

Amicus *Curiae*

The Journal of the Society for Advanced Legal Studies



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EDITOR'S INTRODUCTION

MICHAEL PALMER

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Welcome to the second issue of the third volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for supporting the progress that the relaunched journal is making.

In this issue, contributions by Inger Andersen (Under-Secretary-General of the United Nations and Executive Director of the UN Environment Programme), and the Rt Hon Lord Carnwath of Notting Hill examine the role of law reform in addressing the issues of climate change. Their contributions were first presented at the Bar Council's Annual Law Reform Lecture,¹ 'Exploring the Role of Law Reform in the Context of Climate Change', held on Tuesday 30 November 2021. This event took place shortly after COP26, the climate conference held in Glasgow. In her contribution, Under-Secretary General Andersen acknowledges the value of important undertakings in the COP26 final agreement, and elsewhere in the summit, on

critical issues, but points also to limitations in a number of areas including the need to work more effectively so as meet the 1.5°C goal of the Paris Agreement 2015, a culture of promises made but not acted upon, a failure to interconnect climate problems with biodiversity loss, pollution and waste problems even though these issues are often driven by the same unsustainable practices. Instead, with the axiomatic goal of enhancing the 'welfare of the people', effective development, implementation

¹ We thank the authors and the Bar Council for agreeing to publication of the presentations in *Amicus Curiae*. On the lecture series generally, and for earlier presentations, see the [Bar Council's website](#).

Amicus Curiae Calendar 2022-2023

New Series Volume 3

3.3 (spring): submission
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New Series Volume 4

4.1 (autumn): submission
5 September 2022; publication
7 November 2022

4.2 (winter): submission
3 January 2023; publication
6 March 2023

4.3 (spring): submission
24 April 2023; publication
26 June 2023

New Series Volume 5

5.1 (autumn): submission
4 September 2023; publication
6 November 2023

and enforcement of domestic and international legal reforms promoting the environmental rule of law are needed in a range of areas. These include, but are not limited to taxation, company regulation, securities, trade commerce, energy, use and planning of land and transportation—‘you name virtually any law, and countries likely need to climate-proof it’. And in the climate-proofing process, international co-operation and co-ordination, as well as greater social responsibility by a wide range of actors and institutions, are essential.

Lord Carnwath, in his contribution, examines the manner in which the law has in fact been drawn on in response to the challenges of climate change, both before and after the Paris Agreement 2015. He observes that legal responses have been varied, but one common theme has been the impact of campaigning groups across many jurisdictions. He highlights important recent (and sometimes still ongoing) cases especially—but not exclusively—in the USA and in Europe. Taken together, these show the growing willingness of the courts to rule against government and business when they fail to implement effective policies and practices that would otherwise counteract climate change and promote environmental welfare. But while such positive experiences show that the courts can and should fill important gaps,

Lord Carnwath also concludes that judicial action alone is insufficient. Initiatives which offer specialized legislation for reform in the context of climate change, and that contribute a coherent framework for the enforcement of climate obligations, are also essential. He points to the importance of the UK’s Climate Change Act 2008, the 2021 World Bank’s Reference Guide to Climate Change Framework Legislation, and the European Union’s (EU) 2021 Climate Law. It might be added here that reforms in the People’s Republic of China (PRC) will also be crucial, as its energy sector is heavily dependent on fossil fuels and it is the largest emitter of carbon dioxide. The PRC aspires to ‘carbon neutral’ by 2060 even though its emissions are still rising, and its enforcement of law a long-standing problem.

In addition, four contributions to the issue comprise the second of two special sections which feature in this and in the previous issue (3-1) of the journal, guest edited by Professor Carl Stychin, and addressing questions of ‘Law, Public Policy and the Covid Crisis’. Based on a series of IALS remote seminars held in the academic year 2020–2021, the essays that have been contributed to this collection offer important analysis of various aspects of the impact of Covid-19. Professor Stychin’s introduction contextualizes the second special section in the emerging discourses

on the nature of the legal changes often made in response to the pandemic, and broader issues such as social justice and the debate about the use of public health for purposes of (sometimes manifest, sometimes latent) enhanced state control at the expense of individual liberties. The essays in this section show that the assertion that Covid-19 is a universal experience is not plausible. Rather, through the contributions' analysis of issues of population movements, gender and cultural dimensions of death respectively, it has a disproportionate and discriminatory impact on the lives of many people around the world.

Justice Anthony J Besanko's contributed essay 'Legal Unreasonableness After *Li*—A Place for Proportionality' considers the issue of substantive legal unreasonableness in the context of administrative law, especially judicial review of the exercise of an administrative discretionary power, following the 2013 case *Minister for Immigration and Citizenship v Li*. In this case the High Court of Australia expanded the ground of legal unreasonableness beyond Lord Greene's *Wednesbury* unreasonableness when assessing the exercise of an administrative discretionary power, so that 'if reduced to a single question, it is now whether, both as to outcome and process, a reasonable decision-maker could reach the decision under challenge, or could reach

the decision under challenge by the process adopted'. Justice Besanko concludes that the concept of proportionality 'has a role to play in the judicial review of the exercise of administrative discretionary powers in circumstances where, because of the nature of the power and the circumstances of the case, means and ends are at the forefront of the analysis. In such cases, it may provide a ready explanation of the reason the exercise of power is legally unreasonable'.

In his essay, 'What is the Role of a Legal Academic? A Response to Lord Burrows', Professor Geoffrey Samuel examines and challenges the arguments recently put forward by Lord Burrows that academics and judges (and other legal professionals) should play a complementary role, and that this role is being undermined by a trend in legal studies scholarship away from distinctively practical and doctrinal issues towards approaches more informed by 'deep theory' and interdisciplinarity. Without seeking to detract from the value of doctrinal analysis, Professor Samuel questions any characterization of the role of legal academics as one in which scholars of law function primarily as servants of legal practice in its various forms. Such a depiction is particularly problematic when legal scholars are expected to advance knowledge about law more generally by meeting the needs of 'good research, adequate

methodologies and epistemological sensitivity' in their academic work. The essay also argues for both a better understanding of the place of theory (especially 'grand theory') in legal scholarship, and greater recognition of the fact that doctrinal law is infused by theory (albeit often implicitly so). For Professor Samuel, doctrinal methodology contains an important diversity that tends to be overlooked even by doctrinalists themselves. A more fruitful approach which could be developed lies in examination of the relationship between the 'reasoning strategies and techniques used by judges and the methods and schemes of intelligibility employed by those working in other social science and humanities disciplines'.

In his contribution, 'Possible Solutions for Protectionist Anti-Dumping Procedures', Dr Abdulkadir Yilmazcan examines international trade negotiations on anti-dumping. These began some two decades or so ago, but the three main groups involved have different interests and take different positions in the Anti-Dumping Agreement negotiations, hindering progress towards a comprehensive agreement. The first group, Friends of Anti-dumping Negotiations, consists of several World Trade Organization members pushing for more transparency, due process and clearer rules. Another group consists of developed countries, such as the USA, and aims to maintain existing rules. A third

group, comprising PRC, Egypt and India, calls for developing country concerns to be taken into consideration in revisions to the Anti-Dumping Agreement. PRC has submitted relatively few proposals, although it is the most affected member as it is the top anti-dumping target. In addition, the EU, Canada and Australia agree on the need for reform but have difficulty in amending their domestic laws. The author takes a pessimistic view of the prospects for successful reform, but suggests that prioritizing procedural issues over substantive questions, thereby enhancing procedural justice in anti-dumping processes, may be the best way forward.

In the contribution by Professor Christopher Waters, entitled 'The Role of Border Cities in International Law', and based on his presentation at the Institute of Advanced Legal Studies Director's Seminar Series on 4 November 2021, two fields of study are brought together, namely: cities as actors in international law and international boundaries. This analytical melding provides the basis for examining the place of border cities in international law and diplomacy, with the urban borderland straddling the Canada-United States border of Windsor, Ontario, and Detroit, Michigan, as a case study. The author points to the fact that cities have become important in respect of a number of legal issues often not anticipated in constitutions or municipal

legislation, including climate change (especially post-COP26), migration and sanctuary, human rights, and human development. In addition, the interdisciplinary field of borderland studies throws light on such issues as economic and political development, social welfare, cultural identity and conflict, discrimination and human rights. Analysis of the Windsor–Detroit relationship shows economic, cultural and interpersonal integration, yet formal governance ties between the two cities appear to be limited. In reality, however, there is substantial governmental cooperation through public authorities responsible for such matters as transport, housing, emergency services, policing, sports and recreation, conservation, education and public utilities, so that we may speak of ‘binational city governance’. This substantive cooperation is often facilitated by ‘boundary spanners’—individuals and non-governmental organizations who function as important points of cross-border contact and conversation. But there remains significant room for more effective borderland governance so that this ‘border city diplomacy’ would be able to deal better with the pressing issues that face the local populations.

In the Notes section, several examinations of recent law publications are offered. Barrie Nathan considers Jeffrey Hill’s study, *The Practical Guide to*

Mooting; Nicola Monaghan evaluates *Electronic Evidence and Electronic Signatures* by Stephen Mason and Daniel Seng (eds) (5th edn); and Professor Jaakko Husa assesses the study by Simone Glanert, Alexandra Mercescu and Geoffrey Samuel entitled *Rethinking Comparative Law*.

‘A Visual Autoethnography of a PhD Journey’ by Dr Clare Williams is this issue’s Visual Law article, and uses a Mountains of Metaphor interactive web-based game as an autoethnographically-inspired account of a doctoral studies journey in law as a part-time researcher with disability. Referring to theories of metaphor and the importance of framing, both of research and of research processes, this contribution encourages us to consider how and why we might approach our research practices with kindness and self-compassion. Finally, by drawing attention to the ways in which we do, talk and think about our approaches to research, this piece hopes to contribute to ongoing discourses about knowledge and understanding within the law school.

The Editor also thanks contributing authors, and Amy Kellam, Maria Federica Moscati, Patricia Ng, Simon Palmer, and Marie Selwood, for their kind efforts in making this issue possible.

**THE BAR COUNCIL'S 19TH ANNUAL LAW REFORM
LECTURE: EXPLORING THE ROLE OF LAW REFORM
IN THE CONTEXT OF CLIMATE CHANGE**

Online 30 November 2021, 18:00–19:30

**LAW, CLIMATE CHANGE AND WELFARE OF
THE PEOPLE**

INGER ANDERSEN

United Nations; UN Environment Programme

Thank you to the UK Bar Council for the opportunity to speak today on the role of law reform in addressing climate change.

We are convening just a few short weeks after COP26, the climate conference from which so many people expected so much. At this conference, we saw important pledges on many topics—both in the final agreement and in commitments made on the sidelines of the COP.

We saw the first concrete signs of a move towards ending coal and fossil fuel subsidies. Promises to begin tackling emissions of methane, which has great potential to slow climate change. Pledges to end deforestation—not new, yes, but this time backed with real money. A commitment to double funding to climate adaptation in developing nations. The finalization of the Paris Rulebook with agreement on Article 6 around carbon markets. A shift in the engagement and role of the private sector, for example the Glasgow Financial Alliance for Net Zero.

But not everybody was happy. Inside the negotiations, the glass was half full. Outside, it was half empty. I am sure we can all understand the anger shown on the streets of Glasgow and across the world. When we add up the promises, we do not land—yet—at the required ambition to meet the 1.5°C goal of the Paris Agreement. We are still looking at a temperature rise well above 2°C this century. Such an increase in global temperatures would be catastrophic.

What is worrying is that we are still witnessing a credibility gap. Promises are piling upon promises. Sufficient action is not following. It is

this credibility gap that means many people are deeply concerned. It is this credibility gap that sends our youth to the streets. It is this credibility gap that we must now close if we are to almost halve greenhouse gas emissions over the next eight years—which we must do to take 1.5°C off life support.

The task before us is clear. The world must act, not only pledge and promise. We must put words into action and up ambition. And let us not forget that climate change is only one prong of an interconnected triple planetary crisis. The climate crisis. The nature and biodiversity loss crisis. The pollution and waste crisis. We must think of, and act upon, these elements as one crisis, because they are often driven by the same unsustainable practices.

Tackling this global planetary crisis requires a whole-of-economy and a whole-of-society approach, one that reforms or recalibrates entire systems. It requires collaboration and solidarity across all sectors of society and across all nations. Failure to succeed will mean huge injustice and damage. I will not rehash the numbers and apocalyptic warnings here. You have heard them. You understand them. More and more of us are living them with every passing year.

So, let us now turn to the role of the law in getting the job done.

You have no doubt heard the maxim from Roman statesman and lawyer Cicero that the welfare of the people should be considered the highest law. This line is often quoted, including by politicians with a background in the classics. This line is often quoted for a very good reason. Even after thousands of years, the principle remains valid. The welfare of the people. Not the short-term profits of corporations. Not the personal ambitions of politicians. Not the compulsion of the super-rich to add to their fortunes. The welfare of the people.

This, in essence, is what we are trying to achieve by tackling the triple planetary crisis. The welfare, peace and prosperity of our species, humanity. The welfare of every other species, over which we exert so much influence. The welfare of our natural world. The full force of the law must be brought to bear on achieving the goals we have set out.

Environmental rule of law sets the foundation to achieve this. Since the Rio Earth Summit in 1992, there has been rapid growth in environmental laws. Over 170 countries now have environmental framework laws. Some 150 countries have established the right to a healthy environment in their domestic legal frameworks—either through their constitutions, laws, jurisprudence or participation in regional human rights treaties.

At the international level, the recently adopted Human Rights Council resolution recognizing a human right to a clean, healthy and sustainable environment raises the bar even higher.

But it's just not enough. Top-level laws and rights have not been translated into specific and widespread environmental laws that are effectively implemented at all levels. This must change.

To drive action on the triple crisis, laws need to do many things at many levels. They need to be clear and effective. Inclusive. Participatory. Rights-based and capable of facilitating a just transition to greener industries. Phase out coal and other fossil fuels. Remove harmful subsidies. Regulate greenwashing.

Laws need to create enabling conditions for investment in climate-resilient and nature-positive development—including clear reporting and disclosure frameworks and harmonized taxonomies for sustainable investment.

They need to facilitate the transition to net-zero pathways for the private sector, setting clear and predictable regulatory conditions. They need to clarify how carbon trading will be regulated domestically now that the Paris Rulebook is completed.

And let's be honest. There is a big difference between passing a law and implementing it. Between passing a law and enforcing it. Between passing a law and people complying with it. Environmental laws need to be implemented effectively, complied with and enforced by capable institutions and empowered citizens. Otherwise, they are meaningless.

Friends, the law clearly needs to do some heavy lifting. The question is how to build the required muscle?

An obvious starting point is for countries to review and strengthen their legal frameworks to make them fit-for-purpose to implement their commitments under the Paris Agreement. Good framework legislation helps put the right institutions in place. Enshrines stable and ambitious targets. Creates mechanisms for realizing these targets. Ensures proper oversight and accountability.

Beyond developing national framework legislation, we need a root and branch analysis and strengthening of laws relevant to all sectors. Tax laws. Company laws. Securities laws. Trade practices laws. Environmental laws. Energy laws. Land-use and planning laws. Transportation laws. You name virtually any law, and countries likely need to climate-proof it.

I am not going to run through every single law with specific suggestions. Let us instead look at framework climate laws which over 30 countries,

including the UK, have put in place. Good framework climate laws have many elements, which we do see signs of in countries across the globe.

- 1** *Long-term emissions reduction targets for 2050 in line with science.* Positive examples of this can be seen in Denmark, France, Germany, Norway, Sweden and the UK.
- 2** *Intermediate and sectoral targets for 2030, again in line with science.* In the EU, the European Climate Law sets an intermediate target of reducing greenhouse gases by at least 55 per cent by 2030 compared to 1990 levels.
- 3** *Risk and vulnerability assessments.* The UK's law requires five-year risk assessments and adaptation plans and provides for an independent evaluation of the same.
- 4** *Climate change strategies and plans.* Ireland's law requires the preparation of a national mitigation plan to 2050, to be updated every five years based on national consultation.
- 5** *Legislative backing of key policy instruments.* France's law, for example, includes a carbon tax and CO₂ emission performance standards.
- 6** *Independent expert advice.* Such as the UK's Climate Change Committee, Ireland's Advisory Council and Costa Rica's Scientific Council on Climate Change.
- 7** *Coordination mechanisms.* For example, Kenya's law establishes a National Climate Change Council, chaired by the President.
- 8** *Stakeholder engagement.* Colombia's National Council for Climate Change and Peru's law on the participation of indigenous stakeholders are good examples here.
- 9** *The involvement of subnational government.* Mexico's law mandates states and municipalities to develop local decarbonization and adaptation programmes, for example.
- 10** *Financing for implementation.* Laws in France, Germany and Sweden connect the climate policy cycle with the annual budget process. Bangladesh's laws, meanwhile, establish climate change funds for attracting public, private, national and international finance.
- 11** *Measurement, reporting and verification.* Mexico's law mandates the development of a registry, methodologies and the system for monitoring, reporting and verification of emissions.
- 12** *Oversight.* The UK's law requires the secretary of state to report to Parliament annually on emissions, including a response to the independent scientific advisory body's assessment on the status of implementation and further progress needed.

These 12 elements are all important, and it is heartening to see many of them emerging. But they form part of a jigsaw that must be pieced together in every framework in every nation—not scattered around the world where they do not form a full picture.

Let me now turn to strengthening implementation, compliance, and enforcement.

To take this crucial step, countries need to invest in environmental rule of law. As outlined by UNEP’s [United Nations Environment Programme] International Advisory Council for Environmental Justice—in which Lord Carnwath participated—this means seven things:

- 1** Fair, clear and implementable laws, at every level, covering every sector.
- 2** Public participation in decision-making, and access to justice and information in environmental matters—in accordance with Principle 10 of the Rio Declaration.
- 3** Accountability and integrity of institutions and decision-makers, including through the active engagement of environmental auditing and enforcement.
- 4** Clear and coordinated mandates and roles, across and within institutions.
- 5** Accessible, fair, impartial, timely and responsive dispute resolution mechanisms. This includes developing specialized expertise in environmental adjudication and innovative environmental procedures and remedies.
- 6** Recognition of the mutually reinforcing relationship between human rights and the environment.
- 7** And, finally, specific criteria for the interpretation of environmental law.

Friends, this sounds like a lot of work. It is. But it is not the work of one country, one person, one branch of the law. We all have a role. If we each play our part, we can get the job done.

So, let me say the following.

To our policy makers: you know what needs to be done in terms of frameworks and legislation that gets us moving faster. It’s time to drive these solutions, over and above just talking about them.

To members of the judiciary: you are all climate judges now. The tidal wave of climate litigation is growing. There have been over 1,800 cases so far, including against fossil fuel companies. They will keep growing.

To barristers and solicitors: you are all climate lawyers now. Climate change has implications for daily legal practice. Lawyers have a responsibility to adopt a climate-conscious, not climate-blind, approach in daily legal practice.

To law students: you are the people who will be hit hardest by the impacts to come. On the other hand, you are also the generation that will live much of your lives with the empowering international human right to a clean, healthy and sustainable environment. A safe climate is aligned to this right. Healthy nature is aligned to this right. A pollution-free world is aligned to this right. Your responsibility is to do whatever you can through the law to help the UK and other countries transition to a safe climate and nature-positive reality.

Friends, we cannot safeguard the future of humanity without the right laws and strong enforcement.

Yes, many people want to do the right thing. Many will do the right thing. But even these people need to be guided by laws and regulations.

Equally, many people will not do the right thing—including those with the wealth and power to do great damage to the planet. History, and even the present, show this quite clearly. The law is the force for good that can shape and correct this behaviour.

And environmental rule of law will not just save us from climate disaster. It will make our lives better. It will guide us to a world of more equity and justice. A world of enough to go round. A world of greener jobs. A world of better human health. A world of trust in the government and our institutions. A world in which we preserve the wonder and diversity of nature. Fundamentally, a world of peace, security and prosperity. A world that safeguards the welfare of the people.

Given the upheaval we are facing right now, this world may seem very far away. But I say to you that it is far closer than you may think. And you, the community that shapes and serves the law, can help the whole world to reach out and grab it.

Thank you.

Inger Andersen is Under-Secretary-General of the United Nations and Executive Director of the United Nations Environment Programme, headquartered in Nairobi, Kenya. Her expertise as both an economist and an environmentalist has been applied in multiple areas, including agriculture, environmental management, biodiversity conservation, climate change,

infrastructure, energy, transport, and water resources management and hydro-diplomacy.

She was the Director-General of the International Union for Conservation of Nature (IUCN) between 2015 and 2019. From 1999 to 2014 she held several leadership positions at the World Bank including Vice President of the Middle East and North Africa; Vice President for Sustainable Development and Head of the CGIAR Fund Council.

Prior to 1999, she worked for 12 years at the United Nations, where her principal area of expertise was drought and desertification. In 1992, she was appointed UNDP's Water and Environment Coordinator for the Arab Region.

She holds a Bachelors from the London Metropolitan University North and a Masters in Development Economics from the School of Oriental and African Studies, University of London.

THE BAR COUNCIL'S 19TH ANNUAL LAW REFORM LECTURE: EXPLORING THE ROLE OF LAW REFORM IN THE CONTEXT OF CLIMATE CHANGE

Online 30 November 2021, 18:00–19:30

LAW REFORM AND CLIMATE CHANGE

LORD CARNWATH CVO

Former Justice of the UK Supreme Court

[A] LOOKING BACK

After Inger Andersen's stirring call to action, I want to spend my time looking at how the law has in fact responded to the challenges of climate change, both before and after the Paris agreement.

In September 2015, ahead of the COP21 summit in Paris, I co-hosted an international judicial conference in London on Climate Change and the Law.¹ We looked at the potential role of the law, international and domestic, in combatting climate change. There had by then been some important judicial interventions in different parts of the world. We could look back to the great case of *Massachusetts v EPA* (2007) in the US Supreme Court, in which the majority decided that the EPA's [Environmental Protection Agency] powers under the Clean Air Act extended to greenhouse gas emissions, such as CO₂ emissions from motor vehicles, and that the agency's failure to take any action was 'arbitrary and capricious' and therefore unlawful. In due course, following a change of administration, that decision provided the legal basis for the radical climate change policies developed by President Obama, to the crucial US-China Joint Announcement on Climate Change in November 2014, and to his leadership of the global efforts to achieve agreement in Paris.

In the months before our conference, there were two other important judicial developments from very different legal systems—the *Urgenda* case in the Hague District Court in the Netherlands (*Urgenda Foundation*

¹ It was organised by the Supreme Court jointly with the Government Foreign Office and King's College, London, and attended by judges, practitioners and academics from different parts of the world. See [Climate Change and the Rule of Law](#).

v The Netherlands 2015) and the *Leghari* case from the Lahore High Court in Pakistan (*Leghari v Federation of Pakistan* 2015). In both cases, the national courts upheld challenges to their governments' failures to implement effective policies to counter climate change. The Hague judgment was of enormous symbolic importance as the first successful case of its kind, although at that stage it turned on what seemed a rather esoteric point of Dutch tort law. It later acquired more general significance when it was affirmed in the Court of Appeal and Supreme Court by reference to Articles 2 and 8 of the European Convention on Human Rights [EHCR].

The *Leghari* decision was of broader legal significance, being based on the constitutional protection of the right to life, such as is found in many legal systems. At our conference the Judge, Mansoor Ali Shah (now in the Pakistan Supreme Court), told us how he had devised a new form of order to deal with the problem that the Government simply was not implementing its own climate change policies. He ordered the setting-up of an independent Climate Change Commission, chaired by a senior lawyer,² bringing together all the interests involved including NGOs, government officials and independent experts, reporting regularly to the court. It was key to the success of this approach that the court was not imposing solutions on the executive, but giving practical effect to the executive's own policies.

The Paris Agreement of December 2015 was a truly monumental achievement, bringing together almost all the countries of the world in recognition of the threat of climate change, and in a programme for joint action to combat it.

As is well known, the key obligations lie in the 'nationally determined contributions' (NDCs), which each party is legally required ('shall') to prepare, communicate and maintain. The NDC is to be achieved through 'domestic mitigation measures' (Article 4.2). Although the content of the NDCs is left to the individual states, there is to be progressive improvement, so that each successive NDC is to 'represent a progression', and reflects the state's 'highest possible ambition' (Article 4.3); and accompanied by 'the information necessary for clarity, transparency and understanding' (Article 4.8). Article 13 fills in the detail of what is described as 'an

² As the Chairman, Dr Parviz Hassan, explained in a paper the following year (Hassan 2016), six Implementation Committees were established on different aspects of the framework: Water Resource Management; Agriculture; Forestry, Biodiversity, and Wildlife; Coastal and Marine Areas; Disaster Risk Management; and Energy. On the basis of their reports the Commission made 16 recommendations. Its final report to the court was presented in 2018.

enhanced transparency framework', designed to feed into the five-yearly 'global stocktake' under Article 14, the first stocktake to be in 2023.

From a legal perspective a distinctive feature is that, while the Paris Agreement is an agreement under international law, it depends principally on domestic measures to give it practical and enforceable effect. However, the agreement says nothing about what legal form those domestic measures should take, or what role the courts should have in their enforcement.

[B] ACTION IN THE COURTS SINCE PARIS

Since then, there have been many attempts in different jurisdictions round the world to establish a legal duty on governments to take action to combat climate change. In November 2016 came the ground-breaking decision of Judge Aiken in the US District Court of Oregon in *Juliana v USA*, refusing to strike out the claim by a group of young citizens against the Government for failing to protect them against the consequences of climate change. Citing authorities from round the world, she held that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society, and thus protected by the Due Process clause of the Constitution, and by the Public Trust doctrine. That case was begun during the Obama presidency. It continued under President Trump but became embroiled in procedural wranglings which found their way to the Supreme Court, and eventually came back to the Court of Appeals for the 9th Circuit, leading to a decision in early 2020 (*Juliana v United States*). Although the claim was dismissed by the majority on procedural grounds, there was no disagreement as to the factual basis of the claim. The majority judgment of Judge Hurwitz was in strong terms:

A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse ...

It is notable that, whatever the personal views of the then President, his lawyers had not apparently attempted to challenge that factual assessment. The reasons for refusing relief were about practicality and the limits of the court's constitutional role. Although the decision was a serious setback for the climate litigants in the USA, it was important in affirming the reality of climate change and its consequences, and of the USA's responsibility.

It may not have helped that the USA, unlike the great majority of states, does not have environmental protection built into its Constitution.³ It is fair to observe, however, that the response of the court was not so different from that of the Norwegian Supreme Court last year (HR-2020-2472-P), in the context of a specific duty under the Constitution to protect the environment. The case was a challenge to the Government's decision to allow oil exploration on the Norwegian Continental Shelf, under Article 112 of the Constitution, which confers a right to 'an environment that is conducive to health' and imposes on the state authorities duty to implement it.⁴ The challenge was rejected. The court upheld the lower court's ruling that the Constitution protects citizens from environmental harms, including climate harms created by burning exported oil. However, it was said (in language similar to that of the *Juliana* court) that:

decisions in cases regarding fundamental environmental issues often involve political balancing and broader prioritisation. Democratic considerations therefore support such decisions being taken by popularly-elected bodies, and not by the courts.

Article 112 was accordingly to be read as 'a safety valve' allowing the courts to set aside a legislative decision, only if the legislator had not addressed a particular environmental issue, or the duties under the article had been 'grossly disregarded', the threshold being 'very high' (HR-2020-2472-P: paragraphs 140-141).

On the other side, an important victory for campaigners was the 2018 judgment of the Colombia Supreme Court in the *Future Generations* case (*Demanda Generaciones Futuras v Minambiente* 2018). Twenty-five young claimants complained that the Colombian state had failed to guarantee their constitutional rights to life and protection of the environment, in particular through deforestation in the Amazon. The Supreme Court agreed, relying *inter alia* on the right to a healthy environment, enshrined in the Colombian Constitution (1991).⁵ The court issued an order to the

³ Gross notes that the constitutions of 150 states include clauses on the protection of the environment (see Kahl & Weller 2021: 83).

⁴ Article 112 of the Constitution provides: 'Every person has the right to an environment that is conducive to health and to a natural environment whereby productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations, which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles.'

⁵ Right to life (Articles 11, 1, 2), right to health (Articles 44 and 49), right to nutrition (Article 44), right to a healthy environment (Article 71).

