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Table of Contents

Mapping and Evaluating Different Approaches to the Marital Rape Exception at Common Law

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Introduction

Until the tail end of the twentieth century, under the criminal law in the United Kingdom, husbands were exempt from rape charges against their spouses. At common law, the justification for the marital rape exception traces its roots to at least 1736, in an extrajudicial statement by Sir Matthew Hale: "the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract"[1]. Legal protections under the criminal statutes were correspondingly lacking. For example, the Sexual Offences Act 1976 stipulated a condition of "unlawful rape", originally interpreted purposively as taking place external to "the bond of a marriage"[2]. This is clearly illustrated in *R v Miller*, where the defendant's forceful initiation of sexual intercourse with his wife only attracted a conviction for violence under the Offences Against the Persons Act 1861[3]. Without a retraction of matrimonial consent in the form of, for example, a non-cohabitation clause[4] or a decree of divorce[5], a rape conviction would fail. The tide turned only in 1992 with the landmark case *R v R*, where the marital rape exception was unanimously overturned by the House of Lords[6]. The hitherto common law rule was declared archaic: the term "unlawful" in the 1976 Act was read as mere surplusage and, in the words of Lord Keith, a modern marriage is "a partnership of equals, and no longer one in which a wife must be the subservient chattel of the husband"[7]. Spousal immunity was assuredly eliminated in the Criminal Justice and Public Order Act 1994[8] and marital rape now triggers criminal liability under the Sexual Offences Act 2003[9].

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[1] Matthew Hale, *The History of the Pleas of the Crown* (first published in 1736, William and Mary) 629
[2] *R v Chapman* [1959] 1 QB 100 (EWCA Crim)
[3] *R v Miller (Peter)* [1954] 2 QB 282 (Assizes (Winchester))
[4] *R v Roberts* [1986] 8 Cr. App. R. (S.) 295 (EWCA Crim)
[5] *Miller* (n 5)
[6] *R v R* [1991] [1992] 1 A.C. 599 (HL)
[7] ibid
[8] Theresa Fus, 'Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches' (2006) 39(2) VJTL 481, 492 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1484&context=vjtl> accessed 21 March 2024
[9] Sexual Offences Act 2003

Other common law jurisdictions have moved to undo the effects of Hale's statement as well. Singapore[10] has also criminalised marital rape. Bangladesh[11] and India[12] have criminalised marital rape when the wife is under 13 and 18 years old respectively.

The treatment of marital rape under statutes and case law in the United Kingdom, before and after 1992, suggests a simple classification of jurisdictions into 'pro-marital rape' and 'anti-marital rape' categories. This binary classification of marital rape laws appears to be the prevailing approach adopted by international bodies such as the United Nations[13]. The realities are more complex.

This article is concerned with common law jurisdictions that do not well approximate the pre- or post-1992 treatment of marital rape in the United Kingdom. They can be broadly classified into two models. The first comprises jurisdictions that have preferred alternative statutory routes to liability over classifying the conduct as rape. The second comprises jurisdictions that have preserved remnants of the marital rape exception despite having criminalised marital rape. In addition, in some jurisdictions, the law may be murky and deserving of clarification. The Child Rights International Network states that it is legal for a husband to rape his wife in 18 Commonwealth countries[14]. The approach in this article allows a more nuanced analysis of marital rape laws than the simple dichotomy of pro-exception and anti-exception. Viewed through these lenses, the United Kingdom may also be seen to be imperfect in its criminalisation of marital rape.

This article assesses how effective these jurisdictions are in recognising the seriousness of marital rape, deterring its perpetrators and providing its victims with the appropriate remedies. Our metric may be summarized as follows: a jurisdiction would have eradicated the marital rape exception if its criminal justice system recognises and prosecutes marital rape no differently from regular rape, imposing the same severity of criminal condemnation and sentencing outcomes. Our

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10 'Country Assessment: Singapore' (Human Dignity Trust, 21 March 2024) <https://www.humandignitytrust.org/reform/countries/singapore> accessed 21 March 2024

11 The Penal Code 1860, s 375

12 The Indian Penal Code 1860, s 375

13 Andrew Davis and Morgan Johnstonbaugh, 'Safe at Home? Examining the Extension of Criminal Penalties for Marital Rape in Cross-National Context, 1979–2013' (2024) 58(1) LSR 126, 126 <https://www.cambridge.org/core/journals/law-and-society-review/article/safe-at-home-examining-the-extension-of-criminal-penalties-for-marital-rape-in-crossnational-context19792013/192D7A6CCFDAADBBDA8FB028A1ABC2A6> accessed 4 May 2024

14 'The Commonwealth - Countries Retaining Marital Rape Exemptions' (Child Rights International Network, 2022) <https://home.crin.org/commonwealth-map-marital-rape-exemptions#:~:text=The%20Commonwealth%20%2D%20Countries%20retaining%20marital,as%20property%20of%20their%20husbands> accessed 21 March 2024

view is that marital rape is gendered violence – a form of discrimination and inequality faced by women that is contrary to contemporary appreciation of human rights[15]. The expressive and remedial functions of criminal law play a critical role in tackling the marital rape exception and its residues[16].

Model 1: Alternative Liability

In certain jurisdictions, legislation keeps the marital rape exception intact, but the act incurs criminal liability of a different kind. On the face of it, this suggests that the law does not recognize the victims of spousal rape. In reality, their rights could be adequately protected under a separate umbrella, and we ought not to draw hasty conclusions without scrutinising the actual practice and effects of criminalisation. However, at least with reference to the different approaches employed in Malaysia, Kenya and Pakistan, we would conclude that the alternative liability model can at best be mitigatory, with outcomes that fall short of what explicit criminalisation of marital rape can deliver.

Malaysia: Overlapping Offences

Section 375 of the Malaysian Penal Code states[17]:

> "Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in Malaysia as valid, is not rape."

The marital rape exception of Section 375 is qualified by Section 375A, which reads[18]:

> "Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years."

Section 375A creates a separate charge relating to marital rape that requires the defendant's conduct to fulfil elements of a crime akin to criminal intimidation and distinct from intercourse without

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[15] Melanie Randall and Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law* (2015) 41(1) BJIL 154, 155

[16] Melanie Randall and Vasanthi Venkatesh*, Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective* in Melanie Randall and others (eds), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Bloomsbury Publishing) 41, 43

[17] Malaysian Penal Code, s 375

[18] ibid, s 375A

genuine consent[19]. As stated in Section 375(c)[20], where consent has been procured "by putting her in fear of death or hurt to herself or any other person", the exception of Section 375 would apply and bar a successful conviction for rape, but the offender spouse would incur liability under Section 375A instead, in effect recognising marital rape[21].

This alternative liability model is unsatisfactory for two reasons.

One, the essence of what makes rape a serious wrong is the lack of consent[22]. However, the mischief of Section 375A is not concerned with whether the victim has genuinely consented. Consequently, it does not recognise marital rape through intoxication or other forms of coercion and deception, where the victim's ability to consent is vitiated but no violence is involved[23], for example. This is simply because the wrongs that are recognized in rape and criminal intimidation are inherently different – the overlap in conduct criminalised by Sections 375 and 375A is more incidental than purposeful. Thus, Section 375A's scope is not wide enough to cover the instances of marital rape where there is no physical violence[24].

Two, the punishment meted by Section 375A does not compare with that for the offence of rape. The maximum imprisonment term for rape extends to 20 years, and if certain aggravating factors are present, minimum and higher maximum sentencing periods are set[25]. In contrast, Section 375A stipulates a maximum sentencing period of 5 years, with no minimum punishment required in any circumstance[26]. In fact, Section 375A is more lenient than Sections 503 and 506 that criminalise criminal intimidation more broadly, carrying a maximum sentencing period of 7 years[27]. In terms of the principle of retributive proportionality, where the severity of criminal sanctions should be proportional to the seriousness of the offence, Section 375A is a lenient punishment for marital rape compared to similar offences criminalised in the Malaysian Penal Code[28]. If it is settled that there

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[19] Usharani Balasingam and Johan Shamsuddin, *Section 375 Exception, Explanations and Section 375A Malaysian Penal Code – Legitimising Rape within Marriage: A Call for Reform* [2015] 42(2) JMCL 69, 89
[20] Malaysian Penal Code, s 375(c)
[21] *PP lwn Mahathir Abu Bakar* [2016] 10 CLJ 567
[22] David Archard, *The Wrong of Rape* [2007] 57(228) TPQ 374, 374
[23] 'Marriage Not a License to Rape: Delete the Exception in Penal Code Section 375' (Women's Aid Organisation, 2018) <https://wao.org.my/wp-content/uploads/2018/11/WAO-Policy-Brief-2018-1-Marital-Rape.pdf> accessed 21 March 2024
[24] Astuti Vitria and Syaiffudin Zuhdi, *A Comparative Study of Marital Rape Laws in Malaysia, Indonesia and Singapore* [2023] 2(1) ICRTL 61, 65-66
[25] Malaysian Penal Code s 376
[26] ibid, s 375A
[27] Ibid, s 503, 506
[28] Richard Frase and others, *Proportionality of Punishment in Common Law Jurisdictions and in Germany* in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice*: *Volume I* (Cambridge University Press 2020) 213, 213

should be no moral or legal distinction between marital rape and regular rape, then the lack of retributive proportionality implies failure to recognise the wrongfulness of sexual violence in a marriage, and a gap in the criminalisation of marital rape[29].

In short, the cumulative effect of Sections 375 and 375A is to create a light punishment for marital rape in a limited set of circumstances. Compared to an unmarried woman, a married woman's rights are afforded a lower level of protection by the law[30]. This alternative liability model is, at best, a "half-way house to recognising marital rape"[31].

Kenya: Civil Remedies

Section 43(5) of Kenya's Sexual Offences Act 2006 does not recognise the commitment of an intentional and unlawful sexual act by a spouse, thereby providing legal immunity from conviction for marital rape:

"This section shall not apply in respect of persons who are lawfully married to each other."

A prosecution could rely on assault provisions in the Penal Code in Sections 250, 251 and 234 that cover a gradation of offences relating to physical violence, ranging from assault to grievous harm[32]. This would be similar to relying on the 'criminal intimidation' provision under Malaysian law. Again, only the threat of physical injury is relevant, and sexual coercion need not involve physical harm, especially since many women do not resist when their partners try to force them to have sex to avoid further violence[33].

In addition, general assault provisions and their evidential burdens placed on the prosecution lack an appreciation for the dimension of rape in a matrimonial context, where the privacy of the matrimonial home means that witnesses cannot be easily furnished[34]. In contrast, classifying marital rape as a sexual offence can afford greater sensitivity to the context: the fact that the complainant

[29] Vitria and Zuhdi (n 23)
[30] Balasingam and Shamsuddin (n 18) 87
[31] Norbani Nazeri, 'Criminal Law Codification and Reform in Malaysia: An Overview' [2010] SJLS 375, 386 <https://www.jstor.org/stable/24870503?seq=1> accessed 21 March 2024
[32] Penal Code of Kenya, s 250, 251, 254
[33] 'Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament', (African Population and Health Research Centre, 2010) < https://assets.publishing.service.gov.uk/media/57a08b20ed915d3cfd000b4e/aphrc-brief13.pdf> accessed 21 March 2024
[34] Christine Wanjiru, 'Criminalization of Marital Rape in Kenya' (MLaws thesis, University of Toronto 2011), 18

and defendant are the only witnesses to the alleged rape is a common scenario and, in the United Kingdom at least, this evidential burden is no bar to prosecution[35].

Therefore, the criminal remedies are insufficient in recognising marital rape as an offence, and the alternative liability model in Kenya is centered around Section 3(a)(vi) of the Protection from Domestic Violence Act (PDVA) 2015, which breaks down the definition of domestic violence[36]:

'In this Act, "violence" means (a) abuse that includes (vi) sexual violence within marriage'.

The PDVA adopts a wider definition of domestic violence and abuse that covers marital rape without physical injury, seeking to address the gap in the law left by Kenya's Penal Code and Sexual Offences Act[37]. It is essentially a civil statute: the victim of domestic violence can receive compensation[38] and court-mandated protection orders if the offender spouse is found liable[39], and can be granted urgent interim orders if there is an ongoing risk of harm as the trial proceeds[40]. However, there is no new criminal offence created for marital rape *per se*[41]; a protection order can only direct the respondent not to sexually abuse the applicant[42], or restrain him from making contact with the applicant[43]. Penal measures are reserved for when there is contempt, such as when the court-issued order is ignored[44].

The PDVA's relief falls short in three respects.

One, there is no punitive measure for the rape. The parallel functions of the civil and criminal systems are relevant: while the civil law compensates for the wrong committed by one individual to

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35 Siobhan Blake, 'How We Prosecute Rape' (Crown Prosecution Service, 2023) <https://www.cps.gov.uk/about-cps/how-we-prosecute-rape#:~:text=It%20is%20necessary%20under%20the,are%20the%20only%20direct%20witnesses> accessed 4 May 2024.

36 Protection from Domestic Violence Act 2015, s 3(a)(vi)

37 Rahab Mureithi, 'Challenges in Litigating under Kenya's Protection from Domestic Violence Act 2015' [2018], 3 JLE 87, 93 < http://ir.kabarak.ac.ke/bitstream/handle/123456789/783/Challenges%20in%20Litigating%20under%20Kenya's%20Protection%20from%20Domestic%20Violence%20Act%20%281%29.pdf?sequence=1&isAllowed=y> accessed 21 March 2024

38 Protection from Domestic Violence Act 2015, s 32(2)

39 ibid, s 13

40 ibid, s 12

41 Winifred Kamau and others, *Dismantling Barriers to Women's Equality: Making the Case for the Criminalisation of Marital Rape in Kenya* in Melanie Randall and others (eds), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford London Portland: Hart Publishing, 2017) 197, 200

42 Protection from Domestic Violence Act 2015, s 19(1)

43 ibid, s 19(2)

44 ibid, s 22

another, the criminal law represents an action by the State against the defendant for the most serious of transgressions[45]. While the PDVA laudably improves access to civil justice, it does not adequately replicate the effects of criminalisation, such as a prison sentence which imposes a heavy restriction on the offender's liberty. Further, the reliance on civil remedies expresses the State's legal tolerance towards marital rape and fails to express its criminal condemnation of the rapist to signal the wrongfulness of his conduct.

Two, the remedies may be insufficient to protect the victim from further offences by the offender. For the victim to qualify for the interim order, there must be a *prima facie* case that violence was committed by their spouse, yet most victims may not be able to adduce sufficient evidence. In a case trialed in the Nakuru Law Courts, the applicant failed to obtain an interim order because she ran away from home and could not present concrete information about her living situation[46]. In the alternative, if the case were treated in a criminal context, the burden of proof would fall on law enforcement agencies that are in a far better position to carry it.

Three, if a further act of marital rape were to be committed in contravention of a protection order, imprisonment would be for only a period not exceeding 12 months[47]. In contrast, the punishment for rape ranges from 10 years to life imprisonment under the Sexual Offences Act[48]. As with Malaysia's Section 375A, there would be a lack of retributive proportionality.

Even if one were prepared to accept that civil justice could potentially plug a gap left by the criminal law, the PDVA provides a negative example that indicates that it is neither easy nor straightforward to achieve. Kenya's alternative liability model falls considerably short of frustrating the marital rape exception.

Pakistan: The Question of Fair Labelling

Other jurisdictions share characteristics of the alternative liability models in Malaysia and Kenya, such as a reliance on offences of infringement of the victim's physical wellbeing rather than her sexual autonomy. As suggested by the examples above, these approaches are likely to suffer from insensitivity to the circumstances that surround marital rape, failure to cover the range of situations

[45] John Child and David Ormerod, Smith, Hogan and Ormerod's Essentials of Criminal Law (5th edn, OUP 2023) ch 1, 8
[46] Mureithi (n 35) 101
[47] Protection from Domestic Violence Act 2015, s 22
[48] Sexual Offences Act 2006, s 3(3)

and lenient punishment. Ultimately, these alternative liability models can only be mitigatory – as the adage goes: "something is better than nothing at all". A fair assessment of jurisdictions such as Malaysia and Kenya would be that there are remedies for marital rape victims, but the protections that they offer are inadequate.

But, theoretically, could an alternative liability model potentially provide an adequate substitute for a legal system that criminalises marital rape? Hypothetically, if Malaysia's Section 375A could be broadened to sufficiently cover the instances of marital rape where there is no physical violence, and its sentencing periods were raised sufficiently, could the marital rape exception of Section 375 be satisfactorily nullified, without classifying the conduct as rape?

In the landmark case of *Javed* just this year in Pakistan, the court found the accused husband guilty of an unnatural offence under Section 377 of the Pakistan Penal Code for forcefully subjecting his wife to forced sexual acts and sodomy[49] and sentenced him to imprisonment for 3 years. This was arguably the first conviction for marital rape in Pakistan[50]: the conduct of non-consensual intercourse between spouses was given criminal sanction under the name of 'unnatural offences'[51]. Of course, 'unnatural offences', defined as 'carnal intercourse against the order of nature with any man, woman or animal'[52], is concerned with the prohibition of 'non-heterosexual sexual activity'[53], even when all parties consent. But the core of rape, and sexual offences more generally, is the complainant's lack of consent. Prosecuting marital rape as an 'unnatural offence' may successfully punish the offender but it ignores the core wrong of marital rape. In the case of *Javed,* it also failed to encapsulate the severity of the wrongdoing. For rape in Pakistan is punishable by death or imprisonment between 10 to 25 years[54], but the defendant in *Javed* was only sentenced to 3 years, far out of the ideal sentencing range. The lack of retributive proportionality appears to be a commonality among all three instances of the alternative liability model. However, unlike Malaysia's criminal

[49] Helena Kennedy, 'IBA Praises Pakistan for Rape-Law Change' (Law Society Gazette Ireland, 19 February 2024) <https://www.lawsociety.ie/gazette/top-stories/2024/february/iba-praises-pakistan-for-rape-law-change#:~:text=The%20human%2Drights%20body%20says,him%20to%20three%20years%27%20imprisonment> accessed 21 March 2024

[50] Alisha Sarkar, 'Man jailed for marital rape in landmark verdict in Pakistan' (The Independent, 22 January 2024) <https://www.independent.co.uk/asia/south-asia/pakistan-marital-rape-karachi-b2482519.html> accessed 21 March 2024

[51] Pakistan Penal Code, s 377.

[52] ibid.

[53] 'Country Policy and Information Note Pakistan: Sexual Orientation and Gender Identity and Expression' (Home Office, 2022) < https://assets.publishing.service.gov.uk/media/62554b85e90e0729fef7bb5f/Pakistan_Sexual_orientation_and_gender_identity_or_expression.pdf> accessed 4 May 2024

[54] Pakistan Penal Code, s 376

intimidation provisions, the conduct of marital rape itself, even without explicit physical violence, will presumably draw the attention of Pakistan's criminal justice system.

This takes us to the matter of fair labelling. Ashworth posits that fairness demands that offenders be labelled and punished in proportion to their wrongdoing[55], and Horder emphasises the importance of the offence being correctly "represented to the public at large"[56]. If one accepts that marital rape should be criminalised for the same reason as rape in general, the criminal law under an alternative liability model would not fulfil its "declaratory" function; it would fail to symbolise the degree of condemnation that should be attributed to the offender[57]. Fair labelling also has implications for the victim: Loh argues that many victims may prefer their assailants to be convicted of rape rather than assault[58]. Labelling the offender as a rapist would represent his culpability accurately. An alternative liability model, by definition, cannot achieve this. Glanville Williams has challenged this line of thinking on marital rape, however. He argues that the word "rape" disproportionately stigmatises the defendant because "the [stranger] never received consent, while the [husband] has received favour in the past and is now perhaps only temporarily out of favour"[59]. Thus, the case for alternative liability models hinges on whether we accept that there is something distinctive about non-consensual intercourse in a marriage compared to rape in general, such that the defendant may be charged with a more lenient offence. We argue below that such a distinction is untenable; a failure to label the conduct as 'rape' would be a shortfall in protecting the victims of marital rape.

Model 2: Remnants of the Exception

While the alternative liability model is concerned with the jurisdictions that retain the marital rape exception, what we will forthwith term the 'remnants model' focusses its attention on jurisdictions that acknowledge marital rape as an offence but manifest remnants of the exception in practice. This may hinder their ability to provide adequate protection to victims of marital rape.

United Kingdom: A Mitigatory Factor

[55] Jeremy Horder, Ashworth's Principles of Criminal Law (10th edn, OUP 2022) ch 4, 88-89
[56] Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person' [1994] 14 OJLS 335, 339
[57] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' [2008] 71(2) MLR 217, 226 <http://www.jstor.org/stable/25151193> accessed 21 March 2024
[58] Wallace Loh, 'What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling' [1981] 37 JSI 28, 37.
[59] Glanville Williams, 'The Problem of Domestic Rape' [1991] 141 NLJ 205, 211

Some legal systems criminalise marital rape but use the fact that the rape happened between spouses as a mitigatory factor in sentencing. Rwanda, which has a hybrid legal system between civil and common law[60], criminalises marital rape but pegs a much lower penalty (3-5 years) thereto compared to that for non-marital rape (10-15 years)[61]. The difference in penalties might not be explicitly laid out in statute but integrated into the law through case law in sentencing. In the United Kingdom, on average, marital rape has seen lower sentences compared to extramarital rapes[62]. In *Berry*, the offender's sentence was reduced from 6 to 4 years as the defendant had previously been married to the complainant[63]. Lord Mustill explained that "the rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be"[64], lacking certain elements of "violation" and "defilement" that would be inevitable in rape by a stranger. This principle was approved in subsequent cases such as *W*[65] and *Richard M*[66].

In our earlier discussion on the alternative liability model, we noted Glanville Williams' argument that non-consensual intercourse between spouses could not be fairly labelled as rape because it was not on par with rape by a stranger. The *Berry* principle applies the same argument to grant lighter sentencing to offender spouses.

We can distill two justifications for more lenient treatment of marital rape from Glanville Williams' and Lord Mustill's propositions.

First, there is the idea that, in marital rape, the victim is less traumatised or less "violat[ed]"[67]. Yet this is empirically false[68]. In fact, research on rape trauma shows marital rape victims could even suffer more severe psychological consequences and for a longer period than those who were raped by a stranger due to a sense of betrayal of trust[69].

