in the world.

Their work feeds into LHub's broader mission: encouraging interdisciplinary research and engaging wider audiences in conversations about law from humanistic perspectives. Through seminars, workshops, and experimental events, LHub fosters both critical inquiry and creative collaboration.

The LHub Days are a case in point, where Visitors come together to explore novel questions and projects. Recent sessions have included Radical Legalisms, which explored how radical thinkers and activists engage with law; Law, Fiction, and the Visual, which

examined storytelling, visual culture, and counterfactual imaginaries in legal research; and Law's Places and Spaces, which transformed London into a living legal map, encouraging participants to reflect on how and where law happens and which is featured as a Special Section in this issue of Amicus Curiae (see pages 382Special Section in this issue of *Amicus Curiae* (see pages 382-429.)

LHub also works to build shared resources. Such is the soon-to-be-launched UK Law and the Humanities Map, developed in collaboration with the Mapping Arts and Humanities Project(Opens in new window). Another is the recently announced Global Mentorship Programme, which will connect emerging scholars with experienced mentors across the globe. It is a collaborative project with partner law and the humanities organizations worldwide.

This year, LHub director Professor Anat Rosenberg co-convened roundtables at the Socio-legal Studies Annual Conference in Liverpool, and another at the Law, Culture and the Humanities Conference in Washington DC, to explore the futures of law and the humanities, essentially asking the community: how can we support you? The range of creative directions from participants will feed into future plans.

At its heart, LHub is about connection—between disciplines, between people, and between ideas. It supports fellowships, hosts seminars, and encourages collaborations across institutions and countries. The emphasis is on openness, curiosity, and making space for a wide range of voices.

Those interested in getting involved are invited to share ideas through the hub's digital Ideas Box, open to researchers, artists, librarians, and practitioners—anyone exploring how law and the humanities might intersect in new ways. You can also join the mailing list to stay informed about upcoming events and opportunities.

Podcasts

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.

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.

Selected Upcoming Events

Company Law and Sustainability

Dates: 7–8 November 2025

Venue: Institute of Advanced Legal Studies, London

Speaker: Eilis Ferran (University of Cambridge)

'People, Planet, and Profit.' What does sustainability mean for companies and company lawyers against surging global trade uncertainty and ongoing economic challenges? This session is part of the Company Law and Sustainability Conference (the Society of Legal Scholars Company Law Section). See website for details.

Law and the Humanities Seminar—"If the Law Were a Colour [It Would be Gold]": The Architecture of the Court of Justice of the European Union

Date: 11 November 2025

Venue: online

Speakers: Dr Renske Vos (Vrije Universiteit Amsterdam), Dr Shailesh Kumar (Royal Holloway, University of London), Dr Aristel Skrbic (Ghent University's Faculty of Law)

Architecture matters to law; to what it is and does; to how it is performed and experienced. Through eye-catching design or bureaucratic functionality, buildings make law tangible for its audiences and constituencies. One of the most iconic and concrete encounters one can have with law is to visit its institutional sites and spaces. One can see a building, access it, be part of its space, or experience its boundaries. Architecture can be used to embody certain norms, values, and histories. At the same time, the buildings of some international institutions such as the Peace Palace in The Hague or the UN headquarters in New York have become icons of themselves. See website for details.

ILPC Annual Conference 2025—Regulating AI in a Changing World: Oversight and Enforcement

Dates: 20 November 2025 (in person) and 21 November 2025 (online)

Venue: Institute of Advanced Legal Studies, London

Annual Lecture: Dr Brian Plastow (Scottish Biometrics Commissioner)

Dr Brian Plastowwas appointed by Her Majesty the Queen on 12 April 2021 on the nomination of the Scottish Parliament. He is a former police Chief Superintendent, and Lead Inspector, with Her Majesty's Inspectorate of Constabulary in Scotland. Brian has over four decades of policing experience in Scotland and has significant knowledge of, and practical experience in, the use of biometric

data and technologies for criminal justice and policing purposes. He has also conducted independent research into policing, equalities, and human rights, and holds an MSc with Distinction in Community Safety, and a PhD in Criminology from the University of Leicester. See website for details.

Historicising Extradition, Deportation, and "Disguised Extradition"

Date: 27 November 2025

Venue: Institute of Advanced Legal Studies, London

Speaker: Professor Ivan Lee (National University of Singapore)

Professor Lee's lecture explores British colonial rule in Hong Kong, British imperialism in China, and the British imperial law of extradition, c 1842-1873. See website for details.

Law and the Humanities Seminar—Seeing Law Feelingly: Humanistic Jurisprudence, Poetic Wisdom, and the Future of Law

Date: 9 December 2025

Venue: Institute of Advanced Legal Studies, London

Speaker: Professor Lorenzo Zucca (King's College London)

Discussant: Dr Katherine Ebury (LHub)

Legal philosophy faces an existential crisis. As populism surges, social fractures deepen, and democratic institutions strain under unprecedented pressure, jurisprudence remains paralysed by the "Barbarism of Reflection"—an excessive rationalism that dissects law while becoming disconnected from its moral and imaginative foundations. Drawing on Giambattista Vico's concept of "poetic wisdom" (sapienza poetica) and Shakespeare's insight that one must "see feelingly", Professor Lorenzo Zucca proposes humanistic jurisprudence as a synthetic framework that transcends the limitations of analytical, critical, and historical approaches to law. See website for details.

Amicus Curiae

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