President and the relevant ministries to create an ‘intergenerational pact for the life of the Colombian Amazon’, with the participation of the plaintiffs, affected communities and scientific organizations. It was an important success for the claimants, although the wide-ranging nature of the order has been criticized as creating problems, by cutting across the established government and social structures (Alvarado & Rivas-Ramírez 2018: 519–526).⁶

Three recent cases at the highest level in European national courts show how judges can give force to the Paris commitments where a suitable legal peg is available within domestic legislation. The *Grande-Synthe* case in the French Conseil d’État last year (*Commune de Grande-Synthe v France* 2020) concerned a request to the French Government to take the necessary measures to limit emissions to comply with the commitments under (*inter alia*) the Paris Agreement. A legal peg was provided by the relevant EU regulation (2018/842) and the implementing domestic laws. The Paris Agreement was regarded as relevant to their interpretation. The court accepted that the municipality of Grande-Synthe had a sufficient interest because of its level of exposure to the risks from climate change, and that the court had jurisdiction to consider whether the Government’s current proposals would achieve its national and international commitment (40 per cent reductions by 2030 and carbon neutrality by 2050). At a further hearing in July 2021 the court ordered the Government to take all the measures necessary by the end of March 2022 to ensure the achievement of those goals.

A case in the Irish Supreme Court concerned a challenge by Friends of the Irish Environment to the National Mitigation Plan, required by section 4 of the Climate Action and Low Carbon Development Act 2015. As the court noted, the ‘overriding requirement’ of a national mitigation plan under the section was that it must ‘specify’ the manner in which it is proposed to achieve the national transition objective (NTO), defined by the Act as requiring transition to a low carbon economy by 2050. The court held that the current plan fell ‘a long way short of the sort of specificity which the statute requires’, since it would not enable the reasonable observer to know, in any sufficient detail, ‘how it really is intended, under current government policy, to achieve the NTO by 2050’ (*Friends of the Irish Environment CLG v Government of Ireland* 2020: [6.46]).

⁶ The authors observe that the judgment has had ‘serious implications on the territorial autonomy of local communities ... and (obliging) all local authorities ... to reformulate their local policies in order to address this judicial order’.

The third case comes from the German Constitutional Court (*Neubauer et al v Germany* 2021). The Climate Protection Act had been passed in December 2019, but a group of young adults instituted proceedings arguing that it insufficiently protected them from climate change. Under the Act, Germany had committed itself to emission goals (minus 55 per cent by 2030, and climate neutrality by 2050) and had laid out measures for achieving these goals up to 2030, but left open the steps to be taken beyond that. This uncertainty was held to violate the fundamental rights of future generations and therefore unconstitutional. The court relied on Article 20a of the Basic Law, which requires that the state have regard to its responsibility towards future generations. As they explained:

one generation must not be allowed to consume large portions of the CO₂ budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom.

It is noteworthy that in all these cases the decisions turned on specific domestic legislation, rather than on more general human rights arguments, such as had succeeded in the *Urgenda* case in the Dutch Supreme Court. In the Conseil d'État, the judge rapporteur (Stéphane Hoynck) had examined the relevant case law under the Convention, including the *Urgenda* judgment, but shared the view of commentators that:

these convention-based rules were not enacted to restrict the margin of appreciation of States by imposing judge-made standards of conduct. This is all the more true when, as is the case here, the State has responded to the issue at stake (*Commune de Grande Synthe v France* 2020: 7).

It remains to be seen how the Strasbourg court itself will deal with climate change issues in the case brought last year by a young Portuguese group against 32 European states (*Duarte Agostinho et al v Portugal and 32 other States*). They complain of failure by the respondent states to comply with their positive obligations under Articles 2 and 8 of the ECHR, read in the light of the commitments made under the 2015 Paris Agreement.

Until recently such cases had been directed principally at governments rather than companies. However, in 2019, a group of seven Dutch NGOs and more than 17,000 individual claimants (under the title Milieudefensie and others) filed a case in the Hague District Court against Royal Dutch Shell seeking a declaration that the annual CO₂ emissions of the global Shell group constituted an unlawful act against the claimants, and that the group must reduce the Shell group's CO₂ emissions by 45 per cent by 2030 relative to 2019 levels. Earlier this year, the Hague Court, following

its dramatic intervention in the *Urgenda* case six years before, made the order requested, holding that the company had a relevant duty of care under Dutch law to the claimants. It remains to be seen how that decision will fare on appeal, or whether it will be followed in other jurisdictions.

Climate change litigation can claim more success when it is aimed at specific targets, such as individual fossil fuel projects.⁷ One of the most important judgments in recent years was that of Judge Preston in the New South Wales Land and Environment Court in the 2019 *Gloucester Resources* case (*Gloucester Resources Ltd v Minister for Planning* 2019). The court upheld the refusal of permission for an open-cut coal mine (the Rocky Hill Coal Project), planned to produce 21 million tonnes of coal over 16 years. The judgment is particularly valuable, not only because of the expertise of the judge, but also because he was sitting in a court with full legal and merits jurisdiction. It is perhaps the most comprehensive judicial discussion available anywhere of the technical and legal issues raised by such a project.

Another route to the same end may be through company law (*ClientEarth v ENEA* 2018; Kahl & Weller 2021: 180). This was used successfully by ClientEarth to stop a proposed coal-fired power plant in Poland. It bought shares in the developer, the Polish utility company ENEA, and began a share-holder action claiming that the consent resolution for construction of the power plant harmed the economic interests of the company due to climate-related financial risks. They were said to include: rising carbon prices, increased competition from cheaper renewables, and the impact of EU energy reforms on state subsidies for coal power. The court held the authorization for the plant was invalid. The project has apparently been dropped by the companies.

It seems likely that more climate litigation in the future will be led by investors or share-holders, directed at the responsibilities of companies and their directors (Kahl & Weller 2021: 466ff; *Gloucester Resources Ltd v Minister for Planning* 2019: part 2, at 15, per Preston). There is increased recognition by the global legal community that climate-related risks would be viewed by courts as reasonably foreseeable and directors who fail to respond appropriately could be found to have breached their duty of care and diligence.⁸

⁷ See, for example, *EarthLife Africa Johannesburg v Minister of Environmental Affairs* (2017), a successful challenge to a coal-fired power station, discussed by Tracy-Lynn Humby (2018: 145-155).

⁸ Preston (*Gloucester Resources Ltd v Minister for Planning* 2019: part 2, at 16) citing a 'landmark' legal opinion, two Australian barristers, Noel Hutley SC and Sebastian Hartford Davis, accepted as legally sound by the Australian Securities and Investments Commission. This subject is examined in reports of the Commonwealth Climate and Law Initiative.

[C] THE NEED FOR A LEGISLATIVE FRAMEWORK

My own view is that, while the courts can fill some of the gaps, there is no satisfactory alternative to specialized legislation.

Our own Climate Change Act 2008 remains a world leader, notably in setting a mandatory target for reduction of emissions by 2050, now set at net-zero by 2050.⁹ The Act contains detailed machinery for successive five-year carbon budgets, to be set on the advice of a highly respected, independent Climate Change Committee, and reported to Parliament. In April this year [2021] the Government, following the recommendations of the Committee, adopted the sixth carbon budget taking us up to the end of 2037. The press release hailed it as the world's most ambitious climate change target, cutting emissions by 78 per cent by 2035 compared to 1990 levels and for the first time incorporating the UK's share of international aviation and shipping emissions.

Earlier this year [2021] the World Bank has published a Reference Guide to Climate Change Framework Legislation,¹⁰ based on the work of the Grantham Research Institute at LSE, which maintains a database of such legislation. It surveyed the state of climate legislation round the world, and gave a number of examples of 2050 net zero targets included in climate laws or executive acts in different countries round the world. That list is growing steadily.

More recently, the European Union has adopted¹¹ the European Climate Law. It sets a legally binding target of net zero greenhouse gas emissions by 2050 and requires the EU institutions and member states to take the necessary measures at EU and national level to meet the target. It also sets a new target for 2030 of reducing net greenhouse gas emissions by at least 55 per cent compared to levels in 1990 and includes a process for setting a 2040 climate target.

⁹ Section 1 provides: 'It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.' The 1990 baseline is defined as 'the aggregate amount of (a) net UK emissions of carbon dioxide for that year, and (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas.'

¹⁰ See [Reference Guide to Climate Change Framework Legislation](#). It draws on the work of my Grantham colleague Alina Averchenkova, and the Grantham Climate Change Laws of the World database.

¹¹ The European Climate Law was published in the Official Journal on 9 July 2021 and entered into force on 29 July 2021.

[D] CONCLUSION

I have attempted in this brief survey to give an idea of the different ways in which the law has responded to the problems of climate change round the world. The story owes much to the persistence and ingenuity of campaigning groups in different jurisdictions. It is not easy to find many common themes. What has emerged is a patchwork of legal responses, rather than a coherent framework for the enforcement of climate obligations. I had hoped that the government might have used the Glasgow conference as a platform to examine this issue in more depth. As has been seen, this country has a good story to tell. In the event Climate Change and the Law formed the subject of a number of side events in Glasgow, but unfortunately not centre-stage. It is now for the global legal community to take up the challenge.

Lord Carnwath is an Associate Member of Landmark Chambers. His principal areas of expertise include planning and the environment, property, rating, local government and administrative law. Over the course of a 25-year judicial career, he has made significant contributions to the law of the environment and climate change. As a Justice in the UK Supreme Court and the Judicial Committee of the Privy Council, where he sat for eight years before retiring in 2020, he gave many leading judgments, such as *ClientEarth, R (on the Application of) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25; [2015] UKSC 28 (air pollution) and *Mott, R (on the Application of) v Environment Agency* [2018] UKSC 10 [2018] WLR 1022 (human rights compensation for environmental controls). From 2005 he was as a member of a judicial taskforce set up by the UN Environmental Programme. In the same year he was a founder member, and first Secretary General, of the EU Forum of Judges for the Environment (EUFJE).

He has been Honorary President of the UK Environmental Law Association and of the Planning and Environmental Bar Association; Honorary Fellow of Trinity College, Cambridge; Visiting Professor of Oxford University; Honorary Professor of University College London; and Visiting Professor in Practice of the Grantham Research Institute on Climate Change and the Environment at the LSE.

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INTRODUCTION TO THE SPECIAL SECTION: LAW, PUBLIC POLICY AND THE COVID CRISIS— PART TWO

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In this issue of *Amicus Curiae*, we present the second of our two part-special issue on ‘Law, Public Policy and the Covid Crisis’.¹ The articles published here were originally presented in a series of remote seminars which I hosted at the Institute of Advanced Legal Studies during the 2020–2021 academic year, entitled ‘Law and Humanities in a Pandemic’.² In addition to this two-part special issue, the remaining papers arising from the series will appear in an edited book entitled, *Law, Humanities and the Covid Crisis*, which will be published in the OBServing Law series of open access publications by the University of London Press (Stychin 2022). Taken together, these interventions provide valuable insights into our understanding of the ongoing changes wrought by the pandemic, as well as the continuities which have been revealed.

The four contributions to this section highlight, in diverse ways, how the claim that Covid-19 is a universal experience belies its unequal and discriminatory impact. We begin with an essay from Nergis Canefe, who elaborates upon the selective application of pandemic legal responses to ‘populations on the move’, particularly refugees, migrant workers and displaced communities. In response to the phenomenon of ‘disposable lives’, she proposes a conception of pandemic justice that recognizes the existing injustices wrought upon these groups.

This is followed by a co-authored article by Lynsey Mitchell and Michelle Weldon-Johns. Their focus is on the impact of the pandemic lockdown on women’s rights, in relation to work, health and wellbeing. They demonstrate how legislation too often has been drafted from the partial perspective of the autonomous, male legal subject. They call instead for the mainstreaming of gender issues within the law-making process. Gender is also central to the concerns of Fatema Hubail. In her

¹ The first part of the special issue is published in *Amicus Curiae* 2.3.1 (Autumn 2021).

² The seminars remain accessible on the [Institute’s website](#).

powerful contribution, she emphasizes the importance of an intersectional understanding of the relationship between gender and sect, in her examination of how the pandemic has exacerbated women's legal, political and social inequalities in Bahrain. She draws upon women's engagement with social media to recount their stories of everyday life. This contrasts against the positive images portrayed by the Bahraini state throughout the pandemic, including its preparedness to host major international sporting events.

Finally, we turn to what would seem to be the universal experience of death and the restrictive legal measures that were imposed during the pandemic on cultural practices related to funerals, burials and mourning. In this article, Hui Yun Chan demonstrates the challenge of accommodating diverse religious and cultural traditions and the potential for the differential impact of public health measures. She analyses this in terms of the need for balance and she emphasizes the universal importance of rituals for bereaved families and friends.

These four diverse and important articles complement the three papers which were published in Part One of this special issue. All together, they provide an important historical record of our times and will be of lasting significance.

Carl Stychin is Director of the Institute of Advanced Legal Studies and Professor of Law in the School of Advanced Study, University of London. He is the author of three monographs, has co-edited three collections, and is co-author of a student text and materials collection (four editions). He is the editor of *Social and Legal Studies: An International Journal*.

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ETHICAL LIMITS OF PANDEMIC GOVERNANCE: POPULATIONS ON THE MOVE AND THE LAW

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Abstract

This article explores the context-bound qualities of the legally sanctified practices of ‘quarantine’ and border closures as it examines the normalized invisibility of populations on the move who have not been ‘protected’ through the use of such standard Covid-19 measures. Inside national borders, isolation and quarantine orders are traditionally issued by states in accordance with the state’s broad powers to protect public health. Throughout the Covid-19 pandemic, these orders have been either not applied to or on certain occasions intervened with or suspended when a quarantine was deemed unreasonable or inapplicable with reference to migrants, refugees and displaced people. The article proposes a redefinition of death as ‘death-in-living’ and ‘grievable lives’ as ‘disposable lives’ in order to understand the conundrum concerning the selective application of Covid-19 measures to irregular migrants, refugees, undocumented and non-status peoples and stateless communities. Legal responses to the pandemic continue to have a far greater impact upon populations on the move, displaced communities and refugees in radically unequal ways. The article reveals the ethical limitations of global pandemic governance in terms of how legal and policy-based practices systemically fail and desert certain populations and advances a notion of justice that starts from a deeper understanding of existing injustices.

Keywords: global governance; death-in-living; grievable lives; populations on the move; Covid-19 pandemic; ethical limits of law.

¹ I would like to express my deep gratitude to Carl Stychin for overseeing the completion of this work. The seminar series he organized on Law and Humanities in a Pandemic hosted by the Institute of Advanced Legal Studies provided me with the opportunity to share the original draft of this article, and I greatly benefitted from his and seminar participants’ constructive comments and guidance.

[A] INTRODUCTION

The motto that Covid-19 knows no boundaries, and that it is blind to all differences, is a colossal misrepresentation. As Covid-19 continues to spread across the globe, the crowded and unsanitary conditions in prisons, juvenile detention and immigration detention centres, factories and mines, farmlands and sweatshops, shantytowns, urban social housing units, refugee camps and border crossings leave specific categories of individuals unequivocally more vulnerable than others.

As governments continue to impose quarantines and travel bans at an unprecedented scale, locking down whole cities, subjecting people to legally enforceable quarantines, regularly banning entry by non-nationals travelling from specific locations, certain populations have been frequently kept exempt from purview of such measures put in place for protecting public health. Putting aside the limited utility of these aforementioned measures for highly transmissible diseases, and the repercussions of their imposition with too heavy a hand on the general population, in this article I explore the context-bound qualities of the legally sanctified practice of 'quarantine'. Specifically, I examine the invisibility of populations who cannot or have not been 'protected' through the use of standard Covid-19 measures.

In public health terminology, 'quarantine' refers to the separation of persons (or communities) who have been exposed to an infectious disease for a limited duration. Quarantining is different from 'isolation' practices, as the latter applies to the separation of persons who are known to be infected. However, both practices are legally enforceable interventions, along with limits on travel and border closures. Inside national borders, isolation and quarantine orders are traditionally issued by states in accordance with the state's broad powers to protect public health and most states do not require an emergency declaration in order to issue a quarantine. What is of specific concern is that throughout the Covid-19 pandemic, and at a global scale, these orders have been either not applied to, or on certain occasions intervened with or suspended with reference to, refugees, migrant workers and non-status people. In such cases, prevention of the spread of communicable diseases into the country or across state borders appears to become a secondary concern. In the following pages, I thus propose the redefinition of death as 'death-in-living' (Mbembe 2003) and 'grievable lives' (Butler 2004) as 'disposable lives' in order to understand the conundrum concerning the selective application of Covid-19 measures.

The Covid-19 pandemic has had a vast array of social, economic and legal implications at a global scale. In addition to political and civil rights such as liberty and privacy being curtailed in the name of public health, legal responses to the pandemic continue to have a far greater impact upon populations on the move, displaced communities and refugees in radically unequal ways. The dimensions of their subjectification to unequal measures are related to their nationality, legal status, race, gender, disability, vulnerability and social class. Furthermore, legal interventions and resort to extreme measures causing further hardship in the plight of migrant workers, asylum seekers and internally displaced peoples under Covid-19 governance regimes are often presented as unequivocal and as not open to public debate. Making sense of the relationship between law and the pandemic requires us to recontextualize our understanding of the use of law in ways to limit, to exclude and to create exceptions, as well as the lacunae created by the anxious and panicked publics' lack of responses to the suffering and exclusion of certain populations under the pandemic circumstances. As governments declared states of emergency and assumed exceptional powers, the relevant obligations, principles of protection and procedures under public international law pertaining to migrant workers, refugees and asylum seekers have been regularly suspended. The strongest instrument of pandemic governance is national legislation. However, the effects of national pandemic governance upon displaced and dispossessed populations assumed the shape of a disaster at a global scale. The sum-total of the parts that make the migration governance regime led to an unprecedentedly stark treatment of non-nationals. A selective mapping of events unfolding in global refugee and migration hubs where we witness chronic crises situations such as the Greek Islands, Columbia, Bangladesh and India allows for a critical legal analysis of repercussions of national bodies' compliance/lack of compliance with established international obligations and ethical limits of global governance of the pandemic as it is imposed on populations on the move.

[B] LAW, JUSTICE AND THE COVID-19 PANDEMIC

Legal interventions that took place in the name of protection against the spread of Covid-19 have been consistently justified on the basis of public health needs, which are assumed to be unequivocal. At the same time, lack of protection measures or their limited application in a select set of circumstances have also been apparent, the latter primarily affecting displaced populations and populations on the move and often

in a disproportionately violent manner. Concerning migration governance regimes, as cascades of public policy measures were introduced leading to border closures and suspension of admissions, national systems of legal regulation of migration and their compliance with international law have been modified or suspended in the name of necessity, with no indication as to when or how they would be restored. Moreover, the relationship between law and discretionary decision-making has been reshaped, allowing for more and more *ad hoc* policy measures to be introduced. These developments, in turn, have adversely impacted individuals and communities who live in between and at the margins of nation-state boundaries. Overall, the Covid-19 pandemic has significantly impacted racialized, gendered and marginalized communities at a global scale, who have been not only disproportionately affected by the health crisis but also were rendered invisible with little or no recourse to alternative modes of protection. The specific challenges faced by these groups require us to develop a frame of critical analysis concerning the protection of non-citizens, the displaced and the stateless.

The contrasting experiences of people falling under two categories of ‘political subjecthood’, one pertaining to those who have nationality and legal status and the other pertaining to peoples on the move and with semi- or clandestine status, reflect the polarized understanding of what constitutes justice and legally enshrined protection within the framework of the Covid-19 pandemic (Ahmed 2000: 85). Under global health crisis circumstances, legal justice has been parsed out as policies and protective measures informed by the governing norms of political membership to the nation-state rather than an unqualified service to humanity at large. In this article, I discuss how such circumscribed ‘justice-related interventions’ to protect public health operated within an already established normative and material framework of the logic of global capital feeding upon a global mobile labour force that profits from racial, ethno-religious, cultural, sexual and regional differences (Achieme 2019). No doubt these differences inform the international and postcolonial legal apparatus of migration governance. What I specifically examine here is how claims and pursuits of legal justice through Covid-19 measures were led by the precarious desires of ‘native populations’ to protect what they already have and thus obviated the possibility of justice both within national borders and at a global scale for others who lack status. As such, this article exposes the limits of law and justice as formal processes defined by the letter of the law concerning public health measures under Covid-19 pandemic circumstances and the global governance of the resultant health crisis. As an alternative, I invite the readers to explore understandings of justice

as everyday practices affecting the lives and livelihoods of people that fall under different categories of political subjecthood and to relate them to the Covid-19 measures at different registers. In the specific context of lives marked by mobilities and uncertainties, the everydayness of injustice not only exceeds the standard readings of legal justice, but acts as a disruptive and disquieting optic forcing us to consider the possibility of developing a more nuanced reading of the governance of a global pandemic through law.

Henceforth, I focus on some of the common features of applications of Covid-19 governance measures in the context of global mobilities and, with reference to these, how some political subjects are recognized as bearers of rights and worthy of protections while others experience injuries and harms that are not deemed as unjust, reparable or remediable.² I also examine how legal justice operates to normalize and sustain governing norms that exclude migrants, refugees, undocumented and non-status people from the normative structure declaring individuals worthy of protection. I argue that the experiences of peoples on the move in the Covid-19 pandemic clearly indicate a need to shift our attention away from legal justice as an end goal, and instead to focus on the work of enlarging the sphere of justice by redefining political belonging and rightful ownership of the right to live and die with dignity.

[C] THE PRIVILEGE OF LIVING TO TELL THE TALE: PANDEMIC GOVERNANCE AND POPULATIONS ON THE MOVE

In order to adequately capture the pandemic experiences of populations on the move, there are three recurrent themes that need to be addressed. First, there is a systemic lack of access to medical, social and financial protections for communities on the move, or without status. Second, there is widespread presence of subcontracted/indentured employment, sub-standard employment, and the threat of forced returns to the country of origin, with no support mechanism or healthcare protection available at either end. In relation to this, there is also a preponderance of high-risk employment often requiring work outside of the home or clandestine work such as in sweatshops, agricultural fields and mines. Finally, populations on the move generally lack access to information about unfolding policy measures concerning Covid-19, and hence there is potential for confrontations with law enforcement and increases in

² On the subject of the continued coloniality of power, coloniality of knowledge and coloniality of being, see Mbembe 2019.

incarceration, detention and summary deportations. Given these three characteristics marking their everyday lives, the chances of irregular migrants, refugees, stateless people and the displaced to live through the pandemic and be able to tell the tale are significantly diminished.

Migrant workers, refugees and displaced populations have been both more directly affected by, and more vulnerable to, the spread of Covid-19. At the same time, as the pandemic evolved, especially migrant workers continued to play an important role in the response to Covid-19 by working in critical sectors such as agriculture, mining, infrastructure maintenance, food-production and service/delivery. Overall, immigrants accounted for at least 3.7 per cent of the population in 14 of the 20 countries in one survey, and they always had the highest number of Covid-19 cases.³ This list includes states in the Global North, as well as regional hubs of migration such as Turkey, Malaysia, the Gulf countries, Columbia and India. Suffice to say, these numbers only reflect registered or regular migrants with status, and they do not include irregular or undocumented migrants, refugees, asylum seekers, stateless peoples or other displaced communities. Migration-related data collected by the United Nations (UN) *Twelfth Inquiry* also reveal that migrants' access to essential healthcare services do not entirely depend on their legal status.⁴ Migration and global mobilities have been and remain as essential components of the global economy. If so, what was curtailed by the Covid-19 restrictions on movement and border crossings? It was the underbelly of the global migration regime: the irregular migrant, the forced migrant, the non-status and stateless peoples on move.

As to be expected, increased border restrictions did not necessarily curtail the mobility of forced and irregular migrants as they escaped from violence, deprivation and suffering, but they altered the role played by humanitarian organizations and governance regimes concerning forced migration movements. They have also been put into effect in a selective manner to respond to the ongoing needs of the migrant-receiving economies. At the onset of the pandemic and just between 11 March 2020, when the World Health Organization (WHO) declared Covid-19 as a pandemic, and 22 February 2021, nearly 105,000 movement restrictions were implemented around the world (International Organization for Migration (IOM) 2021). During the same time period, however, 189 countries, territories or areas

³ See Global Migration Data Analysis (2019–2021) section at 'Migration Governance Indicators'.

⁴ This specific inquiry collected data from 111 countries between late 2018 and early 2019, and it posits that more than three-quarters (86 per cent) of governments provide essential and emergency healthcare to all non-nationals, regardless of their migratory status, while 8 per cent indicate that they provide such services only to those whose status is regular. See UN 2018–2019.

issued 795 exceptions to these restrictions, thus enabling mobility for select groups (*ibid*). This dataset precisely proves the point that, while border regimes became highly restrictive in response to Covid-19, they remained flexible to accommodate the need for migrant labour. This is despite the fact that migration flows to countries of the Organisation for Economic Co-operation and Development (OECD) – which are measured by new permits and visas issued – are estimated to have fallen by 46 per cent in the first half of 2020.⁵ These lower numbers largely pertain to a drop in new intake rather than a decrease in cyclical or long-term/renewable permits or special arrangements. The regular workings of regional economies continued to be fuelled by migrant labour, albeit many faced novel challenges. Ultimately, if we were to define capitalism as a forward-looking movement that reduces all future gains to the current value of what is exchangeable at present (Bichler & Nitzan 2010), one of the best examples to observe this reduction is migrant, indentured and clandestine labour on the move. Global capitalism flattens qualitative distinctions among different populations on the move, often to the point of sheer irrelevance as in principle, all of them are potentially disposable and ultimately ‘ungrievable’ (Butler 2004).

[D] LOST IN TRANSITION?

As the Covid-19 pandemic unfolded, by mid-July 2020, the IOM estimated that the pandemic had left at least 3 million migrants stranded, often without access to consular assistance, or a means to ensure that they did not slip into irregular status and hence were faced with the situation of having insufficient resources to meet their basic needs.⁶ Furthermore, these figures only refer to ‘international migrants’ and not to those who are the millions of internally displaced or the clandestine labour force of undocumented migrants. Three cases of immigrants ‘lost in transition’ to global pandemic governance are particularly revealing in this context. First, thousands of migrants were stranded in Panama’s jungles while attempting to travel north to the United States, as part of the long-standing Caravan movement. Second, migrant workers in Lebanon from Syria, Iraq, Libya and select African countries were exposed to extremely difficult conditions after the August 2020 explosion in Beirut and subsequent surge of Covid-19 cases, whereby they ended up having no place to return to and no means to survive. And third, in India, stranded outside of their

⁵ See OECD data provided by OECD’s annual publication analysing developments in migration movements and policies in OECD countries (OECD 2020).

⁶ As of 13 July 2020, IOM’s Return Task Force had identified at least 3 million stranded migrants (IOM 2020). Of these, more than 1.2 million migrants were stranded in the IOM region of Middle East and North Africa.

home state, many migrant workers had to risk life and limb by walking hundreds of miles in the midst of a raging pandemic to return home from destinations where they regularly performed seasonal or temporary work. Here, I will closely examine the Indian case to understand the general dynamics of dispossession under pandemic circumstances.

India was quick to close its international borders and enforce an immediate lockdown. Still, India's population of 1.3 billion, which is spread across diverse states, with health inequalities and widening economic and social disparities, presented unique challenges for its hundreds of thousands of (internal) migrant workers (Suresh & Ors 2020). Preparedness and response to Covid-19 have differed at the state level. Kerala, for instance, has drawn on its experience with the Nipah virus in 2018 to use extensive testing, contact tracing and community mobilization to contain the Covid-19 virus. It has also set up thousands of temporary shelters for migrant workers. Similarly, Odisha's experience with previous natural disasters allowed for repurposing already existing emergency structures. Some states such as Maharashtra resorted to more draconian measures and employed drones to monitor physical distancing during lockdown and applied cluster containment strategies (Maji & Ors 2020). However, with all these measures came the danger of stigmatization and coercion of migrant workers who were not in their home state. The Government's sudden enforcement of the lockdown disadvantaged these already vulnerable populations. The mass exodus of migrant workers and starvation among people who work in the informal economy, which constitutes close to 90 per cent of the labour force in many of India's states, has gone largely unnoticed as the rest of the world struggled with their own Covid-19 related crises.