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60 'Rwanda' (Judiciaries Worldwide, 2021) <https://judiciariesworldwide.fjc.gov/country-profile/rwanda#:~:text=Legal%20System&text=In%202019%2C%20Rwanda%20became%20the,legislation%20follows%20common%2Dlaw%20principles> accessed 21 March 2024

61 'Next Steps Towards Reform: Assessing Good Practice and Gaps in Commonwealth Sexual Offences Legislation' (Human Dignity Trust, 2020) <https://www.humandignitytrust.org/wp-content/uploads/resources/2020-Next-Steps-Africa.pdf> accessed 21 March 2024

62 Philip Rumney, 'When Rape Isn't Rape: Court of Appeals Sentencing Practice in Cases of Marital and Relationship Rape' [1999] 19 OJLS, 243, 258-259 <https://www.jstor.org/stable/20468269?seq=16> accessed 21 March 2024

63 *R v Berry (Arthur John)* [1988] Crim. L.R. 325 (EWCA Crim)

64 ibid [15] (Mustill LJ)

65 *R v W (Stephen)* [1992] Crim. L.R. 905 (EWCA Crim)

66 *R v M (Paul Richard)* [1995] Crim. L.R. 344 (EWCA Crim)

67 Williams (n 53) 205

68 Rumney (n 56) 254

69 Brisa Victorio, 'The Effects of Marital Rape on a Woman's Mental Health' [2023] 11(2) RJJSFS 1, 2 <https://scholarworks.sjsu.edu/themis/vol11/iss2/4> accessed 21 March 2024

Second, there is the idea that it is less egregious or blameworthy to initiate non-consensual intercourse based on prior consensual intercourse. But accepting this proposition would invalidate the victim's sexual autonomy by deeming her subsequent consent, or lack thereof, as less important than the very first consent given. It is but a watered-down version of Hale's proposition that a wife has given irrevocable consent to her husband for sexual intercourse[70], which has already been declared archaic in *R v R*. It is clear that the *Berry* principle qualifies the abolition of the marital rape exception in *R v R*.

In both the alternative liability model and the remnants model, marital rape is not treated on the same footing as regular rape, whether in how it is labelled or in the severity of the sanctions. Neither model fully purges itself of the marital rape exception. But this is not to say that the two models are the same in terms of their distance from a satisfactory criminalisation of marital rape.

Let us compare the United Kingdom, a remnants model, with Pakistan, an alternative liability model. The United Kingdom recognises non-consensual intercourse in a marriage as "rape", while Pakistan relies on "unnatural offences" to prosecute marital rape. Both practise discriminatory sentencing for marital rape, as opposed to extramarital rape, and the degree of discriminatory sentencing bears examination. In our assessment, the United Kingdom's fair labelling has pushed its legal system closer to the proportionate criminalisation of marital rape. In the United Kingdom, sentencing for marital rape will always fall within the range for regular rape (4 to 19 years)[71]. In Pakistan, sentencing for 'unnatural offences' (the offence charged for marital rape) ranges from 2 to 10 years, compared to the 10 to 25 years for rape[72]. As marital rape does not fall within the sentencing guidelines for rape in Pakistan, it can employ a greater degree of discriminatory sentencing. In this respect at least, the United Kingdom has more satisfactory protection against marital rape. Nonetheless, it is still insufficient, in terms of the protection of the victim's rights, that marital rape is recognised as rape but attracts more lenient sentencing.

Ghana: Customs and Judicial Discretion

[70] Lalenya Siegel, 'The Marital Rape Exemption: Evolution to Extinction' [1995] 43 CSLR 351, 355 < https://core.ac.uk/download/pdf/301537703.pdf> accessed 21 March 2024
[71] 'Rape' (Sentencing Council, 2014) < https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/> accessed 4 May 2024
[72] Pakistan Penal Code, s 376-377.

Ghana's position on marital rape is more uncertain compared to the United Kingdom's. Let us look briefly at the history of Ghana's treatment of marital rape. Section 42(g) of the Criminal Offences Act 1960 originally read[73]:

> "a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, for the purposes of the marriage, cannot be revoked until the parties are divorced or separated by a judgement or decree of a competent court."

Under this provision, a wife could not revoke her consent to sex as the husband's right to sex was considered part of the "purposes of marriage", and spousal rape, as a form of sexual force, was not recognised as a crime[74]. In 2007, under pressure from the women's movement advocating for a domestic violence law and removal of the marital rape exception[75], the Laws of Ghana (Revised Edition) modified the marital rape exception in the Criminal Offences Act 1960. Section 42(g) now reads[76]:

> "a person may revoke a consent which that party has given to the use of force against that person, and the consent when so revoked shall not have effect or justify force (the exception to this provision regarding marriage has been omitted in the reinstatement as being unconstitutional)"

Examination of the legislative history shows that the change was an explicit acknowledgement that the marital rape exception was unconstitutional, and a wife can revoke her consent to sexual intercourse with her husband.

However, the statutory language suggests that a wife is vulnerable to the presumption that she had consented to the marital rape unless she can prove that she had somehow revoked her consent prior to the sexual conduct. Archampong and Sampson raise a valid concern: judges may interpret "revocation of consent" from a wife to her husband as a higher bar to reach, making it harder for a victim to prove revocation and challenge the presumption[77]. This is not too far detached

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[73] Criminal Offences Act 1960, s 42(g)
[74] Nancy Stafford, 'Permission for Domestic Violence: Marital Rape in Ghanaian Marriages' [2008] 29 WRLR 63, 64-65
[75] Elizabeth Archampong and Fiona Sampson, 'Marital Rape in Ghana: Legal Options for Achieving State Accountability' [2010] 22 CJWL 505, 509
[76] Criminal Offences Act, 1960 (Revised 2007), s42(g)
[77] Archampong and Sampson (n 68) 510

from Hale's statement that 'matrimonial consent' is assumed by default. In Ghana, this possibility may be all the more real considering the traditional tolerance of marital rape in customary law, which treats women as inferior in status to men[78]. In addition, owing to the poor policing of domestic abuse by the Domestic Violence and Victim Support Unit[79], there is also a noticeable deficiency of case law involving the prosecution of marital rape to examine how Section 42(g) is interpreted[80].

In the United Kingdom, where the existence of a marital relationship is treated as a mitigating factor by the *Berry* principle, sentencing may be more consistently guided by case law. While the sentence that is meted is variable, sentencing in rape cases is constrained by the guidelines set out in *Billam*. There, a 5-year starting point was established, subject to various mitigating and aggravating factors[81]. *Billam* 'anchors' the law in this respect, bringing a degree of certainty to determining a rape sentence.

In contrast, there is uncertainty in Ghanaian law in respect of the circumstances in which a wife can revoke her consent. Ghana's abolition of the marital rape exception is qualified not by jurisprudence, but by judicial discretion, and thus more susceptible to the influence of cultural and customary beliefs. Ghana therefore presents a curious situation: while acknowledgement of the unconstitutionality of the exception should, in theory, guarantee legal protection, the lack of case law nonetheless leaves a vacuum for cultural beliefs to come in, rendering the position on marital rape less certain. In our assessment, this uncertainty leaves Ghana further away from a satisfactory criminalisation of marital rape than the United Kingdom. Jurisdictions that have done away with the marital rape exception can vary significantly in the actual protections provided.

Conclusion

By casting a spectrum of stances that different common law jurisdictions adopt towards the marital rape exception, we may observe that the binary pro-exception versus anti-exception classification provides an inadequate appreciation of the more nuanced positions that actually exist.

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[78] Elizabeth Archampong, 'Marital Rape – A Women's Equality Issue in Ghana' [2010] The Equality Effect 1, 11 < https://theequalityeffect.org/pdfs/maritalrapeequalityghana.pdf> accessed 21 March 2024

[79] '2022 Country Reports on Human Rights Practices: Ghana' (U.S. Department of State, 2022) 14 <https://www.state.gov/wp-content/uploads/2023/03/415610_GHANA-2022-HUMAN-RIGHTS-REPORT.pdf> accessed 21 March 2024

[80] ibid

[81] *R v Billam (Keith)* [1986] Crim. L.R. 347 (EWCA Crim)

We identified two broad models that have been adopted, each beginning from one end of the spectrum and converging towards the middle. The first model, i.e. the alternative liability model, covered jurisdictions that accept the marital rape exception but find alternative routes to liability for the same conduct. The second model, i.e. the remnants model, covered jurisdictions that reject the marital rape exception but preserve remnants of Hale's justification. These models help to keep us cognisant that jurisdictions rarely sit fully at the extremes on this issue. For example, it is possible that Pakistan, an alternative liability model, may have more concrete protection for marital rape victims than Ghana, a remnants model, for the reasons outlined above. Yet, a superficial analysis might too quickly draw the opposite conclusion because Pakistani law does not recognise marital rape as an offence.

The treatment of the marital rape exception in certain civil law jurisdictions is also fascinating. In France[82], the marital relationship between victim and perpetrator constitutes an aggravating factor in rape cases. Rumney argues that the United Kingdom should adopt a similar position due to the breach of trust and betrayal that spousal rape entails[83]. Whether this is doctrinally sound is for another article to cover, but it serves as a further illustration that jurisdictions may also defy a convenient categorisation into one of the two models proposed.

The marital rape exception has no place in our society. To properly protect the rights of vulnerable women, further reform is necessary to completely divorce the common law from this antiquated principle and its underlying justifications.

[82] French Criminal Code, art 222-23, 222-24
[83] Rumney (n 56) 251

"Stopping the Boats": Human Rights Implications of the 'Safety of Rwanda (Asylum and Immigration) Bill'

Hannah Zia

Introduction

The journey of the 'Safety of Rwanda (Asylum and Immigration) Bill' (henceforth the "SR(AI)B") through Parliament represents another catastrophe for asylum seeker protection in the UK. It marks the fourth occasion since the Human Rights Act (HRA) was passed in 1998, in which the Home Secretary could not issue a positive statement of compatibility with the European Convention on Human Rights (ECHR) under section 19(1)(a) HRA. Though not automatically an admission of an *illegal* Bill per se, this should nevertheless raise alarm bells for the legal community and public at large. This article lays bare the major practical and constitutional implications of this Bill were it to pass as an Act of Parliament, in the interests of clarity, transparency and warning.

The Bill, though not yet law, charters a woeful trajectory for asylum seeker protection. Specifically, it stands in firm opposition to the Supreme Court's recent judgement ruling that the so-called 'Rwanda Policy' is unlawful by legislating exactly the opposite: Rwanda, contrary to the judgment, is a safe third country. The SR(AI)B represents the latest step in the UK's immigration law saga, as Parliament seeks to reassert its final legislative say, prompting a potential battle between Parliament and the courts on the question of immigration removal. This escalation only deepens an existing constitutional malady. In the absence of written guidance, the courts may have to exercise further interventionist powers to offset this attack on their quintessential roles of arbitration and fact-finding. And for the enormous human rights issues this Bill will trigger, it is remarkably short.

Part I will give a brief overview of the 'Rwanda Policy' and the Supreme Court's judgment in *AAA vs SSHD* to provide the necessary legal background which catalysed this Bill's creation. Part II will provide a brief explanatory summary on what the SR(AI)B seeks to do by breaking down its various provisions. Part III will delve further into the practical implications of this legislation were it to become an Act of Parliament, including the UK's future relationship with the European Convention on Human Rights (ECHR) and how a decoupling is imminent. Part IV considers the battle between the judiciary and legislative branches over the protection (or lack thereof) of minority

rights. In the absence of a written constitution, we will ponder the question: can this Bill simply be rejected by the courts as unconstitutional? The nature and scope of likely judicial intervention remains uncertain. Nevertheless, the SR(AI)B's wholesale immunisation of questions surrounding Rwanda's safety from judicial review, is testament to an ailing constitutional balance between Parliament and the courts. Part V draws these strands together to issue a resounding warning: this Bill runs counter to existing human rights mechanisms and creates especially fertile ground for human rights abuses within the asylum system. Practitioners and judges alike must work to bridge this legal gap in protection.

For brevity, we will exclude any focus on the UK's international obligations under refugee law outside of the ECHR remit. The incompatibility of this Bill with such law has been well-documented but is worthy of more focus than this short paper can give.

Part I: The 'Rwanda Policy' and *AAA v SSHD*

In April 2022, the UK Government announced a signed memorandum of understanding (MoU) with Rwanda, confirming an asylum externalisation scheme: 'the Rwanda Policy'. This agreement would transfer individuals whose claims have been ruled inadmissible in the UK to Rwanda to have their asylum claims processed. The SR(AI)B is the Government's latest attempt to initiate deportations to the Republic, in the face of months of legal obstacles including last-minute interim measures of the ECHR halting scheduled flights.

The Bill is a direct response to the Supreme Court's judgement in *AAA v SSHD* where the court unanimously held that the Rwanda Policy is unlawful.[1] The majority ruled that deficiencies in the Rwandan asylum system are such that there are substantial grounds for believing that persons sent to Rwanda will face refoulement (returned to their country of origin) where they may face persecution or inhumane treatment. Consequently, to send anyone to Rwanda would constitute a breach of article 3 of the ECHR and until the asylum deficiencies are remedied, removing a person to Rwanda will be unlawful.[2] Whilst finding no 'bad faith' on account of Rwanda signing the MoU, Lord Justice Underhill confirmed that the defects in the Rwandan asylum system 'must be regarded as a whole'.[3] Considering evidence on Rwanda's asylum system including Rwanda's asylum laws, the MoU, consequences of the Israel/Rwanda agreement and Rwanda's history of refoulement

[1] UK Government Website, 'Collection: Illegal Migration Act', 2023 <https://www.gov.uk/Government/collections/illegal-migration-bill> accessed 3 May 2024
[2] *AAA v Secretary of State for the Home Department* [2023] UKSC 42
[3] ibid, [264]

(amongst others), the Court concluded that there were 'substantial grounds to believe that asylum-seekers relocated to Rwanda under the MEDP were at real risk of refoulement, and that accordingly such relocation would constitute a breach of article 3 of the ECHR'.[4] Thus, the UK's positive ECHR obligation to ensure individuals were governed by an adequate asylum scheme were not dispelled.

In the face of inadequate guarantees against refoulement, asylum seekers could not be deported to Rwanda without risk of their article 3 ECHR rights being breached. The Rwanda scheme as it stood could not be reconciled with existing obligations on the international plane.

Part II: The Government's Response: SR(AI)B

In direct response to this ruling which obstructs implementation of the existing Rwanda Scheme, the SR(AI)B was drafted. Its main function is to legislate a fiction: that Rwanda *is* a safe third country and that every decision-maker is to *conclusively* treat it as such, in their decisions concerning deportation (section 2(1)).[5] 'Decision-maker' is clarified to conclude courts or tribunals (section 2(2)(b)).[6] By extension, a court or tribunal must not consider a review of, or appeal against a decision made by the Secretary of State or immigration officer relating to the removal of a person to Rwanda, based on the grounds that Rwanda is not a safe third country (section 2(3).[7]

The Bill also prohibits the courts from considering any claim or complaint that Rwanda will violate its international obligations in relation to removing a person (section 2(4)(a)), that a person will not receive fair and proper consideration of asylum in Rwanda (section (2)(4)(b)), or that Rwanda will not act in accordance with the Rwanda Treaty (section 2(4)(c)).[8] These provisions apply notwithstanding the HRA (section 2(5)(b)), among others.[9] Section 3 of the Bill disapplies several provisions of the HRA, including sections 2, 3 and 6 to 9 (SR(AI)B section (3)(2)).[10] The Bill explicitly disapplies section 2 HRA which otherwise provides that domestic courts must take into account Convention rights and Strasbourg jurisprudence. Accordingly, this judicial obligation no longer applies in relation to decisions on Rwanda's safety for a deported individual (section 3(3)).[11]

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[4] ibid, [293]
[5] Safety of Rwanda (Asylum and Immigration) Bill 2024 (SR(AI)B), s 2(1) <https://bills.Parliament.uk/publications/53802/documents/4312> accessed 3 May 2024
[6] SR(AI)B, s 2(2)(b)
[7] ibid, s 2(3)
[8] ibid, s 2(4)(a), s 2(4)(b), s 2(4)(c)
[9] ibid, s 2(5)(b)
[10] ibid, s 3(2)
[11] ibid, s 2(3)

A very narrow exception to this exists whereby the Home Secretary or immigration officer may decide that Rwanda is not a safe country due to 'particular individual circumstances' requiring 'compelling evidence' (section 4(1)(a)).[12] The court may similarly consider a review or appeal against deportation based on such 'particular individual circumstances' requiring 'compelling evidence' which may point to Rwanda being unsafe *in that narrow instance* (section 4(1)(b)).[13]

The decision-maker is also prohibited from considering any claim or complaint based on Rwanda's possible contravention of its international obligations, including the Refugee Convention (section 4(2)), although for brevity, we will not examine this further.[14] UK courts are permitted to grant an interim remedy to delay or prevent deportation only if satisfied that the person would 'face a real, imminent and foreseeable risk of serious and irreversible harm if removed to the Republic of Rwanda' (section 4(4)).[15] The bar to delay or prevent deportation is set higher than ever before.

In relation to the ECHR, the Bill makes expressly clear that interim measures *may*, but not *must*, be listened to. Instead, 'it is for a Minister of the Crown (and only a Minister of the Crown) to decide whether the United Kingdom will comply with the interim measure' (section 5(2)).[16] Subsequently, a court or tribunal 'must not have regard to the interim measure' when considering any application or appeal which relates to removal to Rwanda (section 5(3)).[17]

In sum, this Bill entrenches a wholesale immunisation of reviews or appeals against deportation based on Rwanda *not* being a safe third country. It removes the fact-finding role of the court by legislating that decision-makers must treat Rwanda as safe, irrespective of reality. Courts are consequently prohibited from any suggestion that Rwanda may not in fact, be safe.[18] Crucially, this Bill makes it near impossible to mount a domestic legal challenge to delay or prevent deportation due to its entrenched position: Rwanda is safe for asylum seekers. If this Bill passes, nothing - not even a mountain of evidence to the contrary - can dislodge this legislated 'fact'.

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[12] ibid, s 4(1)(a)
[13] ibid, s 4(1)(b)
[14] ibid, s 4(2)
[15] ibid, s 4(4)
[16] ibid, s 5(2)
[17] ibid, s 5(3)
[18] Irena Sabic and Alex Grigg, 'Blog: Irena Sabic KC and Alex Grigg Reflect on the Rwanda Bill' (*Garden Court Chambers*, 22 December 2023) <https://www.gardencourtchambers.co.uk/news/blog-irena-sabic-kc-and-alex-grigg-reflect-on-the-rwanda-bill> accessed 3 May 2024

Part III: Practical Implications of the SR(AI)B

Coupled with the Illegal Migration Act 2023 which has widened the categories of individuals eligible for removal while legalising indefinite periods of detention, this Bill would place tens of thousands of asylum seekers at imminent risk of being deported to Rwanda.

The targeted exclusion of any domestic legal challenge pertaining to the safety of Rwanda will make it markedly more difficult to mount a successful legal challenge at home. Though the exception requiring 'compelling evidence' of an individual's unique circumstance exists, this is clearly a narrow exclusion. Furthermore, by disapplying the HRA and prohibiting challenges based on general safety concerns, the Bill essentially bars any plausible domestic remedy.[19] The lack of effective remedy likely breaches article 13 of the ECHR.[20] To grant ministers the discretion not to comply with interim measures of the ECHR is likely to run up against article 34 of the ECHR on individual petition.[21]

On a conceptual level, prohibiting courts from hearing arguments based on evidence which would implicate Rwanda's asylum system as unsafe, poses grave issues to access to justice. The Bill codifies an inconclusive state of affairs as fact, while disallowing any legal suggestion of the opposite. This amounts to legal censorship of arguments pertaining to safety issues. It is their safety (or lack thereof) and namely the risk of refoulement that is a major concern for individuals facing deportation to the Republic.

A silver lining does exist. The Bill does not disapply section 4 of the HRA which leaves scope for the judiciary to issue a 'declaration of incompatibility' with Convention rights.[22] This provides some hope. Past declarations of this kind reveal a track record of Parliament responding positively to remedy an act's potential breach of the ECHR. This was the case in the infamous *Belmarsh* decision where the House of Lords ruled that the provisions that held foreign nationals suspected of terrorism in Belmarsh prison violated their article 5 ECHR rights.[23] As a result, Parliament amended the offending legislation. There is a small possibility that a declaration of

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[19] ibid, [20]
[20] Murray Hunt, 'Safety of Rwanda (Asylum and Immigration) Bill: A Preliminary Rule of Law Analysis for House of Commons Second Reading' (*Bingham Centre for Rule of Law*, December 11, 2023) <https://binghamcentre.biicl.org/publications/safety-of-rwanda-asylum-and-immigration-bill-a-preliminary-rule-of-law-analysis-for-house-of-commons-second-reading?cookiesset=1&ts=1705056255> accessed 3 May 2024
[21] ibid
[22] Human Rights Act, 1998, s 4
[23] *A v Secretary of State for the Home Department* [2004] UKHL 56

incompatibility could mount appropriate pressure on the political branches to respond appropriately. However, the Government has already made exceptionally clear its commitment to this Bill regardless of its ECHR implications. Indeed, former Home Secretary Suella Braverman renewed her calls to leave the ECHR in a bid to move the Rwanda Policy along.[24] The Bill's resolute position on Rwanda's safety presents a near-impossible reconciliation challenge with the ECHR.

Relationship to the ECHR

The SR(AI)B signals an explicit move away from ECHR standards and sets a precedent of future detachment from the Convention. Whether such decoupling is possible while remaining a signatory to the ECHR, however, is questionable.

The Bill legislates for optional and not mandatory compliance with ECHR 'Rule 39' interim measures, by granting civil servants' full discretion to comply (or not) with Strasbourg's orders. It was a last-minute interim measure which was responsible for halting the first flight set for Rwanda in June 2022, and which has proved a legal challenge to full implementation of the Government's Rwanda plans. The proposed section has prompted fierce criticism on an international level with ECHR President Sofia O'Leary stating that by legislating to allow non-compliance with Rule 39 measures, the UK would be in clear breach of its international ECHR obligations.[25]

Alongside this, the Bill does away with section 2 HRA which otherwise provides that domestic courts must take into account Convention rights and Strasbourg jurisprudence. More disturbingly, it disapplies section 6 HRA which otherwise would require public bodies to act compatibly with Convention rights. As it stands, the UK Government is manoeuvring a turn away from the ECHR, citing (among other reasons) unwarranted intrusion by a 'foreign court' and a reassertion of Parliamentary sovereignty on immigration matters. Regardless, it is entirely possible that a deportation may breach ECHR standards even if permitted under domestic law. As Mark Elliott explains, unless the UK repudiates or ceases to be a party to the ECHR, it remains bound by

[24] Peter Walker, Matthew Weaver *and* Diane Taylor, 'Suella Braverman restates wish for UK to leave European court of human rights' *The Guardian* (London, 28 August 2023) <https://www.theguardian.com/politics/2023/aug/28/suella-braverman-restates-wish-for-uk-to-leave-european-court-of-human-rights#:~:text=Suella%20Braverman%20has%20reiterated%20her,people%20as%20%E2%80%9Cmere%20objects%E2%80%9D> accessed 3 May 2024

[25] 'Europe Court Says UK Has 'Clear Obligations on Rwanda Rulings' (*Barron's*, 25 January 2024) <https://www.barrons.com/news/europe-court-says-uk-has-clear-obligation-on-rwanda-rulings-c457fd96> accessed 3 May 2024

its international obligations regardless of its domestic regime.[26] Legislated ignorance cannot change legal fact: the Bill is incompatible with Convention rights. Given this odd detachment from a Convention which the UK remains a signatory to, it is hard to marry continued membership of the ECHR with this Bill. Perhaps this antithesis will eventually prove too hard to reconcile and the UK may be forced to compromise on one position or another.