Implementing public health measures is difficult in places with overcrowded living conditions and inadequate hygiene and sanitation at the best of times. With non-Covid-19 health services severely disrupted, the Indian Government's efforts to provide financial support and food security could not alleviate the dire needs of the migrant populations on the move. As hundreds of thousands of India's migrant workers walked back to their home towns and villages amidst the pandemic, nationwide lockdowns for Covid-19 caused public transportation operations to cease, which led to thousands being stranded in different parts of the country. The service volume to repatriate India's massive migrant worker population, based on a forecast from the 2011 census data, reveals a population reaching several millions who are on the move (Singh 2020). The disproportionate impact of the pandemic on the livelihood and survival of these populations, not caused by Covid-19 but due to their

socio-economic status or lack thereof within Indian society, is but one example concerning the ethical limits of pandemic governance through emergency laws and generic policy measures. India continues to witness a massive crisis. In this context, the impact of Covid-19 on migrant workers and their families—particularly women with accompanying children—including loss of livelihoods and resulting debt, disrupted access to social services, insufficient support, and lack of recognition of the widespread and devastating nature of the problem, indeed constitutes a key chapter in the saga of disposable lives of peoples on the move during the Covid-19 pandemic.

[E] OUT OF SIGHT, OUT OF MIND: FORCED DISPLACEMENT AND COVID-19 GOVERNANCE

As a substantive sub-category of irregular migration, displaced peoples fleeing conflict and disaster zones across borders, and struggling to apply for international protection, have been facing severe difficulties under the terms of global governance of the Covid-19 pandemic. First and foremost, border closures severed the ability of displaced peoples to seek legal status and protection. Secondly, they reduced or in some cases permanently stalled the options for asylum-seeking populations living in overcrowded camps with alarmingly high infection rates—such as among the Rohingya population in Bangladesh and Syrian refugees in Greece—for moving on to possible safety.

Currently, over 1.3 million Rohingya refugees are living in highly congested camps with high risk of Covid-19 in Bangladesh (Khan & Ors 2021; Mistry & Ors 2021). The majority of the displaced Rohingya population live in 34 camps with poor access to water and sanitation, and very limited health services (UN High Commissioner for Refugees (UNHCR) 2021a). Even before the Covid-19 pandemic, continuous outbreaks of various infectious diseases, including measles, hepatitis C, HIV and diphtheria, were already prevailing conditions in these camps. In addition, a high proportion of Rohingya refugees are suffering from noncommunicable diseases (WHO 2019). While Bangladesh seriously struggles to address its Covid-19 crises, it is almost impossible for the country to provide vaccinations for Rohingya refugees as it cannot deliver vaccines to its own population of 167 million citizens. As a result, Rohingya refugees continue to suffer the insufferable under the special circumstances of a population already devastated by prior genocide and mass displacement.

The Covid-19 pandemic has also further highlighted discriminatory limitations in terms of access to healthcare, including preventative care, hospital beds, oxygen supplies, intensive care capacities and vaccination, as we see in the case of Syrians stranded on the Greek islands (UNHCR 2021b). The response to Covid-19 in these refugee camps is marked by the lack of human resources, laboratory and hospital facilities for testing and treating Covid-19, and *ad hoc* or absent vaccination programmes. As a result, these populations are not only dangerously unprotected, but the deaths that occur among them go unrecorded. The plight of Syrian refugees and other refugee communities stranded on the Greek islands, and by definition on the external border of the European Union (EU), has worsened dramatically since the Covid-19 pandemic (Oztig 2020).

The priorities concerning the spread and outcomes of the Covid-19 pandemic in Greece as well as in the EU at large have been squarely determined according to state territories, state borders and in terms of citizens and those who can declare a legal status within a given state (Fouskas & Ors 2020). Furthermore, the media and related statistical information portrayed and discussed the effects of the pandemic in such a way that those who were stranded at the borderlands rarely if ever were included in the discussion. Again, an ethically engaged legal perspective is needed in order to address the protection of health of refugees stranded in places such as the Greek island of Lesbos (Marceca 2017). Keeping in mind the basic definition of public health not only as the eradication of a particular disease but also as the maintenance of the entire spectrum of health and wellbeing of individuals regardless of their citizenship or legal status, the fate of close to 40,000 children, women and men contained in the five centres for reception and identification on the Greek islands could only be explained through concepts such as disposable lives or the death-in-living. This is a situation of 'chronic emergency' which originally led to the EU-Turkey statement of March 2016 reassuring that 'all people on the move would be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement' (European Council 2016; Veizis 2020: 266). The majority of the asylum seekers in these island camps have arrived from Syria, Afghanistan, Iraq and the Democratic Republic of Congo with no chance of return. They were huddled together in uninhabitable conditions even before the onset of the Covid-19 pandemic. In Lesbos, for instance, in excess of 20,000 people have been living in a space designed for 2,840 (Veizis 2020: 265). As things stand, with no emergency plan in place, it would be impossible to contain major outbreaks in the camp settings in Lesbos, Chios, Samos, Leros and Kos, especially in the face of the most

current mutations of the virus. And yet, as Covid-19 spread rapidly across European countries, the human tragedy experienced by refugees on the Turkish–Greek border and the Aegean Sea ceased to be a relevant item in political discussions. Meanwhile, ships and dinghies carrying human cargo continued to sink to the bottom of the Aegean and Mediterranean Seas. Attempted crossings include sea arrivals in Spain, Italy, Cyprus and Greece, while no data on interceptions by the Tunisian Navy, nor by Egyptian or Moroccan authorities, are currently available.⁷ What we do know is that the total tally of dead bodies lacing the deep blue yonder of the Eastern Mediterranean increases by the day, most of whom remain nameless and go unrecorded.

Similarly, hundreds of displaced Venezuelans arriving in Colombia, Peru, Chile, Ecuador and Brazil have already lost their means of livelihood. While having no means to return home, they faced Covid-19 under circumstances of extended legal limbo. Back in June 2018, the first official register of irregular migrants who moved from Venezuela to Colombia revealed that more than 800,000 Venezuelans were already living in Colombia.⁸ Constituting a part of the larger trend of ‘survival migration’ (Betts 2010), there are approximately 4.5 million Venezuelan refugees and migrants worldwide, close to half of them currently in Colombia (Botia 2019; UNHCR 2020). Irregular migrants in Colombia cannot gain employment and cannot access the contributory public services or regular health insurance until their legal situation is resolved. Though such individuals are entitled to emergency care and public health interventions, only pregnant women can access other services (Fernández-Nino & Ors 2018). These are the circumstances under which the displaced Venezuelan populations are experiencing Covid-19.

It is apt to state that not only the Covid-19 pandemic itself but also the way states and societies responded to it have left a deadly mark on displaced populations and on populations on the move. At the peak of the first wave of the pandemic in April 2020, almost the entire roster of states refused entry to travellers with no exceptions for asylum seekers. With the temporary suspension of refugee resettlement services by the UNHCR and IOM in March 2020, only half as many refugees could depart for resettlement countries in the first six months of 2020 as in the same period in 2019. Similarly, returns of internally displaced persons (IDPs)

⁷ According to the IOM data, 20,000 arrivals in 2020 and 21,000 arrivals in 2021 led to recorded deaths in 2020 as 279 and in 2021 as 685. Deaths by year, starting at 2014 were successively 3320, 4054, 5143, 3139, 2299, 1885, 1417: the total being 23,150 recorded deaths thus far. See [Missing Migrants Project](#).

⁸ See the figures provided by Wolfe (2021).

became almost impossible. This is despite the fact that, throughout the pandemic, conflict- and violence-driven displacement continued if not increased on a global scale. The Syrian war did not come to a stop, the violence against the Rohingya did not ease, the plight of the Venezuelans did not diminish, and the Afghan crisis did not come to a sudden halt, to name just a few instances. Even more alarmingly, the number of new IDPs within Cameroon, Mozambique, the Niger and Somalia during the first half of 2020 had already surpassed the figure for the entirety of 2019.⁹ And yet, the legal framework of pandemic governance scarcely mentioned these millions who were on the move.

[F] COVID-19: REDEFINING LAW, INEQUITIES AND INJUSTICE

Disparities in infection and death rates during pandemics are due to three main factors: disparities in exposure to the virus, disparities in susceptibility and underlying causes that increase the chances of contracting the virus, and disparities in the adequacy and appropriateness of subsequent treatment (Yearby & Mohapatra 2020). The inequities witnessed in this current pandemic were predictable, as there has been no plan to protect populations on the move who lack status, legal standing or who are undocumented. Existing inequities simply worsened during a pandemic. As the examples discussed illustrate, these populations are not even counted as ‘groups at risk’ by public health authorities since they are not included in the public domain. Although jurisdictions have been collecting data concerning Covid-19 infections and deaths, undocumented and non-status people are not included in this tally. Hence, there is no political conversation taking place to address disparities in exposure, susceptibility, or treatment through legal or policy measures concerning populations on the move. Structural problems causing increased death and illness of irregular migrants, the dispossessed and the displaced, in effect amount to *health injustice* for these communities. Allocation policies for testing, emergency care, ventilators, clinical attention, future treatment and vaccine access are practically out of reach for them. Thus, they are bound to continue to bear the brunt of Covid-19 at a global scale.

Since early 2020, there have been several changes made to asylum and immigration statutes, or their equivalents, across Europe and in North America, all of which have promoted the furthering of policies of control and containment (Miller & Ors 2020; Bissonnette & Vallet 2021). The

⁹ See the figures provided by the ‘Global Report on Internal Displacement’ (Internal Displacement Monitoring Center 2020).

everyday affairs of irregular and undocumented migrants and asylum seekers—often deemed criminals or potential criminals—are increasingly managed by expanding police powers, detention, collection of biometric data and electronic monitoring (Amon 2020). Policies of dispersal and withdrawal of support in the form of denial of social resources for refugees have become all too common as well. These are part and parcel of the denigration of the institution of asylum throughout Western Europe and immigrant-settler societies such as Canada, the US and Australia. The term ‘culture of disbelief’ refers to this already restriction-oriented and deterrence-laden environment (Anderson 2014). Here, I put this term to use in a slightly different context: the legal invisibility of Covid-19-related experiences of undocumented and irregular migrants signals the transformation of the already entrenched culture of disbelief into an institutional culture of denial of the regular loss of life and livelihoods among these communities.

[G] CONCLUSION

Writing in the immediate aftermath of the 9/11 attacks on the twin towers in New York City, and the ‘legalized’ response to these attacks, Judith Butler posited that some lives are not apprehended as *grievable* since they were not appreciated as living in the first place (Butler 2004).¹⁰ Butler elaborates upon this duality further in her *Frames of War* and asks us under which conditions we apprehend a life (Butler 2009)? In this article, I referred to Butler’s discussion on precariousness in order to examine how certain harms or injuries in relation to the legal status of populations on the move as insiders or outsiders of the national polity came to determine the life chances of these individuals in legal frameworks pertaining to the governance of the Covid-19 pandemic and, in particular, the pandemic-related regulation of global migration and mobilities. In order for a political subject who experiences harm or injury to be able to seek remedy or protection, she must be recognized as such in the first place. Global mobilities continuously produce hierarchies of who counts as a recognizable political subject worthy of legal recognition and hence protection, and who does not. Covid-19 protection regimes made these distinctions not only starker, but also normalized and naturalized them in the name of public health and through the use of law.

As a result, during the pandemic, specific lives were marked as not to be ‘mourned, or grieved’ (Butler 2004: 147). In the language of social death

¹⁰ In *Precarious Life* (2004: xiv), Butler states that ‘the differential allocation of grievability that decides what kind of subject is and must be grieved, and which kind of subject must not, operates to produce and maintain certain exclusionary conceptions of who is normatively human’.

which is defined as part of necropolitics by Achille Mbembe via his notion of 'death-in-life', the undocumented migrant and the non-status refugee are not included in the registers of public health for protection against Covid-19 (Mbembe 2001, 2003). But just like Mbembe's master cannot afford to lose the slave, the migrant labourer, the refugee indentured worker, the stateless child soldier, etc cannot be removed altogether. The complete loss of these lives is not to the benefit of the system at large which relies on globalized irregular labour regimes. As a result, we witness a hierarchy being established, which is determined by practical calculations. In the specific context of legal status determination and uneven distribution of protection during the Covid-19 pandemic, the death or disappearance of an asylum seeker receives no recognition under domestic legal regimes that regard them either as criminal or as outsiders to the (national) polity. At best, these lives are governed by a human rights apparatus that reduces the people on the move to victims in need of rescue, rehabilitation and, ultimately, reintegration. Similarly, the undocumented or temporary migrant is deemed unworthy of protection until and unless she finds a recognizable use for herself within the system in place. Until then, the harms she may endure are neither reparable, nor is the life that may be lost deemed grievable. The Covid-19 pandemic and its governance made this harsh reality of the everydayness of injustice experienced by these populations all the more 'natural'. The 'collateral damage' of this global health crisis includes the millions who are on the move, many of whom are an essential part of how the system of global capitalism works, above and beyond the protected mirage of the nation-state and its coveted citizenship.

Legal justice is always followed by the long shadow of those who are not included under its cloak, who cannot make claims through it, and who are not considered to be a part of it. Critiques of international migration governance and related legal regimes, including refugee law, must therefore at least be partly directed to deconstructing the ways in which 'the project of Empire' has operated and continues to operate through international law (Anghie 2005; Esmeir 2012; Achiume 2019). Postcolonial critiques of migration governance reveal how historical legacies of past injustices shape the contours of legal justice in the contemporary moment. Covid-19 measures related to immigration control and selective border closures, and their effects on vulnerable populations at a global scale, make these legacies all the more visible and challenge the articulation of legal justice as a disembodied system. Pandemic governance clearly revealed how legal justice operates in accordance with existing historical and political formations dictated by those who

already set the rules pertaining to political subjecthood. In this sense, it has clear ethical limitations and it is not value-neutral. Legal justice is an intervention—it is claimed from a structural position where historical power relations are already deeply embedded and normalized. As Martti Koskenniemi argued more than a decade ago, moralizing international law could easily lead to very dangerous results by turning law into a sanctified instrument in the hands of those who already have power and privilege (Koskenniemi 2008).

I will conclude by stating that *declaring all lives as grieveable* in legal terms is a politically potent and timely move. We must reveal the connections between those who are deemed worthy of protection and those who are not, and yet who are relied upon for the sustenance of the very system that legal regimes are designed to uphold. Recognition of precariousness and suffering as shared experiences is an absolute ethical necessity; experiences which nonetheless regularly fall outside of the legal order and notions of justice, but particularly so during ‘extraordinary times’ such as the Covid-19 crisis. Rallying marginalized migrant and refugee communities into political action through shared grief or injustices at a time of a global pandemic is no doubt beyond utopian. However, registering systemic human suffering and death as death-in-life exposes the very limits of (pandemic) governance that are not only against the core principles of fundamental justice but also of humanity.

Nergis Canefe is a scholar of public international law, comparative politics, forced migration studies and critical human rights. She has published several books and articles in the area of memories of atrocities and injustice for marginalized groups, critical studies of human rights, genocide and crimes against humanity, the relationship between nationalism and minority rights in the Balkans and the Middle East, decolonization as method, forced migration, debates on ethics in international criminal law pertaining to mass political violence and state criminality. Professor Canefe has more than 20 years of experience in carrying out in-depth qualitative research with displaced communities and teaching human rights and public law globally. Her research experience includes working with the Muslim and Jewish diasporas in Europe and North America, refugees, and displaced peoples in Turkey, Cyprus, India, Uganda, South Africa, Bosnia and Colombia. She has held posts in several European and Turkish universities and has been a faculty member at York University, Canada, since 2003. She is also a trained artist and her designs and murals have been showcased regularly since 2008.

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LAW'S INVISIBLE WOMEN: THE UNINTENDED GENDERED CONSEQUENCES OF THE COVID-19 LOCKDOWN

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Abstract

This article examines the unintended gendered consequences of lockdown on women's rights, particularly those related to women's work, health and wellbeing. Situating this assessment within wider feminist legal scholarship, which exposes the gendered nature of law and the tendency to legislate in a way that prioritizes a privileged male legal subject, we argue that legislation and subsequent decisions fail to centre women's lived experiences and so deprioritize women's needs. We ultimately argue that lessons need to be learned regarding how post-pandemic responses are implemented to mitigate the impacts on women and ensure gender is mainstreamed within the law-making process.

Keywords: women; Covid-19; flexible working; care; telemedicine; abortion; gender mainstreaming.

[A] INTRODUCTION

This article examines the unintended gendered consequences that the Covid-19 lockdown has had on women's rights, particularly those related to women's work, health and wellbeing. One of the main consequences of lockdown has been the blurring of the traditional boundary between public and private spheres. This is evident in both the widespread move to home-working and the increase in use of telemedical services, both of which have the potential to renegotiate these boundaries with potentially beneficial consequences for women's experiences of work and care and access to women's health. We examine two distinct but related policy areas that have had a significant impact on women, namely the closure of school and childcare settings on women's work and the

expansion of telemedical services to enable women to access abortions at home. We argue that, while challenging the boundaries between public and private spheres in these contexts has the potential to benefit women, the legislative and policy responses to the Covid-19 crisis and subsequent decisions have failed to take adequate account of the impact that such measures would have on women and their inherently gendered needs. Situating this assessment within wider feminist legal scholarship that has exposed the gendered nature of law and the tendency to legislate in a way that prioritizes a privileged male legal subject, we argue that the legislation and subsequent decisions fail to centre women's lived experiences and realities and so deprioritize women's needs. We ultimately argue that lessons need to be learned regarding how post-pandemic responses are implemented in order to mitigate the impacts on women and ensure gender is mainstreamed within the law-making process.

[B] FEMINIST SCHOLARSHIP

Various feminist legal scholars have critiqued the inability of law to properly redress gender inequality due to its promulgation of gender and class hierarchies. Ngaire Naffine and other feminist legal scholars have long argued that the law is centred around an idealized legal subject that is male. In particular, Naffine argues that law is based on a male subject with a male middle-class masculinity (1990: 100), which does not reflect or respond to the lived experiences of women. This is because law reflects liberalism's distinction between the public and private spheres and assigns to women the role of 'holding the two worlds [public and private] together' (Naffine 1990: 149). Similarly, Carol Pateman's (1988) famous feminist critique of the social contract holds that the social contract theory, as espoused by Hobbes, Locke and Rousseau, not only assumes, but is dependent upon women's subordination and relegation to the private sphere. However, it should be noted that this separation of spheres does not necessarily reflect the lived realities of all women. In particular, this distinction is critiqued by Collins who argues that it does not reflect African-American women's experiences of work (Collins 1998: 11-22, especially 21-22; 2000: 45-46; 2002: 47-48). However, this separation between public and private spheres is also evident in the employment context, where Pateman argues that the standard worker model is unburdened from caring responsibilities, reflecting the division between the public sphere of work and the private sphere of family life (1988: 135). James (2016) similarly refers to the unencumbered male worker model in the context of work-family rights, reinforcing the continued focus on the male subject as the standard subject in law. As

Naffine states, '[c]onsequently, the law has imposed on women the roles of child-bearer, child-rearer and domestic servant' (1990: 6). Indeed, even when household labour is contracted out, it is work that is predominantly undertaken by women, usually poorer women and in many cases, women of colour. This reinforces Collins's analysis of African-American women's work. While they have always undertaken paid work, as well as responsibility for familial care, this has traditionally been domestic work. Consequently, their employment has not been in the traditional public sphere, but instead in the private sphere of white women's homes (Collins 1998: 11-22, especially 21-22; 2000: 45-46; 2002: 47-48). Consequently, their experiences of work, and care, are often ignored or rendered invisible (Bargetz 2009). In contrast, the male subject of law is unencumbered from the domestic and family care responsibilities by women in the home (Naffine 1990: 104).

These constructions of the legal subject are underpinned by a specific biological construction of women and femininity in legal regulation that often problematizes them and their bodies (Smart 1992). While Smart was examining the experiences of women during the Victorian period, the constructions of idealized motherhood, and conversely problematized behaviours such as abortion and women's employment and childcare, remain prevalent today (1992: 14, 18-24). However, as Fineman notes, there is no clear delineation between the private and public spheres in practice, with certain institutions being classified as public in some instances and private in others. For instance, Fineman argues that the market is framed as public in comparison with the family, but private when compared with the state (2005: 21-22). Furthermore, as noted above, Collins (1998; 2000; 2002) argues that these distinctions do not reflect the lived realities of all women. Therefore, there is room for uncertainty, given that it is difficult to draw clear boundaries between both spheres in all instances. Even the family, which has more traditionally been classified as private, is subject to significant regulation by the state (Fineman 2005: 21-22). This reinforces that the boundaries are not as fixed as they may appear, and a renegotiation is possible. Nevertheless, doing so requires challenging these idealized constructions of women and motherhood.

As we explore in the subsequent sections, the Covid-19 responses and subsequent decisions have reified these gendered roles within law by failing to acknowledge the impact of certain policies and/or decisions on women. This is evident in research on the Government's response to the pandemic which highlights that: only 38 per cent of women (compared to 50 per cent of men) felt that the government had focused on matters important to them; 43 per cent of women (compared to 50 per cent of

men) felt that the government was acting in their best interests; and 28 per cent of women (and 35 per cent of men) agreed that women's specific needs have been considered and responded to well by the UK Government (UK Women's Budget Group & Ors 2021). Consequently, the impact and potential legacy of the pandemic is a regression in feminist gains in unpicking gendered assumptions and stereotypes within law.

It has reinforced the interrelationship between the spheres and the interdependency required to make work in the public sphere possible, with women continuing to hold 'the two worlds [public and private] together' (Naffine 1990: 149). However, there is also the opportunity to challenge these boundaries and, in doing so, ensure that lessons can be learned from the experiences of the pandemic. For instance, it is already apparent that the traditional notion of work is changing and also that access to telemedicine has become more mainstream. We use these examples to demonstrate how there is an opportunity to escape the gendered law and policymaking that has all too often failed to situate women at its heart and instead has reduced women to stereotypes of mothers and caregivers. Such an escape potentially would help to dismantle the public/private divide. Nevertheless, challenges remain in ensuring that these changes reflect women's lived experiences and do not continue to only benefit specific privileged groups. Thus, we caution that without listening to the voices of women and situating their needs at the heart of the Covid-19 recovery any achievements in dismantling the public/private divide will have been lost.

[C] WOMEN AS WORKING CARERS

Various studies demonstrate that the closure of schools and childcare settings for most children during the pandemic has had a disproportionate impact on working women with caring responsibilities. For instance, the Office for National Statistics (ONS) (2021) research highlights that women were more likely than men: to undertake unpaid childcare (March 2020: 55 per cent more than men; September 2020: 99 per cent more than men); and to be home-schooling (early 2021: 67 per cent women and 52 per cent men) during the pandemic. This is reinforced in research by the Fawcett Society (2020: figure 1, 5) which shows that, in response to the statement, 'I do the majority of work to look after my child/ren while schools and nurseries are closed', 73.8 per cent of mothers working from home agreed with this statement compared with 50.4 per cent of fathers working from home. Furthermore, 48.3 per cent of mothers compared with 39.1 per cent of fathers agreed that they were struggling to balance paid work and care (2020: figure 2, 5-6). Women were also more likely

to report increased pressures on their ‘mental load’ as a consequence of bearing the multiple burdens of work and care during the pandemic (2020: 7). This research underscores that women have shouldered the burden of responsibility for care and home-schooling during the pandemic, with corresponding challenges and consequences for their engagement in paid work. This is true even when both parents are working from home and so are both able, in principle, to provide care. Consequently, the pandemic has exposed both the fragility of women’s labour market engagement and how contingent it is on effective and stable childcare supports, as well as the resilience of gender roles. This reinforces the interdependency of the public and private spheres and the tendency to return to traditional gender roles when this breaks down. In doing so, it highlights either a failure to appreciate the implications of lockdown on women with caring responsibilities, or a wilful disregard for the disproportionate impact it created. Nevertheless, what is key now is how to redress these inequalities in the future.

However, the more recently published 28-country study by the Policy Institute at King’s College London and Ipsos Mori (2021), on which inequalities are viewed as the most pressing in the context of the pandemic, does not reflect these lived experiences and the impact of the pandemic on British women. This research shows that only 23 per cent of Britons thought that gender inequality was a cause for concern, compared with an average of 33 per cent for Europeans. While the authors note that this could be explained by Britain’s relatively high ranking for gender equality overall (20th), other high-ranking countries, such as Sweden (4th) still identified it as an issue (37 per cent). Consequently, the authors suggest that it might instead reflect complacency here. This appears to be in sharp contrast with the research noted above which highlighted the lived experiences of women with caring responsibilities during the pandemic. While this is problematic in itself, as the authors also note, it poses challenges for policymakers, who may prioritize other areas post-pandemic as a consequence (Duffy 2021). If so, women’s experiences and voices will remain invisible in the post-pandemic recovery. Furthermore, initiatives that are aimed at addressing gender inequality may fail to do so anyway because they do not reflect or respond to the specific issues that women have faced during the pandemic. One such response is the focus on flexible working, which has dominated during the pandemic and appears likely to be a key characteristic of post-pandemic employment.

Flexible Work as a Response?

The boundary between the public sphere of work and the private sphere of home and family care has most notably been blurred by the large-scale move to home-working as a key policy both during periods of lockdown and throughout the pandemic. This has resulted in a significant change in the way in which the nature of work has been conceptualized, including, most significantly, where and how some people work and where and how they may work in the future. However, it is important to recognize that, in some sectors, flexibility of working hours and choice of place of work was not an option during the pandemic. For instance, employees in female-dominated sectors such as health and social care and related services were more likely to remain in the workplace and at considerable risk during the pandemic. Furthermore, that it has taken a significant global event such as the pandemic to highlight the potential value of flexible working, not least of all for those with caring responsibilities, reinforces the value that has previously been placed on such forms of work. Nevertheless, there is an opportunity for both employers and government to reflect on the experiences of flexible work and renegotiate the boundaries between work and life and the ways in which people work in the future. This has the potential to have positive implications for working women with caring responsibilities; however, it is important to reflect on the current right to request flexible working, the recommended changes and whether these changes can support this.

It is important to remember that the right to request flexible working is currently enshrined in the Flexible Working Regulations (2014) and has been available to all employees with 26 weeks continuity of employment since 2014 (regulation 3 and section 80F Employment Rights Act 1996 (ERA)), having previously been available only to persons with caring responsibilities (Flexible Working (Eligibility, Complaints and Remedies) Regulations (2002)). Despite this, research by Working Families (2019: 2) shows that 86 per cent of parents want to work flexibly but just under half do so (49 per cent). Their reasons for not working flexibly include: that it is incompatible with their job (40 per cent); that it is not available where they work (37 per cent); and that their manager does not like them working flexibly (10 per cent) (2019: 2). This reinforces the importance of workplace culture and support from employers, as well as the limitations of this right in practice. This can be explained in part by the framework of the legislation itself.

Employees can request a change in the hours, times or place of work (section 80F(1) ERA) and may make one such request in a one-year

period (section 80(4) ERA). However, the requirements are quite onerous since the employee must consider the impact that their request will have and how it can be addressed (section 80F(2)(c) ERA). In contrast, the obligations on the employer are less burdensome. An employer must only deal with the request in a reasonable manner, inform the employee of the decision within three months and can only refuse it on the noted grounds (section 80G(1B) ERA). However, there are various grounds for refusal, making it relatively easy for an employer to do so (section 80G(1) ERA). There is no requirement in the legislation for the employer to offer a right to appeal the decision, but if the employer does, the final decision must also be reached within the three-month timeframe (section 80G(1A) ERA). An application can only be made to the Employment Tribunal if the employer failed to comply with section 80G(1), the decision was based on incorrect facts, or the employer's notification did not satisfy the relevant requirements (section 80H(1) ERA). This does not allow the decision of the employer to be challenged on the grounds that it is unreasonable and/or that the justification is inaccurate, unreasonable or tainted by bias or discrimination, making it difficult for an employee to successfully challenge the decision (James 2006: 276-277). Consequently, the right to request flexible working offers a limited right with limited remedies in practice. Indeed, equality law has provided more effective remedies for those refused such requests. For instance, female employees have previously succeeded in raising claims of indirect sex discrimination relating to flexible work, now under section 19 of the Equality Act 2010 (for example, *Home Office v Holmes* (1984); *London Underground v Edwards (No 2)* (1999); *Lockwood v Crawley Warren Group Ltd* (2000); *Littlejohn v Transport for London* (2007); *Dobson v North Cumbria Integrated Care NHS Foundation Trust* (2021), but compare *XC Trains Ltd v D* (2016)). However, this comes at the price of continuing to frame childcare as undertaken primarily by women and arguing that a provision, criteria or practice to work full time and/or to return to a workplace places women at a particular disadvantage because they are more likely to be responsible for care. While this has undoubtedly been the case during the pandemic, it continues to reify women as carers. Having to rely on discrimination legislation here to assert rights makes this more difficult to challenge and continues to reinforce the resilience of the male subject of law, even in relation to a right aimed (initially at least) at benefitting women as working carers (James 2009: 277-278). This also presents problems for working fathers being recognized as working carers. The Employment Appeal Tribunal in *Walkingshaw v The John Martin Group* (2001) upheld a direct sex discrimination claim brought by a father who had been denied access to flexible working. However, this was in circumstances where it

was clear that a female employee's request would have been approved. It will not always be possible to identify a relevant comparator for fathers to be able to succeed here. This is reinforced in more recent case law on comparators for shared parental leave (SPL) (see *Capita Customer Management Ltd v Ali* (2019) and *Price v Powys County Council* (2021)). Thus, stereotypical views on care continue to be reinforced.

Nevertheless, the pandemic has accelerated support for the normalization of flexible work. In particular, Minister for Women and Equalities Liz Truss MP has noted that there has been a change in mindset about flexible work as a consequence of the pandemic and that:

We should take the opportunity to capitalise on some of those cultural changes that have happened to make it easier for people balancing family and career to work from home, to make it more flexible and to challenge the culture of presenteeism, which has been very alive in business and has also been very alive in politics (Women and Equalities Committee (2020): response to q14).

While the normalization of flexible work is not unwelcome, it is important to consider how this is achieved and supported to enable working women with caring responsibilities, and working carers more generally, to benefit from the renegotiation of the boundaries between work and family life. However, the recommendations relating to flexible work do not go far enough to address this.

The first recommendation follows research undertaken by the government-backed Behavioural Insight Team (BIT) and jobsite Indeed, which reinforces that advertising jobs as available flexibly is more likely to attract interest from both women and men (Londakova & Ors 2021). Furthermore, including flexibility in adverts can normalize flexible work, help increase the availability of quality flexible work and help facilitate the employment of those with caring responsibilities (2021: 7-8). This reflects the proposals consulted upon prior to the pandemic in the 'Good Work Plan: Proposals to Support Families' (HM Government 2019: 50) to increase the visibility and availability of flexible working when advertising jobs. While the normalization of flexible work is to be lauded, it is important to remember that utilization of flexible work has previously been highly gendered, with negative implications for working women and their careers. So, it is necessary to consider what is meant by flexible work in this context and what kind of flexible work has been valued by employers during the pandemic.

The gendered nature of flexible work in practice is highlighted by Chung and van der Lippe (2020: 365, 366 and 369-371) who identify various

studies which show that flexible work often means that women reduce paid work to care and men work additional (at times unpaid) hours to advance their careers. This reflects the traditional division of gender roles, with working women continuing to take primary responsibility for care to the detriment of their engagement in paid work. By contrast, men tend to continue to prioritize paid work, with flexibility being used to work different hours or in different places with the goal of career progression. It is arguably the latter form of flexibility that has been more prevalent during the pandemic, with many employees working flexibly from home, but not necessarily reducing their working hours and men continuing to work more than women. For instance, ONS data shows that during lockdown, fathers spent an average of 45 minutes more per day, across all days, on paid work than mothers (July 2020). This raises concerns if flexible work is viewed as the potential answer to the inequalities that working women with caring responsibilities have experienced during the pandemic. While flexible working will be of benefit to some people with caring responsibilities, it is entirely dependent on what is meant by flexible working in practice and the kind of flexible working that is valued. Many employers have recognized the value of flexible working as a consequence of the pandemic, however this has typically involved employees working from home in much the same way as they did in workplaces. While this nevertheless represents a significant shift in the site of work, it tends to reflect a white collar, middle-class, male model of work rather than the kind of flexibility that is necessary to combine work with care. If the model of flexible work is reflective of this kind of flexibility, then it may further entrench traditional gender roles and reinforce the double burden of work and care that women with caring responsibilities tend to experience.

Furthermore, Chung and van der Lippe (2020: 368-369) also refer to studies that show that flexible work can create more work-family conflict because of competing commitments and blurring of boundaries, particularly when employees are home-working. This has certainly been the case during the pandemic for many employees, most notably women with caring responsibilities as noted above. This suggests that, rather than addressing gender inequalities, the ways in which flexible work operates in practice can instead further entrench traditional gender roles. This is also reinforced in research undertaken by the Working@Home Project (2020) during the pandemic which highlights the emergence of digital presenteeism, which could make home-working more difficult, particularly for those with caring responsibilities. Consequently, the expectation that home-working can challenge ingrained cultural norms and be more responsive to caring obligations may not be borne out in

practice. Instead of the boundaries between the public sphere of work necessarily adapting to accommodate the private sphere of home and family life, the private sphere may actually be contracting for some, with the blurring of these boundaries increasingly resulting in poorer work–life balance. This is particularly likely to be the case where the normalization of flexible work is modelled around the traditional unencumbered male worker model, rather than recognizing and responding effectively to the needs of working women with caring responsibilities. A better response to these challenges is to also redesign the package of work–family rights in the UK to support working carers more effectively and challenge traditional assumptions around care.

The second recommendation—to abolish the 26-week continuity of employment requirement to request flexible work—offers greater potential here (Women and Equalities Committee 2021: 12-13). Similar recommendations were made by the Equality and Human Rights Commission, which recommended extending the right to request flexible working as a day-one right, available at all levels (unless there are genuine business reasons where it is not possible) and to include this when advertising roles (2020: 16). Such a change is a necessary accompaniment to the first recommendation, to ensure that those who wish to work flexibly have the right to do so from the moment they start work. While these recommendations are not unwelcome, they do not address the underlying limitations of the right to request flexible working itself and the different experiences of flexible work for both men and women.

A further challenge within the current legislation is that a successful request will result in a permanent change to the employee's contract of employment. This can make the right less attractive to employees who do not want to make permanent changes to their contracts and can trap employees in decisions that they had to make to respond to particular circumstances. This issue is addressed in Article 9 of the EU Work–Life Balance Directive (2019) (WLBD), which includes the right to request a temporary change and then return to your previous working arrangement (Article 9(3)). Including such a provision in the UK Flexible Working Regulations (2014) could be beneficial in practice and could ensure that carers (primarily women) are not relegated to part-time work.

While flexible working has captured many headlines both during the pandemic and as part of a future renegotiation of the boundaries and sites of work and family life, it is important to bear in mind that the recommendations for change here were not, initially at least, in response to the pandemic itself. Consequently, they do not actually respond to

the lived experiences of working women, and other carers, during the pandemic. Instead, what is necessary is a re-envisioning of the work–family dichotomy to support working carers more generally and challenge traditional gender roles. In doing so, women’s experiences of the pandemic must be more visibly included in the responses and renegotiation of these boundaries, which include making men more visible as working carers.

Revisiting Work–Family Rights

While the relocating of paid work from public workplaces to private homes has limited potential on its own to renegotiate responsibilities of care, a broader revision of work–family rights has far greater potential to do so. While the burden of care and home-schooling has rested on the shoulders of working women throughout the pandemic, there is some evidence of working fathers undertaking a more active role in care during this time (Burgess & Goldman 2021; Margaria 2021). However, as noted above, the focus on redefining work post-pandemic has been on flexible working, with limited attention from policymakers being focused on renegotiating the boundaries between work and care. This approach is unlikely to challenge the division of gender roles because it does not incentivize a sharing of caring responsibilities. Renegotiating the package of work–family rights and related care infrastructures, however, presents a greater opportunity to do so and to genuinely value care, something which has been notably absent in the development of UK work–family rights. This is supported by Mitchell’s (2020) recent analysis of the current framework of rights in the UK, in which she argues that care is not valued. Instead, she argues that the legislation should be based on an ethics of care approach and that a right to care should be developed in the UK. This builds on work by both James (2016) and Busby (2011) in this regard and reinforces the fundamental flaws within the existing framework of rights that continues to be based around a male worker model. There are three ways in which this can, and should, be challenged as part of the post-pandemic recovery. First, by revising rights for working fathers; second, by enacting a right to carers’ leave; and third, by ensuring that the appropriate care infrastructures are in place to provide greater choice for working persons with caring responsibilities.

Fathers’ Rights

While working mothers did undertake the majority of responsibility for care and home-schooling during the pandemic, research also indicates that fathers engaged more in these activities during lockdown than they had previously (Burgess & Goldman 2021). This has been viewed

optimistically by some, who note that the requirement to stay at home and the resultant physical presence at home has enabled fathers to undertake a greater role in care (Margaria 2021: 135). This suggests that the blurring of the boundary between the public and private spheres of work and family life has facilitated a renegotiation of caring roles for some working fathers. This poses the question of whether fathers' work-family rights should now be reviewed and enhanced to capitalize on this.

Subject to various qualifying conditions, fathers currently have the rights to: two weeks' paid paternity leave (Paternity and Adoption Leave Regulations (2002) and Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations (2002)); up to 50 weeks of SPL (Shared Parental Leave Regulations (2014) and Statutory Shared Parental Pay (General) Regulations 2014); and 18 weeks' unpaid parental leave (Maternity and Parental Leave etc Regulations (1999)). However, all these rights are subject to qualifying conditions, and for SPL the mother has to curtail her leave in order for the father to access it. The secondary nature of fathers' rights has been a long-standing criticism of UK work-family rights (James 2006 and 2009; Busby & Weldon-Johns 2019; and, from an EU perspective, Caracciolo di Torella 2015). Redefining fathers' roles in care at the same time as redefining how and where people work provides an opportunity to engage fathers more meaningfully in care and to challenge traditional gender roles (akin to Busby & Weldon-Johns's 2019 'active' fatherhood ideology). Providing fathers with a more clearly defined role in this context is not a new recommendation (see, for instance, Weldon-Johns 2011; Caracciolo di Torella 2015; Atkinson 2017), although strengthening such rights has been recommended as a response to the pandemic (Fawcett Society 2020: section 8; Margaria 2021). Furthermore, the UK Government previously committed to reviewing the right to SPL (HM Government 2019: 4-5), which has not been widely used (just over 1 per cent of those entitled utilized SPL in 2017/291818: Birkett & Forbes 2018). Now would be the opportune moment to do so and to strengthen fathers' rights. While a radical re-envisioning of parental rights, akin to the Nordic style of flexibility where parents each have periods of non-transferable leave, would be welcome (for an overview of rights, see Weldon-Johns 2011; Koslowski & Ors 2020), it is perhaps unlikely in the context of the post-pandemic recovery. Nevertheless, small but meaningful steps forward could make a significant difference. For instance, extending SPL as a day-one right, as recommended by Working Families (2019), would make it more accessible to working fathers. Removing qualification barriers based on the mother's engagement in paid work in the first instance and instead providing fathers with an independent right to leave would also

be a significant improvement (Atkinson 2017; Busby & Weldon-Johns 2019). Enhancing rights to paid leave and facilitating greater flexibility in its utilization would make it more affordable and accessible to working fathers (Atkinson 2017; Busby & Weldon-Johns 2019). Similar changes are evident in the WLBD, which repealed the Parental Leave Directive (2010) and enhanced the right to parental leave, enacted as unpaid parental leave in the UK. Parents are entitled to an individual right to four months' leave, two months of which cannot be transferred (Article 5(1)-(2)). Parents exercising this non-transferable period of leave will be entitled to some form of payment or allowance (Article 8(1)), which 'shall be set in such a way as to facilitate the take-up of parental leave by both parents' (Article 8(3)). The WLBD also requires member states to adopt the necessary measures to ensure that parents can request that it be utilized flexibly (Article 5(6)). These changes mark a greater commitment to working fathers as carers. While they are limited in practice—for instance the payment is unlikely to fully compensate for loss of normal earnings—this is coupled with the right to request that the leave be exercised flexibly, which may mitigate this. These revisions nevertheless represent a positive step forward in recognizing working fathers as carers (Weldon-Johns 2020). Implementing such changes into UK law, either as a revision to the current right to unpaid parental leave or as part of more sweeping reforms to SPL, would signify a significant commitment to recognizing fathers as working carers, and would challenge the continuing focus on mothers as 'child-bearer[s], child-rearer[s] and domestic servant[s]' (Naffine 1990: 6).

Carers' Leave

While the focus in this article has been on working women with childcare responsibilities, those with other caring responsibilities have also been impacted by the pandemic, and this needs to be recognized in the post-pandemic responses. The UK Government consulted on a right to carers leave in 2020 (Department for Business, Energy and Industrial Strategy 2020), which indicates a potentially positive step forward in extending rights to working carers. However, the proposals were limited to five days' unpaid leave per year and contained a narrow definition of carers and the circumstances in which carers' leave could be utilized (ibid: 11-15). Consequently, the proposed right would not cover all of those with caring responsibilities nor all care needs, and seems unlikely to extend to childcare responsibilities. This is in contrast to the Trades Union Congress's (2020) recommendation of a day-one right to 10 days of carers' leave for all parents. Therefore, in much the same way as other work-family rights, the proposals offer little more than another 'sound-bite' addition to the package of work-family rights (Anderson 2003; Weldon-

Johns 2011). In practice, it may offer only a slightly better right to time off than that afforded under the dependent care leave provisions (sections 57A and 57B ERA), which enable employees to take leave to deal with emergency care situations, but otherwise would fail to adequately respond to the needs of working carers. In particular, while it might allow carers to better plan for caring needs rather than only being able to respond in an emergency, the overall length of leave is unlikely to enable working carers to substantially renegotiate the boundaries between work and care on a long-term basis. However, this does reflect the right to carers' leave contained within the WLBD, which introduces a right to five days' unpaid carers' leave (Article 6). It similarly limits the right to traditional familial relationships and only to a person 'who is in need of significant care or support for a serious medical reason' (Article 3(1)(d)). This also fails to capture every relationship of care and all care needs, although it is a tentative first step in recognizing the caring responsibilities of working carers (Weldon-Johns 2020). Nevertheless, a more flexible right to paid carers' leave that is broadly defined would offer greater potential benefits to working carers. This would also challenge the standard male worker norm, the boundaries between paid work and unpaid care, and would recognize that all working persons can be impacted by caring responsibilities at any time.

Childcare Infrastructures

Finally, it is clear that investment in childcare and social care infrastructures is necessary to ensure that working women are able to engage in paid work. The pandemic has underscored the continuing fragility of women's work and the resilience of traditional gender roles when such structures are absent. This reinforces that women's work continues to be viewed as ancillary to men's work, and that women can, and will, revert to the private sphere to fulfil this role when this cannot be provided outside of the home. Indeed, research by Pregnant then Screwed (2020) highlights that 81 per cent of employed mothers who responded to their survey reported that they needed childcare to work. The interdependency of these spheres and their impact on women's work must be recognized. Consequently, the post-pandemic recovery must ensure that there is investment in childcare infrastructure to redress these inequalities and ensure that women can remain in—or return to—paid work (Margaria, 2021; UK Women's Budget Group & Ors 2021; Fawcett Society 2020: section 8). Without this, it is clear that any potential gains made, or lessons learned, during the pandemic in challenging traditional models of work will fail to benefit women in the longer term. These tensions are similarly evident in the experiences of abortion care, the subject to which we now turn.

[D] REPRODUCTIVE HEALTH

Access to abortion has long animated the cause for gender equality and advocating for reproductive autonomy has always been a central strand of feminist advocacy. Access to abortion within mainland Britain is considered a key strand of reproductive health policy with abortions offered by the National Health Service (NHS). However, there are still real barriers preventing many women from accessing appropriate reproductive healthcare, especially disabled women, trans and non-binary people, refugee and migrant women, BAME women, women with abusive partners or families, and women who live rurally (Engender 2016: 7-19). As we argue above, the immediate pandemic law and policymaking by the UK Government demonstrated a dearth of understanding of women's specific needs. It also reified the traditional heteronormative family model, which is premised on a married couple with children. This presupposed a stereotypical family arrangement where the woman either did not work or worked part-time. The regressive gender stereotyping was clear in Government framing that positioned women as mothers and caregivers throughout the pandemic. These same regressive gender stereotypes can be seen in the UK and devolved Governments' approach to women's reproductive health. Here, the pandemic-necessitated move away from in-person service provision has created space for a service that is actually better for many women. Yet, because of the nature of these services—abortion provision—it seems lawmakers are keen to return to the pre-pandemic status quo that is less beneficial to women. This demonstrates that, once again, women's needs and interests are not at the heart of law-making or policymaking.

Thus, similar to the deprioritization of childcare and work-family rights, women's health needs were also deprioritized and the effect of this downplayed (Engender 2020). The initial closure of GP services and many clinics for in-person appointments not only made it difficult for women to manage issues such as pregnancy, contraception, emergency contraception, and gynaecological and sexual health, it also reduced the space available for women to access environments in which they could safely seek help from domestic violence or other abusive behaviours (Scottish Government 2020b: 5). Yet, while the authors agree with the criticisms levelled at the UK Government and devolved administrations for their failure to adopt a gendered assessment in their immediate pandemic response, in this section we highlight how the exceptionalism wrought by the pandemic has provided an opportunity to rethink and redo policy that affects women. We consider the lessons that can be learned from this. This section sets out how the pandemic has in fact provided an

opportunity to change how women and pregnant people access abortion and other reproductive health services and how this has allowed for a more patient-orientated service that is able to better cater for those women who traditionally have faced barriers to accessing abortion. These changes to abortion access were brought about due to the constraints placed on in-person services by the pandemic. As such, these changes to abortion access were made in the absence of the usual criticisms and moralistic debates on abortion that generally accompany any discussion on reform of services and have previously hindered attempts to relax the law. Thus, the pandemic has provided the perfect context to introduce services for which abortion service providers and charities have long been lobbying. However, what is problematic is that governments have made clear that such provisions, even when faced with overwhelming evidence of their success, are merely temporary. This once more demonstrates that women's needs are not at the heart of law-making and that any dismantling of the public/private divide during Covid-19 is not a permanent one. This is problematic because access to reproductive health that allows women to plan when they have children is recognized as being necessary for gender equality (International Planned Parenthood Federation 2015).

Abortion Regulation Pre-pandemic

The passing of the Abortion Act 1967 was heralded as a momentous gain for women's rights and freedoms (Sheldon & Ors 2019). For the first time in Great Britain there was a legal exception to the criminalization of abortion. The 1967 Act does not decriminalize abortion, and those undertaken outwith the terms set out in the Act remain criminal. The Act provides that: 'a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner' and meets certain requirements set out in section 1(a)-(d) (Abortion Act 1967). Such abortions would be criminalized in England and Wales under the Offences Against the Persons Act 1861 and under the common law in Scotland. However, there is debate over whether Scots law has ever criminalized abortion given that pre-1967 jurisprudence allowed for a more liberal regime than in England (Norrie 1985; Brown 2015).

Yet, as Sheldon (1993) has highlighted, the Abortion Act is an incredibly patriarchal and paternalistic framework that merely replaced the criminal justice system as the gatekeeper of women's reproductive rights with medicalization. Indeed, the 1967 Act has been described as a 'curious' piece of legislation 'due to the fact that it does not grant any rights to women that seek to terminate pregnancy' (Brown 2015: 29). It instead

confers a privilege upon doctors. Scott (2015) notes that, far from being a liberal regime, the fact that section 1(1)(a) of the Abortion Act still requires women to gain the permission of two doctors—even in the first trimester—can be read as an obstacle to women’s reproductive autonomy (ibid: 39). Indeed, one of the reasons listed for the requirement for two doctors to be enshrined in law was that it would require the woman to demonstrate a ‘seriousness to terminate’ (House of Commons Science and Technology Committee 2007: 32). Such reasoning reflects the fact that in the 1960s abortion was a surgical procedure and carried risks if not carried out by trained doctors. The lack of legal provision prior to 1967 meant that thousands of women died from complications arising from the unsanitary conditions in which such ‘backstreet abortions’ occurred (Cavadino 1976). However, advancements in medicine mean that the majority of women who undergo an abortion today do so by medical abortion (NHS Information Services Division 2019) and the de-stigmatization of abortion has meant the eradication of ‘backstreet’ secret abortions that were often carried out in unsanitary and dangerous conditions. The development of drugs that can successfully be used for early term abortions means that, for most women, abortion today is a very different and much safer experience than it was in the past (World Health Organization 2018).

However, the moralistic overtones that continue to frame abortion as controversial have remained, and any attempts to reform abortion law are generally met with hyperbolic rhetoric (Mitchell 2021). This has meant that, since 1967, UK lawmakers have only amended the Abortion Act once, in 1990, and remain generally reluctant to revisit abortion legislation. Thus, the overarching criminalization remains, as do the constraints set out in the 1967 Act (Grubb 1990). Yet, this means that the tight restrictions on abortion, which were specifically designed to protect women by allowing abortions only in approved medical settings, now serve as a barrier to women, as many would prefer to self-manage abortions at home when undergoing early medical abortion (Pizzarossa & Nandagiri 2021). Generally, early medical abortion is achieved by administering the drug misoprostol via a single pill and then a day or two later administering the drug mifepristone via a single pill (British Pregnancy Advisory Service (BPAS) 2021). Where previously the Abortion Act’s requirement for abortions to take place in a registered or approved premises was understood to mean a hospital or similar clinical setting in order to prevent private enterprise from seeking to make abortion a profitable business and offering it in private premises, it was also thought that hospital settings would be necessary should anything go wrong. Thus, it is clear that the legislative framework for abortions that mandated they be carried out within clinical premises was

there to protect women from the risks associated with unsafe abortions. That risk no longer exists. As a consequence, women's organizations and abortion charities have long campaigned for a relaxation of the law to allow for self-managed abortion at home.

Despite the evolution in safe early medical abortion, until recently, compliance with the law meant women still had to attend a clinic to take the first pill and then return a day later to take the second pill. This did not provide a better healthcare experience for women, nor make abortions safer (as was claimed by anti-choice organizations), as women generally departed the clinic as soon as they administered the medication in order to complete their abortions at home. However, this resulted in some women, especially those who live rurally, beginning to experience symptoms while travelling home. For some, this even meant beginning to pass the pregnancy while on public transport (Purcell & Ors 2017). It was not until 2017 that lawmakers throughout the UK consented to relax the requirement that mandated women attend clinical settings to administer both pills for medical abortion. Scotland was first in the UK to move to a system that allowed women to take the second pill at home, thus removing the chance that a woman will begin her abortion while travelling home. The Scottish Government used its powers under section 1(3A) Abortion Act 1967 to approve 'the home of a pregnant woman who is undergoing treatment for the purposes of termination of her pregnancy' as a place where an abortion could legally take place.¹ The UK Government and Welsh administration similarly approved women's homes as premises for abortion in England and Wales.²

Any attempt by abortion providers to move to self-managed abortion pre-pandemic was undermined by anti-choice organizations who have challenged what they see as relaxations of the Abortion Act 1967. The amendment to the class of place that allowed for administration of abortion medication at home was challenged in the Scottish courts by the anti-choice group the Society for the Protection of Unborn Children (SPUC) on the grounds that a woman's home was not a suitable premises as envisioned by the Abortion Act. They asked the court to reverse this decision (*Society for the Protection of Unborn Children v Scottish Ministers* (2018)). The Court upheld the Scottish Government's use of these powers at both first instance and on appeal (*SPUC Pro-Life Scotland Ltd v Scottish Ministers* (2019)).

¹ Abortion Act 1967 (Place for Treatment for the Termination of Pregnancy) (Approval) (Scotland) 2017.

² Abortion Act 1967 (Approval of Place for Treatment for the Termination of Pregnancy) (Wales) 2018; Department of Health and Social Care (2018).

This decision was celebrated by abortion care providers, abortion rights organizations and women's groups. Yet, while this win was a huge vindication for those seeking to offer easier access to abortion, it can also be seen as a procedural compromise. The changes only allowed for the second pill to be taken at home, so still required an in-person visit to administer the first pill on site. While an improvement, this requirement still presents obstacles, and, as several women's groups and abortion rights groups have highlighted, disproportionately affects poorer women, disabled women, women with childcare responsibilities, women in abusive relationships, and women living rurally, as it is generally more difficult for them to organize the time away from work or childcare to travel to a clinic. For other women, this can also be prohibitively expensive, or difficult to ensure privacy (Engender 2016: 7-19). While it is disappointing that abortion providers did not feel able to push for a more radical interpretation of the Abortion Act 1967 that would have negated the need for women to attend in person at all, it is understandable that it was important to first secure this victory to allow women to administer the second pill at home. This was particularly welcomed as it meant that those who had further to travel or could not afford taxis no longer were forced to begin their abortions whilst on public transport. Thus, the relaxations were a welcome step in providing reproductive healthcare that acknowledged the pain, suffering and indignity that the two-day in-person attendance placed on many women.

Pandemic Opportunities in Reproductive Healthcare?

The pandemic actually provided the impetus for the radical revision of abortion provision in mainland Britain that seems unlikely to have been implemented otherwise. The necessity of reducing non-urgent in-person medical consultations meant that many patients were being offered telephone or internet consultations with their medical teams. This is known as telemedicine. To ensure staff and patient safety, and also free up NHS resources to fight Covid-19, it made sense that abortion services be offered in the same way. It generally involves a patient having a telephone or internet consultation and then being prescribed both abortion pills to take at home and bypasses the need to attend the clinic. Since this is how abortion is provided in many other jurisdictions and is known to be safe (Aiken & Ors 2021a; 2021b), it would appear that pandemic necessity forced a move to a service that is actually more appropriate for many patients. It allows for a quicker and more efficient service for abortion and also does not require women to travel. The Scottish Government allowed for telemedical abortion through issuing revised guidance to abortion providers (Scottish Government Chief Medical Officer 2020).

The guidance was put forward by the Scottish Abortion Care Providers Network (2020). What is curious is that the move to telemedical abortion required only a minimal change to the law.³ Indeed, it was clear from the earlier court judgments that it would have been within the power of the Scottish Government to allow for telemedical abortions back in 2017 when it amended the law to list the woman's home as a suitable place for an abortion. If her home was suitable to administer the second pill, then it stands to reason it would be suitable to administer both pills.⁴

While the availability of telemedicine during the pandemic has actually been an opportunity for women's health services to reorganize service provision around the actual needs and wants of patients, it has taken the lockdown, and the necessary move away from in-person services to prevent Covid-19 transmission, to actually facilitate this. Indeed, at the start of the national lockdown in 2020, in England the Department of Health (DOH) issued guidance to allow for full telemedical abortion in England in March 2020 (Department of Health and Social Care 2020b). Yet, when this was reported in the media and attracted backlash from anti-choice groups, the guidance was withdrawn and the DOH claimed it had been published by mistake (Ford 2020). It was only following media pressure by women's groups that the guidance was reinstated and telemedical abortion made available in England during the pandemic. Despite recent changes to the law to provide for abortion provision in Northern Ireland, no telemedical services were made available by the NHS there. Northern Irish women seeking abortion continued to travel to Britain, even at the height of the pandemic. This situation was roundly criticized as being both damaging to the individual woman and also to attempts to reduce the spread of Covid-19 (Bracke 2021; McManus 2021; see also Todd-Gher & Shah 2021).

Yet, despite the success of telemedical abortion, both the Scottish and UK Governments have made clear that such provision is only a temporary state of affairs. Despite evidence reported by patients and service providers that telemedicine offers a better service (Prandini & Larrea 2020), the English,⁵ Scottish⁶ and Welsh⁷ Governments all launched

³ The Scottish Government again used its powers to approve a pregnant woman's home as a class of place for the termination of a pregnancy. This time the legislation allowed for both pills to be taken at home after an online or telephone consultation. See the Abortion Act 1967 (Place for Treatment for the Termination of Pregnancy) (Approval) (Scotland) 2020.

⁴ However, Taylor and Wilson (2019) argue that the first instance case is wrongly decided.

⁵ Department of Health and Social Care (2020a) and Scottish Government (2020a).

⁶ Scottish Government (2021).

⁷ Welsh Government (2020).

public consultations on the future of telemedical abortion provision. As women's organizations and abortion rights charities highlighted, no other healthcare decisions are made on the basis of public opinion. The fact that governments would choose to consult the public on the future of abortion services, rather than use an evidence-based approach from both patients and the experts, suggests once more that women's needs and realities are not placed at the centre of law or policymaking. Instead, they are subordinate to wider influences. This again demonstrates that women's needs are conditional on overcoming hidden barriers rather than be taken as read, meaning law and policy actually reinforce harmful patriarchal gendered stereotypes. In the case of reproductive healthcare, law and policy changes that would provide a more patient-oriented service are too often 'balanced' against moralistic objections voiced by anti-choice groups. In labelling the provision of telemedicine temporary, and subjecting its future to public consultation, the governments are once again subordinating women's needs and wants to the wishes of anti-choice and anti-women influences. Any potentiality offered by the pandemic seems set to be lost in the return to mandatory in-person abortion services.