On a macro level, this Bill necessarily fractures the 'baked-in' HRA-ECHR system, and contributes to a weakening of this international human rights regime as a whole. If the Human Rights Act which gives domestic effect to Convention rights is disapplied in the key areas targeted by this Bill, the impact of the ECHR is severed. No domestic challenge based on sections 2, 3 or 6 of the HRA may be mounted, and a key purpose of the HRA 'to bring (Convention) rights home' is rendered redundant. In fact, we end up sending rights back.

Disapplication of HRA provisions offset by continued ECHR membership will likely result in litigation under the Strasbourg court. As Elliott puts, the Bill may 'switch off' the UK to its international obligations, but they are still a legal fact.[27] Any interim measures issued by the Court, however, will be at the discretion of civil servants to ignore. Ultimately, power concentrated in the hands of the executive will put civil servants in an extremely difficult position. The Bill grants them the freedom to reject the orders of a human rights protectorate but the transparency of doing this will certainly project an unfavourable image.

This newly legislated apathy towards the ECHR will undoubtedly impact the UK's international reputation as a self-declared protectorate of human rights. Instead, the UK will occupy an increasingly difficult position where it must work to reconcile this legislated rejection of ECHR standards, with ongoing ECHR membership. The precedent set is one which will rob the UK of any future moral standing when other countries attempt to emulate this brazen attitude towards ECHR standards. This Bill marks a slow withdrawal of any meaningful ECHR commitment, and a dilution of its espoused human rights protections.

[26] Mark Elliott, 'The Rwanda Bill and its constitutional implications' (*Public Law for Everyone*, 6 December 2023) <https://publiclawforeveryone.com/2023/12/06/the-rwanda-bill-and-its-constitutional-implications/> accessed 3 May 2024
[27] ibid

Part IV: Constitutional Implications of the Bill

The SR(AI)B is the latest punch thrown in a long battle between Parliament and the courts in the context of immigration removal. The Bill makes plain its intention to 'respond' to the Supreme Court's ruling on Rwanda's safety by excluding the question of generic safety from the Court's remit. It is essentially, a glorified ouster clause. And, in the context of an unwritten British constitution, there is no straightforward answer as to where the last word lies.

Under an orthodox model of Parliamentary sovereignty most famously articulated by A V Dicey, it is for Parliament alone to make or unmake any law. Accordingly, any attempt by the Supreme Court to reject the Bill as unconstitutional would be an unwarranted intrusion into political affairs. However, caselaw on ouster clauses has revealed a significant weakening of this model, with senior judges even suggesting that Parliamentary sovereignty 'is no longer, if it ever was, absolute'.[28] Lady Hale sounded the warning in *Jackson* that '[t]he courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing Governmental action affecting the rights of the individual from all judicial scrutiny'.[29] The Bill's blanket exclusion on the generic question of Rwanda's safety ousts judicial review or even overview in the sphere of an individual's safety when in the Republic. It is, for all intents and purposes, an ouster Bill. Suspicion is warranted.

Evidence from recent caselaw suggests that Dicey's orthodox model of Parliamentary sovereignty has been diluted significantly and can no longer stand as he proposed. In practice, a delicate power balance exists between the courts and judiciary in a shared sovereignty whereby the former will occasionally intervene more than usual, but not unjustifiably so. Indeed, in *Evans*, Lord Neuberger adopted a strong stance that 'a decision of a court is binding […] and cannot be ignored or set aside by anyone'.[30] Similarly, Lord Carnwath in *Privacy International* asserted that 'it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review'.[31] While Dicey's orthodox model still holds weight, it is not so outlandish to suggest that judges will exercise their power to repudiate a piece of legislation if they deem it absolutely necessary. Although, as Elliott suggests, triangulating the Bill by statutory interpretation to make it compatible with human rights obligations is a more likely (and less drastic) response. For either judicial response, this Bill is a notable candidate.

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[28] *R(Jackson) v Attorney General* [2005] UKHL 56 [104]
[29] ibid, [159]
[30] *R (Evans) v Attorney-General* [2015] UKSC 21 [52]
[31] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [131]

Given the lack of any written code of conduct for judicial intervention, it is difficult to tell how far the courts will go. One thing is for sure: the brazen anti-rights stance in this Bill coupled with its targeted attack on the Supreme Court's judgment is sure to probe a judicial response in a more urgent capacity than ever before, in the immigration context. The growth in likelihood of article 3 breaches will mount exceeding pressure on the courts to fulfil their role as an appropriate check on Government power, and an arbiter against tyrannical rule. A likely constitutional crisis is brewing. While Elliott is certain that constitutional uncertainty on how the judiciary may respond is beneficial to a functioning checks and balances system and subsequently that no such crisis exists, the brazenness of this Bill warrants another reading. Raffael Fasel's warning of an ongoing and '*silent*' constitutional crisis is far more fitting. He notes the judicial trend in stretching statutory meaning to breaking point, notably in *Privacy International,* coupled with further escalations from Government through the introduction of 'super ouster clauses', now found in the SR(AI)B's sister legislation: the Illegal Migration Act.[32] The result is a downward spiral which pulls both judiciary and executive away from their proper roles. The SR(AI)B represents the latest blow struck. By legislating determination of fact - a quintessentially judicial role - it remains to be seen whether Parliament has finally cracked the code and legislated an unchallengeable ouster Bill. Either way, Fasel's call for intellectual candour is far more appropriate: all is *not* well in the UK constitution.[33] All-out judicial rebellion may not be the answer, but neither is denying the extraordinary judicial and political destabilisation triggered by this Bill; the latest in a saga of constitutional escalation.

Given the enormous strain on the traditional roles of Parliament and the courts, the orthodox model of parliamentary sovereignty is fracturing. Indeed, senior barrister Sir Geoffrey Cox has suggested that the orthodox model is only an *assumption*, which could be 'revisited by courts 'in the event that Parliament did the unthinkable'.[34] The deportation of individuals to Rwanda without adequate safeguards against refoulement coupled with the exclusion of judicial review against any decision pertaining to Rwanda's general safety, amounts to a potential death sentence. Lord Anderson in the International Agreements Committee elucidated this further: it would mean 'sending people, potentially, back into the torture chamber'.[35] 'Unthinkable' it is.

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[32] Illegal Migration Act 2023, s 51

[33] Raffael N. Fasel, 'Ouster Clauses and the Silent Constitutional Crisis' (*UK Constitutional Law Association*, 20 February 2024) <https://ukconstitutionallaw.org/2024/02/20/raffael-n-fasel-ouster-clauses-and-the-silent-constitutional-crisis/> accessed 3 May 2024

[34] Mark Elliott, 'Could the Supreme Court reject the Rwanda Bill as unconstitutional?' (*Public Law for Everyone*, 11 December 2023) <https://publiclawforeveryone.com/2023/12/11/could-the-supreme-court-reject-the-rwanda-bill-as-unconstitutional/> accessed 3 May 2024

[35] House of Lords, International Agreements Committee, *Corrected oral evidence: UK-Rwanda asylum agreement* (HL 18 December 2023) <https://committees.Parliament.uk/oralevidence/14036/pdf/> accessed 3 May 2024

Ultimately, the SR(AI)B strips the courts of their role as independent arbiter and leaves the human rights of a minority, in the hands of an elected class. But in a majoritarian democracy, protecting minority rights is a task of which the elected class do a notoriously poor job. How far the courts will go to remedy this malady is uncertain, but a traditional deference to parliamentary sovereignty can no longer stand: not in the name of intellectual honesty nor human rights protection.

Part V: Some Concluding Thoughts

The closer this Bill gets to royal assent, the more criticism it attracts. The Bingham Centre for the Rule of Law has concluded that it is wholly contrary to the rule of law, while the UNHCR has declared the entire scheme incompatible with international refugee law.[36] The audacity of this Bill is matched by its brevity. The Government has initiated a wholesale removal of judicial review on a crucial question of safety, pertaining to the deportation of asylum seekers to Rwanda. Cabinet remains undeterred, despite the numerous warning signs sounded along the way. As made transparent in the Brook House review of September 2023 which revealed rampant article 3 breaches in UK immigration centres, we are in an especially fertile climate for asylum seeker mistreatment. Given this climate, the SR(AI)B with all its human rights deficiencies, is remarkably shameless.

If this Bill passes, the paradox will be this. Unelected judges may have to exercise greater judicial intervention to protect the human rights of asylum seekers which the elected class could not guarantee. This could pave the way for constitutional upheaval or create greater opportunity for legal protections to be found, argued and won. In the face of a series of closed doors of protections for the most vulnerable, challenging this Bill is surely a worthy struggle.

[36] Hunt (n 20);
'UNHCR finds new UK-Rwanda treaty and Safety of Rwanda Bill are incompatible with international refugee law' (*Electronic Immigration Network*, 16 January 2024) <https://www.ein.org.uk/news/unhcr-finds-new-uk-rwanda-treaty-and-safety-rwanda-bill-are-incompatible-international-refugee#:~:text=It%20is%20UNHCR%27s%20firm%20view,the%20prospect%20of%20any%20challenge> accessed 3 May 2024

All Roads Lead to the Executive: Deciphering the Lack of Judicial Redress for Victims of the May 1998 Riots

Gabrielle Kurniawan

Introduction

On 11 January 2023, President Joko Widodo issued a statement expressing regret regarding twelve gross human rights violations which had taken place in Indonesia's post-colonial history. This included mass killings in 1965, the killing and abduction of student protestors in the late 1990s, and the approximately 1200 people, many of whom were Chinese Indonesians, killed during rioting in 1998.[1] Considering Indonesia's reputation for disregarding human rights, President Widodo's declarations to "endeavour wholeheartedly to ensure gross human rights violations never happen again in the future" and to move toward restoring rights of victims "fairly and wisely without negating judicial resolution" should have been welcome.[2] However, those affected remained sceptical.

President Widodo's statement is a long-awaited follow-up to campaign promises made in 2014 to bring victims some form of resolution, rendered significantly less credible by his choice to appoint officials with longstanding reputations of involvement in the aforementioned breaches of human rights, such as Prabowo Subianto and Wiranto, to high positions in governance and security.[3] The initial appeal of his vows to carve a new trajectory in Indonesian human rights governance is evident; Indonesia's long history of autocracy and corruption sits on an enduring culture of unspoken conventions and private agreements hidden from official records. For victims who have found themselves unable to access any other means of seeking justice, the mere acknowledgement of the existence of such violations was an unprecedented hope, albeit one that has proven to be ostensibly superficial.

[1] Ananda Teresia and Stanley Widianto, 'Jokowi regrets Indonesia's bloody past, victims want accountability' *Reuters* (11 January 2023) <https://www.reuters.com/world/asia-pacific/indonesia-president-says-strongly-regrets-past-rights-violations-country-2023-01-11/> accessed 22 March 2024.
[2] Kelly Ng, 'Jokowi acknowledges Indonesia's past human rights violations' *BBC News* (12 January 2023) <https://www.bbc.co.uk/news/world-asia-64245668> accessed 22 March 2024.
[3] Christian Donny Putranto, 'Jokowi's broken human rights promises' (*Indonesia at Melbourne*, 6 September 2016) <https://indonesiaatmelbourne.unimelb.edu.au/jokowis-broken-human-rights-promises/> accessed 22 March 2024.

The complexity of Indonesia's judicial system, alongside its tendency to be mired in under-the-table activities, has obscured both pathways to seeking justice and explanations as to why such efforts have often been futile. This article seeks to explore the various factors which have prevented affected parties from obtaining judicial redress, with a focus on the May 1998 riots. In order to do so, it will outline the key details of the May 1998 riot and discuss the structure of Indonesia's judicial system. Then, it will move on to examining the key factors leading to the aforementioned outcome under two main branches: the control of Indonesia's judiciary by its executive and by extension its military, as well as the particular vulnerabilities of the particular demographic affected by the riots. In doing so, it will argue that greater independence and competence of Indonesia's judiciary is required in order to strengthen the country's human rights regime and offer a greater chance at reparation for victims.

Background to the May 1998 Riots

The significance of the May 1998 riots cannot be overstated. It heralded the fall of Suharto, an infamously authoritarian and brutal president of three decades.[4] It gave rise to an age of reformation (*reformasi*), which sparked the demand for a more democratic regime. Within Indonesian history, itself marred by competing narratives and an enduring lack of accountability, this was a crucial turning point which still remains largely unresolved. Despite its absence from the public narrative, the bloody history of violence belying the campaign promises remains prominent in the minds of its victims. Silent *Kamisan* ("Thursday") protests are well-attended by relatives whose children had been killed and raped in the May 1998 riots. Those who gather wear black shirts and hold up black umbrellas as a signifier of their persistence.[5] However, their grief and determination are blunted by the reality of human rights law in Indonesia.

It is key to understand the economic and political background to the May 1998 riots. In the preceding decades, post-colonial Indonesia was so greatly influenced by the governance of President Suharto that his name has come to be the eponym of the era. Under his leadership, the New Order government took rapid and tightly-held control of the country, quickly becoming known for its brutality toward political opposition. In 1997, however, their unbroken dominance over command

[4] The Editors of Encyclopaedia Britannica, 'Suharto' (*Britannica*, 20 March 2024) <https://www.britannica.com/biography/Suharto> accessed 21 March 2024.
[5] Jessica Damiana, 'Twenty years on, victims of 1998 Indonesia violence still seek justice' (*Reuters*, 20 May 2018) <https://www.reuters.com/article/idUSKCN1IL04B/> accessed 22 March 2024.

of Indonesian governance was marred by the Asian financial crisis.[6] Indonesia was among the worst affected, with the rupiah undergoing rapid devaluation and Indonesian businesses deteriorating so quickly that the government was forced to turn to the International Monetary Fund for assistance. University students, greatly affected by the ensuing economic hardship, became zealous in their criticism of the government,[7] campaigning against *korupsi, kolusi, nepotisme* (corruption, collusion, nepotism), also known as "KNN", and calling for *reformasi*.[8]

On 12 May, thousands of students at Trisakti University in Jakarta, amidst a rising air of indignance at other universities, gathered to demand the end of Suharto's regime.[9] A lengthy standoff, initially peaceful, gave rise to violence when a provocateur, allegedly planted, incited chaos. Two students were injured; four more were shot and killed.[10]

This triggered "a wave of mass violence which engulfed the capital",[11] which sprawled over Jakarta, Solo, Surabaya, Lampung and Palembang from 12–15 May.[12] The destruction was characterised by "widespread looting, burning, rapes and killings".[13] Witnesses reported "organised groups of men acting under orders", as well as "large groups of men, women and children of all ages taking unrestrained advantage of the situation to loot goods from stores and shopping malls, often in response to an invitation to do so".[14] There was no form of restraint or control coming from security forces, who were "either absent or inactive".[15] There was also substantial numbers of women, primarily of Chinese ethnicity but including also *pribumi* (indigenous Indonesians)[16] and foreigners, who were sexually assaulted and raped on the streets, in workplaces, and in their homes.[17]

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[6] Jonathan Peter Tehusijarana, 'Indonesia's Student and Non-student Protesters in May 1998: Break and Reunification' in Melani Budianta and Sylvia Tiwon (eds), *Trajectories of Memory: Excavating the Past in Indonesia* (Palgrave Macmillan Singapore, 2023).

[7] Jonathan Peter Tehusijarana, 'Indonesia's Student and Non-student Protesters in May 1998: Break and Reunification' in Melani Budianta and Sylvia Tiwon (eds), *Trajectories of Memory: Excavating the Past in Indonesia* (Palgrave Macmillan Singapore, 2023).

[8] Theodore Friend, *Indonesian Destinies* (Harvard University Press 2005) ch 11, 326.

[9] ibid.

[10] ibid 327.

[11] Jonathan Peter Tehusijarana, 'Indonesia's Student and Non-student Protesters in May 1998: Break and Reunification' in Melani Budianta and Sylvia Tiwon (eds), *Trajectories of Memory: Excavating the Past in Indonesia* (Palgrave Macmillan Singapore, 2023).

[12] Jemma Purdey, *Anti-Chinese Violence in Indonesia 1996–1999* (Singapore University Press 2006) 108.

[13] ibid.

[14] ibid.

[15] ibid.

[16] ibid 2.

[17] ibid 108.

Scholars have struggled to put specific figures to the destruction. In the days following the incident, Habibie, the president immediately following Suharto, put together a joint fact-finding team to identify the perpetrators and clarify the facts of the matter; the final report concluded that there had been "52 rapes, 14 rapes accompanied by other violence, 10 instances of sexual attacks, and 4 instances of sexual harassment in Jakarta, Medan, Surabaya in connection with the May riots. The majority of victims were Sino-Indonesian women."[18] These numbers cannot be taken at face value; among other factors which will be discussed at greater length, the joint team comprised members of the police and the military selected by Habibie, who had also been Suharto's Vice-President. The team also had to grapple with many conflicting reports.[19] Purdey described the final product as "a highly problematic representation of the predominantly Jakarta-based violence in May 1998" but also "the best available account of those events".[20]

Both then and now, dissent remains rampant. Famously, an article published in 1998 in the Indonesian national daily newspaper *Republika*, questioned whether or not the rapes had happened at all.[21] Such scepticism cannot be dismissed and attributed to the political fervour of that time period, for in his book published a few years later by Indonesia's Institute for Policy Studies, Fadli Zon asserted that "the rapes (especially mass rapes) were unlikely to have happened in a situation like the May 1998 turmoil", citing evidence such as female activists' interviews in which they said that they had received dozens of reports but only met one victim. Notably, Fadli Zon is politically aligned with Prabowo Subianto,[22] who was head of the Army Strategic Reserve Command (*Kostrad*) at the time of the incident.[23] Additionally, he declared in his capacity as a politician that the ethnic Chinese minority in Indonesia held responsibility for the economic crisis in 1998 and warned that it would soon be "payback time".[24]

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[18] US Department of State, 'Indonesia Country Report on Human Rights Practices for 1998' (*US Department of State Archive*, 26 February 1999) <https://1997-2001.state.gov/global/human_rights/1998_hrp_report/indonesi.html#:~:text=On%20November%203%2C%20the%20joint,connection%20with%20the%20May%20riots> accessed 22 March 2024.
[19] Jemma Purdey, 'One Billion Rising' (*Live Encounters*, February 2013) <https://liveencounters.net/2013-2/02-february-2013/dr-jemma-purdey-one-billion-rising/> accessed 22 March 2024.
[20] ibid.
[21] 'New Report Says Official Denials of Indonesian Rapes Hinder Investigation' (*Human Rights Watch*, 8 September 1998) <https://www.hrw.org/news/1998/09/08/new-report-says-official-denials-indonesian-rapes-hinder-investigation> accessed 22 March 2024.
[22] 'Fadli Zon' (*OECD Global Parliamentary Network*, 8 September 1998) <https://www.oecd.org/parliamentarians/members/whos-who-riga-on-the-road-meeting-2022/#!fadlizon> accessed 22 March 2024.
[23] Theodore Friend, *Indonesian Destinies* (Harvard University Press 2005).
[24] Kuan-Hsing Chen and Beng Huat Chua, *The Inter-Asia Cultural Studies Reader* (Routledge 2015).

More broadly, there persists the lack of a single truth about the incident. What is "known" is highly contested; given the disproportionately high number of Chinese Indonesians who were affected, many see the riot as a racial one, attributing this focus to the general impression of ethnic Chinese as wealthier than the rest of the population, and thus to blame for the economic downturn. However, other common explanations were that it was state-sponsored and to do with an internal political conflict between the two key figures Wiranto and Prabowo, or that it was class-based. Without a clear view of what had happened, who numbered among the victims, and who the perpetrators were, it was difficult to even begin bringing legal action. Indeed, to this date, no criminal investigations or prosecution of perpetrators have taken place.[25] Suspected masterminds of the violence remain in positions of power. The incident is rarely discussed publicly; there has been no official redress for the victims.[26]

Indonesia's Judicial System

Indonesia's legal system falls under the civil law tradition, a remnant of Dutch colonial rule. This means that it does not have an official system of precedent. Unofficially, however, evidence indicates that prior judgments, especially from higher courts, do possess great influence over decisions made by judges. Lower courts generally follow Supreme Court decisions out of fear that their decisions will be later overturned if they do not.[27] Moreover, by principle, Indonesian judges "are also said to accept the desirability of consistency between decisions involving similar issues and, to this end, are said to prefer following previous decisions".[28]

At the top of the hierarchy, there are two courts: the Constitutional Court and the Supreme Court. The Constitutional Court was set up in 2003 in an attempt to introduce constitutional reforms; its functions include "checking government power and mediating disputes of state significance".[29] For example, it can confer upon the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, or "MPR") the power to impeach the president if it confirms that the president has "committed a serious wrongdoing or no longer meets the requirements to hold office".[30] On the other hand, the Supreme Court oversees four judicial branches: the military courts, religious courts, administrative courts, and general courts. General courts handle most civil and criminal cases; some of these general

[25] Eunike Mutiara Himawan, Annie Pohlman, and Winnifred Louis, 'Revisiting the May 1998 Riots in Indonesia: Civilians and Their Untold Memories' (2022) 41 Journal of Current Southeast Asian Affairs 240.
[26] ibid.
[27] Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne University Press 2023) 8.
[28] ibid.
[29] ibid 238.
[30] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 1.

courts will also include certain specialised courts, such as the commercial court, human rights court and taxation court. Typically, these courts are presided over by panels of three judges, although judges may sometimes sit alone or in a panel of five.[31]

Technically, the judiciary derives its authority from Articles 24 and 24A of the Constitution. However, some scholars argue that, more broadly, it is the Pancasila, Indonesia's national ideology, which is the "theoretical determinant of validity of all law and government action".[32] Pancasila (meaning 'The Five Principles'), comprises:

1. Ketuhanan Yang Maha Esa (Belief in Almighty God);
2. Kemanusiaan Yang Adil dan Beradab (A Just and Civilized Humanity);
3. Persatuan Indonesia (The Unity of Indonesia);
4. Demokrasi; and
5. Keadilan Sosial (Social Justice).[33]

In practice, however, how this principle affects the execution of the law is ambiguous; the Pancasila is vague and theoretical. It has been used to justify very different political systems, laws, and government actions, all of which have experienced great shifts over time in Indonesia.[34]

Under the authoritarian rule of its first two presidents, Sukarno and Suharto, Indonesia's judicial system grew to be known for its dysfunctional nature. Under Sukarno, the 1964 Judicial Power Law "gave the president authority to 'interfere' (*melakukan campur tangan*) in judicial affairs, including in specific cases".[35] This meant that Sukarno possessed the power to directly instruct courts to make certain judgments. During Suharto's rule, government control over the courts became "more systematic and comprehensive".[36] Judges were rewarded based on their "compliance with the will of the state" and would sometimes receive instructions over the phone from the presidential palace instructing them to issue specific decisions in cases regarding state interests.[37] Simultaneously, judges were poorly paid and thus frequently engaged in corruption. Courts were under-resourced, leading to wait times of years for cases to even be heard. By 1998, the Supreme

[31] Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne University Press 2023) 7.
[32] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 2.
[33] The 1945 Constitution of the Republic of Indonesia.
[34] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 2.
[35] Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne University Press 2023) 1.
[36] ibid.
[37] ibid.