What Has the Pandemic Highlighted?

Thus, it is clear that the exceptionalism and necessity wrought by the pandemic has allowed for a streamlined approach to relaxing the guidance on abortion provision. This is a change that has benefitted women and has been welcomed by abortion service providers (BPAS 2020). However, it has once again shone a light on the fact that, in regular times, simple changes in, or relaxations of, abortion guidance are difficult to achieve due to the residual moralistic framing that remains. For too long, women's particular healthcare needs have been classed as 'controversial', which has meant unnecessary medical oversight, placing a burden on individual women and creating barriers to access (Purcell & Ors 2014).

Nevertheless, the necessity for people to remain at home has meant the widespread adoption of telemedical abortion has allowed women to access healthcare from their own homes. This has allowed for a patient-centric service that has generally been welcomed by both service users and service providers, and has generally meant women are having abortions earlier and therefore more safely (BPAS 2020).

The fact that telemedical services have been so successful suggests that they should continue as an option for women. The reluctance of the English, Scottish and Welsh administrations to commit to continuing this

successful model post-pandemic suggests that they are not committed to women-centric services that place the individual patient's needs at the centre. Indeed, while this section has used reproductive rights and abortion services in general as a case study for viewing emancipatory potential for female-centric law and policymaking, it recognizes that the exceptionalism narrative deployed to justify lockdown law-making means that, post-pandemic, politicians seem likely to return to framing women's reproductive healthcare as controversial. This will mean the continuation of moralistic balancing exercises, despite evidence that telemedical abortion is successful and more appropriate for many women. This seems a needlessly regressive step.

[E] CONCLUSION

We have argued that the lack of gender sensitivity at the beginning of the Covid-19 lockdown produced both unintended harsh consequences for women, but also the space to envision emancipatory possibilities. We explored the distinct but related examples of home-working and reproductive health to demonstrate a lack of awareness about women's lived reality in legislating and policy around Covid-19. While the Government eventually amended its initial lockdown policies and law to allow for some children to remain in childcare or education (where necessary to allow parents to work) and called on employers to embrace flexible working, it only did so after much criticism by women. In the same way, abortion guidance was only relaxed to allow for self-managed abortion at home after it was highlighted that abortion is a time-critical and necessary health service, and that lack of provision would result in serious consequences for women's mental and physical health. In this way, accommodations were made that acknowledged women's specific needs. These accommodations, if enshrined further in law, have the potential to benefit women and contribute to lasting gender equality. However, we have demonstrated that such potentiality needs to be harnessed and embedded in law and policy in order to further and not hinder gender equality. The fact that flexible working and revisions to work-family rights are not guaranteed, and that provisions allowing for home abortions may not be continued, point to a short-sightedness and a stubbornness on the part of the law-makers in upholding and reifying the public/private divide.

We caution against such a regressive approach as the Covid-19 recovery plan will only succeed if it centres women's actual needs at its heart. Without these measures entrenched, inequality will be further cemented by the pandemic. Ultimately, women-focused law-making must take

account of women's lived reality in order to ensure that gender equality is not set back a generation.

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IN THE SHADOW OF THE LAW: BAHRAINI WOMEN'S REALITIES WITHIN THE COVID-19 PANDEMIC

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Abstract

With the emergence of the Covid-19 global pandemic, the questions of gender and sect have been reintroduced in Bahraini media as examples, spectacles and objects of critique. The pandemic does not only carry a health risk, but it has also become a means of social-conditioning, surveillance and the reification of difference for Bahrainis. In the cases of Ania and Fatima, the pandemic was a time that defined key moments in their lives: their ability to name and shame their abusers online. However, as these women bravely shared their stories, they were confronted by social and cultural forces that attempted to silence them. Although these two testimonies are not representative of all women's experiences in Bahrain, they shed light on the various legal, familial and social structures that affect women's lived experiences. This research will further explore the legal and social silencing of women's lived experiences through the lens of the Covid-19 pandemic. This research aspires to carve an academic space that brings some justice to these women, by sharing their experiences in light of the emerging sociopolitical, sociolegal and cultural contexts of their society. In this research, I answer the following questions: (1) to what extent does Law No 19 of 2017 on the Family Law (also known as the Unified Family Law of 2017) perpetuate silencing on the grounds of gender and sect throughout the pandemic in Bahrain? And (2) to what extent has the Covid-19 pandemic amplified the expectations ascribed to women on the grounds of gender and sect in Bahrain? The focus on the Unified Bahraini Family Law of 2017 is vital to understanding the social expectations that frame women's lived experiences in Bahrain. It complicates the lives of women, as the state imagines unification, but the reality suggests that women are found at the intersection of gender, sect, structures of kin, trauma and, lastly, the sociopolitical implications of the Covid-19 pandemic.

Keywords: digital space; marginalization; Covid-19 pandemic; Bahraini family law; sect.

[A] INTRODUCTION

Today I decided to break my silence and speak about my terrible childhood ... From the age of nine till 16 I was repeatedly raped by three people. Three people continuously raped me ... Three people destroyed my life completely (Ania 2020a).¹

On 27 June 2020, a Bahraini woman with a pseudonym of Ania resorted to Twitter in an attempt to break her silence on her abuse, speaking about how she was raped by three people for a period of over seven years. Ania concluded her statement pitting the complete destruction of her life against the ‘great perfection’ by which the abusers continue to live (Ania 2020a). Ania’s story was one of many circulated throughout social media platforms emerging at the heart of the Covid-19 pandemic.² With the increase in the outbreak of the pandemic, state lockdown responses amplified the risks that women experience globally (UN Women 2020). The ‘Shadow Pandemic’ has become the term that connotes the endemic violence against women and girls, specifically the violence experienced in the dark, shadowed, albeit prevalent facets of societies—mainly the households (UN Women 2020; Okwuosa 2021). Although Ania’s story is akin to the multiplicity of narratives represented by the Shadow Pandemic, her story neither exists in the shadows of the pandemic nor does it emerge out of a vacuum. Ania’s story is spotlighted by the pandemic; it is representative of the many other silenced women’s and girls’ voices from within the margins.

In the neighboring Gulf Cooperation Council (GCC) state, Kuwait, other stories of silenced women were brought to the public attention through

¹ Ania is a pseudonym chosen by the informant. The account is currently suspended, however, I recall the choice of the name ‘Ania’ was in reference to the story of a woman who was able to persevere against the tides of injustice. Instead of using the informant’s real name, I chose to retain the pseudonym that the informant used to share her story. Other stories of female victims of sexual assault and abuse will also be anonymized out of respect for their privacy. However, perpetrators will be actively named throughout this research in an effort to contextualize this work as ‘justice-seeking’ (consult the following for more information: Fileborn 2014; Vitis & Gilmore 2017; Mendes & Ors 2018; Harris & Vitis 2020).

² For example, in Jordan, on 18 July 2020, Ahlam was brutally killed by her father, who ‘[smashed] her head with a concrete block in plain view on a public street, then sat beside her body, smoking a cigarette and drinking a cup of tea’ (Balaha 2021). The image of a father standing beside the cold, bloodied body of his daughter, plainly and silently enjoying a cigarette and a cup of tea, presents an eerie reality of the active, violent, and gruesome silencing that Ahlam experienced. ‘Ahlam’s screams’ (#صرخات_أحلام) hashtags began to circulate along with video footage of her murder. Although her family and witnesses did not save her in time, Twitter users comprising activists, civil society organizations and general users organized both digitally and in person (Balaha 2021) in an attempt to answer Ahlam’s screams and prevent other women from experiencing the same. Whether these initiatives were effective remains uncertain.

the digital space. ‘Sabah al-Salem Crime’³ hashtags (Abueish 2021), ‘Al-Ahmadi Crime’⁴ hashtags, followed by ‘I am next’⁵ hashtags trended in the Twittersphere, with activists, feminists, men and women from across the GCC sharing their discontent with state failures in protecting women. Twitter users, in Kuwait to be specific, used the Twitter platform to ‘name and shame’⁶ perpetrators, advocating for justice for the women who died in al-Salem and Al-Ahmadi, and other major cities (Abolish153 2021). Twitter users demanded justice, punishment for the perpetrators, and for the abolition of honour crime codes in Kuwait, and across the GCC (Abolish153 2021).⁷ What remains striking in these hashtag campaigns is the growing support for the lives of women lost to gruesome murders in Kuwait. In most posts, the women’s names were disguised, kept in the shadows, leaving the crime to speak and Twitter users to demand justice for them. Despite the fact that the ‘I am next’ hashtag was also trending, certain cases of women using the digital space to share their trauma, whether in the past or ongoing, did not fully merit the same advocacy, response, or Twitter hashtags. In fact, Twitter users in the case of Ania, for example, demanded proof whilst constantly questioning her story, and rendering her experience as a mere fiction, a honeytrap, or a young girl’s thirst for attention.

In July 2020, Fatima’s⁸ testimony was circulated across social media platforms, identifying Ayman Al-Ghasra as the man who raped her and threatened to ruin her reputation. Fatima’s testimony was followed by

³ This hashtag emerged in Arabic throughout Twitter, Instagram and other social media platforms under the hashtag #جريمة_صباح_السالم.

⁴ This hashtag emerged in Arabic throughout Twitter, Instagram and other social media platforms under the hashtag #جريمة_الأحمدي.

⁵ This hashtag is not to be confused with the #MeToo movement. It emerged in Arabic throughout Twitter, Instagram and other social media platforms following the murders of women in the cities of Al-Salem and Al-Ahmadi in Kuwait. The hashtag trend can be found via the following: #أنا_التالية.

⁶ Naming and shaming functions as a tool of confronting perpetrators in the digital space. This is evident in the #MeToo movement emerging globally. For more information, see Fileborn & Loney-Howes 2019.

⁷ The crimes committed in Kuwait with respect to the hashtags mentioned earlier continued to trend in light of the recent crime in Kuwait where a mother kept her daughter’s dead body in the bathroom for five years (*Arab Times Online* 2021).

⁸ ‘Fatima’ is a pseudonym chosen by the researcher to represent the second informant. The story of ‘Fatima’ was shared via ‘Ania’s’ account which is currently suspended. Instead of using the informant’s real name, I chose to anonymize the identity of the informant by using a suitable pseudonym to share her story.

the hashtag ‘Exposing Bahraini sex trafficking gang’,⁹ which exposed a group of Bahrainis including Ayman Al-Ghasra who deceived Fatima into trusting him while she was travelling to Iraq. Fatima was raped, while her young son was locked in a neighbouring room. Fatima’s testimony was subverted, undermined and rendered as a fictitious narrative—that of a Shi’a woman, who was once deemed to be a threat to the state. Some users pointed to Fatima’s role in the 2011 protests, where she was arrested and tortured by Bahraini authorities and forced into a false confession (France24 2013). Fatima’s rape testimony was further falsified, as some users called her a ‘traitor’ and ‘attention-seeker’ for publishing a video of her apologizing to the King for insulting him, shortly after the Bahraini protests of 2011.¹⁰ In the latter example, Fatima was seen as a traitor to the cause, and thus her rape testimony was seen as unreliable.

In both cases, Ania and Fatima share similar stories and standpoints. They are both women and they are both Shi’a. Additionally, both women live with their families. Both women resorted to the digital space to share their experiences. Both women shared testimonies of acts emerging from within an intimate private space, concerning the violation of their bodies. Both women attempted to expose their assaulters in an effort to garner support from the community. In both cases, most online reactions were derogatory, negative and perpetuated specific social expectations of both gender and sect in Bahrain. In the case of stories of women breaking their silence, such as Ania and Fatima, the digital space no longer functions as a public space where opinions can be shared, experiences and stories can be told, and where your online identity is not conflated with your offline one. Instead, the digital space has become a tool of policing and silencing, not only by the Bahraini state, but also by Bahraini digital citizens. In these two cases, respondents engaged in actively silencing these women, calling them attention seekers, disobedient and deserving of their trauma. Respondents also indicated that ‘such stories’ should not be shared publicly, and specifically on Twitter. In the eyes of these interlocutors, these stories neither merit the privilege of being shared publicly on social media, nor do they merit the privilege of a hashtag campaign calling for justice against their perpetrators.

These two case studies are central to this research. Although these women are sharing their experiences of domestic and communal violence, online responses to their experiences reify the structures of silencing

⁹ This hashtag emerged in Arabic throughout Twitter, Instagram and other social media platforms under the hashtag: #فضح_عصابه_الاتجار_بالجنس_البحرين.

¹⁰ These comments were gathered from a social media analysis of [Fatima]’s testimony across different platforms.

taking place in Bahrain. In various responses, we see users utilizing language pertaining to the social expectations ascribed to women akin to the language emerging from within Law No 19 of 2017 on the Family Law (also known as the Bahraini Unified Family Law of 2017). Respondents also pointed to the intimate nature of these testimonies, and how narratives that deal with the private space of family, the household, and a woman's body ought to remain private. Although these two testimonies are not representative of all women's experiences in Bahrain, they shed light on the various legal, familial and social structures that affect women's lived experiences. This research will further explore the legal silencing and social silencing of women's lived experiences through the lens of the Covid-19 pandemic. This research aspires to answer the following questions: first, to what extent does the Unified Family Law of 2017 perpetuate silencing on the grounds of gender and sect throughout the pandemic in Bahrain? Second, to what extent has the Covid-19 pandemic amplified the expectations ascribed to women on the grounds of gender and sect in Bahrain?

While these are merely two experiences that trended on Twitter among Bahrainis, they are vital and central to the research at hand; both women were brave enough to break their silence and withstand social, legal and structural enmity. Despite their bravery, the structures that these women confronted through their stories have arduously silenced them. This research engages in a dialectic reading of laws, narratives and lived experiences. The focus on the Unified Bahraini Family Law of 2017 is vital to understanding the social expectations that frame women's lived experiences in Bahrain. Family laws delineate the public and private spheres and further designate roles and expectations to women as they navigate both spaces.¹¹ Family laws are often equated to 'women's rights within the family' (Welchman 2012: 371), however, it is important to note that women's rights in this case become '*dependent on the family*' (Hubail 2019: 18, emphasis added). Thus, family laws do not only demarcate the roles of men and women within the family, essentially the private space, they also construct the limits to which women can be socially and

¹¹ Family laws across the GCC states reference specific rights a woman has access to within the family and by extension the public space. For example, the Qatari Family Law 2006 explains that a husband ought to consent to his wife's pursuit of an education inside the country 'in so far as this does not conflict with her family duties' (Qatari Family Law 2006). Here, a woman is expected to primarily be obedient in order for her to be able to pursue an education. The law also assumes that women graduating from high school are more likely to get married prior to pursuing an education. Additionally, the Ministry of Interior in Qatar permits single women above the age of 25 to travel outside of Qatar without the permission of their guardian. However, customs rely on Article 69(4) of the Family Law that states that wives travelling without the consent of their husband would be rendered as 'disobedient'. This, in practice, also applies to single women, rendering their singlehood as irrelevant in the requirement for permission from their guardians.

economically active, mobile, and independent. Family Laws also reduce women to the social roles of wives and mothers. Furthermore, these laws pose social limitations, expectations and specific gendered subjectivities aiming to mould women into the ideal, submissive, silent citizen in the eyes of the state. In the case of Bahrain, this idealism is complicated when accounting for the relationship between gender, sect and violence. For Bahraini Shi'a women, family law already grants them limited rights in comparison to their Sunni counterparts. When accounting for violence committed against a woman, and in this case against her body, she is rendered as 'unusable' or tainted, thus implying that women's bodies do not belong to them. Rather, they are a product of the private sphere, and they belong to that space. Women, in this case, are expected to constantly navigate and negotiate their social/public and intimate/private selves. Confronting sexual violence further challenges this duality. As the cases of Ania and Fatima show, their testimonies of sexual assault, specifically of rape, subjected them to social repercussions and interpretations of gendered subjectivities—as obedience to family, reputation, and the implications of public exposure were invoked. Ultimately, these responses not only silenced these women, but functioned as a social reminder of their gendered obligations. Hence, by focusing on the law, state politics and the lived experiences of Ania and Fatima, this research will show how these sources speak to one another dialectically. The dialectical process central to this research aspires to 'provide a more in-depth nuanced understanding of research findings and clarifying disparate results by placing them in dialogue with one another' (Mertens & Hesse-Biber 2012: 75). The objective is to represent realities as they emerge, to showcase how the legal and national imaginaries of the Bahraini state, and members of the society, through the digital space, police gender and sect specifically within the pandemic.

[B] COVID-19: THE BAHRAINI EDITION

The outbreak of the Covid-19 pandemic has drastically tested states' responses to emerging public health concerns (Adolph & Ors 2021), which has impacted the legal, social, political and economic realities of citizens (Mezran & Pertaghella 2020). Bahrain, through the lens of the pandemic, presents a complex friction between state-sanctioned narratives and people's realities. Throughout the pandemic, Bahraini authorities actively engaged in silencing citizens, in embellishing life in Bahrain, and concealing the ongoing violence and torture against its citizens (Alhajee 2020; Amnesty International 2020a; Michaelson 2021). The Covid-19 pandemic introduced a ripe opportunity for state surveillance and unequal

access to sites of redress, thereby further exacerbating existing sectarian and gendered inequalities (Amnesty International 2020b; Garthwaite & Anderson 2020; Statt 2020; Human Rights Watch 2021b). On 19 March 2020, reports showed over 1500 Bahraini nationals stranded in Iran due to travel disruptions in response to the coronavirus outbreak (Bahrain Institute for Democracy 2020). The Bahraini authorities refused to repatriate nationals, which was justified by using two main arguments: (1) public health of Bahrainis living in Bahrain; and (2) ‘biological aggression’ from Iran (Bahrain Institute for Democracy 2020). Using the public health of Bahrainis as a central concern, the Bahraini Parliament agreed with ‘a majority vote’ to ‘[delay the repatriation] of Bahraini citizens afflicted by the virus (in Iran) until they recover’ (Alkhawaja 2020). This decision was coupled with the refusal to repatriate citizens primarily because their passports were not stamped by Iranian customs. Sheikh Rashid bin Abdulla Al Khalifa, the Bahraini Minister of Interior, deduced that Iran’s actions in this case amounted to biological aggression, since the absence of a stamped passport indicating arrival from Iran functioned as an intentional attack on Bahrain. He stated:

With this behaviour, Iran has allowed the disease to travel abroad, and in my estimation this constitutes a form of biological aggression ... as it has put in danger our safety and health and that of others (Eltahir & Barrington 2020).

National security and public health were utilized as the primary crutches that the state was leaning upon to justify its actions towards Bahraini citizens stranded in Iran. Additionally, the Bahraini Government introduced various hurdles preventing the repatriation of citizens, such as: ‘instructing’ the Shi’a Ja’fari Ministry of Endowment to fund the return of Bahrainis stranded in Iran and cancelling scheduled flights, further prompting Qatar’s involvement in supporting the stranded Bahrainis in Iran (ADHRB 2020). In this specific case, ‘instructing’ a ministry, ‘cancelling’ flights because of ‘logistics’, ‘requiring’ parliamentary votes, maintaining ‘national security’, and upholding ‘public health’ were the primary justifications employed by the state (ADHRB 2020; Middle East Eye 2020; The New Arab 2020). These narratives, in the minds of many citizens, equated to unequal treatment, sectarian tensions, the misconception that Shi’a Bahrainis are pawns serving the Iranian agenda, and, possibly, the health of non-Shi’a citizens (also known as citizens who do not travel to Iran) being more important than the health of Bahrainis stranded in Iran.

Narratives pointing to Iran as the prime suspect in the outbreak of a global pandemic began to recede within the second half of 2020. Instead,

Bahrain, as with other GCC states, spread narratives symbolizing progress and normalcy. On 15 September 2020, Bahrain signed the 'Abraham Accords: Declaration of Peace, Cooperation, and Constructive Diplomatic and Friendly Relations' normalizing relations with Israel (Singer 2020). The Supreme Council for Women published various reports celebrating the efforts taken to empower women (Supreme Council for Women 2020).¹² A Formula 1 event was hosted in Bahrain showing the unity of a community and happy citizens. The rosy lens of these state-sponsored narratives, taking place within a global pandemic, function as state-sanctioned tropes disguising the realities for citizens in Bahrain. In fact, Bahrainis engaged in activism both offline and online. On the one hand, 14 February 2021 marked the 10-year anniversary of Bahrainis protesting against state authoritarianism (Al-Jazeera 2021; AP News Wire 2021; MacDonald 2021). Minor protests were reported throughout Bahrain (Al-Jazeera 2021; AP News Wire 2021) coupled with active online campaigns, such as: Resist Until Victory 10.¹³ Bahrainis also expressed their dissent online against the normalization of relations with Israel, reporting archival images showcasing the community's long history of pro-Palestinian support (Al-Jazeera Mubasher 2020). While Bahraini media boasted the ability to host the Formula 1 during the pandemic and social media platforms were bursting with pictures of happy citizens holding Bahraini flags at the Grand Prix, Bahrain simultaneously launched campaigns dedicated to 'curbing' (Amnesty International 2020b; MEI 2020; Soliman 2020; Human Rights Watch 2021b) the spread of rumours that might disturb public opinion—a practice long-existing in the state of Bahrain (Jones 2013; 2016; 2020a; 2020b). At the same time, arbitrary arrests of children in February 2021 took place (Human Rights Watch 2021a; Reuters 2021) which were followed by the outbreak of Covid-19 in Jau Prison and threats made against relatives of dissidents (Amnesty International 2020a, 2020b). Protestors, although significantly smaller in number than in 2011, demanded the cancellation of the Formula 1 race and demanded the freeing of prisoners. One report exposed the arbitrary arrest and torture of a 13-year-old Bahraini, shedding light on violent police brutality. Police officers tortured the 13-year-old Bahraini boy by hitting him on his head and genitals. They repeatedly threatened him with rape and further subjected him to electric shocks (Human Rights Watch 2021a; Reuters 2021).

¹² Some of these publications include: *The Efforts of the Kingdom of Bahrain to Contain the Repercussions of the Coronavirus (COVID-19) Pandemic on Bahraini Women and Families* (2020); *National Gender Balance in Future Sciences Initiative* (2021); and *National Plan for the Strategy for the Advancement of Bahraini Women* (Updated 2021).

¹³ This hashtag emerged in Arabic throughout Twitter, Instagram and other social media platforms under the hashtag: #نبات_حتى_النصر. The translation used here is the author's own translation.

While reports celebrated the achievements of institutions such as the Supreme Council for Women, none of them explicitly mentioned rates of domestic abuse, family violence and gendered violence taking place within Bahrain. In fact, the celebrated 15-page report published by the Supreme Council for Women, *The Efforts of the Kingdom of Bahrain to Contain the Repercussions of the Coronavirus (Covid-19) Pandemic on Bahraini Women and Families* contains no reference to domestic violence, family violence, gendered violence, or any action taken to ameliorate the conditions that women experience (Supreme Council for Women 2021). One news article, showcased that *Shamsaha*, a crisis response programme in Bahrain catering to women experiencing violence, had experienced a 46 per cent increase in cases of domestic violence in April 2020 (Zawya 2020). No further reports were published on any rates of domestic violence. Most headlines pertaining to ‘women’ or issues of ‘gender’ in Bahrain addressed the economic infrastructures that the state is providing to help women throughout the pandemic.

Although global reports have significantly mapped the surge in domestic violence, divorce and gender violence rates (Evans & Ors 2020; UN Women 2020; World Health Organization 2020), Bahraini reports continue to exclude this data. The absence of official statistics—or even statistics from active organizations—further distorts our understanding of Bahraini women’s lived realities. Despite the fact that the Unified Family Law was promulgated in 2017 as a successor to the 2009 (Sunni) Family Law, there remains a significant gap in information regarding the application of laws and practices. Thus, an overview of how the Family Law operated throughout the pandemic, such as whether court cases involving family matters increased in Bahrain, as well as domestic violence rates, remains hidden from the public eye.

What materializes as visible throughout the pandemic is the active concealing, silencing and correcting of narratives emerging from within Bahraini society. For example, while the Formula 1 event was being promoted, authorities imprisoned Kameel Juma Hasan, the 17-year-old son of a former prisoner. In 2020, Kameel recounted the accounts of his mother being sexually assaulted by the authorities in 2017 (Americans for Democracy and Human Rights in Bahrain (ADHRB) 2020). Immediately after the Formula 1 event, Jau prisoner Mahmood AbdulRedha al-Jazeerai disappeared from the public eye. He was forced into solitary confinement after he recorded a message criticizing Covid-19 safety measures in prisons (Human Rights Watch 2020). By contrast, the state had previously published a sanitized narrative of health measures in prisons. Contrary to that, al-Jazeerai’s leaked video showcases a conflicting and dystopian

reality of prison conditions. Sportwashing, or the use of sports events as means to conceal the realities and truths shared by the people, became a vital Bahraini façade—which emerged systemically.¹⁴ In conjunction with state-sponsored silencing, we see another active form of silencing emerging within the digital space. In this case, it is not the Bahraini state that acts as the primary gatekeeper of truth and knowledge, rather Bahrainis themselves are actively policing the digital space and silencing critical narratives. Evident in the cases of Ania and Fatima, this phenomenon reiterates the silences emerging from within the family laws. Thus, digital silencing becomes a medium that furthers the power of the state and social silencing with respect to women at the intersection of gender and sect. This further raises the following questions: how does the law approach gender and sect? What silences emerge within the law itself, and how does it affect women's lived experiences? In what ways does the Unified Family Law of 2017 demarcate public and private spaces? Lastly, what implications are there for women's lived experiences and their narratives of violence arising from this demarcation of spaces?

[C] LAWS, SPACES AND SILENCES

Family laws define the structure of a family within a state. These laws outline how people can navigate social spaces through the institution of the family. In order to legitimate the institution of the family, the Bahraini family law defines marriage as the primary means to start a family, and designates specific rights and duties of men and women. In *Gulf Women*, Amira Sonbol explains that family laws differentiate:

one human being from another in natural or family characteristics ... such as whether the human being is a male or female, married, widowed, or divorced, a father, or legitimate son, a full citizen or less by reason of age or imbecility or insanity and whether he has full civil competence or is limited as to his competency for a legal reason (Sonbol & Dreher 2012: 334).

Family laws in this case define the spaces to which women are entitled, and they define how women navigate these constructed public and private spheres (Hubail 2019). Although citizenship is an expression of how men and women are seen ideally as equals in the eyes of the state, the subjugation of women to the private sphere complicates the way they can be seen by the state—specifically as equals to men. Thus, a woman in Bahrain is not only defined by her gender, but also by the sect she belongs to, her kinship ties and her experiences. The Bahraini National Action Charter of 2001 stipulates that 'men and women alike,

¹⁴ For more on sportwashing in Bahrain, see IFEX 2021; Roussel 2021; Yazbek 2020.

have the right to participate in public affairs and political rights including suffrage and the right to contest as prescribed by law' (National Action Charter 2001: 10). Although the Constitution posits gender equality in the eyes of the state, the rights and liberties granted to women vary from those granted to men within the institution of the family. This is seen through the Unified Family Law. Citizenship here does not only refer to the subject belonging to a state, but is rather the process to which a subject is subjected as a citizen of the state. This is where Suad Joseph's contention of citizenship being a 'gendered enterprise' (2000: 4) plays a key role. Men are 'naturally' citizens, while the extent to which women are seen as citizens is determined by their roles within the family. As Michel Foucault reminds us, citizenship becomes 'a cultural process of subjectification' (1980) a space where cultural and national imaginaries of citizenship are woven into the citizenry. In order for a Bahraini woman to be seen as a citizen, she must subscribe to a 'male-defined kin group', a 'religious sect' and, in the cases of both Ania and Fatima, an 'untainted lived experience' such that she could belong to the Bahraini nation.

Expectations of the Unified Family Law of 2017

On 19 July 2017, Bahrain promulgated its first unified family law. Unlike its 2009 predecessor, the new law functions as a civil code for all Bahrainis, regulating *both* the Sunni and Shi'ite sects in matters of personal status. Praised as a 'milestone' by the King (Toumi 2017b) the unified law was seen as a means of uniting various social groups under one law. In theory, the law should *successfully* supervise, inspect and control the limits of administration while mitigating social divisions between sects in Bahrain. The law was viewed as a historical moment of unity, an achievement of the Bahraini Parliament as it was ratified 'hours after its draft was unanimously supported' (Toumi 2017b). Shura Chairman Ali Al Saleh emphasized, '[t]his law is not just for families, but it is for all Bahrain ... By endorsing the law, we are reacting to all those who want to incite sectarianism and divisions' (Toumi 2017a). The unification of the family law was celebrated specifically because its predecessor was consistently rejected by Shi'a leaders. This rejection was previously justified in light of concerns over who (and what) had the authority to direct decisions pertaining to the family within the Shi'a community. What remains absent in these statements is how this law would benefit women and what social expectations it embodies.