Court was experiencing a backlog of nearly 20 000 cases, which was increasing by 50–100 cases monthly.[38]

By the time of Suharto's fall, the judiciary was in a dire state. Reformists hoped that the new era would usher in a judicial revolution. The introduction of the *satu atap* ("one roof") structure seemed to signal a promising future, handing over control of the financial, administrative and structural affairs of the courts from the government to the judiciary.[39] Even more encouraging was how this shift seemed to yield more cases decided against the government.[40] However, there have been many instances of Indonesian courts retaining their corrupt practices independently, even refusing outside scrutiny from the Judicial Commission, an organisation "established precisely to ensure that the increased independence brought by *satu atap* was exercised accountably".[41] Through an analysis of past cases such as *Bantleman*, *Wongso*, and *Ahok*, Butt also asserts that the increase in efficiency belies poor quality judicial reasoning and a general lack of competence.[42]

Another key judicial change prompted by the shift toward *reformasi* pertains to Indonesia's human rights legislation. Indonesia had been a member of the United Nations since 1950, and thus technically beholden to the Universal Declaration of Human Rights. However, until the end of the New Order, the government had rejected "the universalism of human rights as an innately Western concept", declaring that it conflicted with "Asian values".[43] A conceptually flexible tool, Asian values tend to refer to educational achievement, paternalism, a focus on collectivism and a deference to authority, and was championed by prominent Asian leadership such as former Singaporean prime minister Lee Kuan Yew. It was conceived as an alternative to "Western" political values such as human rights, capitalism, and democracy. Part of the appeal of Asian values was that it would be more suitable for Asian societies, which were characterised by hierarchy and the existing influences of Islam, Confucianism and Hinduism. The use of religious justification, in particular, makes countries such as Indonesia, whose Constitution utilises religious authority as a means of gaining legitimacy, fertile ground for the propagation of such a value system. However, scholars have agreed that it is often used as a means of justifying self-serving ends.[44] One such end, in this case, would be

[38] ibid.
[39] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 1.
[40] Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne University Press 2023) 2.
[41] ibid.
[42] ibid ch 3.
[43] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 13.
[44] Randall Peerenboom, 'Human Rights and Asian Values: The Limits of Universalism' (2000) 7 China Review International 294, 297.

refusing to incorporate international law regarding human rights, resulting in the overriding of an international judiciary by Indonesia's national executive.

However, within a few years of Suharto's downfall, Indonesia adopted a series of international human rights instruments, such as the Convention Against Torture and the International Covenant on Civil and Political Rights. In 1999 and 2000, the national legislature enacted a Human Rights Law and a Human Rights Court Law. A Charter of Rights was included in the Constitution, including rights such as the right to freedom of expression and association.[45] The rise of non-governmental human rights organisations have also played a key role in balancing out state-sponsored narratives regarding human rights violations such as the May 1998 riots and the criminal code passed in 2022 which "seriously violate international human rights law and standards".[46] Such organisations include Imparsial and the Human Rights Working Group.

However, there are key limitations which prevent these seemingly powerful instruments from being used effectively, or at all. Despite the ratification of many of these human rights instruments, Indonesia has expressed reservations regarding certain protocols, refusing to integrate them into national legislation. For example, the ratification of the International Covenant on Economic, Social and Cultural Rights was accompanied by the significant reservation that "'the right of self-determination' appearing in this article do not apply to a section of people within a sovereign independent state and cannot be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states".

Moreover, the country refuses to allow external judicial bodies to exercise their jurisdiction in Indonesia. Instances abound; when Indonesia ratified the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), they did so alongside the submission of a reservation to exclude the jurisdiction of the International Court of Justice. With regard to the International Covenant on Civil and Political Rights (ICCPR), Indonesia refused to ratify the first Optional Protocol which would establish a mechanism which would allow citizens to complain directly to the Human Rights Committee, who would then be allowed to launch an investigation.[47] Such choices are particularly damaging to their human rights regime; external

[45] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 13.
[46] 'Indonesia: New Criminal Code Disastrous for Rights' (*Human Rights Watch*, 8 December 2022) <https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights> accessed 22 March 2024.
[47] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 13.

inspection would be an effective and direct solution against the continued corruption of Indonesia's national judiciary, which prevents the transparency and trust required for those affected by human rights violations to attempt to use these instruments.

Connecting the Dots

Having discussed Indonesia's judicial and political landscape with regard to the May 1998 riots, this article will now discuss how this confluence of factors gave rise to the lack of legal accountability following the incident. Such factors include the main demographic affected by the riots, the control of Indonesia's judiciary by the executive, and the lack of transparency in Indonesia's government.

Arguing for the near impossibility of achieving justice after mass violence, Judge Richard J. Goldstone once wrote: "It should be recognised that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence. There are simply too many victims and too many perpetrators."[48] The complexity of the May 1998 incident reflects this sentiment. That there are too many victims is exacerbated by the social standing of the victims; that there are too many perpetrators is aggravated by the fact that much of the evidence pointed toward people perched at the very top of the political and military hierarchy. This essay will proceed to examine each of these factors separately.

Racial Minorities, Women, and the Price of Security

To deal with the former point, it is critical to examine precisely who had been affected by the tragedy. There remains much debate about whether or not the incident can be considered a racial riot, given the turbulent political and economic backdrop against which it took place. What is undeniable, however, is that the majority of those affected were of Chinese ethnicity. Despite being only 2% of Indonesia's population,[49] Chinese Indonesians occupy a distinct position in Indonesian society. Historically, under the New Order government, legislation specifically directed toward banning "Chinese language, characters and cultural festivals and strongly encourag[ing] ethnic Chinese to adopt Indonesian-sounding names"[50] ensured that they were seen and treated differently from *pribumi*. At the same time, however, Suharto encouraged the prosperity of Chinese Indonesians' businesses. His autocratic regime was in part tolerated because of the economic growth for the

[48] Jemma Purdey, *Anti-Chinese Violence in Indonesia 1996–1999* (Singapore University Press 2006) 149.
[49] ibid 3.
[50] ibid 21.

country it experienced.[51] As such, the government could "strengthen its hold on power while at the same time restricting political and social freedoms".[52]

Because of this, Chinese Indonesians were socially and structurally vulnerable. They had neither a legal basis nor a strong social contract by which they could be said to 'belong' in Indonesia. The anti-Chinese sentiments kindled by the New Order policies aimed at extermination of Chinese culture resulted in *cukong*, or patron-client partnerships, in which exclusively Indonesian Chinese people engaged in financial transactions to obtain assurances of safety and the security needed to develop their business. The New Order had created a system in which Chinese Indonesians were helping to grow the economy, whilst becoming increasingly vulnerable and dependent on the elite in the military and government for protection. Contrary to public belief, the number of Chinese Indonesians who appeared to exist in elite stratas of society were actually few,[53] but the same transactional nature existed for Chinese Indonesians at all levels of society — for instance, between small shopkeepers and local military officials. By virtue of their ethnicity, Chinese Indonesians had no real claim to existence in Indonesia. They had to pay for their safety.[54]

However, because the number of ethnic Chinese who actually fit the description of being wildly wealthy, corrupt, and wholly protected through secret connections with higher-ups were few, many of them could not afford to pay this price, which rose steadily alongside racial tensions in Indonesia. Both the external factors, such as the Asian financial crisis, as well as local conflicts and political trends, contributed to intense anti-Chinese sentiment. It was not clear that they would be protected, or how they might seek protection, if what they required went beyond the safety needed to exist on a day-to-day basis.

Another key group of people who had been affected were women; many studies found that widespread sexual assault and rape took place.[55] As previously mentioned, key figures in Indonesia have attempted to cast doubt on whether or not this has happened at all, typically asserting the apparent logical impossibility of mass rape and citing a lack of testimony from victims as proof as to the nonexistence of the sexual assault.[56] In response, human rights groups have provided

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[51] Simon Butt, *Corruption and Law in Indonesia* (Routledge 2012) 14.
[52] Jemma Purdey, *Anti-Chinese Violence in Indonesia 1996–1999* (Singapore University Press 2006) 21.
[53] ibid 22.
[54] ibid 21.
[55] Indonesian National Commission on Violence against Women, *Special Rapporteur Of National Commission on Violence Against Women Regarding Sexual Violence in May 1998 Riot And Its Impacts* (2008).
[56] Fadli Zon, *The Politics of the May 1998 Riots* (Solstice Publishing 2004) 104–105.

convincing counterarguments, such as numerous past instances of mass rape and the weaponisation of rape as a traditional military tactic,[57] and called for greater accountability.[58]

The barriers to seeking justice, specifically for victims of sexual assault, are multifaceted. On a societal level, with 87.4% of the population Muslim and 10.5% of the population Christian,[59] Indonesia is heavily influenced by religious norms. Heryanto argues that even in the *reformasi* period, the enduring religious values embedded into Indonesian society created "a gendered distinction" between victims. Male bodies, characterised by "bodily wounds of these activists… were publicly endowed with a degree of political heroism". In contrast, female rape victims were "stigmatised and marginalised, a response that grew out of social constructions of femininity and the values imposed on the female body, such as chastity and virginity".[60]

This nationwide attitude has a cascading effect on a community level, and on an individual level. On a community level, the individual may be influenced by the fear of damage to their family's reputation, fear of revenge attacks should they reveal their identity, or fear of an unforgiving or biased legal system. They may fear being branded a disgrace for being raped, suffer the consequences of being unable to be married, possess a superstitious fear of misfortune invoked by repeating the negative experience, or fear the scrutiny of others because of the belief that rape is the karmic manifestation of a previous ancestor's crime.[61]

This trickles down to the individual level, which may trap victims in wanting to keep silent or forget about the incident, and wanting to seek help. The *Special Rapporteur Of National Commission on Violence Against Women Regarding Sexual Violence in May 1998 Riot And Its Impacts* published by the Indonesian National Commission on Violence against Women recounts incidents of meeting with survivors of sexual violence who experience trauma and shock so great that they refuse to even recall the incident. Responses can range from a loss of personal confidence to a loss of linguistic ability.[62] Some victims attempt to cut off any connection to their past by moving abroad and changing their identity entirely, while others commit suicide.

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[57] Saparinah Sadli, 'Dr. Saparinah Sadli's Open Letter to the Minister of Defence and Security' (*Human Rights Watch*, 3 August 1998) <https://www.hrw.org/legacy/campaigns/indonesia/openlet.htm> accessed 22 March 2024.
[58] 'New Report Says Official Denials of Indonesian Rapes Hinder Investigation' (*Human Rights Watch*, 8 September 1998) <https://www.hrw.org/news/1998/09/08/new-report-says-official-denials-indonesian-rapes-hinder-investigation> accessed 22 March 2024.
[59] 'Jumlah Penduduk Menurut Agama' (Satu Data Kementerian Agama RI, 24 August 2022) <https://satudata.kemenag.go.id/dataset/detail/jumlah-penduduk-menurut-agama> accessed 22 March 2024.
[60] Jemma Purdey, *Anti-Chinese Violence in Indonesia 1996–1999* (Singapore University Press 2006) 159.
[61] Indonesian National Commission on Violence against Women, *Special Rapporteur Of National Commission on Violence Against Women Regarding Sexual Violence in May 1998 Riot And Its Impacts* (2008) 13–18.
[62] ibid.

Combined, it is no surprise that judicial redress has been so difficult to achieve. Even if the population of ethnic Chinese could muster the sense of entitlement to their rights to mount an effort to seek reparations, their social position, alongside their minority in numbers, makes it difficult for them to effective political pressure on the government. For incidents of sexual assault, traditional methods of evidence collection to hold perpetrators accountable may not be feasible nor possible. The state must be prepared to take a nuanced perspective on the realities of mass rape, and to take accountability for it instead of using the elusive nature of the evidence of sexual assault to shirk responsibility. However, because of the absence of political power or support from other members of the electorate, these theoretical barriers have proven to be fatal.

All Roads Lead to the Executive: Indonesia's Separation of Powers

In 2023, Indonesia dropped two ranks to 56th on the Economist Democracy Index and was classified as a "flawed democracy".[63] Preceding its 2024 elections, Indonesia's Constitutional Court held, contrary to a longstanding rule that presidential and vice-presidential candidates must be over forty years old, that the incumbent President's son could exceptionally run for vice-president. Indonesian civil society organisations have alleged abuse of state resources by President Joko Widodo to support his son and his son's election partner in exchange for state funds.[64] However, in most democratic states, politicians, motivated by the desire to be re-elected, remain bridled by the regular threat of losing the support of the majority and thus their positions.

However, as previously discussed, this was not one such case. When vulnerable demographics unable to exert any real political pressure are subject to oppression, the job of ensuring that recompense is made falls to the courts. In a perfectly-functioning judiciary, courts possess the unique ability to swiftly and effectively restrain tyrannical governments in accordance with democratic principles of equality and fairness. This is associated with the concept of legal constitutionalism. However, with Indonesia's courts' reputation for succumbing to parasitic corruption and the lingering legacy of executive control, the judiciary is unable to act as a check on the executive on behalf of the minority. Moreover, the executive's iron grip over the legislature means that the possibility of Indonesians seeking aid from international courts of justice has also been cut off. The executive has exercised dominance over not only the national but also the

[63] 'Democracy Index 2023' (*Economist Intelligence Unit*) <https://www.eiu.com/n/campaigns/democracy-index-2023/> accessed 7 June 2024.
[64] 'Indonesia' (*International IDEA, Global State of Democracy Initiative*) <https://www.idea.int/democracytracker/country/indonesia> accessed 7 June 2024.

international judiciary, and has subsumed all three branches of government into itself. Indonesia's reputation for corruption is widespread, but without a clear view into arguably the least regulated branch of government, the hands of those attempting to hold the political elite accountable are completely tied.

As with the May 1998 incident, the aftermath of other incidents prove that all that such a system can reliably be expected to do is deliver results in accordance with the desires of the autocrat in power. The *Trisakti* shootings and the *Semanggi* II incident were connected events involving human rights violations which occurred just before and not long after the May 1998 riots respectively. Military trials were held, yielding sentences of less than one year for low-ranking soldiers; it is unclear whether any officers were convicted at all. All other results remained concealed. When civil society attempted to pressure Indonesia's House of Representatives (*Dewan Perwakilan Rakyat*, or DPR) to establish an ad hoc tribunal instead, the DPR decided to hold its own 'trial', committing a clear breach of the separation of powers principle enshrined in its Constitution.[65]

In this 'trial', no established judicial procedures were followed. Military figures widely suspected to be masterminds behind the incidents were invited to answer questions, but victims' representatives were not permitted to ask questions or conduct cross-examinations. Members of the police and military were invited to sit on the Committee.[66]

Moreover, the police and military resisted attempts by organisations such as The National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, or "Komnas HAM"), whose central role is to investigate gross human rights violations, to conduct investigations into their activities. Komnas HAM eventually found that there was evidence supporting the finding that egregious breaches of human rights had occurred in these incidents, including "indiscriminate killing, torture, rape and other sexual violence, forced or involuntary disappearance, and arbitrary appropriation of independence and other physical freedoms".[67] However, upon submission of this report to the public prosecutor, he returned the dossier to Komnas HAM four times, citing 'administrative technicalities'. [68] Later, he stated that further action was impossible, because defendants had already been tried in the military court, and thus the principle of double jeopardy prevented them from being tried again.[69]

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[65] Tim Lindsey and Simon Butt, *Indonesian Law* (OUP 2018) ch 13.
[66] ibid.
[67] ibid.
[68] ibid.
[69] ibid.

The manifold weaknesses in Indonesia's government, combined with their reputation for oppression of minority demographics, is an urgent cry for the intervention of its judiciary. However, where in more democratically developed countries legal constitutionalism might enter as an alternative, Indonesia finds any possibility of using judicial instrumentation to protect minority groups and its own democracy entirely incapacitated by the rampant corruption and complete lack of separation of powers. If nothing is done to repair this system, such egregious handling of judicial redress will not only destroy any chances of obtaining justice which might be had by the victims of the May 1998 riots, but by victims of all of its human rights violations, both past and future.

Conclusion

The effects of the lack of legal accountability in Indonesia are plain to see. Soon after issuing his campaign promises to deliver justice to the victims of the May 1998 riots, Widodo appointed retired General Wiranto as Coordinating Minister for Politics, Law and Human Rights.[70] In 2024, Prabowo won the Indonesian general election,[71] with the immense irony of his rebrand as a "cuddly grandpa" logged by younger voters seemingly lost on the electorate.[72] Every Thursday, black-clad relatives of victims brutally attacked and killed continue to gather, to mourn and protest.

The May 1998 riots serve as a prime example of the extent to which the independence, competence, and transparency of the judiciary is critical to the safeguarding of human rights. As an incident whose orchestration was likely connected with members of the political elite, and whose aftermath continues to affect some of the most vulnerable demographics in society, the May 1998 riots were a true test of the mettle of Indonesia's government with regard to the kind of protection it could offer its population. However, with the deprivation of all other possible avenues to justice, and without a strong legal system able to stand in opposition to a country's executive, it has failed miserably.

The post-1998 *reformasi* period has yielded many meaningful changes in Indonesia, among which number the growth in non-governmental human rights organisations, and attempts at

[70] Hellena Souisa, 'Victims of Indonesia's 1998 violence continue to fight for justice 25 years on' *ABC News* (26 May 2023) <https://www.abc.net.au/news/2023-05-27/25-years-on-victims-1998-violence-fight-for-justice/102381372> accessed 22 March 2024.
[71] Frances Mao, 'Prabowo Subianto: The tainted ex-military chief who will be Indonesia's new leader' *BBC News* (15 February 2024) <https://www.bbc.co.uk/news/world-asia-68237141> accessed 22 March 2024.
[72] Banyan, 'The favourite in Indonesia's presidential election has a sordid past' *The Economist* (11 January 2024) <https://www.economist.com/asia/2024/01/11/the-favourite-in-indonesias-presidential-election-has-a-sordid-past> accessed 22 March 2024.

eradicating corruption via the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) and the Anti-Corruption Court (*Pengadilan Tindak Pidana Korupsi*, or ACC). However, until a true commitment to upholding human rights is evinced through a specialised court integrated with anti-corruption measures as trialled in the ACC,[73] or by allowing the jurisdiction of international human rights courts in Indonesia, the obstacles barring the path of justice will never be truly cleared.

[73] Simon Butt, *Corruption and Law in Indonesia* (Routledge 2012) ch 1.

The Wave of Human Rights Due Diligence – A Sea Change on the Horizon?

Brendan Mark

Introduction

One may deem it wishful thinking for corporations to adopt frameworks of human rights due diligence (HRDD) into their value chains. Indeed, almost a decade after the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs), 47% of extractives and 62% of apparel companies among the 55 most globally influential still score still below 20 out of 100 points in a comprehensive benchmark[1]. Against this, some look to legislative solutions: growing European momentum in the adoption of compulsory HRDD obligations has been observed, from the 2017 French Duty of Vigilance[2] and similar laws in Germany and Norway, to the EU's proposed Corporate Sustainability Due Diligence Directive (CS3D)[3]. Such laws hold large companies to the standards of international covenants in areas like child labour, harmful emissions and working conditions, on pain of penalty fines and class action litigation for non-compliance.

This paper does not take such laws as its mainstay. Rather, I aim to develop a softer 'carrot-not-stick' approach that evaluates the corporate motivations for adopting such frameworks independent of the law. Wrangling compliance with such laws may be a sure-fire way to enforce HRDD obligations. But given the difficulties of such bold laws being enforced worldwide, the intense resistance by Member States to the CS3D itself[4], and the last-ditch ratification of the disappointingly watered-down Directive on the brink of failure[5], decisive legislative action seems off the global menu for the present. Instead it is hoped that by exploring the positive reasons that corporations may wish to undertake HRDD processes into their machinery, analysed within the

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[1] World Benchmarking Alliance, Corporate Human Rights Benchmark Report 2023

[2] *Loi* n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)

[3] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU)' COM(2022) 71 final

[4] Christelle Coslin, 'Failure of the EU Council to endorse the Corporate Sustainability Due Diligence Directive' (Hogan Lovells, 29 February 2024) <https://www.engage.hoganlovells.com/knowledgeservices/news/failure-of-the-eu-council-to-endorse-the-corporate-sustainability-due-diligence-directive> accessed 3 March 2024

[5] Jennifer Younan & Elise Edson, 'EU Council Waters Down Corporate Sustainability Due Diligence Directive (CS3D)' (Shearman & Sterling, March 18 2024) <https://www.shearman.com/en/perspectives/2024/03/eu-council-waters-down-corporate-sustainability-due-diligence-directive--cs3d> accessed 23 March 2024

context of mergers and acquisitions, I may shed light on the increasing utility and necessity of such measures to commercial success, or at least the avoidance of commercial failure.

II. The Essence of Human Rights Due Diligence (HRDD)

HRDD is at its heart a structured investigative process for companies to assess, address and monitor both existing and prospective human rights implications of their operations, supply chains and professional relationships. A United Nations Working Group identifies four key components:[6]

1. Identifying and assessing actual or potential adverse human rights impacts
2. Integrating findings from impact assessments across relevant company processes
3. Tracking the effectiveness of measures and processes
4. Communicating on how impacts are being addressed and showing stakeholders that there are adequate policies and processes in place

From these components, several instructive points may be extracted.

Firstly, HRDD centres around risks to people, not risks to business[7]. This differentiates it from traditional corporate due diligence that involves an examination of various facets of a target company including its operations, financial health, legal liabilities, and market position. By contrast, HRDD evaluates a range of human rights concerns like employee health and safety, labour rights, workplace discrimination, and community relations. This ultimately aims to safeguard the rights of individual workers and affected communities that are in a weaker bargaining position vis-a-vis corporations.

Secondly, HRDD is an ongoing process[8], reflecting the changing risks to human rights as commercial operations and business environments evolve. Impact assessments should thus be refreshed with a regularity that befits the size of the enterprise, the risk and severity of the impacts, and the context of its business operations (eg. more regular, not to mention more stringent review, may be needed for businesses operating in conflict-affected areas). Where measures are implemented pursuant to the findings, they must be monitored for their efficacy in resolving the underlying

[6] UN Human Rights Council, 'Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises : note / by the Secretary-General' (2018) A/73/163, para 10
[7] Ibid, para 15
[8] Ibid, para 40

problem and adjusted as needed. This secures their continued relevancy and prevents them from falling prey to tokenism or obsolescence.

Thirdly, HRDD should be informed by meaningful engagement with stakeholders[9]. This includes suppliers and business partners, customers, shareholders, and crucially, directly affected parties like employees and local communities subject to the adverse impact. It should be done both before and after measures are taken, to understand the root causes of the adverse impact and to evaluate how helpful enacted measures are in addressing them. Troublingly, this facet has proved especially challenging for companies, as the World Benchmarking Alliance's 2023 benchmark revealed that stakeholder engagement only occurred for 40% of serious allegations of negative human right impacts faced by top companies, and only 5% of the allegations resulted in companies disclosing how this effected change to prevent similar impacts in the future[10].

HRDD is conventionally held to the global standard of the UN Guiding Principles endorsed by the UN Human Rights Council in 2011[11]. The list of 31 principles resembles more blueprint than solution, lacking any "robust or ready-made" answers to the widespread "corporate impunity" for human rights violations[12], but instead offering guidance to well-intentioned companies on the conduct of responsible business. This is underscored by their lack of enforceability, seeking to provide "guidelines" rather than establish "obligations". It is argued in the next section that these principles enjoy continued pertinence even now, especially with the changing attitudes of various stakeholders that expect companies to adhere to human rights standards.

III. Growing Expectations

The past decade has been marked by a pronounced shift in the expectations of various parties for companies to adopt more rigorous HRDD standards. They are outlined below to illustrate the mounting pressure from all sides on companies to act.

We begin by examining consumers. The 2023 Conscious Consumer Spending Index (CCSIndex) benchmarking study by the marketing consultancy Good.Must.Grow[13] highlighted that

[9] Ibid, para 25(c)
[10] World Benchmarking Alliance, Corporate Human Rights Benchmark Report 2023
[11] UN Office of the High Commissioner for Human Rights (OHCHR) 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/04
[12] Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) European Company Law, Vol. 9, No. 2, pp. 101-109, 2012 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028785> accessed 3 March 2024
[13] Good.Must.Grow, 'Socially Responsible Spending Experiencing Massive Growth, According to

71% of Americans deemed it important to support socially responsible brands, and 42% planned to focus their spending on socially responsible companies in 2024. Such figures exceeded the same benchmark in 2022, and are record highs[14]. Across the pond in the UK, Co-Op's 2021 Ethical Consumerism Report indicated that "ethical consumer spending and finance…in 2020 broke through the £100bn mark for the first time"[15], reaching over 10 times the total size of the UK ethical consumer market in 1999. The increasing consciousness among consumers of the ethical implications of their purchases translates to expectations on companies to be transparent about their supply chains[16].

Furthermore, the rise of social media provides new mechanisms for consumers to hold companies accountable: 89% of consumers in California expect companies to use both their websites and social media to communicate their corporate social responsibility (CSR) practices, and 93% want companies to provide additional information on CSR using a website[17]. The similar prevalence of digital activism on platforms like Twitter (now "X") and Facebook worldwide[18] accentuates the burgeoning awareness and demand for companies to adhere to substantive HRDD standards, while enhancing the mechanisms by which they can be held accountable, 'named-and-shamed', or boycotted for their failures.

For investors, there has been growing recognition that Environmental, Social and Governance (ESG) considerations, which human rights form an integral part of, can significantly impact a company's reputation, and thus long-term performance[19]. Investors thus increasingly prefer companies that display commitments to responsible business strategies[20], seeing it as "not just the right thing to do" but "necessary"[21] to generate sustained value and maximise returns. Among such

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11th Annual Conscious Consumer Spending Index' (2023) <https://goodmustgrow.com/cms/resources/ccsi/2023-ccsindex-press-release.pdf> accessed 5 March 2024

[14] Ibid.

[15] Co-Operative Market, 'Ethical Consumerism Report 2021: Can we consume back better?' (2021) <https://assets.ctfassets.net/5ywmq66472jr/3kwPOTPk1xuAUGpJmyLEdM/1249d071ea404f526041af2fdd1e86f8/COP58366_Ethical_Consumerism_Report_Final.pdf> accessed 5 March 2024

[16] Katharina Kilian-Yasin & Rafael Correa, 'Corporate Social Responsibility in International Supply Chains' (2021) Martin, L. (eds) International Business Development. Springer Gabler, Wiesbaden <https://doi.org/10.1007/978-3-658-33221-1_12> accessed 5 March 2024

[17] Hyun-Hwa Lee, Minsun Lee & Yoon Jin Ma, 'Consumer responses to company disclosure of socially responsible efforts' (2018) Fash Text 5, 27 <https://doi.org/10.1186/s40691-018-0142-4> accessed 5 March 2024

[18] Laura Brukner, 'Digital Activism in Online Communities and the Spread of Misinformation on Twitter' (Debating Communities and Networks 11 Conference, 2020)

[19] Thinh Hoang, 'The Role of the Integrated Reporting in Raising Awareness of Environmental, Social and Corporate Governance (ESG) Performance' (2018) Stakeholders, Governance and Responsibility (Developments in Corporate Governance and Responsibility, Vol. 14), pp. 47-69 <https://doi.org/10.1108/S2043-052320180000014003> accessed 8 March 2024

[20] AML Group, 'The Investor Index 2023 Report' (2023) <https://aml-group.com/our-work/the-investor-index-2023/> accessed 8 March 2024

[21] Ibid.

responsible business strategies are the adoption of HRDD standards that effectively manage human rights risks.

Looking to regulatory bodies, one may observe the waves of regulations (and, to a slower extent, legislation[22]) taking root across the world. The International Sustainability Standards Board (ISSB)'s newly-released standards for disclosure of sustainability-related financial information[23] are being considered and aligned with by regulators across Asia, including Hong Kong, Singapore, Japan, South Korea, and India[24]. The UK Treasury has within the last 12 months released a potential new regulatory regime governing providers of ESG ratings for public consultation[25]. As aforementioned[26], the EU is paving the way with mandatory HRDD legislation in various stages of implementation. The exponential increase in public awareness over the last decade has contributed to this regulatory boom that itself has potential to reinforce, and shore up black-letter support for, the global awakening to the importance of human rights considerations in the business world.

In short, all this portends the imminent revolutionising of commercial due diligence. It is trite to observe that HRDD has historically flown under the radar of businesses keen to buy and sell, in favour of more concrete legal and financial forms of compliance. Traditional due diligence checklists skim over or entirely omit risks of adverse human rights impacts (independent of existing legal liabilities)[27][28]. In the near future, regulatory requirements may force an overturn of this. But while slow-moving regulatory regimes and legislation remain in their nascent stages, companies that incorporate HRDD into their due diligence processes have the potential to stay ahead of the curve - if not by signalling a positive commitment to ethical standards that matter increasingly to all sides, then by avoiding the reputational fallout that has hamstrung deals neglectful of these considerations in the past. It is to these cautionary tales that we now turn.

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[22] As seen in the troubled waters faced by the CS3D, at n 10, 11.
[23] International Financial Reporting Standards, 'General Requirements for Disclosure of Sustainability-related Financial Information' (2023) <https://www.ifrs.org/content/dam/ifrs/publications/pdf-standards-issb/english/2023/issued/part-a/issb-2023-a-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf?bypass=on> accessed 8 March 2024
[24] Latham & Watkins, 'Regulatory Updates in Asia ESG — December 2023' <https://www.lw.com/en/insights/regulatory-updates-in-asia-esg-december-2023> accessed 8 March 2024
[25] HM Treasury, *Future regulatory regime for Environmental, Social, and Governance (ESG) ratings providers* (2023) <https://assets.publishing.service.gov.uk/media/642556f460a35e00120cb180/ESG_Ratings_Consultation_.pdf> accessed 8 March 2024
[26] See s *I*
[27] Thomson Reuters, 'Due diligence business investigations checklist' <https://legal.thomsonreuters.com/en/insights/articles/due-diligence-business-investigations-checklist> accessed 8 March 2024
[28] Datarooms, 'Conducting Commercial Due Diligence for M&A [Checklist]' (21 April 2023) <https://datarooms.org.uk/due-diligence/commercial-due-diligence-ma-checklist/> accessed 8 March 2024

IV. Case Studies of Neglect

A failure to properly consider the potential human rights risks of the target company can cost an acquiring company dearly. Three notable case studies illustrate this[29].

German pharmaceutical company Bayer's 2018 acquisition of Monsanto, an agricultural biotechnology corporation, was regarded as "one of the worst corporate deals in modern history"[30]. At the root of the disastrous post-acquisition lawsuit causing Bayer to lose US$10 billion in market capitalisation was a failure to properly evaluate the financial, reputational and human rights implications of Monsanto's extensive use of the carcinogenic glyphosate in its products. The lawsuit crystallised the "significant recognition" of the rights to information and a healthy environment of victims affected by the toxic products[31], a ruling that black-letter due diligence checklists left Bayer unprepared for. The failure to pre-emptively identify these human rights considerations as part of the due diligence process and accord them proper weight in the acquisition enabled the lawyers to be blindsided, with ruinous consequences in legal claims and impairments that plague Bayer to this day.

The consequences of ignoring human rights considerations extend beyond the legal sphere. Dow Chemical's purchase of Union Carbide Corporation (UCC) in 2001 failed to consider the continuing inter-generational human rights impact[32] of the latter's involvement in the Bhopal gas tragedy in India that killed thousands and violated, among others, the rights to life, health and access to clean drinking water[33][34] of hundreds of thousands more in the "world's worst industrial disaster"[35]. Dow's intentional structuring of the agreement to exclude direct assumption of UCC's legal

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[29] Anna Triponel, 'Human Rights and M&A: It's no longer about the 'why'; it's now about the 'how'' (14 May 2019) <https://uk.practicallaw.thomsonreuters.com/w-020-2360> accessed 10 March 2024

[30] Angus Liu, 'Worst deal ever? Bayer's market cap now close to the total cost it paid for Monsanto' *Fierce Pharma* (29 August 2019) <https://www.fiercepharma.com/pharma/worst-deal-ever-bayer-s-market-cap-now-close-to-total-cost-it-paid-for-monsanto> accessed 10 March 2024

[31] 'Monsanto lawsuit ruling a 'significant recognition' of victims' human rights, say UN rights experts' *UN News* (15 August 2018) <https://news.un.org/en/story/2018/08/1017102> accessed 10 March 2024

[32] Amnesty International, '30 years after the Bhopal disaster, ongoing environmental contamination must be addressed in India' (31 March 2014) <https://www.amnesty.org/ar/wp-content/uploads/2021/06/asa200102014en.pdf> accessed 10 March 2024

[33] OHCHR 'Bhopal: Chemical industry must respect human rights' (Geneva, 27 November 2019) <https://www.ohchr.org/en/statements/2019/11/bhopal-chemical-industry-must-respect-human-rights> accessed 31 March 2024

[34] Amnesty International 'Global: Dow's failure to offer remedy for the Bhopal disaster has created a "sacrifice zone"' (28 March 2024) <https://www.amnesty.org/en/latest/news/2024/03/global-dows-failure-to-offer-remedy-for-the-bhopal-disaster-has-created-a-sacrifice-zone/> accessed 31 March 2024

[35] Apoorva Mandavilli, 'The World's Worst Industrial Disaster is Still Unfolding' *The Atlantic* (10 July 2018) <https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/> accessed 10 March 2024

liabilities[36] did not insure it from the resulting reputational damage encompassing massive loss of business opportunities in India, and the public backlash over its sponsorship of the 2012 London Olympics for its links with UCC[37]. A more careful examination of the human rights legacy of UCC could have prevented Dow from being collateral to this industrial faux pas.

Meridian Gold's acquisition of Brancote Holdings in 2002 for its strategically-located gold mine in Esquel, Argentina, failed to flag the strong opposition that the local community had to the development of the land for an open-pit gold mine. Although the M&A team found no issues and deemed the fact that the land had a legal title to be satisfactory, their investment went to waste when the province successfully banned the mining project in the Argentinian Supreme Court[38], revealing the dangers of neglecting the rights of affected stakeholders like local communities[39]. Yet the passing of the baton over to Yamana Gold signalled the adoption of a more responsive approach that involved initiating conversations on sustainably developing resources with regional stakeholders like residents and the provincial government. Yamana Gold's nuanced understanding that a "strong understanding of human rights-related risks, including how to manage them"[40] advantaged the company in the long-term exemplifies the awareness around HRDD that this article advocates for, and that can evidently determine the fate or fortune of companies involved.

V. Motivations to HRDD Importation

The above case studies warn of the dangers of turning a blind eye to human rights considerations in corporate due diligence, specifically within the context of mergers and acquisitions. It will be short work to summarise the reasons, then, why companies may strongly consider including HRDD in their acquisition processes.

As seen above, the mitigation of legal, financial and reputational risks associated with human rights violations is a strong pull factor. This cannot be done by simply modifying traditional due diligence processes or categories for two key reasons.

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[36] 'The Dow Chemical Company and Union Carbide' (Dow Corporate) <https://corporate.dow.com/en-us/about/legal/issues/bhopal/tragedy#accordion-0b7a5346ea-item-e4f6c567e4> accessed 10 March 2024
[37] Telegraph Sport, 'London 2012 Olympics: Dow Chemical partnership has 'damaged reputation of London Games'' *The Telegraph* (11 July 2012) <https://www.telegraph.co.uk/sport/olympics/news/9392569/London-2012-Olympics-Dow-Chemical-partnership-has-damaged-reputation-of-London-Games.html> accessed 10 March 2024
[38] 'Argentine Supreme Court upholds gold mine ban' *Reuters* (Buenos Aires, 19 April 2007) <https://www.reuters.com/article/idUSN19289293/> accessed 10 March 2024
[39] Anna Triponel, 'Human Rights and M&A: It's no longer about the 'why'; it's now about the 'how'' (14 May 2019) <https://uk.practicallaw.thomsonreuters.com/w-020-2360> accessed 10 March 2024
[40] Ibid.

Firstly, traditional due diligence is fundamentally backward-looking[41], while HRDD is at its heart forward-looking. Traditional due diligence processes primarily hone in on historical data and existing accounts to flag out areas of concern, with reference to legal regimes, financial reporting frameworks and industry benchmarks. While investigating established track records can be useful, especially in determining the stability of a target company and predicting its future commercial prospects, it crucially fails to apprise buyers of risks that do not currently stand out but may do so in the future. Specifically, it overlooks the potential for inchoate or dormant human rights risks, that are not picked up by such yardsticks, to attract future litigation[42] or censure[43]. Human rights due diligence frameworks, such as the one identified by the United Nations Working Group,[44] bridge this divide on both the identification and remediation fronts – with its assessment of actual as well as potential impacts, and its continuous monitoring of remedial measures to stabilise these risks. This shift in perspective both warns and prepares companies much better for traditionally 'invisible' risks.

Secondly, traditional due diligence self-evidently has the target company as its primary object, as opposed to HRDD that centres around parties affected by the target company's operations[45]. The transaction-specific execution of traditional due diligence underlies this, and cants the main objective of due diligence processes towards evaluating the financial, operational, regulatory and legal aspects of the target company, to inform decision-making. By contrast, HRDD's built-in engagement with stakeholders and reference to outward-looking standards of human rights[46] rather than inward-looking corporate frameworks allows it to more objectively visualise and examine potential breaches of human rights. HRDD is thus antithetical to orthodox commercial due diligence in these two regards, but it does not mean they are incompatible. Rather, it is these disparities that allow HRDD to fill in the gaps that traditional due diligence leaves behind. But for it to do so, a distinct HRDD regime, accompanied by relevant external standards such as those set out above, must be imported into the due diligence framework as a distinct head of review, rather than being integrated merely as one more consideration.

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41 Caroline Firstbrook & Rajesh Sennik, 'Can Private Equity do Due Diligence for the Long Haul?' (2007, Accenture) <https://www.criticaleye.com/inspiring/insights-servfile.cfm?id=11> accessed 12 March 2024
42 Bayer, at n 29; Meridian Gold, at n 35.
43 Dow Chemical Company, at n 33.
44 UN Human Rights Council, 'Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises : note / by the Secretary-General' (2018) A/73/163, para 10
45 Ibid, para 15
46 Ibid, para 25(c)

Another argument that can be drawn from the current early stages of HRDD regulation worldwide is the competitive advantage gained by firms that adopt 'voluntary sustainability standards'[47] in jurisdictions that do not enforce mandatory HRDD regimes. Adopting such practices offers companies the chance to differentiate themselves from competitors and appeal to the increasing number of ethically conscious consumers and investors[48]. Naturally, this only works where such diligence is not already made compulsory by regional or national laws by taking advantage of the interregnum between growing recognition and growing implementation. Companies will be wise to implement these strategies at the earliest opportunity to seize this window of opportunity.

Ultimately though, adoption of such standards must come from genuine resonance with the principles and rationale of HRDD. Uptake arising only from self-serving agendas or conformity with legal mandate risks a form of 'cosmetic compliance'[49] that has created phenomena like greenwashing[50]. To meaningfully implement the complete process of HRDD, companies must, at least in concert with the desire for commercial gain, recognise the intrinsic deontological importance of conducting human rights due diligence.

VI. Obstacles to HRDD Importation

Yet, it would be naive to assume that uptake of HRDD is always so straightforwardly welcomed. Indeed if this were the case, the issue would not be so pertinent and contentious now. We must also examine the possible factors that dissuade companies from wholeheartedly adopting these processes, in order to contemplate their removal and achieve increased receptiveness.

On the face of it, companies may be driven by short-term value maximisation and profits[51], a phenomenon noted by the European Commission as recently as 2019[52]. The long-term approach to risk management that HRDD calls for, and its resource- and process-intensive implementation,

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[47] Enrico Partiti, 'The Place of Voluntary Standards in Managing Social and Environmental Risks in Global Value Chains' European Journal of Risk Regulation. 2022;13(1):114-137 <https://doi.org/10.1017/err.2021.34> accessed 12 March 2024

[48] See s *III*

[49] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' Human Rights Due Diligence and Labour Governance (Oxford, 2023; online edn, Oxford Academic, 14 Dec. 2023), <https://doi.org/10.1093/oso/9780198876069.003.0008> accessed 12 March 2024

[50] Ruzann Shahrin a et al, 'Green "Eco-Label" or "Greenwashing"? Building Awareness About Environmental Claims of Marketers' Advanced Science Letters, Volume 23, Number 4, April 2017, pp. 3205-3208(4) <https://doi.org/10.1166/asl.2017.7713> accessed 12 March 2024

[51] Colin Moore, 'A New Social Corporate Purpose: Stakeholders, Legitimate Expectations and Unfair Prejudice' <https://ssrn.com/abstract=4438975> accessed 14 March 2024

[52] Commission, 'The European Green Deal' (Communication) COM(2019) 640 final, s 2.2.1

can dissuade opportunistic, profit-oriented acquisitions from bothering with HRDD. No easy solution to this is envisaged, but the very nature of shareholder governance may see changes to this if increasing all-round recognition of human rights impacts causes this short-termism, and target companies that tolerate it, to lose their appeal as worthy investments.

Additionally, the fast-changing landscape of corporate HRDD can generate great uncertainty for businesses that may lack "concrete understanding and knowledge" of how such seemingly onerous standards may be "translated into day-to-day corporate practice"[53]. This could paralyse companies from taking action in this regard. In response to this, multi-stakeholder initiatives that bring together business and civil society organisations to brainstorm 'soft' approaches towards HRDD[54] may be considered. These approaches are especially notable for allowing the government to "[step] back from complete control" over regulation and instead "orchestrat[e]" these collaborations, taking the pressure off companies to procure compliance as may be seen in legal regimes. That Netherlands and Germany have invested substantially in such approaches[55] may speak to their plausibility.

Another significant concern raised by some corporate general counsel, in a report by the UN Special Representative of the Secretary General[56], is that following HRDD requirements may actually "increase the potential liability for firms" by upending stones previously left unturned and providing scrutinising parties with ammunition that they would not otherwise have had[57], to strengthen potential legal claims against the company. The concern is entirely understandable, yet Sherman and Lehr dismantle it as unfounded[58]. This owes to HRDD's prospective outlook that helps companies to identify and address potential human rights risks before they occur, narrowing rather than widening their exposure to litigation, and defending rather than sustaining possible claims against

[53] Accenture, 'Practical implementation of human rights due diligence in 10 companies' (twentyfifty, October 2021) <https://twentyfifty.co.uk/wp-content/uploads/2022/06/2021-Practical-implementation-of-HRDD-in-10-companies.pdf> accessed 14 March 2024
[54] Boris Verbrugge et al, 'Belgium and the Sustainable Supply Chain Agenda: Leader or Laggard?' <https://doi.org/10.13140/RG.2.2.32333.08167> accessed 14 March 2024
[55] Ibid.
[56] The late Professor John Ruggie of the Harvard Kennedy School, who served as the Special Representative of the UN Secretary-General for Business and Human Rights until 2011.
[57] OHCHR 'Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', (2008) A/HRC/8/5, para 80
[58] John F. Sherman, III & Amy Lehr, 'Human Rights Due Diligence: Is It Too Risky?' (2010) Corporate Social Responsibility Initiative, <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_55_shermanlehr.pdf> accessed 14 March 2024

them. Such misconceptions will need to be recast constructively to aid in commercial understanding of the true nature of HRDD.

VII. Future Prospects

We have thus examined the need and potential for HRDD to play a bigger role in commercial decision-making, from both a historical and forward-looking perspective. Yet its reception is hindered by several entirely understandable factors. Corporate counsel's "natural reluctance" to investigate risks that were previously unappreciated[59], stray from comfortable profit-maximising approaches, and navigate an uncertain due diligence framework in the already scrutiny-heavy context of M&A may stem from an instinctive desire to avoid rocking the boat, or fixing what is apparently not broken. Yet it is submitted that the boat of neglect is a sinking one, and the future that has opened its eyes to the importance of human rights impacts is one from which the world can never resile.