Consider Article 38 of the Family Law. It defines the rights and duties that both spouses are expected to follow, which include: '(i) enjoying each other as a couple; (ii) preserving the family; (iii) respecting

each other as well as their parents and relatives; and (iv) caring and upbringing of their children' (Musawah 2017: 3). The rights that a wife can expect from a husband vary from those a husband can expect from a wife. Article 39 provides for the rights that a wife can expect from her husband: (i) financial maintenance; (ii) non-interference with her right to manage her own assets; (iii) not to be harmed physically or morally; (iv) fairness in maintenance and time spent if the husband is married to two or more wives; (v) maintaining kinship ties with her family; and (vi) not depriving her of offspring (Musawah 2017: 4). Therefore, a husband must financially provide for his wife, keep her safe and protect her, and allow her to exercise her agency with respect to her own assets, with her family and, as will be illustrated in later sections, with her body. However, a wife's duty to her husband requires her to take care of him and obey him, take care of his children, breastfeed them, be faithful to him, take care of his money and his household, and 'not refrain from procreation unless with his permission or a legitimate excuse' (Musawah 2017: 4). With both sects taken into account, these articles illustrate 'gender-specific rights and duties in the spousal relationship' (Welchman 2007: 89). On the one hand, the husband is in charge of financial decisions which translates to 'his authority and control within the family' (Welchman 2007: 89). On the other hand, a wife in return for spatial and financial maintenance must obey her husband. Scholars such as Abu-Odeh (2005), Sonbol (1998) and Mir Hosseini (2003) all indicate that the listing and legislating of such rights are a 'construction of the codes', without much premise in *fiqh* (Welchman, 2007: 89).

The law further stipulates that a wife cannot work outside the marital home without the permission of her husband. Permission to work is an extension of a wife's obligation to obey her husband 'in lawful matters' (Welchman 2007: 98). A wife's right to work needs to be stipulated in the marriage contract if she was not working prior to the marriage. However, in cases where women were working prior to marriage, they have the right to continue to work without requiring the permission of their husbands. The explicit requirement for a woman to include her right to work as a condition in her marriage contract makes the contract legally binding, further suggesting that a husband cannot legally forbid his wife from working. Here, we see the law defining the family structure through the duties and obligations of both spouses. On the one hand, the obligations of a woman within a marriage are centred around the household and the family structure. A woman's role outside the house is not obligatory. Nevertheless, it is permissible—with the permission of a woman's husband—that, in return for her obedience and compliance, the husband

can grant her the right to work. In regard to status and privileges to which men and women are entitled within the family structure, the code paints an unequal picture. A woman is obligated to obey, while a man is obligated to provide. A man facilitates a woman's right to mobility outside the household in return for her obedience. In practice, this frequently translates to conditioning women to uphold social expectations, in which they are often associated with needing to be governed, maintained and controlled. In this case, the law embeds gendered subjectivities and expectations of men and women on the grounds of masculinities and femininities, respectively.

On the level of sect, there are various Articles that designate specific rulings to the Sunnis and to the Shi'as. In regard to suitability (*kafa'a*) of a marriage partner to a woman, the Bahraini Unified Family Law defines suitability as applicable only to Sunnis. This condition requires a guardian of a woman to be able to accept a partner for the woman on the basis that the man is seen as equal to the woman. Article 37 of the family law defines *kafa'a* through the Sunni *fiqh* with four sub-articles (Law No 19 of 2017 on the Family Law). Primarily, suitability is mandatory in the existing conditions that legitimate a marriage, and it pertains mainly to the woman and her legal guardian. Suitability should embody what is viewed as religiously beneficial, and specifically it applies in relation to *all* factors that contribute to its recognition through custom, further allowing social interpretations to come into play. If a husband claims to fulfil the suitability requirements, but is then proven to be unequal to the woman or unable to fulfil the status he claimed to possess, the wife and her legal guardian have the right to terminate the marriage contract. Despite the applicability of the suitability criterion to Sunnis, according to an interview with Sheikh Moussa, a Shi'a cleric, *kafa'a* retains an integral place within the Shi'a community (Al-Asfoor 2014: 57-65; Hussain 2019). However, the law positions *kafa'a* as merely valid and applicable to Sunnis.

In an interview in 2019 with a lawyer from Bahrain with experience in the Ja'ffari (or Shi'a) courts, I asked several questions concerning women's experiences in courts with unfit husbands, and the judicial rulings made (Anonymous 2019).¹⁵ The one experience that stood out dealt with a woman who filed for a divorce only a few months after signing her marriage contract. With the signing of a marriage contract, 'even if a wedding does not take place, the spouses are legally able to consummate the marriage despite the absence of a white wedding' (Hubail 2019: 55).

¹⁵ Transcript in possession of author.

After the woman's first few sexual experiences with her husband, the woman noticed her husband behaving strangely. Over the period of a few months, she discovered her husband abusing drugs and alcohol, and was spending nights outside the marital home, implying he was committing adultery (Hubail 2019: 55). Upon confronting her husband, he presented an ultimatum: 'If you do not like this, then you can go ahead and ask for a divorce' (Anonymous 2019; Hubail 2019). After the wife requested a divorce, the husband asked, 'How much are you willing to pay? ... Pay me 50,000 BD [USD 132,608], and the divorce is yours' (Anonymous 2019). In a case such as this, within the Sunni community, the wife would be granted a divorce on the grounds of (financial) suitability. However, within the Shi'ite community, a woman needs to compensate her husband to terminate the marriage. In this example, the Shi'a woman's case lasted four years. When she presented her arguments to the court, the judge requested that the spouses reflect on this situation or '*raji'ou anfusikom*' before the case was decided (Anonymous 2019). Throughout the hearing, the woman was challenged by the judge as he consistently requested evidence from her in order to satisfy the burden of proof. Proof was required because the court space became a space where '*asrar al-biyoot*' or the private secrets of a home are exposed (Hubail 2019: 56). Divorce in the Sunni courts can be on the grounds of a breach in a contractual condition, by the husband authorizing someone to divorce his wife, and it can be brought to court as retrospective evidence—meaning the words were said outside the court, but need to be formalized through paperwork. By contrast, the Ja'ffari jurisprudence within the Shi'a court requires the presence of a wife and two witnesses, thereby limiting the ways in which divorce can take place. Although this may work in favour of women whose husbands are unilaterally divorcing them, the burden of proof is heavier in cases pertaining to divorces of Shi'a women than those of Sunnis.

The judge, the court space and the legal, official filing of a case, all function as social actors. In this case, it is important to note how divorce proceedings in courts vary between sects. The privacy of a home, and by extension, the privacy of a family, become overtly public and exposed within a court case. Despite the fact that the law attempts to regulate private sphere affairs, family cases brought to court are viewed as risks to the privacy and intimacies of the domestic sphere, and may be associated with bringing shame to the family. Although these cases are legally regulated, the lawyer emphasized that, '[T]here is no solution, because we are a part of a society ruled by religion' (Anonymous 2019; Hubail 2019: 56). In this case, social structures, practices and expectations determine the outcomes of judicial rulings, specifically when sect comes

into play. 'A society ruled by religion' is in fact a society ruled on the basis of what is perceived as religious, customary, or acceptable by the leading clerics and members of the community. Therefore, the judge acts not as an objective actor expected to uphold the rights of citizens. Instead, the judge acts as a social and religious arbitrator guided by social and communal interpretations.

Lastly, Article 108 addresses a husband who is missing, absent and whose whereabouts and state of being are unclear or unknown. For Sunnis, a woman can request a divorce after four years of investigation and the husband has been proven to be 'missing' or 'absent' (Law No 19 of 2017 on the Family). For Shi'as, there are two specific sub-articles that govern this particular circumstance. The first has the same exact phrasing as the Sunni Article, while the second states: 'A wife is not divorced if her missing or absent husband has money or a guardian who can financially support her' (Law No 19 of 2017 on the Family). It is relevant here that, since 2011, Bahrain has effectively been a police state, one where forced disappearances, revocations of citizenship and police violence are not uncommon. In a case where a Shi'a woman's husband is missing for a period of time and the husband's finances are sufficient to support her, the woman cannot remarry nor get divorced *until* and *unless* the support is depleted. The availability of a guardian to financially support her also repositions women from the guardianship of their husbands to the guardianship of their in-laws or male relatives. The question of divorce here thus may actually be tied to the existing social and political instability, where women belonging to the Shi'a sect may not necessarily be able to access the same privileges that Sunni women can obtain (Hubail 2019). Article 111 discusses the arrest of a husband and the circumstances in which a woman can request a divorce (Law No 19 of 2017 on the Family). Unlike its predecessor, the 2017 law is unclear and states that a woman can file for a divorce *if* her husband is in jail, and if she has been affected by the husband being imprisoned. The legal requirement to prove that she has been affected further conditions women to remain within their marriage unless they have clear (acceptable) proof to support a dissolution. In cases where women find proof, they are then confronted by judges who arbitrarily decide on whether the proof is valid or not. Although the law explicitly discriminates against Bahraini women on the grounds of gender and sect, we have relatively little evidence as to how the law operates in practice. In order to fill this gap, the following sections will engage the lived experiences of women and explore the implications of the law for them.

Bahraini Women Speaking from the Margins

'To be in the margin is to be part of the whole but outside the main body ... We could enter that world but we could not live there', explains bell hooks (1989: 20). The notion of the margin situates the marginalized in a space that is ostensibly outside the hegemonic narrative of the centre, a 'site of deprivation' (hooks 1989: 21). In this space, women are confronted with hegemonic silences, ones that render their experiences, voices and location in friction with those emerging from the centre. It is in this space that we can locate women such as Ania and Fatima. Their experiences of rape are neither recognized nor acknowledged given their marginality. Instead, they are spoken to, confronted, challenged, critiqued and ultimately silenced on behalf of the centre, and from within the centre. Thus, what does speaking from a position of marginality entail? Let us now consider the narratives presented by both Ania and Fatima.

Ania's Case

Ania continues her story explaining how her assaulters are 'loved' by everyone—'sanctified' by all—while she is 'outcast' and 'oppressed'. They are 'closer' to everyone as she remains 'farther' from all (Ania 2020a). Ania engages the binary of experiences that she shares with her assaulters to contextualize the gravity of her situation. She explains that she would go to school after being assaulted all night, feeling everyone was looking at her, knowing she had been tainted. Ania further explains that her mind was always distraught, preventing her from making friends and interacting socially, pushing her to find corners to isolate herself in any space she entered. Ania recounts her feeling of guilt, of fault, where she confesses that she thought of herself as 'the criminal' while also feeling thankful that her assaulters did not 'expose' her (Ania 2020a). She continues to explain that 27 June 2020 was a prominent day when she exposed her rapists to her family and received compassion, love, and support—a day that marks the end of her self-torture and the nascence of the fear and worry of her rapists. She explains that her rapists were her brothers and cites her confrontation with her eldest brother. He argued that she did not need to take 'it this far' and that she is 'too serious' while asking her to 'pray' on it and remember that they are 'siblings'. Ania then cites another screenshot of her messages with her brother; she writes,

I remember all the details, I remember when you took me upstairs when they were repairing your mother's apartment, and you kissed me and [he] passed by us and did not say anything ... Do you remember this? Do you remember when you showed me porn on your phone while I lay on my stomach, telling me it wouldn't hurt when you put it

behind and I bled ... do you want me to remind you of more or is this enough? ... Do you remember when you took him against his will to the bathroom as he screamed ... Do you remember when you came to me while I was asleep and came on my face ... It went in my eyes and you laughed? Do not say you don't remember ... (Ania 2020a)

Her rapist also requested that she should 'soften her heart' and keep the matter private as his reputation was at stake. Ania's confrontation with one of her rapists garnered various responses (Ania 2020a). One male respondent mentioned: 'With all men, none of us is safe and honest with a female at all. Even if she is our family' (@abawq321 2020). Another respondent advised her to 'travel far away. Leave this place behind ...' (@GO10976h 2020). Other respondents joked, stating their suspicions regarding the truth of this story, advising her to avoid lying on social media. One respondent stated: 'There is no way that a rape for a period of seven years was without a form of consent or total consent' (@rezoo98 2020). Another respondent advised her to pitch her dramatic story to '@NetflixMENA' (@Hani_1957 2020). Other responses cited religious figures warning against the threat of feminism, her need for mental health help and the fictitious nature of the story. Respondents argued that the story is false, otherwise she would have told her parents. Respondents on Twitter situated her as deserving of the violence committed against her, since they argued that she was disobedient because she exposed her assault.

Ania took her experience a step further and reported her rapists. She uploaded a series of images on social media citing her reports to the Ministry of Interior and specifically her legal case report submitted on 29 June 2020. Additionally, Ania gained the support of #orangetheworld, an initiative led by UN Women, which created a specific post thanking Ania for sharing her experience (Ania 2020b). Although responses to Ania's initial post varied between positive responses in support of her testimony to negative responses challenging the veracity of her testimony, there are specific implications that emerge from her experience in particular.

Crucially, Ania lives with her family and is related to her abusers. Although she filed a legal case against her rapists, there is no evidence to indicate whether her rapists experienced any legal repercussions. Ania's story is also important because the alleged rape took place within the domestic sphere and was committed against her as a child and as female. In this case, the domestic expectations of 'obedience', 'softening her heart', 'forgiving' her rapists continue to emerge on social media. Specifically, what remains significant in her case is some respondents' iterations of '*asrar il-biyoot*', which means that the secrets of the home ought to remain

private. In this case, respondents are appealing to the privacy of the home as valid grounds to conceal the violence and to silence her. Ania shares similar experiences to many women throughout the pandemic. One key feature of the pandemic that we need to remember is that women forced to remain at home in the private sphere have been further limited in their ability to access any sites of redress. In the case of Ania, she utilizes the digital space as a means to share her story and claim the rights that were denied to her in the private space, thereby inspiring other victims to share their experiences. She continues to resist active silencing.

As discussed earlier, Ania's case does not emerge out of a vacuum. In fact, the respondents' requests for proof resemble the attitudes of judges in courts who consistently demand women to 'prove' their assault. In this context, the victim's memory, her body's memory of the assault, how she felt, how she experienced the assault, her life before, within, and after the assault are not in themselves valid grounds of proof. The court becomes a space where the intimacies and privacies of the home are exposed. By extension, the privacy of the family becomes overtly public and ostensibly exposed. The Family Law attempts to regulate the domestic sphere, yet a case brought to court may be associated with bringing shame upon the family, as the intimate privacy of the home and of the family are exposed to the public. Additionally, because women are exposing the privacy of the home, they are also met with the social consequences ascribed to exposing the secrets of the family. In this regard, although *bait il-ta'a*¹⁶ or the house of obedience is not necessarily enforced in court, a woman experiences legal and social repercussions from going to court. This introduces another complexity, which is that social conditions determine the ability of a woman to successfully bring a case to court.

As previously argued, women are often met with a statement by the judge asking the spouses to reflect on their situation or '*raji 'ou anfusikom*' (Anonymous 2019). Fatima Rabee'a mentions that, in these cases, many spouses and family members are asked to visit *maktab tawfiq al-usari* which is the 'Family Reconciliation Office' (Rabee'a 2019). Hence, the court perceives the process of reconciliation as important prior to considering the merits of the case. This presents risks for women, as Rabee'a argues:

The cases we deal with suggest that a husband wants to hurt the woman after the case. This is not to say that every case follows this specific outcome. Rather the cases we deal with suggest women are

¹⁶ *Bait il-ta'a* or house of obedience refers to specific provisions in Islamic jurisprudence, *fiqh*, and family laws that designate conditions of obedience. These function as structural, spatial and temporal interpretations that emerge in customary practices. See Shehada (2009).

at risk when they leave courts, because they have ‘shamed’ [their family] (Hubail 2019; 75).

She explains that this leads to a *tahadi* or challenge where a man sees his wife as not only disobeying him but is also challenging his authority and his masculinity. Divorce is a man’s right, and not a woman’s. Additionally, the Family Reconciliation Office functions as a one-stop shop for family grievances and issues, meaning that cases that women put forth are more likely to start (and perhaps end) with the Family Reconciliation Office. In regard to the conditions that women experience in court, it is important to consider these examples as not merely limited to divorce, but are rather gendered in nature. For example, women’s testimonies, whether in cases of divorce, domestic violence, or any other issues they put forth within a court space are often if not always confronted by ‘a challenge’ or the requirement for the women, regardless of their case, to provide proof that is socially, culturally and legally weighed by the judge. In the case of Ania, if her case was indeed taken to court, her testimony as a woman would be pitted against the testimony of a man respected in society. She would be judged by virtue of her gender, age, social status, online presence, as opposed to these specifics ascribed to the man she is suing. Here, despite this case, it is important to account for the role of judicial arbitration, the legal space, and the social expectations ascribed to women who report cases to family courts, or cases pertaining to the structure of the family. If Ania were to sue her brother for assaulting her, she would be confronted by social and legal forces that would ultimately and definitively ‘shame’ her.

Rabee’a also introduces the case of a woman whose body, as she describes it, was ‘*mitqati*’ or cut up. She states that traditions and customs ‘act above the law’, where a woman was asked to go back to her husband or family, rather than be granted a divorce on the grounds of severe domestic violence. She situates the role of social expectations through what she describes as culture, traditions and customs. These forces also influence the decisions of women. When a woman files a case against her husband or a family member on the grounds of violence—whether in court or in a complaint in a police station—he is expected to sign a pledge stating he will not hit his wife or family member again (Rabee’a 2019; Hubail 2019: 76). Although Rabee’a recognizes this as a solution, she emphasizes that a woman goes back home with her abuser. The theory behind the pledge is that it provides a shield that women can hide behind to protect themselves and their bodies. The reality, however, is that these pledges are merely papers, and that women continue to experience violence when they return to their marital or familial home

(Hubail 2019: 77). The violation of the pledge is intended to be a warning and to provide the basis for legal repercussions, including grounds for divorce and even prison. However, a woman is required to report her husband or family member again, and the lawyers I interviewed all claimed that women steer away from further reporting (Hubail 2019: 77).

Fatima's Case

I turn now to the case of Fatima, which was circulated on social media through TikTok, Instagram, and Twitter on 18 July 2020. Fatima's testimony was shared as a series of voice threads. She begins by stating, 'This is [Fatima] with you after a long absence' indicating that her absence is related to her living abroad (Ania 2020c). She explains that a gang has been harassing her for days, and she is ready to break her silence, as her continued silence 'would put new victims at risk' (Ania 2020c). Fatima begins narrating her experience specifically citing the imprisonment of her husband for participating in Bahraini protests. She states that there are some months when she would receive 50 BD (132 USD) to spend on her son's needs, at other times, she finds herself in financial need, humiliated, and used by others, in the absence of the person who provides her with financial maintenance. She describes her experience of travelling to Iraq for pilgrimage with her son Hassan and her mother, where she was approached on Instagram by Hussain who was on pilgrimage to Iran. He stated that, 'Since I saw a picture of you in Iraq on Instagram, I wanted to inform you that a man named Ayman Al-Ghasra wants to speak to you about a *very* important subject' (Ania 2020c). She mentioned that she did not know him and could not speak to someone she does not know. He responded indicating this is an important subject and that 'she wouldn't lose anything' by speaking to Ayman, further explaining that Ayman is the brother of the martyr Ridha Al-Ghasra. Bearing this status of martyrdom in mind, Fatima adds him on her Snapchat account, claiming she was aware that she rushed into this decision without considering any potential consequences. She began speaking to Ayman who stated that he needed to see her immediately to discuss the important subject. She immediately agreed, reiterating that it was because he was the brother of the martyr, implying that he has to be a legitimate, trustworthy individual. She explains that while she was on pilgrimage to Al-Abbas Shrine in Karbala, Iraq, Ayman arrived as they had agreed. Ayman told her and her mother that they should go to a quieter place to speak, and that she should bring Hussan with her. Her mother agreed since she also had some errands to run at the time.

Fatima explains that Ayman recommended a nearby café, to which she agreed, once again because he was the brother of a martyr, a trustworthy figure, and that she was naïve. As they approached a building, Fatima confusedly asked about where the café was located. Ayman responded, ‘Come this is our apartment’ (Ania 2020c). Fatima still confused remarked, ‘I cannot go up with you’ (Ania 2020c). Ayman then said, ‘I am holding your son in my hands, come catch him, I will be throwing him off the building’ (Ania 2020c). Fatima reflects on her thoughts at that moment, thinking maybe he wanted to go through her phone to see if she was a Bahraini spy or agent of the Government. She thought that it would be wise for her to go with him and give him her phone to avoid any harm to her child. As she entered the apartment, Fatima recalls a room in front of her, an open kitchen to her right, with a cabinet and a *sheesha* bong on top of it, a TV to her left, a sitting area on the floor of the living room across from her, with the picture of the martyr Ridha Al-Ghasra and his father plastered on the wall of the living room. Ayman proceeded to take Hussan and lock him in a dark room. He then guided Fatima to a room on her left. Fatima asks her listeners, ‘Would you like me to describe it too?’ (Ania 2020c). Fatima explains that on the right side of the room was a bed with a mirror next to it and a cabinet across from it. She then states:

More importantly, Ayman, Ayman Al-Ghasra, you brother of the martyr ... do you remember my tears? Do you remember how much I begged you? Do you remember the screams of my son outside the room? Of course, you remember! But you will deny it, right (Ania 2020c).

Fatima then states, ‘Most importantly, Ayman finished his crime’ (Ania 2020c). Here, Fatima implies that his crime was her rape. Ayman follows this act by accessing her phone and sending himself messages, taking pictures and videos of Fatima and sending them to his account. Fatima exclaimed that she was not aware of what exactly he sent to himself after he raped her. After Ayman finished sending the messages, he told Fatima: ‘If anyone finds out, I will expose you to all of Bahrain. And your blood is tainted. Your blood is tainted’ (Ania 2020c). Fatima explains to her listeners:

Of course, Ayman, I would not have spoken about this to anyone because you are the brother of the martyr, and you always write Quranic verses and about religion [on your account]. And I am [Fatima], who since her husband was arrested, her reputation became garbage. Who will people believe? Of course, they will believe you, right or wrong? (Ania 2020c)

After the crime was committed, Fatima recalls Ayman dropping her and her son back to her mother as if nothing had happened. Fatima began crying to her mother stating she wanted to go back to Bahrain.

Fatima explains that she believed that this was over; she saw a psychiatrist and received mental health care because she admitted that she wanted to commit suicide. She recalls that a period of time passed before Ayman contacted her again via Telegram. Ayman wrote to her explaining that he has her pictures and videos, and if she does not want these images and videos to be circulating, she should return to him because his friends also 'want her' (Ania 2020c). Fatima explains that after what happened she was fed up and had to include Hussan's father in this. She confronted her husband in jail who told her, 'I will take care of it' (Ania 2020c). She requested permission from her husband to file a legal case and do a medical test, to which her husband responded: 'People will talk about you. These are the brothers of the martyr. The martyr Ridha Al-Ghasra was my friend. I promise you I will resolve this [in private]' (Ania 2020c). Fatima continues to explain how her husband unsuccessfully attempted to resolve the issue. They approached Ayman's sister who unconditionally supported her brother, claiming that, '[Fatima] wears makeup and shows her hair [under her veil]' (Ania 2020c). Ayman's sister then cited the video of (Fatima) from 2011 apologizing to the King for her participation in the Bahraini protests in hopes of pardoning her and her husband for their political activity. Fatima concludes her statements explaining that she fled Bahrain after Ayman's gang continued to harass her.

She describes how she fled to the United Kingdom to a shelter for asylum seekers and refugees, and was then homeless with her child. When she was there approached by men who offered to help her, Fatima refused their support. This was due to her experience with Ayman, which taught her a lesson she would never forget, specifically that she cannot trust men. She then received some support from her husband's family. Fatima addressed the reasons behind her homelessness. She blamed Ayman, who circulated her pictures and videos and stained her reputation. She mentions all the men who approached her after these messages were circulated, to which she had one final message, 'Do you know the break in my heart? Do you know how many times I wished I was dead because of your words' (Ania 2020c). She recounts how her friends and other women have abandoned her after they received phone calls from strangers stating, '[Fatima] is a whore' (Ania 2020c).

Fatima emphasizes that she is strong and has the will to live for her son, even though Ayman and his gang destroyed her and have the ability

to continue to destroy her with their reputations. Their citing of Quranic verses further grants them a sense of communal and religious authority within the Bahraini Shi'ite community. Fatima remarks:

Ayman, share whatever you want to share. Share whatever you want to share. Okay, Ayman? A note for his highness the King, I hope my voice will reach you ... There are women suffering without their husbands ... without their fathers ... who are imprisoned. I wish ... you would pardon them and grant them the chance for these girls ... I wish from all my heart' (Ania 2020c).

Fatima's case introduces various gendered and sect-based implications. These can best be understood through Miranda Fricker's analytical framework that expresses threats to credibility affected by social inequalities. Fricker (2007) argues that listeners of testimonies often are affected by prejudice that influences how they view the credibility of a speaker; she describes this form of prejudice as testimonial injustice: 'a distinctively epistemic injustice, as a kind of injustice in which someone is wronged specifically in her capacity as a knower' (Fricker 2007: 20). Fricker further explains that this form of injustice emerges out of the 'identity prejudice in the hearer' (2007: 28). In Fatima's case, her testimony was subverted because of her identity as a Shi'a woman, a married woman, and a woman with a history of anti-government sentiment. In the minds of hearers or in this case respondents, Fatima's testimony appeared inconsistent with her previous role and participation in the Bahraini protests of 2011.

Fatima's appeal to the martyrdom of Ridha, Ayman's association with Quranic verses and his reputation present another form of epistemic injustice in society. Ania invokes these references as she attempts to solidify the credibility of her testimony, specifically by shedding light on how her rapist is a known, religious, important figure socially. This plays a significant role in shaping how her husband reacted to her assault, by *requesting* that they handle matters privately. By invoking the privacy of the matter, her husband's request raises two major implications. Primarily, it reaffirms that Fatima's case would not be considered credible, as she lacks the reputation, status and position that the Al-Ghasra family holds. Specifically, Ridha is viewed as a martyr, and the references to the Quranic verses could hamper Fatima's testimony. She explains that her use of makeup and the showing of her hair may position her as a woman 'asking for it' in contrast or opposition to the religious figure in Bahrain. In this regard, invoking martyrdom renders the Al-Ghasras as people of status. As Magdalena Karolak (2016: 52) explains:

For both the opposition groups and the pro-government supporters, online commemoration of martyrs plays, to begin with, a role in engraving their lives and their sacrifice in the collective consciousness. As a result, online visual imagery aims at preventing the community from forgetting these exceptional individuals and their sacrifice for the good of the community.

Thus, Fatima's testimony is further subjugated when pitted against the status and reputation of a person related to a martyr. It challenges both community and religiosity, as Karolak (2016: 53) goes on to explain:

The commemoration of martyrdom becomes ritualized performance, with community members taking the stage to invoke the martyr's life and death on stage ... commemoration is considered a religious duty... The moments of death are thus constantly present as a reminder of the duty that lies upon the living.

In addition, Fatima's role as a participant in the 2011 Bahraini protests, with a husband in jail, further dilutes the credibility of her testimony in the eyes of her community. By requesting that she addresses these issues privately, her husband also implies that their political activity would further undermine Fatima's testimony and ought to be concealed from the public eye. Fatima's resort to sharing her experience publicly signifies her desperation and need for communal support. However, her social group association as a Shi'a, a woman and a victim of rape are minor in comparison to the prejudice she experienced as a protestor. As Fricker reminds us, Fatima's testimony presents an 'identity-prejudicial credibility deficit' (2007: 28), one where her political identity reduces the credibility of her personal lived experience. In this case, Fatima is degraded both as a Shi'a and as a woman, as her testimony becomes conditioned by the prejudice ascribed to her political status.