It is often proposed that future regulation will see the mandatory uptake of HRDD[60]. However this paper proposes that there is room for more immediate changes in attitude. Though it is corporate top brass that will need to take these steps in understanding, it may be unfair to expect sagacity and prescience of them if they are not adequately informed or reassured. Human rights due diligence espouses a bottom-up approach, and it may validly take time and publicity for such concerns to reach the top.

To this effect, what the literature has neglected to emphasise is that the legwork may ultimately lie not just with executives and executors, but also with the 'grassroots' actors of industry associations, civil society and research organisations. These organisations can play powerful roles in advocating, collaborating with and convincing companies that they do not need to "reinvent the wheel" to bring HRDD into commercial decision-making[61]. Admittedly, this change of mentality is easier said than done. But the growing quantity of case studies and reports (such as those outlined in this article) may be grist to the mill of a concerted effort to de-mystify the shifting sands of HRDD.

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[59] Ibid.

[60] Gabriela Qujiano & Carlos Lopez, 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?' <Business and Human Rights Journal. 2021;6(2):241-254 <https://doi.org/10.1017/bhj.2021.7> accessed 14 March 2024

[61] Accenture, 'Practical implementation of human rights due diligence in 10 companies' (twentyfifty, October 2021) <https://twentyfifty.co.uk/wp-content/uploads/2022/06/2021-Practical-implementation-of-HRDD-in-10-companies.pdf> accessed 14 March 2024

Tackling the UK's Homelessness Crisis

Lorraine Tan

The UK is currently experiencing a homelessness crisis. In England alone, the number of homeless people during Christmas 2023 was estimated at 309,000, a 14% increase from the previous year[1]. The Government's inability to tackle this crisis is a violation of its international obligation to ensure individuals' right to an adequate standard of living as required by the ICESCR. The factors contributing to the UK's homelessness epidemic include the chronic lack of investment in social housing, austerity measures which reduce housing-related welfare benefits and services, as well as prohibitively strict housing eligibility criteria. It is most likely that a combination of solutions, such as private sector investment in social housing, more frequent adjustments to the Local Housing Allowance in line with rent hikes, and amendments to the Housing Act 1996 will be required to tackle the UK's housing crisis.

I. Introduction

Having a roof over one's head is extremely important to one's physical and mental wellbeing. On the other hand, homelessness deprives victims of various basic physical needs and is an affront to their dignity. Therefore, it is crucial to reduce homelessness in society. This article will provide a characterisation of homelessness in the UK today, explain why it is a violation of human rights, outline the main causes of increasing homelessness rates and analyse the methods that have been, or could be used to address these causes.

II. Homelessness: An Overview

Definition

Homelessness is commonly thought as being equivalent to rough sleeping. This is, to some extent, true - sleeping in public places such as on the pavement, under bridges, and spaces not meant for residential purposes such as bus stops and coach stations[2], is the most visible form of homelessness.

[1] Shelter, "At least 309,000 people homeless in England today" (Press releases and statements, 14 Dec 2023) https://england.shelter.org.uk/media/press_release/at_least_309000_people_homeless_in_england_today#:~:text=Posted%2014%20Dec%202023&text=The%20charity's%20research%20shows%20homelessness,most%20of%20whom%20are%20families. Accessed 15 March 2024

[2] Amnesty International, "An Obstacle Course: Homelessness assistance and the right to housing in England" (June 2022) https://www.amnesty.org.uk/files/2022-06/Homelessness%20report%20England_EUR%200353432022%5B1%5D.pdf?VersionId=rtxmP_leX2hxlgqw66G.YY.VKX.uE8z6 Accessed 1 February 2024.

However, in English law and policy, homelessness is recognised to cover a much wider range of living conditions. An example of a more hidden form of homelessness is sleeping in short-term accommodation[3], also known as "sofa surfing". This is an informal living arrangement where one lives with friends or even strangers on a temporary basis. Sofa surfers are considered homeless because they do not have rights or security of tenure. Another form of homelessness is sleeping in unsuitable temporary accommodation offered by local authorities[4].

Current Trend

Homelessness is steadily increasing in the UK. In England alone, the number of homeless people during Christmas 2023 was estimated at 309,000, a 14% increase from the previous year[5]. A similar trend was observed in Scotland, where the number of homeless people rose by 10% from 2022 to 2023[6]. In light of these figures, a question arises - do homeless people have a legal right to housing? If they do, is homelessness a violation of said right?

III. Widespread Homelessness: A Violation of Human Rights

Violation of Rights under the Human Rights Act ("HRA") 1998 / European Convention on Human Rights ("ECHR")

The HRA 1998 is the key piece of human rights legislation in the UK. It incorporated key human rights from the ECHR and made them enforceable in British courts. While the HRA-ECHR regime does not provide a right to housing per se, courts may adopt a broad interpretation of the right to respect for private and family life contained in **Article 8** of the ECHR, in order to protect people who are homeless or facing the threat of homelessness. This was evident in *Connors v UK*[7] - the eviction of the applicant, a gypsy, from the local authority site he was residing at was held to be disproportionate to the legitimate aim being pursued by the eviction; therefore, the eviction was held to be unlawful and the applicant's right to remain in the local authority site was protected. However, cases like this, in which a claimant's homelessness was held to amount to a breach of their Article 8 right, are rare. This could be because the threshold for establishing a breach under Article 8 is high

[3] ibid
[4] ibid
[5] Shelter (n1)
[6] Shelter Scotland, "Homelessness in Scotland" (Housing policy) https://scotland.shelter.org.uk/housing_policy/homelessness_in_scotland Accessed 15 March 2024.
[7] Connors v The United Kingdom, Application no. 66746/01, Strasbourg Judgement

– Article 8 does not amount to a right to be provided a home, it merely suggests that local authorities should ensure that their policies and practice do not interfere with a person's right to respect for private and family life. For example, the standard of accommodation must not be so low that a person's right to respect for their private or family life is infringed[8]. As such, the application of Article 8 in the context of homelessness would be rather limited.

Violation of the UK's International Obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)

While the UK does not have domestic legislation which explicitly protects homeless individuals' rights to housing, it is bound, as a matter of international law, by the ICESCR and is obliged to progressively realise the rights contained within the ICESCR, including the **Article 11** right to an adequate standard of living. This encompasses the right to adequate housing. The UN Committee on Economic, Social and Cultural Rights (UNCESCR), which is a body responsible for overseeing countries' adherence to the ICESCR, issued General Comment 4[9] - the Comment defined adequate housing as the right of all persons, regardless of their income or economic resources, to "live somewhere in security, peace and dignity". The General Comment also explained how countries can comply with its international obligation under Article 11 - it posits that the right involves, inter alia, (1) making essential facilities and infrastructure available in the accommodation provided to individuals, (2) guaranteeing adequate space and protection from cold, damp, heat or other threats to health, (3) providing legal protection against forced eviction and (4) allowing individuals to access accommodation in a location which has sufficient employment options, healthcare services, schools and other social facilities.

It follows that most, if not all homeless persons will be considered to be deprived of their Article 11 right. For example, those who live on the streets do not have accommodation at all and are therefore unable to access any of the aforementioned benefits associated with accommodation. Those who stay with friends on a gratuitous basis could be evicted at any time without legal recourse.

[8] R (Bernard) v Enfield London Borough Council [2002] EWHC 2282 (Admin), bailii.org/ew/cases/EWHC/Admin/2002/2282.html, and R (Anufrijeva) v Southwark London Borough Council [2003] EWCA Civ 1406, bailii.org/ew/cases/EWCA/Civ/2003/1406.html.

[9] Office of the High Commissioner for Human Rights, CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant) (13 Dec 1991) https://www.refworld.org/legal/general/cescr/1991/en/53157 Accessed 13 March 2024

Those who rely on local authorities to house them may be placed into substandard temporary accommodation which is lacking in essential facilities and/or contains health or structural hazards.

Therefore, it can be concluded that under international law, since the UK is a signatory to the ECHR and ICESCR, both of which are legally binding treaties, it has a legal duty to tackle the homelessness crisis. This is supported by the UNCESCR statement that any state party in which a significant number of individuals are deprived of basic shelter and housing is prima facie failing to discharge its obligations under the Covenant[10]. This does not mean that the UK has to entirely eliminate the problem of homelessness; it merely means that the government ought to progressively realise the right to adequate housing. An example of this is ensuring the availability of necessary resources, such as temporary emergency accommodation, which make up for the shortfall in affordable housing.

IV. Importance of Addressing the Homelessness Crisis

Even if tackling homelessness is a costly venture, it is essential and worthwhile for the government to act quickly in order to reduce homelessness rates. This is because homelessness not only leads to a violation of the human rights of those affected, but also has far-reaching impacts that will be highly detrimental to society in the long term.

First, the longer one spends homeless, the more difficult it is for them to reintegrate into society. Due to the widespread stigmatisation of homeless people who are often labelled as lazy and deserving of their plight, and the negative effects of the homelessness experience on victims' mental health, homeless people may lose self-confidence and the motivation to find work[11]. In addition, a permanent address is necessary for individuals to participate in activities such as starting a bank account and entering into an employment contract. The emotional and practical hurdles that homeless people face pose a significant hinderance to their ability to join the labour force. Therefore, if we continue to deny homeless people a stable home, we are losing the meaningful contributions they could potentially make to society if they had a roof over their heads.

[10] UNCESCR, General Comment 3: The Nature of States parties' obligations (Art.2), 14 December 1990, contained in document E/1991/23, https://www.refworld.org/legal/general/cescr/1990/en/5613 para.10.
[11] Local Government Association, "The Impact of Homelessness on Health: A Guide for Local Authorities" https://www.local.gov.uk/sites/default/files/documents/22.7%20HEALTH%20AND%20HOMELESSNESS_v08_WEB_0.PDF Accessed 1 May 2024.

Second, for families with children, the effects of homelessness extend beyond the period during which they are homeless. Research has shown that the stress and emotional tension that comes with homelessness is particularly harmful for developing children, resulting in depression and behavioural issues which in turn adversely affect their educational attainment[12]. This will damage their productivity and ability to contribute to society in the future.

Third, while homeless people have the right to vote in theory, they face higher barriers in practice such as the shame of having to disclose the fact that they are homeless when registering to vote. As a result, they are often marginalised in the democratic process and are unable to put forward their interests and voice out their demands. Therefore, the government ought to proactively take steps to extricate homeless people from their predicament.

V. Current Efforts and Other Potential Solutions

This section identifies the three main causes of homelessness in the UK today – the lack of investment in social housing, the draconian austerity measures implemented since the 2008 financial crisis and the strict eligibility criteria barring homeless individuals' access to public housing. This section further argues that so far, many of the government's national laws and policies have led to many being denied protection from homelessness. This reflects the UK's "flawed approach to homelessness law and policy which views housing as a benefit, charity or even a reward instead of a human right that is available to all"[13].

In order to tackle homelessness effectively, the following solutions can be employed. Private social housing investment firms can increase the supply of social housing to address the demand-supply gap in the housing sector. The government should ensure that housing benefits are consistent with rent hikes and that local authorities receive adequate funding. Even when funding is tight, courts ought to ensure that local authorities are complying with their duty to provide accommodation as far as possible. Lastly, rather than denying help to homeless individuals who are not in priority need, the Housing Act 1996 should be amended such that local authorities are empowered to determine whether or not to render assistance to homeless people on a case-by-case basis.

[12] ibid
[13] Amnesty International (n2)

Cause 1: Lack of Investment in Social Housing

Many are homeless in the UK because there are insufficient social homes to accommodate them. This is mainly due to the Right to Buy scheme introduced by the **Housing Act 1980**, which enabled most council tenants to buy their homes at a discounted rate. The scheme was initially beneficial as it greatly increased the rate of home ownership among the poor at the time. But in subsequent years, the government failed to replenish the stock of social housing quickly enough to keep pace with demand, particularly in London which has a fast-growing population owing to immigration. The housing shortage problem was recognised in 2000, which prompted the government to set a target of building 250,000 new homes annually[14]. However, this goal has been missed every year since then, creating a shortfall of around 1.5 million social homes today[15]. This has forced low-income individuals into cheap, low-quality and unsuitable homes in the private housing market, and puts them at a high risk of homelessness, because (1) rent is becoming increasingly unaffordable, and (2) they may not have a stable source of income to pay their rent.

In light of the UK's cost of living crisis and high national debt today, it may not be viable or wise for the government to fund social housing construction by raising taxes or borrowing. Even if the government had adequate resources to boost the housing supply, they may face political opposition in the process, or may simply not be incentivised to do so. But this does not mean that the social housing shortage issue cannot be solved. An alternative means of investing in social housing is via the private sector. Private social housing investment firms, such as Axxco, already exist - they play an active role in sourcing and refurbishing properties, working with government-backed housing providers to bring these properties up to regulatory standards and ultimately offering these properties to low-income tenants[16]. The efforts of these firms may remedy the continued and severe lack of social housing provided by the government itself. In addition, given that there is a general increase in companies' awareness of their social responsibilities and their need to engage in ethical investment projects, it is likely, in my view, that the private social housing investment sector will expand significantly in the next decade. It is hoped that as a consequence, the gap between the supply of social homes and the demand from low-income persons will shrink, thereby reducing homelessness in the UK.

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[14] Shelter, "Social housing deficit", https://england.shelter.org.uk/support_us/campaigns/social_housing_deficit Accessed 14 March 2024.
[15] ibid
[16] Axxco, "What is Social Housing Investment?" (10 Mar 2024), https://www.axxco.co.uk/post/what-is-social-housing-investment Accessed 13 March 2024.

Cause 2: Austerity Measures

After the financial crisis in 2008, Brexit and the Covid-19 pandemic, the UK has imposed a wide range of austerity measures in the last decade. The reduction in public spending on housing-related welfare benefits and institutions has significantly limited individuals' ability to access accommodation.

An example of this is the cap on Local Housing Allowance (LHA), which is a housing benefit granted to tenants renting private properties[17]. It is, in theory, calculated based on the private market rental rates in a broad rental market area, and is intended to cover the cheapest 30% of local private rental homes[18]. However, this has not been achieved because despite continuously rising rents, LHA has been frozen since 2020, based on 2018-19 market rates[19]. As a result, the LHA offered to many low-income private renters is no longer sufficient for them to cover their skyrocketing rents, pushing them into homelessness. It may be argued that the level of LHA is currently not a significant concern, because the government has announced that LHA will be unfrozen with effect from April 2024 - this will hopefully alleviate the dire homelessness situation the UK is facing. Yet, this does not eliminate the risk that the LHA may be frozen once again. In my view, to ensure that LHA rates continue to be adequate, they ought to be frequently reviewed and adjusted in line with rent hikes. This is particularly important in light of the fact that rent inflation rates have shown no signs of slowing in recent months - it rose from 5.7% in the 12 months to September 2023, to 6.1% in the 12 months to October 2023[20].

The lack of funding for local authorities, another austerity measure, has also led to a rise in homelessness in the past decade. According to the National Audit Office, central government funding for local authorities fell by 49.1% from 2010/11 to 2017/18[21]. This has inevitably had a negative effect on local authorities' ability to carry out their duty to provide suitable accommodation to homeless individuals. The most obvious solution to this problem is increasing funding for local authorities, which has been done intermittently by the government in the last 5 years. One instance

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[17] Gov.UK, "Local Housing Allowance" (22 Jan 2016) https://www.gov.uk/guidance/local-housing-allowance Accessed 1 February 2024.
[18] Shelter, "The chancellor must act: the housing benefit freeze is costing the country" (17 November 2023) https://blog.shelter.org.uk/2023/11/the-chancellor-must-act-the-housing-benefit-freeze-is-costing-the-country/ Accessed 1 February 2024.
[19] LGiU, "The problems caused by the Local Housing Allowance freeze" (26 July 2023) https://lgiu.org/blog-article/the-problems-caused-by-the-local-housing-allowance-freeze/ Accessed 13 March 2024.
[20] ONS, Index of Private Housing Rental Prices, UK: October 2023 (Inflation and price indices, 15 November 2023) https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/indexofprivatehousingrentalprices/october2023 Accessed 13 March 2024.
[21] Amnesty International (n2)

of this occurred in 2019 - local authorities were given £263 million[22] to fulfil their obligations under the **Homelessness Reduction Act 2017**. While these governmental efforts are highly welcome, they may merely be one-off grants and could even be withdrawn if the government is cutting back on its expenditure. This creates uncertainty in the amount of financial support local authorities will obtain, potentially leading to inconsistent administration of local authorities' housing duties.

Such concerns were, to some extent, allayed in *R (Imam) v London Borough of Croydon*[23], in which the Supreme Court upheld a mandatory order that the London Borough of Croydon (LBC) must comply with its duty to provide suitable accommodation under s193(2) **Housing Act 1996** despite LBC's claims that it lacked the financial resources to do so. The court stated that it was not entitled to "dilute" or "absolve an authority… from complying with [its statutory] duty by reason of the insufficiency (in the court's opinion) of the resources available to it", and held that "in light of this…[LBC] had not sufficiently explained its situation in its evidence, if it wished to avoid a mandatory order being made against it". This was because LBC failed to show that it lacked an alternative source of funds to meet its duty. This judgement was satisfactory in the sense that it required local authorities to satisfy a high burden of proof before they could displace their statutory responsibilities on the grounds of financial strain. This is likely to lead to more consistency in local authorities' exercise of their duties towards homeless persons, notwithstanding their financial positions and the amount of funding they receive.

Nevertheless, before this judgement, Ms Imam had already been housed in unsuitable accommodation for 5 years as a consequence of LBC's breach of its duty. I would argue that recourse for her came too slowly. Instead, bringing breach of duty cases to the Local Government and Social Care Ombudsman (LGSCO) may be more efficient, because the LGSCO only deals with a particular category of cases[24], and is therefore not likely to have as large of a backlog of cases as courts do. The government could require local authorities to inform its clients of this means of seeking redress. Such a move may raise homeless persons' awareness of this alternative accountability mechanism and prompt them to choose this option rather than going to court, thereby allowing them to have their complaints heard and dealt with sooner. This is crucial particularly in light of the UK's deteriorating economy, which might lead to the implementation of more drastic austerity measures, further budget cuts for local authorities and more instances in which local authorities fail to carry out statutory duties due to funding issues.

[22] Amnesty International (n2)
[23] R (Imam) v London Borough of Croydon [2023] UKSC 45
[24] Local Government & Social Care Ombudsman https://www.lgo.org.uk/ Accessed 1 May 2024.

Cause 3: Strict Eligibility Criteria for Public Housing Applicants

Local authorities have a statutory duty to provide suitable accommodation to homeless individuals but only if they meet certain criteria, such as being "in priority need"[25]. Those "in priority need" include but are not limited to pregnant women, people who reside with dependent children, and people who are vulnerable as a result of old age and mental illness[26]. This closed list does not create room for discretion on a case-by-case basis, which is unjust because there may be situations where the homeless individual does not fall into any of the categories in s189(1), yet their housing needs clearly should be prioritised in light of their unique personal background or circumstances. In addition, an individual's vulnerability due to their mental health condition is currently assessed by local authorities rather than medical professionals[27]. While allocating the decision-making power to authorities is more efficient from a policy perspective, it gives rise to the risk that local authorities may make medically unsubstantiated claims that their clients' mental health conditions are not severe enough to render them vulnerable.

The outcome is that many homeless people end up falling outside the scope of the "in priority need" classification and are therefore not owed a duty to be given housing by their local authorities. This is highly problematic because it is a violation of the UK's obligation to protect everyone's right to housing on a non-discriminatory basis[28]. To remedy this issue, Parliament should remove the "in priority need" classification in the Housing Act 1996, and instead require local authorities to discharge their duties to all homeless people equally.

Another eligibility criterion is that the homeless person must not have "become homeless intentionally"[29] . This is the case where the person "deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy"[30] . Local authorities often claim that homeless individuals fall under this section if they choose not to take up accommodation offered by the authority, and use this as a reason to end their duty to provide secure accommodation to the homeless. But I would argue that s191(1) should not be applied to the detriment of those who

[25] Housing Act 1996, section 189B, subsection 4
[26] Housing Act 1996, section 189, subsection 1
[27] Amnesty International (n2)
[28] K Boyle & A Flegg, "The Right to Adequate Housing in the UK – An Explainer" (Briefing – Economic, Social and Cultural Rights Part Three, May 2022) https://dspace.stir.ac.uk/retrieve/e1e0d475-00c9-4912-8732-d859ebdd270c/04_Briefing3-Housing_18MAY22.pdf Accessed 15 March 2024.
[29] Housing Act 1996, section 189B, subsection 4
[30] Housing Act 1996, section 191, subsection 1

reject their offered place of residence by reason of it being too far away from their children's place of schooling, or their support network which is essential to their recovery from their mental illnesses.

Recent case law has proven that in such a context, s191(1) does not pose as significant of a problem as the "in priority need" requirement. In *Uduezue v Bexley London Borough Council*[31], the court held that local authorities had a "proximity obligation", which was a "duty to accommodate homeless persons as close as possible to where they had previously been living, even if the only accommodation available was outside its local area, unless there was a particular reason not to do so". On the facts of the case, there was no evidence that the authority had sought accommodation any closer than the one offered, nor had it ensured that the accommodation offered was the closest property to the claimant's original residence that the local authority could secure. Therefore, the local authority's duty to house the homeless claimant was held to be continuing. This decision can be said to be a victory for homeless persons who would suffer from major disruption to their existing lives if they were placed in properties that are geographically distant from their present homes.

VI. Conclusion

The causes behind the high homelessness rate in the UK today can be feasibly mitigated by raising the supply of social housing, increasing housing-related welfare benefits/services, and expanding the duty of local authorities to provide suitable accommodation to a wider range of individuals. However, insofar as the UK views housing as a benefit that "undeserving" individuals should not be entitled to, it will continue to be in breach of its international obligation to provide the right to adequate housing to everyone equally, as required by the ICESCR. I have faith that the UK, which has traditionally given a significant degree of deference to its international obligations, will be able to address the issues it currently faces with regards to homelessness and make progress in upholding homeless persons' right to adequate housing.

[31] Uduezue v Bexley London Borough Council [2023] EWCA Civ 322

Gender-Based Violence in the UK: A Curable Endemic?

Parijaat Jain

Introduction

Gender-based violence is a global issue that remains prevalent, with almost one in every three women experiencing physical or sexual intimate partner violence or non-partner sexual violence in their lifetime.[1] Originally an umbrella term covering violence directed against a person based on one's gender identity or more specifically "any act… that results in or is likely to result in, physical, sexual or psychological harm or suffering to women", the category has grown to be representative of its largest subset – violence against women.[2] This ranges from offences such as domestic violence, sexual violence, female genital mutilation, trafficking and honour-based violence to violence encountered more regularly on a day-to-day basis, such as misogyny and sexual harassment.[3] New to this set of offences is the rise of technology-facilitated gender-based violence – a realm that has grown since the onset of the Coronavirus pandemic. With such an all-encompassing range of offences, it seems like the Sustainable Development Goal of "eliminat[ing] all forms of violence against all women and girls in the public and private spheres" is a lofty target with no easy solution.[4]

Though not an all-curing panacea, legislation and legal frameworks are a good place for nations to begin tackling the issue of gender-based violence. Legislation criminalising violence against women enshrines women's basic human rights to enjoy a life free of violence and discrimination. Beyond indicating that such behaviour is not socially acceptable, legal sanctions can be an important deterrent to reduce the occurrence of gender-based violence. Legislation also allows us to approach the issue of gender-based violence from a victim-sensitive angle, putting in place protective systems which promote access to support services.

This paper examines the legislative action that has been brought forward to tackle gender-based violence within the United Kingdom (UK), pitting it against the international standards that have been set and that the UK has pledged itself to. This paper will investigate the great potentiality

[1] World Health Organisation, 'Violence against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence Estimates for Intimate Partner Violence against Women and Global and Regional Prevalence Estimates for Non-Partner Sexual Violence against Women' (2021) < http://www.jstor.org/stable/resrep33207> accessed 15 March 2024

[2] Declaration on the Elimination of Violence Against Women 1993

[3] *Ibid.*

[4] United Nations, 'Sustainable Development Goals Report 2022' (2023) <https://sdgs.un.org/goals/goal5> accessed 15 March 2024

of the recent developments in the law as well as their shortcomings. I argue that while there has been incredible growth in the legislation targeting gender-based violence, there are several gaps that the law has yet to fill.

The paper is structured as follows: it will begin with an outline of the significance of gender-based violence globally and domestically. The essay will then go on to scrutinise the general approach taken by international law before considering the approach taken by the UK. There will be a specific focus on the recent developments surrounding technology-facilitated violence as well as sentencing for the commission of gender-based violence offences. The paper will inquire into the adequacy of such efforts to eradicate gender-based violence, concluding with potential areas for improvement within each specified field.

Significance of Gender-Based Violence

Globally, an estimated 736 million women have been subject to gender-based violence at least once in their life – amounting to nearly one in every three women.[5] This figure, though astonishing enough, only represents the physical violence that women suffer, making it a highly skewed statistic that obscures the true magnitude of violence women face. It fails to take into account sexual harassment which does not necessarily escalate into any physical manifestation.[6] This is further exacerbated by the notion that many cases of recognised forms of violence go officially unreported, with less than 40% of women seeking help and fewer than 10% of those reaching out to the police to have their cases formalised.[7] It is likely then that the figure of one in three women is a grossly underestimated value and the prevalence of gender-based violence is a far more serious issue than originally thought out to be.

Within the UK, 6.9% of women aged 16 and above were victims of domestic abuse (inclusive of non-physical abuse, threats, force, sexual assault or stalking) in the year ending March 2022, amounting to about 1.7 million women.[8] This figure, though relatively similar to those of the

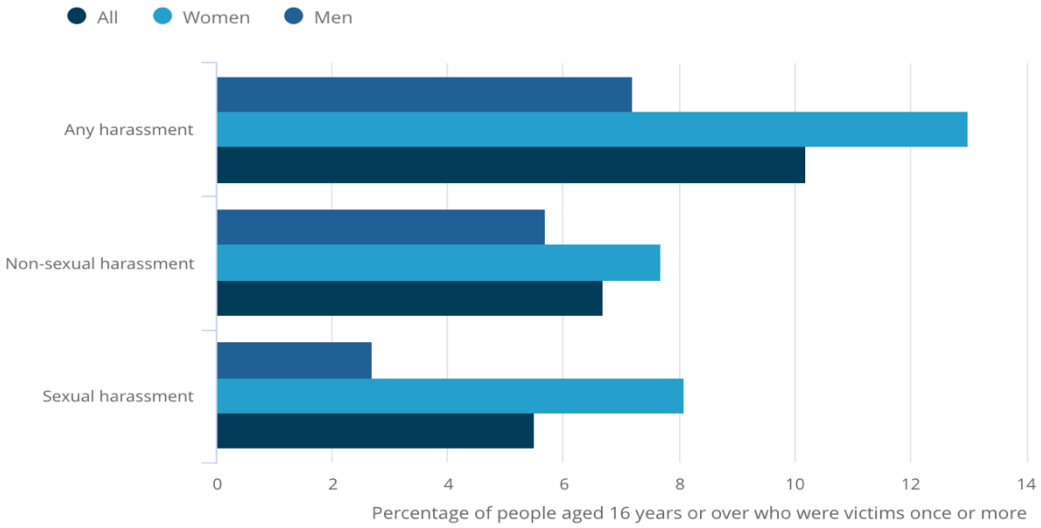
[5] United Nations, 'Facts and figures: Ending violence against women' (2023) < Facts and figures: Ending violence against women | UN Women – Headquarters> accessed 15 March 2024
[6] *Ibid.*
[7] *ibid.*

[8]ONS, 'Domestic abuse in England and Wales overview: November 2022' (2022) < Domestic abuse in England and Wales overview - Office for National Statistics (ons.gov.uk)> accessed 15 March 2024

previous years, is still a slight increase from the 1.6 million women in 2020.[9] With regard to the documentation of any type of harassment, there has historically been no comprehensive measure of the prevalence of such offences till 2022. However, recently data has shown that 13% of women had experienced some form of harassment in the last 12 months – primarily driven by sexual harassment.[10]

Figure 2: Harassment is more prevalent among women compared with men across harassment types

Prevalence of harassment in the last year for people aged 16 years and over, by type and sex, England and Wales, year ending March 2023



Source: Crime Survey for England and Wales from the Office for National Statistics

Overall, women faced a disproportionately higher rate of harassment than men, reaching shocking levels.

[9] ONS, 'Domestic abuse in England and Wales overview: November 2020' (2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2020 > accessed 1 May 2024

[10] ONS, 'Experiences of harassment in England and Wales: December 2023' (2023) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/experiencesofharassmentinenglandandwales/december2023#:~:text=The%20Crime%20Survey%20for%20England%20and%20Wales%20(CSEW)%20estimates%20that,in%20the%20last%2012%20months.> accessed 1 May 2024

Development in International Law

This section begins with tracing the history of international law relevant to gender-based violence over the past few decades. While developments in international law may not be the focal point of this paper, international conventions and declarations play a crucial role in defining what constitutes gender-based violence and formulating multifaceted frameworks which take into consideration specific factors that contribute to disproportionality within violence against women. This forms a holistic benchmark for us to compare the evolution of domestic law and its nuance. We will examine in particular international law which the UK is subject to.

Treaties and Conventions

Treaty law is the primary source of international law and one that holds the most potency. Once ratified, state parties are mostly compelled to take action to effectuate the rights specified in the treaties they have signed, giving rise to a sort of accountability and an imposition of a positive obligation on nations to bring about change.[11]

The 1979 Convention on the Elimination of All forms of Discrimination against Women ('CEDAW'), often recognised as an 'International Bill of Rights for Women', was the first significant step towards the establishment of the key rights for women.[12] This has been ratified by 189 states till date. All party states are then under a legal obligation to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[13] Though not a direct duty to prohibit violence against women, it incorporated an implicit commitment within the outlawing of "discrimination against women in all its forms."[14]

Subsequent recommendations by the CEDAW Committee – a board supervising States' compliance with the Convention– make explicit reference to violence against women. The

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[11]World Development Report, 'Gender based violence and the law' (2017) < WDR17BPGenderbasedviolenceandthelaw.pdf (worldbank.org)> accessed 15 March 2024

[12] UK Parliament, 'A review of the effectiveness of legislation protecting women from violence across the Commonwealth' (2021) <wip-report-final-3.pdf (uk-cpa.org)> accessed 15 March 2024

[13] U.N. G.A., Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) accessed 15 March 2024

[14] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, https://www.refworld.org/legal/resolution/cedaw/1992/en/96542 accessed 16 March 2024

Committee's General Recommendation No. 19 (1992) broadly defined discrimination to include gender-based violence. This recommendation also clarified that in taking all appropriate measures to eliminate discrimination, States may also be responsible for "private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation."[15] This suggests that not only must states take positive action to combat violence against women but they could be responsible for inaction in preventing said violence. The recommendation also highlighted the active contribution of societal stereotypes and attitudes to the propagation of violence and discrimination against women, urging States to take effective measures to overcome these attitudes, whether through education, public information programmes or other similar methods. [16]

The Committee's General Recommendation No.35 (2017) broadens the scope of gender-based violence, making clear that the Convention is applicable to technology-mediated environments– effectively incorporating technology-facilitated violence.[17] The Committee reasserts the requirement for States to adopt legislation harmonious with the Convention, recommending the inclusion of age-sensitive and gender-sensitive provisions as well as effective legal protection and reparation.[18]

Regional Instruments

Regional human rights instruments work alongside the wider conventions to prohibit gender-based violence, promoting greater involvement from individual states.

The Council of Europe adopted the Convention on Preventing and Combating Violence Against Women and Domestic Violence ('Istanbul Convention'). The Convention sets out similar positive and negative duties, as in CEDAW, for State parties to "exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that is perpetrated by both State and non-State actors."[19] There is also the additional obligation to implement State-wide effective, comprehensive and coordinated policies encompassing

[15] *Ibid.*
[16] *ibid.*
[17] United Nations, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (2017) <General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (un.org)> accessed 15 March 2024
[18] United Nations, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (2017) <General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (un.org)> accessed 15 March 2024
[19] UK Parliament, 'A review of the effectiveness of legislation protecting women from violence across the Commonwealth' (2021) <wip-report-final-3.pdf (uk-cpa.org)> accessed 15 March 2024

all relevant measures to prevent all forms of violence, inclusive of sanctions, and offer a holistic response to violence against women.[20]

Declarations and International Norms

While international declarations do not have the same legally binding power as conventions, they cultivate international legal norms.

Beginning with the 1948 Universal Declaration of Human Rights which laid out the basic rights and principles of equality, security, liberty and dignity, the foundation for combating gender-based violence was solidified with the acceptance of women's rights as human rights at the 1993 United Nations World Conference on Human Rights in Vienna. This was bolstered by the UN Declaration on the Elimination of Violence against Women adopted by the General Assembly. The Declaration encouraged the provision of specialised assistance and support structures to women subject to violence as well as measures tailored to women who are especially vulnerable to violence. It also specified that the measures to end violence against women should target the structures, contexts and social and cultural patterns which constitute the root causes of this type of violence.

Jurisprudence

International jurisprudence has elaborated on the contents of the due diligence duty set out in the conventions, which holds governments accountable to prevent, investigate and punish acts of violence against women. This obligation includes both making law in the relevant area as well as ensuring change in the socio-cultural aspects of society and modifying social institutions that reinforce gender-based violence.[21]

Though not binding on domestic courts in the UK, these cases form a "yardstick for assessing the efficacy of government action."[22] *Bevacqua and S v Bulgaria*, in particular, specified that this duty entails ensuring that women have access to enforceable forms of protection, such as

[20] *ibid.*

[21] Shazia Qureshi, 'The Emergence/Extention of Due Diligence Standard to Assess the State Response towards Violence against Women/Domestic Violence' (2010) 28(1) A Research Journal of South Asian Studies 55-56 <543128208.pdf (core.ac.uk)> accessed 15 March 2024

[22]World Development Report, 'Gender based violence and the law' (2017) < WDR17BPGenderbasedviolenceandthelaw.pdf (worldbank.org)> accessed 15 March 2024

restraining orders, when confronted with gender-based violence, as well as access to a legal framework that enables them to bring criminal prosecutions.[23]

Development in Domestic Law

Having noted the expansion of international law with regards to tackling gender-based violence, this section will analyse the general efforts that have been made to support the eradication of violence against women before considering in more detail what has been implemented to address the areas of sexual harassment, digital gender-based violence and the enforcement of gender-based violence offences.

International law has set out the principle of due diligence which forms the foundation of what is expected of legislation and governments. This duty can be further split for analysis purposes into four pillars, namely – prevention, investigation (dealing with the collection of data), punishment or enforcement of the law, and the provision of reparation and support. These pillars will be the predominant basis for the evaluation of the domestic law.

Domestic Abuse

In 2021, the Government published the 'Tackling Violence Against Women and Girls Strategy', in which the key areas for action corresponded to the four pillars set out in the due diligence duty. Alongside this was the enactment of the Domestic Abuse Act 2021. The Act sought to increase awareness of domestic abuse, strengthen support for victims and improve the effectiveness of the justice system.[24] The Act set out a statutory definition of domestic abuse that went beyond just physical abuse to include emotional, controlling or coercive and economic abuse.[25] The Act further expands the scope of a domestic abuse offence by encompassing more than intimate partner relationships and accepting that domestic abuse can take place in a broader range of situations. Most notably, the Act criminalises non-fatal strangulation and puts an end to the 'rough sex' defence, where men plead that the victim had consented to serious harm for sexual gratification.[26] Such extension undoubtedly highlights the UK's fulfilment of their duty to punish and pursue perpetrators of gender-based violence who would have otherwise gone unreprimanded.

[23]Bevacqua and S. v. Bulgaria App no 71127/01 (ECHR, 12 June 2008)

[24] Gov.UK, 'Tackling violence against women and girls strategy' (2021) <Tackling violence against women and girls strategy - GOV.UK (www.gov.uk)> accessed 15 March 2024
[25] Domestic Abuse Act 2021
[26] Domestic Abuse Act 2021

Regarding support for victims, the Act makes provision for all eligible homeless victims of domestic abuse to automatically have 'priority need' for homelessness assistance. The beauty of this provision is its focus on the correlation between homelessness and domestic abuse and its recognition of the fact that gendered violence places victims in between a rock and a hard place. The only concern with this provision would be the Government's ability to ensure that there are resources to cater to the potential rise in need for assistance and the sustainability of such a measure. Elsewise, the Domestic Abuse Act is overall a positive piece of legislation that offers greater protection than what was already available.

The Act fails to achieve its maximum utility, however, as it simply fails to recognise the gendered quality of domestic abuse. While domestic abuse can be suffered by both men and women, it is predominantly a burden borne by women with one in four women experiencing domestic abuse as compared to the one in six to seven men.[27] Domestic abuse is a crime rooted in gender inequality and it is necessary to address this explicitly for legislation to begin considering the underlying contributors to domestic abuse or more generally, gender-based violence. This would require the legislation to go beyond support and punishment, adopting a focus on prevention-based measures and mandating them at various levels and in various institutions (firms, schools, etc). This could be legislated in slightly more general terms and accompanied with guidance and supervision (perhaps through an independent agency) to allow institutions to take tackle the individualised root causes of gender-based violence in their institutions.

Another major issue with the Domestic Abuse Act is the exclusion of migrant women with insecure immigration status.[28] Such women fear reporting abuse due to concerns about deportation and their immigration status. The limited access to support services due to language barriers and a lack of awareness about their rights make it additionally difficult for them to reap the benefits of such legislation. These women are no less vulnerable to gender-based violence than the ordinary woman. In fact, they are likely to be more susceptible to gender-based violence due to the same reasons that hinder their usage of the Act. Consideration for such susceptibility must be taken into account for the UK to have comprehensive and State-wide policies, which aligns with the nuance required by International Law.

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[27] ONS, 'Domestic abuse in England and Wales overview: November 2022' (2022) < Domestic abuse in England and Wales overview - Office for National Statistics (ons.gov.uk)> accessed 15 March 2024

[28] Pragna Patel, The Domestic Abuse Act 2021 and Migrant Women. in Edwards and others (eds), Blackstone's Guide to the Domestic Abuse Act 2021 (2023)

Technology-Facilitated Gender-Based Violence

Gender-based violence is already one the most prevalent human rights violations. This has only grown with the rise of the use of the internet and technology that has allowed perpetrators to devise new ways to abuse victims. This phenomenon became increasingly evident during the Covid-19 pandemic, where incidences of digital gender-based violence skyrocketed. This section will first give a brief outline of digital gender-based violence before inspecting the recent legislation which deals with this phenomenon and making a critical analysis of its various provisions.

Technology-facilitated gender-based violence ('TFGBV'), being a relatively novel term, has yet to have a consistent definition or terminology. However, some of the most common forms of TFGBV can include image-based abuse, referring to offences such as non-consensual pornography and unsolicited sexual images; harassment and abuse; stalking and monitoring; gendered hated speech; gendered disinformation, referring to the use of misleading gender narrative against women; and threats of violence.

Up till recently, the approach taken by the UK fell short of addressing online harms simply because it excluded the online harms suffered by women and girls despite TFGBV disproportionately affecting these groups.[29] However, there is no reason why behaviour that would be unacceptable in person should be accepted as commonplace online.

Parliament has thus recently attempted to rectify this discrepancy with the passing and enactment of the Online Safety Act 2023. The Act introduces duties on companies running social media sites and search engines to take down illegal content, including child-sexual abuse, hate crimes and revenge porn, and prevent and remove 'priority' illegal content, referring to priority offences which include gender-based violence offences such as sexual images, sexual exploitation, stalking and harassment.[30] This is an important step towards combating gender-based violence in the digital sphere as it provides an avenue for the previously untouchable private companies to be held accountable. However, the Act does not go as far as desired in protecting women from gender-based violence. The Act imposes duties to carry out 'suitable and sufficient' assessments and to take 'appropriate steps', which though enforceable are not as concrete and binding as an explicit Code

[29] Barker K and Jurasz O, 'Gender-Based Abuse Online: An Assessment of Law, Policy and Reform in England and Wales' (2022) The Palgrave Handbook of Gendered Violence and Technology <Gender-Based Abuse Online: An Assessment of Law, Policy and Reform in England and Wales | SpringerLink> accessed 15 March 2024

[30] Online Safety Act 2023 cl s1(2)

of Practice would have been.[31] Nevertheless, there is an understanding that it is a sizeable hurdle to regulate the operation of companies managing social media platforms and websites since they are usually internationally based, giving rise to jurisdictional issues.[32] As such, the Government and Ofcom – the UK's regulator for TV and radio as well as the overseer of the new regulations – will have to supervise companies more closely in order to ensure that they have taken sufficient steps.

The Act also introduces a new base offence of intentionally sharing an intimate image without consent, in which the complainant must only prove that the perpetrator intentionally shared a photograph or film showing the complainant in an intimate state.[33] Since intention as to consequence or circumstance elements need not be proven under this offence, it hopefully suggests that more cases will proceed to convictions. The Act also creates two more offences of sharing an intimate image without consent, based on the perpetrator's intent to cause alarm, distress or humiliation or to obtain sexual gratification.[34] The threatening to commit such an offence as well as the act of cyberflashing, when someone sends an unsolicited sexual image to another without their consent, are also criminalised. The reform of intimate image abuse law, while obviously beneficial in allowing women to take action for violence committed against them, needs to be accompanied with specialised training to ensure that law enforcement officers are in fact capable of enforcing such laws to the expected standard.[35] However, the odds of training being sufficiently comprehensive, such that this reform is effective, seem quite grim. The need for police officers to have better training has become a recurring mantra in other sectors of tackling gender-based violence. Training has been a solution preached in relation to rape and sexual assault report investigations, yet there has been little to no increase in cases that reach court or culminate in convictions. This does not inspire confidence in the success of the Act's provision.

Overall, while the Online Safety Act has made an attempt to address TFGBV, it seems to lack the precision and detail which would allow it to be a comprehensive solution. Being the only legislation available on this matter at the current time, there has been consideration for the intersection between age and gender when looking at TFGBV. However, there is room to consider the intersectionality of gender with insecure immigration status, where women may be more at risk

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[31] *Ibid.,* cl s10
[32] The Fawcett Society, 'Sex Discrimination Law Review' (2018) <Download.ashx (fawcettsociety.org.uk)> accessed 15 March 2024
[33] Online Safety Act 2023 2023 cl s188
[34] Online Safety Act 2023 2023 cl s188
[35] Jess Eagelton, 'The Online Safety Bill – what does it mean for women and girls?' (Refuge, 2023) <https://refuge.org.uk/news/the-online-safety-bill-what-does-it-mean-for-women-and-girls/> accessed 17 March 2024

of digital 'honour violence'[36], or with learning disabilities, where women may experience unique forms of TFGBV such as the co-option of assistive devices.[37] The focus on punishment leaves the other duties incomplete and much scope left for the law to expand in this realm.

Enforcement of the Law

This section focuses on the pillar advocating for the punishment of perpetrators. It will examine the current shortcomings of the sentencing system, setting out briefly what the current situation is. For each point of criticism, it will highlight what Parliament and the government has done to bridge the shortcomings and the sufficiency of such efforts as well as areas that the State has failed to take note of.

It is a common argument that the Police and Crown Prosecution Service should do more to protect victims and punish perpetrators. Of the estimated 2,124,000 victims who had suffered domestic abuse in England and Wales in the year ending March 2023, only about 900000 were recorded by police, 47000 were charged and 39000 were eventually convicted.[38] It is an alarming statistic that only about 40% of cases are accounted for and only 0.018% of victims receive the deserved justice. Such a case was primarily due to the lack of offences catering to various types of violence against women, as is the case with sexual harassment. However, since 2015, there has been the introduction of new offences for controlling behaviour, stalking, 'revenge-porn' and upskirting, broadening the scope for prosecution for gender-based violence and allowing more victims to access justice. The extension of offences is the most effective solution to the reduction of gender-based violence. Theoretically, if all forms of gender-based violence were criminalised, the deterrence effect would be strong enough to reduce the incidence of gender-based violence. However, this is unlikely to be the preferred option due to its impracticality and the excessive burden it would place on the legal system and prisons and the exacerbation of delays in the processing of cases and trials.

Furthermore, simply focusing on punishment or criminalisation as a solution on its own does not resolve the underlying distrust in the legal system and the societal notion that victims won't

[36] Such women may be more vulnerable to incidents where technology is used to shame or threaten them to conform to certain standards so as to uphold the 'family honour' or more accurately, to prevent them from leaving. This can include a range of acts from deleting online documents required for the women's immigration status to withholding access to technology.