[D] CONCLUSION: WOMEN'S REALITIES ON THE BACKBURNER—A CASE OF SILENCING

Women's lived experiences, as seen throughout this research, are not secured or protected through law. Rather, the realities of women position them at the locus where different social and political powers collide. In both Fatima's and Ania's cases, the digital space was viewed as the ideal site of redress. However, as both women's testimonies were confronted by critiques and scepticism, the digital space transformed from a site of potential redress to a vicious space where the women's social location and identity shaped the negative responses with which they were confronted. In these two cases, Fatima and Ania were silenced and further pushed into their private spheres. Additionally, their testimonies were belittled

on the grounds of gender, sect and kin. In both cases, the Unified Family Law is pivotal in understanding the spaces to which women are entitled and explains how they navigate these constructed public and private realms. Although the digital space exists outside the binary of the public and private, reactions to these testimonies suggest that the digital space is far from ideal for sharing *asrar il-biyoot* or the secrets of the home. As a consequence, these women are expected to abide by the social expectations ascribed to their gender and sect in the public space. Despite the global #MeToo movement, which has seen victims and survivors of violence and abuse persist in speaking up, women continue to be confronted by challenges to their testimonies, which further burdens them with the demand for proof.

The forms of silencing that these women experience are also important. On the one hand, they experience legal and social silence. Legal and social forces actively have remained silent in these cases. Although there were legal measures taken by the victims, the status of these actions remains unknown. Various social actors, groups and civil society in Bahrain have also remained silent. On the other hand, both women experienced silencing. Respondents discredited or attempted to silence their testimonies on the grounds of kin and gender. In Ania's case, she was asked to soften her heart, appealing to her femininity in order to persuade her not to take legal action. In Fatima's case, her husband requested that she deal with matters privately. In both situations, we see reiterations of socially gendered expectations of women, specifically referencing the shame this would bring to the reputation of their kin and of the perpetrators. In both cases, the victims were also actively silenced by their perpetrators. Ayman Al-Ghasra threatened to circulate Ania's images, videos, and chats, relying on the fact that he is socially viewed as a credible and legitimate source, in comparison to Fatima's seemingly politicized and tainted reputation. In both cases, the victims were actively silenced by the Bahraini state, as neither case made headlines nor did they spark policy discussions on the impact of domestic violence, political violence and cyber violence toward Bahraini women. In both examples, the victims were silenced by others in their community, rendering their experiences as being implausible due to the locale from which they are speaking, despite various international groups sharing the experiences of these women, such as through the UN Women's campaign.

The Unified Family Law of 2017 is merely one example of a legal structure that marginalizes the experiences of Shi'a women. Although the Constitution emphasizes women's citizenship within the Bahraini state, the Family Law limits the extent of their citizenship. Deniz Kandiyoti

argues that Middle Eastern states, leaders and reformers ‘imagine their communities as modern’ through women (1998: 6). Their bodies, and what happens to their bodies, affects how states uphold their national identity. Suad Joseph (2000: 5) further illustrates that ‘[t]he bodies and behaviors of women have become critical frames for weaving together unified national tapestries for people who are highly diverse—explosively divided by ‘national,’ religious, ethnic, tribal, linguistic, regional, and class differences’. To add to Joseph’s claim, gender and sect are also significant divisions that shape the nation’s imaginary and how it approaches women’s experiences, their behaviours and ultimately their bodies. Being a woman in Bahrain does not lead to a universal, unmediated gendered subject position. Instead, women’s claims are found at the intersection of gendered expectations and sectarian ones too. Religion through sect, society through the family, and the state through the law, all coalesce and compete in governing a woman’s body. When taking these claims to the digital realm, the online nature of interconnections also competes with these powers in governing the bodies of women.

With the outbreak of the Covid-19 pandemic, women’s lived experiences are further affected by new and different structures. In the case of the digital sphere, although it has been romanticized as a space where people can freely share their daily life and experiences, it also functions as a space of control where social expectations re-emerge and are reified online. As citizens experienced lockdown procedures in countries around the world, the private sphere also increasingly became a space of control, where marginalized experiences remain contained. Thus, the pandemic introduces new implications for us to consider. First, who ‘belongs’ to the private sphere? What happens to the testimonies of women on the margins in that space, such as domestic workers? Second, the various sites of resistance also have shifted throughout the pandemic, as women resorted to digital spaces, while many others do not have the privilege of access to them. The digital becomes a complicated site for redress of grievances, one with various social repercussions for women. In the case of Bahrain, the pandemic has been a time that reified gendered and sectarian identities and expectations, one that amplified structures of silence. The pandemic also functioned as a moment of remembrance, as many women were confronted by their perpetrators online or within their households. The pandemic further presented a structure of gatekeeping, empowering state-sanctioned and society-sanctioned forms of expression, further pushing those on the margins farther from the dominant narrative of nationhood. Bahraini nationhood, within the pandemic, steered away from the devastating realities of protestors both on its public streets and

digital spaces that are confronting injustices to praising the state for its pandemic-wide initiatives, from the realities of imprisoned protestors to silencing narratives of arbitrary arrests of Bahrainis, from the lack of medical support and interventions in prisons to producing high-end surveillance and monitoring applications, and finally to diluting social and national grievances by promoting sportswashed, sanitized events of a happy, patriotic Bahrain.

With regards to Fatima and Ania, the pandemic forced their testimonies into the public domain, whilst social and communal actors attempted to resist and return their testimonies to the private. Fatima and Ania are merely two women, sharing a space with countless other silent and silenced victims of violence and abuse. It is in this very space that we can meet as marginalized, silenced, voiceless, traumatized, raped, assaulted, violated victims and survivors.

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DEATH, BURIALS AND FUNERALS: GRIEVING IN THE SHADOW OF COVID-19

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Abstract

Covid-19 has radically upended death and dying. Restrictive measures aimed at containing the spread of infections have resulted in a simplification or abandonment of many social and cultural practices related to burials, funerals and mourning. This article aims to examine how the pandemic has affected burials, funeral practices and mourning. It analyses the extent to which the restrictions balance the need to protect public health and the opportunity for mourners to honour the deceased. A consideration of the implications for surviving families and the wider community is important for future pandemic preparations.

Keywords: pandemic; death; burial; funeral; grief; mourning.

[A] INTRODUCTION

Covid-19 has radically upended death and dying. A marked increase in the number of deaths has resulted in innumerable households of bereaved families (Ritchie & Ors 2020; Kontopantelis & Ors 2021) compared to pre-pandemic times (Office for National Statistics 2020). Record numbers of deaths at the height of the pandemic led to pressures in keeping up with space and time for burials and funerals, despite expedited processes across many countries (Chaffin 2020; Esfandiari 2020; Ross 2020; Wright 2020b). The abrupt sundering of families in the wake of the pandemic has left living relatives traumatized, in addition to coping with the associated administrative burial, ritual and funeral arrangements for the deceased. While death is raging, infections continue to soar, resulting in mandatory restrictions in household gatherings and people movement on the basis of public health. Physical and social-distancing measures introduced as essential to curb infection transmission have reshaped the way the bereaved mourn for the deceased.

Social and cultural practices related to burials, funerals and mourning, such as spending time with the deceased, the last acts of washing and cleaning the deceased, and attending funerals and burials with families, are forced to be simplified or abandoned. For many families ravaged by the pandemic, the important mutual sharing of support in times of grief has become a luxury.

This article aims to examine how the pandemic has affected burials, funeral practices and mourning, drawing from relevant law and socio-cultural practices. It analyses the extent to which the restrictions balance the caution to protect public health, the opportunities for individuals to honour the deceased, and the implications for surviving families and the wider community. While it is accepted that customary practices are obliged to yield to temporary emergency measures in the interest of population health, the adverse effects these restrictions have on the living, bereaved families are significant considerations. Grave concerns surrounding the psychological wellbeing of bereaved families have emerged following heightened death rates and curtailment in burials and funerary practices (Graham 2020; Siddique 2020; Verdery & Ors 2020). The long-term implications, ranging from the inability to have closure, prolonged, complicated grief, and the physical and mental anguish at being deprived of the opportunity to mourn properly, are important concerns that illuminate aspects of the meaning of being human in the context of end-of-life.

The article begins with an overview of the common practices and distinct rituals relating to burials, funerals and mourning and their significance, drawing from examples from different socio-cultural contexts. We can see how these practices are intricately linked to notions of grief. They provide a basis to appreciate the changes resulting from the emergency law affecting burial and funeral practices during the pandemic and the extent to which such measures accommodate the mourners' needs, while attempting to strike a balance with protecting public health. In the light of these analyses, we examine the implications for bereaved families. The article concludes with reflections on potential options to support bereaved families during and beyond the pandemic. While the focus of the analysis is the UK, the discussion and implications have broader applications as the world continues to cope with the aftermath of the pandemic.

[B] THE SIGNIFICANCE OF BURIALS, FUNERALS, RITUALS AND MOURNING

The practice of burying the dead and associated rituals has been enshrined since time immemorial, ranging from the prominent funerary opulence in Victorian times to the striking poverty of paupers' funerals (Strange 2005). Burial is the practice of burying a dead body, while funeral is the ceremony held shortly after a person's death, usually including burial and cremation. Burial is the common method of disposal, with an ancient religious basis (Cantor 2010). This is true for funerary practices in the UK, with its Christian roots, where churches have authority over burial and funeral. The deceased were buried in local parish cemeteries, which subsequently developed into burials in private cemeteries (Green & Green 2006: 26). Burials and funerals in urban areas expanded exponentially in the industrial era in the nineteenth century, with rising funerary choices and influenced by an increasingly diverse population, which marked the departure from rural churchyards burials (Rugg & Parsons 2018). Cremation was predominantly used for deaths arising from the flu epidemic between 1914 and 1915, although some migrant communities opted for remains to be repatriated. Contemporary funerary practices are simpler and largely undertaken by funeral directors.

A typical body disposal process includes death verification by a medical practitioner, the death pronouncement, notification, registration and the issuance of the death certificate; care of the deceased, a wake, funeral service and burial (Cantor 2010; Rugg & Parsons 2018). Once death is notified, families, usually in conjunction with funeral directors, are tasked with selecting the mode of disposal (burial, embalming, cremation) and redressing the deceased (Rugg & Parsons 2018). We will see how these decisions are curtailed in an infectious diseases setting. In ordinary times, standard procedures such as death notices, coffins, flowers and funeral service orders are carried out. Where death occurred in hospitals, medical staff will be responsible for preparing and storing the body for the funeral. The laying out of a body, performed by the Last Offices of hospitals, signifies respect for the dead. Bodies are washed and cleansed, labelled and shrouded in white garments, or wrapped in sheets (body bags in the case of infectious disease) and sent to the mortuary (Green & Green 2006: 182). The Bereavement Services Officer will arrange for transport and disposal of bodies in cooperation with local authorities in a swift and dignified manner (Cantor 2010: 43, 44). The time between death occurring and funeral taking place normally lasts from five to ten days, and sometimes longer due to factors such as peak funeral times

or local authority shortages. There are some traditions of viewing the body and holding a wake prior to funerals where relatives visit the bereaved families, with offerings of meals or refreshments. The funeral day is usually marked by relatives and friends congregating at church, graveyard or crematorium. Where services are held indoors, music, singing and hymns are usually conducted, with eulogies delivered by funeral officiants and speeches by close family or friends of the deceased. Following funeral services, burials take place, with further words or prayers at the graveside as coffins are lowered into the ground and filled. Where cremations are chosen, the family would accompany the coffin to the crematorium following the conclusion of the funeral service. Where bodies are to be taken out of the country for burial, permission must be obtained from the coroner (Rugg & Parsons 2018).

Burial and funeral practices are symbolically significant, as they represent a respect for the dead and a collective sympathy for the loss of loved ones. Customary expressions of grief and condolences are spiritually significant, for they epitomize the separation between the realms of living and dying, which are often considered as therapeutic for the bereaved. The typical contours of funerals and burials demonstrate the close, interwoven links between the dead, the living and how rituals perform a significant role in the process. Burials, with the attendant rituals, are often associated with ancestral spirits, safeguarding cultural values and reorganization of social structures (Hoy 2013; Brennan 2014: 68). The dead body embodies the previous living, breathing person who is connected to the family, and this loss is recognized by the living through respectful treatment and mourning rituals (Cantor 2010; Conway 2012). The identity and appearance of the deceased and the feelings of the living towards the deceased represent the spiritual connections between them, which are often translated into actions in reminiscing the deceased, memorializations, open-casket viewing or speaking to and touching the deceased softly—actions which are crucial in facilitating closure (Cantor 2010: 30). Consequently, these rituals offer the opportunity for the living to reflect on life while grieving (Hoy 2013). Funerals thus provide the occasion for families and friends to honour the deceased and share social and emotional support (Brennan 2014: 217, 218).

Body disposal affects the living physically and psychologically. It exemplifies the intertwined relationships between culture and people, such that rituals are not merely procedural, but reflect a mosaic of social, community, cultural traditions, faiths and values transcending social classes and generations (Walter 2017: 71). For example, filial respect in Chinese society is reflected by worshipping dead parents as ancestors

with particular rituals and the offering of food performed at the graveside. Burials are common in Chinese funerals, with wakes following the funeral which lasts for 49 days, where chanting and prayers are conducted for the departed soul, open lamentations are common, and meals are served to mourners (Cheung & Ors 2006; Green & Green 2006: 300, 301). The rituals of touching, bathing and dressing the body and spending the final moments with the deceased in solitude represent the act of caring and are considered valuable to the bereaved (Cheung & Ors 2006: 73). Similarly, the ritual of 'crossing the bridge' during the funeral, which signifies the safe departure of the deceased to the afterlife, is said to provide experiential relief to the family (ibid: 75). A traditional meal-gathering of families after death in anticipation of the deceased spirit returning home symbolizes the final letting go (ibid: 79). These cultural practices collectively illustrate how rituals embedded in funerary practices facilitate the slow, healing journey of bereaved families. It also signifies shared grief and happiness, with an understanding that participation in the rituals benefits the deceased in the afterlife and the living families in this world (ibid: 85). Another example is the open pyre cremation observed by Hindus in India, symbolizing the departure of the soul; although this practice has been modified among British Hindus to the switching on at the crematorium (Walter 2017). Hindus do not believe in resurrection and that funerals should be visible to others. Cremation and its viewing thus fulfilled these beliefs (Rugg & Parsons 2018). Families and friends pay respect to the deceased through the ritual of walking around the body and then placing flowers on it. Following cremation, ashes are scattered in rivers or oceans, after which families and friends will gather for meals and prayers.

Religious and cultural traditions in funerary rituals provide spiritual structures to remember the deceased, wherein non-observance or departure from customary practices may result in anguish or family disagreements (Green & Green 2006: 217; Brennan 2014: 219). Examples include the practices by Buddhists whispering the name of Buddha into the ear of the near departed for good transition into the next life, while Catholics perceive the opportunity for a priest to hear the final confession of the dying as essential, with sermons, hymns and readings (Rugg & Parsons 2018). The ritual of cleansing the deceased and burying the dead within 24 hours rather than cremation within the Jewish community is based on resurrection beliefs, which is similar to Muslims (ibid). Such belief is reflected in the practice of embalming and swift burial and the proscription against autopsy. African-Caribbean Christians in the UK have strong familial influences and community practices that involve cultural and island identity, sometimes including cremation or burial

in the homeland (ibid: 246, 248). In this aspect, family and community participation is essential, where funerals may be delayed to enable relatives to travel to participate in the occasion. Funerals can be elaborate, with live music and singing, and, following the conclusion of burials, families might return to church for further gathering, and receiving calls and prayers at home for a week (ibid: 249). There is some similarity here to Irish wakes, which are lively, filled with storytelling, card games, songs and dance (Cantor 2010: 136).

Thus, rituals are important, durable elements in funerary practices from ancient periods to contemporary times, with strong associations between the dead and the living, reflected in unique forms and expressions, detailed rites and memorials, which are often linked to spiritual redemption and retributive justice (Rollo-Koster 2016). Rituals are socially constructed, underlining relationships, cultures and external constraints such as politics and public health priorities (Morgan & Ors 2009: 80). Rituals signal the deceased's transition to the afterlife, the act of protecting their souls and wellbeing, and offer an open avenue for socio-religious duties to take place, such as mourning, remembrance and the support of mourners (Morgan & Ors 2009: 56-58; Cantor 2010; Conway 2012). Rituals equally demonstrate the final gestures of affection and emotions (Strange 2005) and the continuing bond between the dead and the living, linking the meaning of life and beliefs in afterlife (Park 2012; Bradbury & Scarre 2017). The ritual of holding wakes served as the beginning of psychological healing for the bereaved (Brennan 2014). Rituals, despite religious and cultural differences, represent the appropriate disposal of bodies and shared emotional experiences of grief (Seeman 2011; Brandt 2015; Huggins & Hinkson 2019). It is clear why rituals and the observance of customs are essential for the bereaved. Hoy has pointed to participations in funerals as offering therapeutic benefits to mourners:

The desire of humans to connect with others likely grows out of an intuitive sense that isolation is not good. Humans are social beings. While connection is a sense of not feeling completely alone, perhaps support is sensing the efforts of caring people to help in tangible ways. In no other place does the role of caring community become more treasured than in confronting loss. The proliferation of bereavement groups and the consistent attendance at their meetings by many testify to their value (2013: 22, 52).

Funerals underscore the significance of social support and sociality of humans, and the innate human desire to be connected, especially in crisis times. Funerals are often private and deeply personal events for the living, where families and friends convene to focus on remembering the deceased, through carefully planned rites, yet filled with emotions and

solidarity in sharing the loss, and with contemplations on the meaning of life and death (Jindra & Noret 2011). The benefits from mutual support translate into coping with grief in a healthier way, leading to a better quality of life (Hoy 2013). As Hoy aptly observed:

But funerals are great for the soul, the real 'us' down deep. They remind us of the truly enduring values, of the relationships we share and the people whose lives we touch, as well as helping us recall the people whose lives have touched ours. Funerals are dynamic occasions that provide a moment or a few days to stop and express gratitude to those who have 'blazed the trail' ahead of us (2013: 168).

The examples above have illuminated the practice and significance of burials and funerals, and the importance of commemorating the deceased through rituals and social support in times of loss. Notwithstanding the diversity of burial and funerary practices, there exists a strong relationship between rituals and healing. Continuity in conducting traditional norms of funerals and burials affects grieving families on a personal level, as well as extended families, communities and the population as a whole. How does Covid-19 affect these norms? Rituals and funerary practices that may not be possible during pandemic times will influence the grieving process of the bereaved and how they wished to honour the deceased. The next section identifies the ways in which the pandemic has reshaped the landscape of burials, funerals and mourning.

[C] *IN THE MIDST OF LIFE WE ARE IN DEATH: DEATH IN THE CORONAVIRUS ERA*

The Covid-19 pandemic that swept the globe has resulted in an exponential increase in deaths which continues today. This rise in death corresponds to an increase in funerary needs, creating pressures in accommodating safe burials, leading to consideration of mass, rapid burials and dispensation with strict religious burial requirements (Fleet 2020; Murphy 2020). Individuals and families have faced drastic disruptions to the way they bury loved ones and grieve their loss. Various states in the United States, Indonesia, Bangladesh, France and Italy immediately prohibited the ritual of washing the deceased, viewing the body and large gatherings, resulting in isolated, shortened funerals, simplified rituals, increased online funeral services, and a significantly reduced time period in claiming dead bodies on public health grounds in order to reduce reinfection risks (Blum 2020; Financial Express 2020; Hawley 2020; Kovner 2020; Levine 2020; Tisnadibrata 2020). Other restrictions include touching the body or opening of the coffin, and suspension of the usual religious or ritual practices for burials or cremations (Khoo & Ors 2020).

Legal Restrictions on Burials and Funerals During the Pandemic

In response to minimizing Covid-19 transmission, the UK Government introduced the Coronavirus Act 2020 and specific guidance that restricted gathering, access to places of worship, funerals and burials. National and local authorities are granted specific powers in relation to the transportation, storage and disposal of dead bodies (section 58B and schedule 28). These powers enabled local authorities to direct funeral and crematoria directors to simplify the death management process in handling increased death (Fairbairn 2020a), leading to the possibility that disposal choices may be disregarded. Although section 46(3) of the Public Health (Control of Disease) Act 1984 prohibits cremation against the wishes of the person, this provision is suspended with the introduction of the Coronavirus Act 2020. In seeking to ensure that choices for disposal will be respected as far as possible, religious and faith groups with specific requirements for burials (such as Muslim and Jewish populations) have voiced their concerns regarding the risk of enforced cremation against their religious proscriptions. The Government, following such concerns, has reassured the concerned groups that the power granted, if exercised, must 'have regard to the desirability of disposing of the bodies in accordance with the person's wishes or religious beliefs, signalling some accommodation with choice (Fairbairn 2020b). Despite such assurance, concerns remain regarding the prospect of cremation against the deceased's wishes as national or local authorities have the power to decide in the current law. In response to this concern, local authorities are directed to work with local communities in agreeing on the appropriate modes of disposal that accommodate the person's wishes as far as possible.

Specific restrictions apply to the care of the deceased with suspected or confirmed Covid-19. Public Health England (2021) guidance endeavoured to balance the need to manage dead bodies sensitively and with dignity, while safeguarding from infections those people who need to handle the bodies. Pursuant to this approach, standard infection control and transmission-based precautions were incorporated to prevent further risks arising from the handling of dead bodies. As such, family members are advised to withhold touching the body, maintain two metres' distance, and to seek help from healthcare professionals. This signified that only trained professionals are allowed to wash and dress bodies, while bereaved families and clinically vulnerable people are strongly advised not to participate in these rituals. Where contact is considered necessary, bereaved families are advised to wear personal protective equipment,

with oversight by trained professionals. Particular caution is paid to funeral directors in preparing and transporting dead bodies for burial or cremation, with precautionary protocols for wearing personal protective equipment (gloves, apron, mask and eye protection), maintaining physical distancing, using shrouds or body bags in managing transmission risk, and wiping the external surface of body bags with disinfectants. These preventative measures underscored the continued risks of transmission through contact with deceased bodies via fluids, tissues and droplets.

Attendance at funerals is considered an integral part of death management. While funerals are permitted to continue, restrictions are underpinned by public health protection to curb transmission risks; with the expectation that funerals are expedited and social distancing maintained at all times. The safe management of bodies and arrangements for burials and funerals are within the remit of national authorities, with as much respect as possible accorded to traditional customs, underpinned by public health and safety protocols (World Health Organization 2020). Attendance at funerals is treated as an exception to the general stay-at-home orders in force in April 2020 at the height of the pandemic (Pocklington 2020; Public Health England 2020). Only the members of the person's household and close family members, in addition to the funeral director, chapel attendant and funeral staff are allowed to attend the deceased's funeral. Where family members are unable to attend, their close friends may attend, and the attendance of a celebrant is only permitted upon the request of the bereaved family. Symptomatic mourners are not permitted to attend and instead are encouraged to participate remotely. Further, the Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020 enacted under the authority of section 45R of the Public Health (Control of Disease) Act 1984 restrict access to certain places including public places, which may include funeral services and religious buildings. The latter include restrictions to memorial services in places of worship. Sections 5 and 6 of the regulations specifically limit participation in gatherings in excess of 30 people in private places, and accessing public places.

Following a slight decline in cases, restrictions to funeral attendance were relaxed in August 2020 to enable 30 people to attend a funeral

with permitted overnight stays.¹ However, maintaining health and safety remains the operating framework, particularly relating to face covering (Public Health England 2020). Specific rules apply to managing funeral venues and mandating face covering while indoors in places of worship, burial grounds and crematoria. Although the authorities recognized the significance of shared mourning and social support, the guidance does not depart from the aim to reduce transmission risks, which emphasized the heightened transmission risks arising from intermingling between different households across the country. Similar to the guidance in force in April 2020, the then guidance reiterates the importance of non-delayed funerals, social distancing at all pre- and post-funeral services, recommends the deferral of memorial services, and encourages live streaming of funerals and remote participation for clinically vulnerable mourners. Those who are shielding are not allowed to attend while restrictions are in place. The restrictions on intermingling between different households extend to travelling to and from funerals, with mourners directed to face away from each other while maintaining hand hygiene at all times. Restrictions to funerals and burials continue to apply as new variants emerge and circulate in the communities.

Sanctions are imposed for failure to comply with these requirements, ranging from fines to imprisonment (Ministry of Housing, Communities and Local Government 2020a; Health Protection (Coronavirus, Restrictions) (No 2)(England) Regulations 2020)). For example, people should not share food or touch or kiss objects that are handled communally, suggesting that mourners are discouraged from sharing funeral meals. However, where food is essential to the funeral service, this is permitted and should be appropriately secured. There are similar restrictions for funeral directors in organizing funerals and associated commemorative activities, such

¹ The Government's roadmap out of lockdown (published on 22 February 2021), which was imposed between January 2021 and March 2021, sets out the gradual lifting of restrictions pursuant to a four-step approach. Restrictions on funerals remained in place until 12 April 2021, where only up to 30 mourners were permitted to attend, while up to 15 people were permitted to attend wakes. The limit on funeral attendance remained capped at 30 people, although 30 people were allowed to attend wakes after 17 May 2021. These restrictions were reviewed in June 2021, with further relaxations in July 2021, culminating in the lifting of all legal restrictions in August 2021. See further Cabinet Office (2021). The restrictions described in this section were in force during various lockdown stages announced by the Government between January 2021 and March 2021. The guidance was withdrawn on 19 July 2021. The updated guidance for funerals and commemorative events during the coronavirus pandemic dated 22 January 2022 stipulates that face coverings are no longer required by law in England, though face coverings are recommended in crowded and enclosed spaces where it is possible to come into contact with other people. People who are clinically extremely vulnerable are advised to consider carefully if they should attend funerals or commemorative events due to the severe risks of Covid-19. Despite these relaxations, the guidance advised mourners not to participate in rituals that requires them to come into close contact with the deceased for fear of reinfection.

as strictly managing the entry and exit to funeral venues, ventilation and people movements. An aspect that is particularly significant is the suspension of rituals that generate aerosol particles, such as singing, chanting, playing music or instruments that require blowing, and activities requiring voice projections. This means that group singing and religious chanting should be avoided. Singing is limited only to a small group of professionals outside, but where conducted indoors should utilize plexiglass screens for protection. The current rule on wearing face coverings while indoors applies unless exempted. Consequently, mourners are unable to recognize each other instantly, creating a distant appearance in an already sombre affair. This is amplified by the advice for specific seating arrangements in order to avoid face-to-face encounters, augmented by protective screens. Participation in funerals is similarly limited to mourners who are not self-isolating; hence, older individuals, extremely clinically vulnerable people and people who are shielding or are more likely to be at risk are advised to stay at home. Post-prayer celebrations are limited to six people from different households where these are held outdoors and with two metres' distancing (Ministry of Housing, Communities and Local Government 2020a). Restrictions imposed for religious services in places of worship have meant that mourners may not be able to conduct pre-burial/funeral service gathering or wakes for the deceased or post-funeral service gathering and meals.

Does the Law Strike an Appropriate Balance?

It is clear that the pandemic has upended funeral and burial practices. Many familiar traditions and the grieving process have been modified to comply with health measures (Felter & Maizland 2020). Swift measures under national legislation and a slew of guidance, briefing papers and reports have illustrated the transformations to how people are buried and remembered. While the law aspires to balance the caution to protect public health and meet the needs of bereaved families to perform the last rites for the deceased, social-distancing requirements and public health safety have meant that any rituals that are performed are considered incomplete and may be unlikely to temper the gravity of grief and provide much-needed consolation. For example, families, where they are permitted to conduct simplified rituals in limited circumstances, have to wear personal protective equipment and be supervised by trained professionals, giving the appearance of being further alienated from the deceased, thus amplifying the loss and sorrow. The shift towards the handling of the deceased by health officers and the need for oversight created a sense of medicalization to the process, affecting important last

rites that are normally undertaken by families. Similarly, families are unable to spend the final moments with the deceased privately which could add to the pain felt. The proscription on washing and touching dead bodies is likely to implicate mourners who are extremely clinically vulnerable, in cases where their life partners have died. There are bound to be segments of the population that would be disadvantaged, hence creating implications for the living as they experienced grief and post-death bereavement.

Customary wakes which are communal in nature in some cultures may be curtailed (O'Mahony 2020). Isolated funerals that became the norm at the height of the pandemic, compared to customary funerals, meant that relatives and friends were unable to be physically present and to offer instantaneous support to the bereaved. These phenomena may inadvertently result in deepened grief for the bereaved, as specific rituals represent the transition towards accepting that death has occurred and letting go in the grieving process. The in-person restrictions on burial and funeral attendance have elevated live-streaming of funerals to new heights, forming an essential component of loss sharing and offering of support (Gay 2020). Although online broadcasting of funerals and sharing of videos on social media are not new, they present new pressure points within the relationships between funerals, physical distance and grieving virtually (Walter 2017). While the availability of digital streaming of funerals provides some relief for the mourners, they do not fully alleviate the pain of loss, nor do they substitute for being present physically (Walter 2017: 97). It is comparable to the sense of incompleteness experienced by families who are only able to view the body at a safe distance. Notwithstanding such inadequacies, they are valued by mourners who are unable to be present physically, offering a limited sense of togetherness in that particular space and time.