[37] Kathryn Brookfield, 'Technology-Facilitated Domestic Abuse: An under-Recognised Safeguarding Issue?' (2023) 54(1) The British Journal of Social Work 419-436 <https://doi.org/10.1093/bjsw/bcad206> accessed 15 March 2024

[38] ONS, 'Domestic abuse in England and Wales overview: November 2023' (2023) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2023> accessed 2 May 2024

be believed, which inhibit access to justice and lead to underreporting.[39] There is a need to create a safe environment with adequate support structures within the legal system – a system where processes are clearly set out such that victims know what to expect, there is a fair standard for treatment of victims and specialised support during the reporting process.[40] This could possibly be satisfied if the recent Victim and Prisoners Bill comes to fruition. Part 1 of the Bill places the overarching principles of the Victims' Code into primary legislation, ensuring that victims are aware of the possible options they are entitled to and the prospective path each option might lead to.[41] However, as it stands, beyond making the Victims' Code legally enforceable, the Bill does not enhance the rights of victims. Moreover, there has been little to no consultation on the content of the revised Victims' Code which would be introduced. There is also a lack of concrete mechanisms that allow victims to secure their rights within the whole process. There must be more than simply a 'range of measures to drive improvements in case quality, timeliness and the engagement of victims throughout the criminal justice process.'[42]

Another criticism of the approach taken to sentencing was the perception of 'lenient sentences'.[43] Currently, the maximum sentences for the prominent offences relevant to violence against women and girls are life imprisonment in the case of rape; five years imprisonment for controlling or coercive behaviour and 10 years for the offence of stalking involving fear of violence or serious alarm or distress. It is often argued that the duration of the sentences for violence against women is not commensurate with the gravity of the crime. However, due to lack of space and time, this is not an argument that will be commented on in this paper. More concerning regarding the question of gravity is the fact that no offence of gender-based violence is met with a minimum sentence. A lack of a minimum sentence connotes that there could be perpetrators who receive a lighter suspended sentence or a sentence disproportionate to their offence. The imposition of minimum sentences would be the ideal solution to ensure that the sentences reflect the seriousness of the violence against women. The Government has repeatedly resisted this on the basis that addressing sentencing and length of time served in prison in cases of violence against women already require a range of legislative and non-legislative action. This, however, is not a convincing argument

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[39]The Fawcett Society, 'Sex Discrimination Law Review' (2018) <Download.ashx (fawcettsociety.org.uk)> accessed 15 March 2024

[40] Gov.UK, Ministry of Justice, 'End-to-End Rape Review Report on Findings and Actions' (2021) <End-to-End Rape Review Report on Findings and Actions - GOV.UK (www.gov.uk)> accessed 15 March 2024

[41] Victims and Prisoners Bill HC Bill (2024-03) [57]

[42] Gov.UK, 'Tackling violence against women and girls strategy' (2021) <Tackling violence against women and girls strategy - GOV.UK (www.gov.uk)> accessed 15 March 2024

[43] *ibid.*

on the Government's part as it is plainly within their job scope and role for them to take action, whether through influencing Parliament's legislating power or through implementing policies, to protect citizens' rights.

Instead, the Government and Parliament have opted to address the severity of sentencing for rape and murder through a focus on parole. This has entailed the inclusion of a provision in the Police, Crime, Sentencing and Courts Act 2022, ending the halfway release of offenders sentences to between four and seven years in prison for serious violent and sexual offences and shifting it to the two-thirds point instead.[44] Furthermore, the Secretary of State has now been granted the power to refer to the Parole Board any prisoner serving a standard determinate sentence who would normally be released automatically, under the general principle of low levels of risk posed to society, but who is actually deemed to present a significant risk to the public, upon which the prisoner will not be released until the Parole Board is satisfied that it is no longer necessary for public safety.[45] While this is indeed a step in the right direction, it is worth considering whether parole should even be a viable option for perpetrators of serious offences, such as rape or domestic homicide. There is certainly the argument that all offenders deserve a chance of rehabilitation and an opportunity to mend their ways but in cases of serious offences, this must be weighed out against the needs and interests of the victim. Does the victim not deserve the opportunity to live a life free of constant fear that her abuser might reappear? This is especially so when the offence committed was grave enough to warrant a high sentence and when odds of re-offending currently stand so high.[46] This is a consideration that if put in place could give the enforcement of the law enough bite to adequately punish perpetrators.

Conclusion

There has been increasing recognition of the unacceptability of violence against women in the UK with the Home Secretary recently elevating gender-based violence to sit alongside terrorism and serious organised crime within the strategic policing priorities.[47] This paper's review has revealed that the legislation too is slowly reflecting this change in sentiment. Women have the right to live a life free of violence and national legislation is where change should start. In essence, much progress

[44] Sally Lipscombe, 'Sentencing for violence against women and girls' (Debate Pack No CDP 2023 0021, House of Commons Library 2023) <CDP-2023-0021.pdf (parliament.uk)> accessed 15 March 2024
[45] *ibid.*
[46] Chris Dyke, 'Parole decisions about perpetrators of domestic violence in England and Wales' (Wiley Online Library , 22 January 2024) <https://onlinelibrary.wiley.com/doi/full/10.1111/hojo.12551> accessed 3 May 2024
[47] Kathryn Brookfield, 'Technology-Facilitated Domestic Abuse: An under-Recognised Safeguarding Issue?' (2023) 54(1) The British Journal of Social Work 419-436 <https://doi.org/10.1093/bjsw/bcad206> accessed 15 March 2024

has been made in prohibiting gender-based violence in the UK but there is much left wanting in the approach towards the societal notions and attitudes that form the root cause of gender-based violence. There is still far to go before all women are able to be free of gender-based violence.

The Right to be Forgotten, the 'Superhuman Right'?

Tai Cheng Tan

Introduction

In light of the Costeja case, Peter Lehofer has characterized the right to privacy as a 'super-human-right' which trounces all other ECHR rights[1], seemingly running counter to the idea that there is no hierarchy of rights in the ECHR. The 'right to be forgotten' that has developed from ECHR case law has since been roundly criticized, especially by journalists and media outlets who argue that such a right would have a chilling effect on free speech.

In this article, I will consider the scope and enforcement of the right to be forgotten, as well as arguments for and against.

Legal Background

Regulation (EU) 2016/679 introduced the General Data Protection Regulation (GDPR), which repealed the 1995 Directive 95/46/EC. Article 17 of the GDPR now forms the foundation of the case law concerning the right to be forgotten. The GDPR applies to the processing of personal data Article 1.1, and since the Costeja case, search engines are data controllers to which the GDPR applies.

Additionally, the ECHR's Article 8 right to privacy and Article 10 right to freedom of expression will form key pillars in the balancing test for the right to be forgotten.

Who Has a Duty

It is important to note the distinction between search engines and third party media outlets[2]. The former merely provides a search and listing system on which the latter can host its content and news websites. Notably, this distinction is important because the website publisher is likely to benefit from the protections to journalism under Article 85.2, whereas the search engine does not[3].

[1] Lehofer P, 'ECJ: Google Has to Forget - the Fundamental Right to Data Protection and the Bowdlerization of the Internet' <https://blog.lehofer.at/2014/05/eugh-google-muss-doch-vergessen-das.html> accessed 2024
[2] Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1) Version 2.0 [7]
[3] M.L. and W.W. vs. Germany (2018) Application nos. 60798/10 and 65599/10

We might consider an example taking points one and two into account. Imagine CNN had published a news article of Victor's recent criminal conviction, with the article being searchable on Google. Should victor make a delisting request to Google, Google may remove Victor's name from its search results, but Victor's information may still be searchable on the CNN website. For example, a CNN news article may have a link to Victor's article, or Victor's article may be found in the CNN websites internal searches.

Likely Defendants

It is worth noting that in most cases, litigation will be directed at the search engine operator and not the third party publisher. This is for three reasons.

Firstly, the Costeja case points out that it would be inefficient to sue third party publishers as opposed to the search engine operator. Search engine operators will practically always have an establishment under EU jurisdiction, hence an order against Google will likely be complied with. In contrast, there can be no guarantee that a publisher will always be under EU jurisdiction. Even if they were initially under EU jurisdiction, the publisher could just replicate the information to another publisher that is without EU jurisdiction.

There is also the additional problem which arises in the event of multiple publishers – it would be more effective to sue the search engine operator as opposed to bringing claims against multiple publishers. This increase in efficiency has its drawbacks – publishers may have an interest in keeping that information accessible, and they may not have an opportunity to defend that interest unless they intervene in the litigation. However it is likely that the interests of the publisher in keeping the information accessible will be taken into account in the court's balancing test.

Secondly, the Costeja case also states that third party publishers (who are often news sites) may benefit from certain derogations, mostly for the purposes of journalism. In contrast, search engines like google do not alter the information displayed on their searches – they merely index and display results. Hence there is no journalistic function to the search engine. Therefore it is possible that a claim against a publisher may fail where a claim against a search engine operator would succeed.

Thirdly, search engines often create more significant infringements of privacy than that of third party publishers. A data subject's information can be found on the publisher's internal searches

by inputting their name into the search parameters. However, the number of users on the publisher's website is merely a small proportion of the overall users of the search engine. Furthermore, a keyword search in the search engine will pool together information from various web publishers, and not just the website of one publisher. Search engines therefore create more severe infringements in terms of the quantity of people having access to the information, as well as the amount of information accessed.

Fourthly, the effect of de-listing is to strike the right balance between the public's interest in being able to access the information against the data subject's right to privacy. De-listing prevents the general public from easily finding the relevant information, whilst still allowing interested individuals to find the information on the publisher's internal searches. As de-listing is an action only available to search engines, publishers are only left with the option of anonymization or full erasure, which might be disproportionate given the journalistic value of having that information online. Given the prevalence of de-listing as an outcome in right-to-be-forgotten litigation, it is likely that search engines will be the main target for litigation as they provide the most flexible and proportionate remedy.

Criticism of the Costeja Case

The decision to include search engines under the definition of 'data controller' has sparked controversy for being too broad. For example, the UK's House of Lords Committee report on the matter argued that the broad interpretation could lead to absurd outcomes. In effect, 'any company that aggregates publicly available data', and as a matter of logic, users of search engines might be caught under the definition as well[4].

I find this to be a weak criticism – the fact that such an absurd definition is possible does not mean it is likely. It is not uncommon for rules operating under systems of precedent to begin as broad abstract rules which give subsequent courts the freedom to refine, restrict, and distinguish the rules. Additionally, there could be circumstances where search engine users might extract information in a manner the arguably should fall under Art 17 of the GDPR. The image of the 'average search engine user' is a strawman that doesn't reflect exceptional circumstances that might warrant ECtHR intervention. So it is not necessarily a bad thing that the definition is broad enough to encapsulate various actors. At any rate, I believe the good sense of the ECtHR, in conjunction

[4] House of Lords European Union Committee, *EU Data Protection law: a 'right to be forgotten'?* (2nd Report of Session 2014–15), accessed 5 may 2024

with the operation of the margin of appreciation, can be relied upon to prevent absurdity in definition.

Elsewhere, the decision in Costeja has been criticized as creating a hierarchy of rights[5], with a strong bias towards the right to privacy trouncing the right to freedom of expression.

In response to this, a Harvard Law Review article[6] points out that this bias was inherent in the wording of the EU directive, and the ECtHR's decision could be understood as flowing from the natural meaning of the directive. The article points out that even where the Directive recognized the importance of the free flow of information to the economy, it nonetheless still subordinates it to the overall goal of protecting rights to privacy. It should therefore come as no surprise that the rules applied favour protection of privacy.

Additionally, Article 17.3.a makes clear from the outset that the right to be forgotten is diametrically opposed to the right to information, and the two interests feature prominently in the ECtHR's balancing tests.

That doesn't invalidate the criticism, but rather points to critics barking up the wrong tree. Any criticism shouldn't be directed towards ECHR jurisprudence itself, but rather the underlying legislation.

Dealing with the criticism itself directly – even if it is conceded that there is a strong bias in favour of privacy rights, I do not think it will be a problem in the long term. The right to be forgotten has only gained traction fairly recently, and even then the right to privacy is young compared to the other established rights like that against torture. This can be seen by the fact that even as late as 1984, English courts did not recognize a common law right to privacy[7], with the right only recently being affirmed in cases like Campbell v MGN[8]. As with most emerging rights, there will be an initial period expansion before the courts eventually restrict the ambit of the right – the initial period of expansion is often necessary to lay down ground rules for the application of the new right.

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[5] Martin Husovec, 'SHOULD WE CENTRALIZE THE RIGHT TO BE FORGOTTEN CLEARING HOUSE?' (The Center for Internet and Society, 30 May 2014), Accessed 5 May 2024

[6] Harvard Law Review, "Google Spain SL v. Agencia Española de Protección de Datos' (2014), 128 Harv. L. Rev. 735 < https://harvardlawreview.org/print/vol-128/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos/> accessed 5 May 2024.

[7] Malone v. The United Kingdom (1984) 7 EHRR 14

[8] Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22

At any rate, the preference for privacy rights is likely to be a short term problem for a few reasons: 1.) should the bias draw up sufficient furore, there will be political will to remedy the issue with legislation, and 2.) even where there is no legislation, as explained above, the courts will likely move to restrict the scope of the doctrine eventually, and 3.) if no such restriction occurs, that might not necessarily be a bad thing either.

We might also consider whether there truly is a bias against free speech in the first place. The Western Liberal Democracy is built around a strong notion of free speech. It might be argued that there was always a strong pre-existing bias in favour of free speech, and the expansion of privacy rights merely correct the imbalance of rights. Where free speech and privacy come into conflict, it might appear as if the court is unfairly favouring privacy rights. Yet what may appear subjectively to be a bias for privacy could just be an objective rebalancing of rights. After all, when our only reference point is the strong tradition of free speech, it is inevitable that we perceive any rebalancing against free speech as a form of bias.

What Types of Right to be Forgotten

Peter Fleischer, Global Privacy Counsel for Google, points out in a blog post[9] that the right to be forgotten does not apply equally to different circumstances. Indeed its application to different fact patterns draw differing amounts of controversy and criticism. Therefore, in assessing the arguments for and against a right to be forgotten, they must be compared using a common denominator – hence being able to distinguish applications between fact patterns is important.

Fleischer's Categories

In his blog posts, Fleishcer outlines 8 fact patterns to which the right to be forgotten might apply, ranking them in increasing order of infringement to the right to expression:

1. Where C posts something onto platform X, and seeks to have it taken down.
2. Where C posts something online, D copies and reposts it, then C seeks deletion of both posts from X.
3. Where D makes an independent post about C, and C seeks deletion from X

[9] Fleischer P, 'Foggy Thinking about the Right to Oblivion' <https://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html> accessed 2024

Category 1 is uncontroversial – individuals should have the right to administer their own data and information. Category 2 and category 3 are where the difficulty arises.

Existing tools like claims in defamation and libel might provide some remedy in a category 3 situation, but a significant obstacle would be proving that the information posted was false. The GDPR meanwhile is more concerned with protecting the applicant's information, and is agnostic as to the verity of the information posted online.

These categories are not prescriptive, but will be a helpful tool in guiding our discussion.

Potential Remedies

The European Data Protection Board's guidelines on the GDPR[10] explain the modes in which the right to be forgotten may be remedies.

Firstly, there are distinctions between deletion, delisting, and anonymization. Deletion involves the complete erasure of the relevant personal data. On the other hand, delisting does not lead to the erasure of personal data. It merely removes the personal data as a search result on the search engine's website[11]. The information is still available on the internet, it just cannot be searched for using the data subject's name.

Secondly, there is deletion, which involves removing information concerning the individual, or complete removal of the article in question.

Thirdly, there is anonymization, in which the underlying facts remain unchanged, but the identity of the claimant is redacted or represented with initials.

The type of remedy requested by the claimant has ramifications for the ECtHR's proportionality test[12]. Deletion poses a greater infringement for the right to freedom of expression, requiring a more compelling reason to justify the infringement. Depending on the circumstances, de-listing or anonymization might be less draconian in its effect on freedom of information, and hence is more likely to be upheld by the ECtHR.

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[10] Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1) Version 2.0

[11] Ibid at paragraph 9

[12] Case C-131/12, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (2014)

How do the Courts Approach the Right to be Forgotten

Where an applicant's request for deletion of personal information infringes the right to be forgotten, the court will apply the factors in Axel Springer AG v Germany[13] when applying the proportionality limb of art 10(2) of the ECHR. these include:

(i) the contribution to a debate of general interest,
(ii) how well known the person concerned was,
(iii) the behaviour of the person concerned towards the media,
(iv) the method of obtaining the information in question,
(v) the content, form and consequences of the publication, and
(vi) the severity of the sanction imposed on the applicant.

However, in the right to privacy context, the court in Biancardi v Italy also considered additional factors[14] such as:

(i) the length of the time for which the article was kept online after the request,
(ii) the sensitiveness of the data at issue,
(iii) the gravity of the sanction, and
(iv) whether the information is up to date.

Martin Husovec has criticized some of the factors the court has taken into account. Case law adopts the position that the value of information decreases over time. Husovec disagrees, arguing that in some cases, the value of information can in fact increase over time. For example, an individual's history of radicalism will in fact become more important should they choose to run for public office[15].

Indeed, some of the factors considered by the Biancardi court appear to be neither here nor there. For example, the Biancardi court considered the fact that the criminal investigations involved in the case were of a sensitive nature and therefore warranting protection. However, it might just as well be argued that the sensitivity of the subject (i.e. the criminal conviction) in fact militates in

[13] Axel Springer AG v. Germany (Application no. 39954/08)
[14] Biancardi v Italy (Application no. 77419/16)
[15] Martin Husovec, 'SHOULD WE CENTRALIZE THE RIGHT TO BE FORGOTTEN CLEARING HOUSE?' (The Center for Internet and Society, 30 May 2014), Accessed 5 May 2024

favour of disclosure. The public should be entitled to learn about criminal proceedings taking place within their communities.

Nonetheless, the decision in the Biancardi case is undoubtedly correct, especially since the information was out of date and the applicants were of no interest to general public debate.

General Criticism

Implementation

Martin Husovec has criticized the current model for the implementation of the right to be forgotten[16]. The present arrangement involves a regime of self-policing by data controllers and search engines. De-listing requests are made to search engines, with litigation being resorted to should such a request be rejected. Lawsuits become the primary way of enforcing the GDPR.
This is problematic on a few levels, not least because the burden of proof is placed on the data controller. Article 21.1 of the GDPR requires the controller to prove that there are overriding legitimate grounds for listing, a reversal of burden of proof from the old EU Directive 85/46.

1. Additionally, the court in Costeja has made clear that the test will significantly favour the data subject, stating: the Court highlights that the directive ensures a high level of protection for the right to privacy[17], and the relevant articles should be interpreted in light of fundamental rights (para 68)[18]
2. An initially lawful publication is not immune to a de-listing request[19]
3. A de-listing request will succeed even if the information published has no prejudice to the data subject, insofar as the provisions of the relevant legislation and balancing test are satisfied[20]
4. The economic interest of the search engine provider does not justify interference to the privacy of the data subject[21]

[16] Martin Husovec, 'SHOULD WE CENTRALIZE THE RIGHT TO BE FORGOTTEN CLEARING HOUSE?' (The Center for Internet and Society, 30 May 2014), Accessed 5 May 2024
[17] Case C-131/12, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (2014) at [66]
[18] Ibid at [68]
[19] Ibid at [93]
[20] Ibid at [90]
[21] Ibid at [81]

Additionally, at para 97 in the Costeja case, it appears as if the court has adopted the starting point that the privacy rights of individuals override both the economic interest of the search engine provider as well as the general interest of the public in accessing that information.

As Jeffrey Rosen[22] points out, the combined effect is that where search engines are faced with fringe decisions, they will always err on the side of caution and delete the offending post. This demonstrates Husovec's point as to why it is a bad idea having private entities make decisions on free speech.

Instead, Husovec argues that having a centralized authority manage de-listing requests and decide on outcomes is a much more palatable option. Ultimately this is a criticism of implementation which can be remedied over time.

Effects on Journalism

Van de Kerkhof points out that a strong right to be forgotten would have an immense chilling effect on journalism[23]. In the Biancardi case, it was argued that de-listing was a good compromise between the right to expression and the right to information: the data subject would prevent their names from appearing in search results, but journalists and highly motivated individuals who had a legitimate interest in accessing the information could still access that information through a more specified search.

The problem with this argument is that in many cases, journalists might not know what they don't know. In order to conduct a specified search, the journalist must first be aware of the existence of the information in the first place. You cannot conduct a specific search for information the existence of which you are unaware of. To that end, de-listing undermines the discovery function of journalism, and it would be disingenuous to downplay the effect of de-listing on journalistic reporting.

Additionally, it is also costly to dispute de-listing requests, and smaller news outlets might find it financially prohibitive to do so. This could discourage the publication of articles containing sensitive information, thereby undermining an important journalistic function.

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[22] Jeffrey Rosen, 'THE RIGHT TO BE FORGOTTEN' (2012) 64 STAN. L. REV. ONLINE <https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf>, accessed 5 May 2024

[23] Jacob van de Kerkhof, 'BIANCARDI V. ITALY: A BROADER RIGHT TO BE FORGOTTEN' (*Strasbourg Observers,* January 07, 2022) < https://strasbourgobservers.com/2022/01/07/biancardi-v-italy-a-broader-right-to-be-forgotten/> accessed 5 May 2024

As the law is developing, the full extent of the chilling effect is uncertain. However, there is reason to believe that this will not turn out to be a major problem. The chilling effect is ultimately a matter of incentive – the prohibitive cost of disputing a de-listing is what influences the behaviour of publications. Having a centralized and optimized de-listing request system will significantly reduce the cost of disputes.

As noted above, new areas of law tend to expand before contracting. It is likely that over time, the contraction of the doctrine will help mellow some of its harshness towards journalists.

Non-Journalist Contexts

Academic commentary largely focuses on the conflict between the right to privacy and the right to information and expression. Lilian Edwards[24] instead points to the value of the right to be forgotten in revenge porn cases.

Matthew Herricks[25] was one such victim of revenge porn – his ex had set up a fake Grindr account and had invited men to turn up to Herricks home expecting sex. One of his suitors broke into Herrick's home after he was falsely informed that Herricks had 'rape fantasies'.

Herricks wrote in to Grindr on many occasions to have his fake profile taken down, to no avail. Were the GDPR to apply in such a case, Grindr would be classified as a data-controller under the GDPR, and a claim for de-listing/deletion could be made. Though on the facts, Herricks was an American case, and the GDPR did not apply.

Under most jurisdictions, laws against harassment may protect the data subject from behaviour such as in the Herricks case. Yet such remedies might be insufficient where the harasser may not be found, or if the identity is unknown (as is common in online blackmail cases). Art 17 of the GDPR might thus provide an important mechanism in combating the proliferation of unwanted information online.

[24] Lilian Edwards, 'Revenge porn: why the right to be forgotten is the right remedy', The Guardian (29 July 2014) < https://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords> accessed 5 May 2024

[25] Herrick v. Grindr, LLC, No. 18–396

Conclusion

Many criticisms have been levied against the right to be forgotten. However, I believe most of these shortcomings will be remedied over time with better statutory mechanisms for enforcement. We have yet to see its effect on journalism and access to information, but I believe ECtHR case law will be tempered over time. Additionally, the GDPR could serve as a useful tool in securing privacy outside of the journalistic context, a function with plenty of potential but has yet to be fully explored.