The question whether the law has struck an appropriate balance between protecting public health and enabling bereaved families to grieve is not an easy one to answer. The law accommodates the opportunity to hold funerals, and in this aspect recognizes mourners' needs to grieve. However, the overarching principle is girded in public health towards preventing re-infections, both for the workers handling the bodies and the families and wider community. Advice for speedy burials and highly simplified funerals demonstrates the constant reminder that the population's health (ie a majoritarian concern) is prioritized. The bereaved are expected to understand and accept the modified approach, despite being rushed through the process. The concessions available to the bereaved in participating in burials and funerals are simply

incidental to safeguarding public health. This is likely to be a contentious suggestion. However, further relaxations to the restrictions as infection rates plateau or decline signal that the widening of the possibility to participate in funerals is contingent on public health. It is evident that the central premise in these restrictions lies in the perception that dead bodies constitute an undesirable cause of infection, while this may not be the priority for families (Strange 2005: 70). Families' participation in the cleansing rituals for the deceased prior to funerals and burials reinforced the maintenance of the bonds between them, which serves the bereaved in their grieving journey. Rituals associated with wakes and viewing, touching or whispering to the deceased contained multilayered significance to the bereaved, from appreciating life's mortality, to coping with the loss and enabling expressions of sympathy and support (Strange 2005: 97). Strange correctly observed that 'Laying out had its own logic, based upon ideas of tradition, decency and ownership, which was no less valid for being at odds with the ideals of sanitary reformers' (ibid: 97). Personal narratives from bereaved families have revealed a more hurried experience compared to traditional timelines (Kenny 2020; Mayland & Ors 2020), indicating the shifting of the balance in favour of sanitary disposal in the competing interests between public health and private losses. The risks of infection transmission from handling dead bodies cannot be discounted; hence handling by health officers is inevitable in the process. However, the socially distanced conduct, protective gear and other pared-back customs are the events that people remember and which constitute the source of complicated grief that could become persistent. Such grief is unquantifiable despite the outward appearance of normality. Although there is awareness in acknowledging the loss through planned memorials for bereaved families in sharing their experiences, grief remains highly personal.

It is accepted that rituals provide a scaffold for bereaved families in channelling their emotions, paving the slow path towards life after loss, and provides a familiarity for them in managing the healing process (Moran 2017: 417). The analyses illustrate how the dead are still bound up with the living through specific rites and rituals that encompass social practices, religious beliefs and ancestral customs and cultures, signifying the transition from and separation between the dead and the living. The diversity of approaches does not deviate from the central idea that these practices are significant for therapeutic effects for the living, and the restrictions have adverse implications in the long-term. While securing public health through minimizing re-infection risks arising from burials and funerals is a defensible notion, the approach could be

better implemented. The restrictions, while acceptable to the extent that they acknowledge the importance of grieving, should be accompanied by measures to support the long-term implications to the bereaved. It is equally essential to establish cooperation between bereaved families, public health workers and local authorities to smooth the harshness of the conflict between, on the one hand, maintaining traditional rituals of burials and funerals and, on the other, the need for safe burials. It becomes imperative to recognize that rapid burials will have deprived bereaved families' need to 'see' the dead bodies and to experience funerals as part of the healing process. Moran aptly observed:

Would body bags of transparent plastic help to make the corpse more 'present' and allow more time for the family to express their grief while maintaining their safety? Are there other ways in which the symbolic equivalent of a body, like the shrines and cloths used for false burials in the southeast, could provide emotional comfort? With the benefit of hindsight ... can those guidelines be written from the perspective of the bereaved? (2017: 416).

It is vital to ensure that legal restrictions do not appear to 'penalize' communities with specific rituals, or for them to give rise to attributions of blame where burial and funeral requirements are perceived as contagious sources. It is unfortunate that specific communities were being blamed for the spread of Covid-19 due to participation in burial and funeral services owing to the differences in religious beliefs and the difficulties in reconciling competing values in carrying out religious rituals and minimizing the spread of infections (Barry 2020; Ellis-Petersen 2020; Katz 2020; Marshall 2020; Wright 2020a). These events would have intensified the grief and loss felt from the death of loved ones. It is pertinent to pause at this juncture to consider the extent to which these regulatory restrictions have been framed within a Christian worldview of death to the exclusion of other faiths and their practices. This is highly likely to create significant implications to the experiences of the bereaved with different religious and cultural sensitivities. The common law is historically influenced by biblical principles, morals, customs and Christian values governing the relationship between individuals in societies throughout the centuries, delineating rights and responsibilities and fundamentally premised on protecting such rights and society (Gest 1910). It is thus unsurprising that questions of death, rites, burials and funerals are shaped by these notions. However, in a contemporary society such as modern England, such perceptions may not necessarily coalesce with the increasingly diverse society, where ethnic communities continue to practise and nurture their distinctive customs and belief systems. Neglecting this aspect would mean overlooking the important value systems affecting

various faiths in society and consequently misconstruing their reactions to regulatory restrictions that are perceived as incompatible with their worldview of death and dying.

Restrictions on burials and funerals are not new and were implemented during the Ebola pandemic (Lee-Kwan & Ors 2017). These restrictions were underpinned by the close association between transmission risks and direct contact with dead bodies (Tiffany & Ors 2017; Moran 2017). A study into burials during the Ebola spread in Sierra Leone revealed concerns regarding interruptions to cultural traditions in washing and touching dead bodies, and misconceptions about mishandling of bodies and stigma (Lee-Kwan & Ors 2017). The community in the study perceived that the failure to adhere to proper sending-off rituals 'may result in misfortune' (ibid: 24-25). Suspicion towards health burial teams originated from misconceptions about the ways bodies are treated, the inability to participate in burials, and stigma surrounding the death and consequent quarantine (ibid: 27). Such concerns can be found in the current pandemic. It is therefore essential that the authorities adopt a more pluralistic attitude towards burial and funerary practices as opposed to a purely sanitary or hygienic approach in the handling of bodies. This approach would obviate some of the resistance encountered in managing dead bodies under the cloud of the pandemic. A pluralistic approach necessitates an appreciation for and an understanding of the variegated belief systems and rich socio-cultural and traditional practices within the communities that shape their worldview of life and death. New procedures to address these barriers include improved communication in engaging families in order to facilitate their understanding of the necessity for medically safe burials and allowing them to view the burial from a safe distance (ibid: 28). These bring forth the complex, interlinked relationships between participation in funeral preparations and the emotional implications to the bereaved; broadening the view that rituals are not merely mechanistic, routine procedures, but that they play a significant role in the grief and bereavement journey. More crucially, it illustrates the importance of efficient coordination, clear directions and strengthened communication between public health workers and the communities in the death management process in highly charged atmospheres during the pandemic. Building bridges and partnerships between faith groups and Covid-19 infection prevention units are more important than ever in these circumstances.

[D] IMPLICATIONS FOR THE LIVING AND OPTIONS FOR SUPPORTING MOURNERS

There are short and long-term implications for mourners and bereaved families vis-à-vis disrupted grieving arising from the restrictions. The dispensations with conventional rituals in burials and funeral services, limits to the number of in-person attendees at funerals, and curtailed interactions amongst mourners have affected bereaved individuals on a personal and emotional level. These phenomena have created wide-ranging psychological responses, from anger to disappointment, deep frustrations and isolation (Aguiar & Ors; Deggans 2020; Hawley 2020; Holter 2020; Kenny 2020). Bereaved families experienced profound grief and a sense of incompleteness in remembering the loss while navigating burials and funerals through the restrictions (Ansberry 2020; Claydon 2020; Frangou 2020; Kenny 2020; Seymour 2020). Curtailed expressions of grief caused resentment in surviving families who were forced to accept a restrained commemoration or funeral service (Kenny 2020). A particularly significant implication for the bereaved is coping with being deprived of sharing the grief by being near to their loved ones. Physical expressions of support and comfort such as hugs are replaced with eye expressions of understanding due to physical distancing. Mourners who participated in the funeral services remotely had to cope with technological limitations such as interrupted live streaming, while the environment amplified the sense of solitariness in remembering the day. These do not substitute for the healing and supportive power of physically holding another person and consoling each other. Instead, the bereaved could only process their own emotional responses privately. Anecdotal accounts describe, for example, the presence of neighbours' gestures in silently supporting the bereaved and displaying mutual solidarity in grief (Kenny 2020). The ritual of sharing the memories of the deceased either during wakes or funerals which formed part of the healing and grieving process becomes truncated. Ceremonies and rituals provide 'comfort' and a sense of anchor in the complicated moments of grief (Seymour 2020). These narratives painted a landscape of desolate, solitary experience, transformed from the usual supportive opportunities through funeral meals, wakes and services.

The lack of physical support, sharing of tissues, the distance and the attire (in personal protective equipment) have cumulatively resulted in depressing moments for the bereaved as they adapted to the temporary 'normality' of funerals and a continued sense of isolation. Grief can become profound under these circumstances. Grief is a natural human reaction arising from attachment to another (Walter 2017: 83). Bereaved

individuals experience different levels of grief, from pain, exhaustion, and relief; to guilt, helplessness, confusion, despair, detachment, feeling withdrawn and disbelief (Kübler-Ross 1969; Parkes 1998; Green & Green 2006: 191; Walter 2017: 235, 236); to psychological or pathological clinical depression in some circumstances (Brennan 2014: 327). Grief can manifest itself in silence and internalized sadness or in incoherent articulation of sorrow and conspicuous public lamentation. Time is irrelevant to grief, as it spans across the death process, where families continue to grieve in private. Assumptions surrounding time as mediating grief and thus providing closure to the bereaved remain inconclusive. The recovery process and time are likely to be considerable as mourners go through various stages of responding to the loss and coming to terms with the death (Green & Green 2006: 191, 192). Numbing, yearning and searching, disorganization, despair and reorganization are part of the recovery process (Bowlby 1969). Continued attachment to the deceased, known as continuing bonds, are normal in grief and bereavement (Klass & Ors 1996). Consolatory efforts that move the mourner away from the deceased would be unlikely to be beneficial; rather, it would be more helpful to the mourner to understand a world without the deceased (Green & Green 2006: 327). This appreciation comports with the continued attachment theory to the deceased, with gradual lessening of grief over time, but never completely overcome.

Complicated grief precipitated by Covid-19 is particularly significant in understanding the implications for the bereaved. Complicated grief is understood as an augmented response which occurs following sudden death or violent circumstances, or where deaths result from disaster or lack of support from families and friends resulting in insomnia or deep anguish (Green & Green 2006: 192; Stroebe & Ors 2013). It is marked by a period of prolonged sorrow, with continuous depressive moods, stress disorder, or guilt for the loss of loved ones, which are compounded by enforced physical distancing and the lack of human touch (Frangou 2020; Gamino & Ors 2000). A parallel can be drawn between families' experiences in confronting visitation restrictions for loved ones who are dying in intensive care units, and restrictions in funeral attendance and participation. Both create elevated risks for complicated grief to develop (Gesi & Ors 2020). The inability to communicate final thoughts to the dying or the dead have meant that the living carry the regret with them for a long time. The bereaved and mourners are expected to draw from their inner resources to cope with the loss, comforted by phone calls and videos from the funeral services. A study into the impact of funeral practices during Covid-19 on bereaved relatives' mental health and grief

revealed an inconclusive picture, with differing findings on the extent of benefit for relatives from funeral participation (Burrell & Selman 2020). However, the study found that the ability to determine the process of the funeral services and engage in rituals that are significant to the bereaved is beneficial to them. This finding suggests that the quality of funeral experience can potentially facilitate the grieving process. Consequently, funeral directors play an important role in offering opportunities to support bereaved families as much as possible, in shaping personalized, sensitive funeral arrangements within the confines of the pandemic (Burrell & Selman 2020: 32; Hennigan 2020). The limited exercise of choice may contribute towards building resilience to cope with the loss (Burrell & Selman 2020: 34). A rushed funeral experience thus would affect the grieving experience of the bereaved and their post-loss healing. Despite the personal loss experienced by families, the loss resulting from Covid-19 and the restrictions on funerals constituted communal grief (Bear & Ors 2020). This recognition paves the way for people to identify their shared losses and to develop ways to facilitate the grieving process post-pandemic and for offering mental health and wellbeing support for bereaved families.

A wider implication for bereaved families and communities is the re-evaluation of the meaning of life and relationships through death. The relationship between the dead and the living continues to exist, represented by the importance of rituals in burials and funerals and opportunities to mourn. The presence of dead bodies reminds the living of the mortality of human beings, the meaning of life, and the significance of transitioning to a future life without the deceased. Funerals, burials and graveyards are reminders of the social aspect of human life, as well as the emotional connections with the dead (Hall 2011). The inability to perform the usual rituals that involve bodily contact with the deceased created a void in the grieving process, with which it is difficult for the bereaved to contend. As a consequence, deepened grief is produced. The next section considers some options in supporting the bereaved in coping with the loss and the grief journey during the pandemic and beyond.

Accommodating Public Health Restrictions and Bereavement Support during the Pandemic and Beyond

There are several ways to support the bereaved and mourners during and after the pandemic. Restrictions imposed on the conduct of burials and funerals impact the bereaved immediately. Consequently, public

health restrictions affecting burials and funerals should involve active and continuous consultation with affected communities so that they can appreciate and accept the implications. For example, emphasizing the importance of conducting identification of bodies by relatives before burial in a safe and humane way can inculcate trust in public health authorities, followed by regular bereavement support that accommodates spiritual and religious care (Aguiar & Ors 2020). Better coordination amongst bereavement bodies supported by strong leadership to provide post-bereavement support could minimize the possibility of complicated grief such as ensuring continuity in connection through technology, individualized care and memorializations (Mayland & Ors 2020).

Giving opportunities to enable private moments during the burial and funeral process within permitted constraints can assuage the level of grief experienced by the bereaved to a certain extent. Prior discussion, involving clear and sensitive communication about the limitations, enables available choices about body disposal to be considered and exercised in honouring the deceased. While the restrictions may appear common sense from the public health perspective, they may not be accepted as such by bereaved families and could be interpreted as disproportionate to their loss. Resistance towards burial and funeral restrictions can result in conflict and cause further adverse effects on the grieving process. A tailored approach, with particular care for different socio-cultural demographics, is helpful to develop a local understanding and reciprocity between the authorities and communities in the death management process. It is equally essential that the population and affected communities are aware of the restrictions, with prior consultation carried out and consistent communications throughout the process. This approach would help towards engendering trust between the parties and collaboration in managing the death process.

Protecting public health is broad enough to include supporting bereaved families who have experienced complicated grief arising from losing loved ones during the pandemic. Cognitive behavioural therapy, remote counselling, virtual memorialization services and encouraging the continuity of bonds are options to help bereaved families negotiate their loss (Carr & Ors 2020; Maddrell 2020; Morris & Ors 2020). These are helpful for the bereaved during and after the pandemic, especially the importance of long-term counselling and grief management plans to enable the bereaved to navigate the mourning process in a healthy way. Alongside bereavement support groups, other measures to mediate grief include self-help, lifestyle management (sleep, diet, stress relief), mental health support and grief counselling (Green & Green 2006: 194; Brennan

2014: 237, 241). Personalized, tailored care is essential to support mourners, taking into account personalities and socio-cultural practices (Anderson 2010; Brennan 2014: 242). The continuity of support post-pandemic is crucial to facilitate the bereaved families' adjustment to the loss, helping them transition from grief to hope.

The pandemic is likely to be remembered for years to come. Public mourning is recognized as an act of solidarity with bereaved families and those who grieved alone; as such, organizing events to mark the loss due to the pandemic could be valuable in acknowledging loss and grief (Bristol News 2020). These commemoration events on a national level are important towards recognizing that the private grief of the bereaved families is shared collectively. Their loss is not only acknowledged but goes towards respecting and honouring those who died in the pandemic. Public memorializations therefore constitute part of a solidarity gesture in facilitating the healing journey for the bereaved.

[E] CONCLUSION

This article has outlined how the Covid-19 pandemic has affected burials and funerals. Rituals in burials and funeral services are significant in the grieving journey for the bereaved within the broad context of death and dying. Traditional funerary customs are suspended during the pandemic in the interest of preserving public health. Physical and social-distancing requirements have interrupted the familiar process of being present for the loved ones who are dying or dead, thereby leaving the bereaved particularly vulnerable to grief in times of loss. These restrictive measures have dented the grieving process, resulting in a less than cathartic healing process to the living. While it is important to prevent further re-infection risks arising from the handling of dead bodies, it is imperative that affected people are given the opportunity to understand the circumstances and allow possible accommodations within the constraints. Additionally, as these restrictions apply to all burials and funerals during the pandemic, which may not necessarily be caused by or related to Covid-19, the implications for bereaved people could be even greater. A broad-brush public health approach towards minimizing the risks of transmission is defensible if accompanied by appropriate, constructive remedial measures to preempt and address long-term implications to the health and wellbeing of the bereaved and the wider community.

Grief management is essential in facilitating closure for bereaved friends and families. Short and long-term wellbeing support mechanisms can assist individuals and families navigate the difficult times and

heal the loss of loved ones. Financial support to fund the offering of wellbeing support services is vital and should be available to all layers of communities. This will help rebuild their lives without the deceased, strengthen their resilience and prepare them for similar future crises. Modifications to how people participate in funerals and burials during the pandemic may prompt innovative ways in conducting funerals, choices for rituals, and the accommodation of particular customs and practices, resulting in greater flexibility. Digital streaming of funerals, for instance, may continue post-pandemic. Grieving is a long, arduous process, and its gravity is amplified in a pandemic. It becomes imperative to recognize these difficulties and to offer sustainable bereavement support.

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LEGAL UNREASONABLENESS AFTER *Li*— A PLACE FOR PROPORTIONALITY

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Abstract

Substantive legal unreasonableness as a ground of judicial review of the exercise of an administrative discretionary power was not often successful in Australia due to the strictness of Lord Greene’s formulation of the test in *Wednesbury*. In 2013, the High Court of Australia reformulated the test in *Minister for Immigration and Citizenship v Li*. That gives rise to questions as to how certain and transparent a test of legal reasonableness can be. The courts in England have considered similar questions concerning *Wednesbury* unreasonableness often accompanied by a consideration of proportionality principles. This article examines those questions and the extent to which the Australian courts may follow developments in England.

[A] INTRODUCTION

In Australian administrative law, the specific grounds upon which the exercise of a discretionary power may be set aside on an application for judicial review are well known and include errors such as bad faith, taking into account irrelevant considerations, or failing to take into account relevant considerations, and exercising a discretionary power for an improper purpose. There is also a more general ground of unreasonableness, or, as it has been referred to in more recent cases, legal unreasonableness. Before the High Court of Australia’s decision in 2013 in *Minister for Immigration and Citizenship v Li* (2013) (*Li*), the more general ground of unreasonableness was commonly described in terms of Lord Greene MR’s formulation in *Associated Provincial Picture Houses*

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Ltd v Wednesbury Corporation (1948) (*Wednesbury*): an exercise of an administrative discretionary power is legally unreasonable if it results in a decision that is so unreasonable that no reasonable person could ever have come to it. Although this formulation was strongly criticized from time to time for its circularity and vagueness, it held its position firmly as the test of legal unreasonableness, not involving one of the specific errors, until 2013. As noted by Professor Paul Craig (Craig 2021: paragraph 21-007), Lord Greene used unreasonableness in two senses, that is, first as an ‘umbrella’ term to describe all the errors comprising jurisdictional error in the case of the exercise of an administrative discretionary power, and secondly, giving unreasonableness a ‘substantive’ meaning in its own right.

This article is addressed to the substantive meaning of unreasonableness as a ground of judicial review. In *Li*, the High Court said that Lord Greene’s formulation was open to the interpretation that it is limited to what is, in effect, an irrational, if not, bizarre decision. The court also said that Lord Greene’s judgment in *Wednesbury* should not be taken to have limited unreasonableness in that way, but it is not necessary for me to examine that proposition. The court said that the legal standard of unreasonableness was not limited to the irrational, if not, bizarre decision (*Li* 2013: 68 per Hayne J, Kiefel J (as her Honour then was) and Bell J). This represented an expansion of the ground of legal unreasonableness in the case of the exercise of an administrative discretionary power or, at least, in the understanding of many administrative lawyers in this country as to the scope of the ground.

One purpose of this article is to identify, as far as possible, the matters which, since *Li*, determine the standard of legal unreasonableness in the case of the exercise of an administrative discretionary power. Another purpose is to consider whether a form of proportionality analysis may be fit for the purpose of determining legal unreasonableness in all cases involving the exercise of an administrative discretionary power or, at least, in some cases. Notions of proportionality inform legal principle in many areas of law, but the test of proportionality may, depending on the context, vary from a highly structured test involving a number of steps to a simple more general test. If a proportionality analysis is useful in determining legal unreasonableness, it is necessary to consider what form the analysis should take.

Wednesbury unreasonableness and the proportionality principle are important doctrines in administrative law in England and have been the subject of considerable analysis and development in recent cases,

including argument at the highest level that the proportionality principle should replace *Wednesbury* unreasonableness. I will examine those developments with a view to commenting on the extent to which they might be adopted in this country.

[B] THE AUTHORITIES BEFORE *LI*

There is very early authority for the proposition that an apparently unconfined discretion cannot be exercised in an arbitrary or capricious way.

In *Rooke's Case* (1597), the Commissioners of Sewers had imposed taxes on landowners adjoining the River Thames. The issue raised was whether the Commissioners were justified in imposing taxes on some landowners, but not others whose lands were equally subject to flooding. The court said (citations omitted):

and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections;

In the often-cited case of *Sharpe v Wakefield* (1891), the House of Lords considered the breadth of the discretion entrusted to Licensing Justices to grant a licence by way of renewal for the sale of intoxicating liquors. In addressing the discretion reposed in the Licensing Justices, Lord Halsbury LC said (citation omitted):

An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case*; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular (*Sharpe v Wakefield* 1891: 179).

In an early decision of the High Court of Australia, the court considered the breadth of the discretion given to a local government authority to register and grant a certificate of registration to an occupier of ground to conduct public amusement and entertainment on that ground (*Randall v Northcote Town Council* 1910). Griffith CJ referred to Lord Halsbury LC's observations in *Sharpe v Wakefield* (1891: 105-106). Isaacs J (as his Honour then was) said:

To justify interference I am of opinion that the reasons actuating the Council must be such that no reasonable men could honestly view them as coming within the wide, indefinite and elastic limits of the powers of local self-government as conferred by Parliament (*Randall v Northcote Town Council* 1910: 118).

A formulation of legal unreasonableness akin to Lord Greene's formulation was applied by the High Court in the case of a municipal council levying a local rate for the execution of work or service under local government legislation (*Parramatta City Council v Pestell* 1972: 327 per Gibbs J (as his Honour then was)), the determination of the price of bread by the Prices Commission under statute (*Bread Manufacturers of New South Wales v Evans* 1981: 420 per Gibbs CJ), and the exercise of jurisdiction by the Conciliation and Arbitration Commission under the Conciliation and Arbitration Act 1904 (Cth) (*R v Moore; Ex parte Co-operative Bulk Handling Ltd* 1982: 222).

In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) (*Peko-Wallsend*), Mason J (as his Honour then was) said that Lord Greene's formulation of legal unreasonableness had been embraced in both Australia and England. His Honour noted that Lord Greene's formulation had been adopted by the legislature in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). The ADJR Act gave a right of review to aggrieved persons with respect to certain decisions made under Commonwealth legislation. The grounds of review in the Act reflected the grounds of judicial review at common law and include a ground that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made (section 5(1)(e)). An improper exercise of power was defined to include, among other errors, the exercise of a power that is so unreasonable that no reasonable person could have so exercised the power (section 5(2)(g)).

Justice Gummow, before his elevation to the High Court and sitting as a judge of the Federal Court of Australia in *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Livestock Corporation* (1990: 166) (*Fares Rural Meat*) also observed that sections 5(1)(e) and 5(2)(g) of the ADJR Act were drawn from the ground of review at general law propounded by Lord Greene MR in *Wednesbury*. At the same time, his Honour made the observation that there was force in the criticism that both Lord Greene's formulation of unreasonableness and subsequent attempts to explain or amplify it have been 'bedevilled by circularity and vagueness' and he referred to Allars (1990: paragraph 5.52). His Honour referred to Dr Allars' attempt to instil a measure of order into the authorities dealing with *Wednesbury* unreasonableness by identifying three paradigm cases

of unreasonableness as rooted in the law as to the misuse of fiduciary powers. The paradigm cases are as follows: (1) the capricious selection of one of a number of powers open to an administrator in a given situation to achieve a desired objective, the choice being capricious or inappropriate in that the exercise of the power chosen involves an invasion of the common law rights of the citizen, whereas the other powers would not; (2) discrimination without justification, a benefit or detriment being distributed unequally amongst the class of persons who are the objects of the power; and (3) an exercise of power out of proportion in relation to the scope of the power.

Justice Gummow decided that the exercise of power in the case before him could not be characterized as having been carried out ‘in such a disproportionately arbitrary manner as to attract review on *Wednesbury* grounds’.

The judgment of Brennan J (as his Honour then was) in *Attorney-General (NSW) v Quin* (1990) (*Quin*) has been very influential in Australian administrative law. His Honour said the following as to the difference between the legality of administrative action and the merits of such action:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone (*Quin* 1990: 35-36).

His Honour said that the consequence is that the scope of judicial review must be defined in terms of the extent of the power and the legality of its exercise.

His Honour then referred to *Wednesbury* unreasonableness in the terms identified by Lord Greene and said that, properly understood, such a ground of challenge leaves the merits of a decision or action unaffected unless the decision or action amounts to an abuse of power. The limitation on the exercise of the power embodied in Lord Greene’s formulation is ‘extremely confined’ (*Quin* 1990: 36).

Justice Brennan said that the court must not usurp the role of the decision-maker, a role given to the decision-maker by the legislature. A court was not equipped to evaluate the policy considerations which might bear on the balance to be struck between the interests of the community

and those of minority groups. Nor is the adversary system with its costs consequences best suited to assessing the interests of those who may not be represented before the court.

[C] THE DECISION IN *LI* AND SUBSEQUENT CASES

The facts in *Li* were simple. The respondent was a non-citizen who had been training and obtaining work experience as a cook. She applied for a Skilled-Independent Overseas Student (Residence) (Class DD) visa. Her application was refused by a delegate of the Minister for Immigration and Citizenship. A necessary requirement for the visa for which the respondent had applied was a favourable skills assessment by Trades Recognition Australia (TRA). The respondent applied to TRA for a fresh assessment of her skills, but had not received a response when she applied to the Migration Review Tribunal (the Tribunal) for a review of the delegate's decision. The TRA's decision on the respondent's application for a fresh skills assessment was unfavourable and the respondent applied to the TRA for a review of that decision. Her application for review by the Tribunal and her application to TRA for a review of its assessment of her skills were both pending.

The review by the Tribunal of the delegate's decision was conducted under Part 5 of the Migration Act 1958 (Cth) and within that Part, the Tribunal was given a general power to adjourn the review from time to time (section 363(1)(b)). The Tribunal affirmed the delegate's decision without waiting for advice from the applicant as to the outcome of the representations of the respondent's migration agent to the TRA. The Tribunal's explanation for why it had decided to proceed in those circumstances was because it considered 'that the applicant has been provided with enough opportunities to present her case'. The court at first instance held that the Tribunal's decision to proceed in those circumstances was unreasonable 'in the *Wednesbury Corporation* sense' and that decision was upheld by the intermediate appellate court. The High Court dismissed the Minister's appeal.

There were three sets of reasons, joint reasons of Hayne, Kiefel and Bell JJ, and separate reasons by French CJ and Gageler J respectively.

The plurality pointed out that the tribunal's power to adjourn was subject to a legal presumption that the legislature intended that a discretionary power, statutorily conferred, will be exercised reasonably. The plurality decided that the Tribunal's decision to bring the review

to an abrupt conclusion was not reasonable in light of its obligation to invite an applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review (section 360). In relation to Lord Greene's formulation of legal unreasonableness, the plurality said:

Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury* has been criticised for 'circularity and vagueness', as have subsequent attempts to clarify it. However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision—which is to say one that is so unreasonable that no reasonable person could have arrived at it—nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (Li 2013: 68 citations omitted).

The plurality referred to the judgment of Dixon CJ in *Klein v Domus Pty Ltd* (1963) (*Klein v Domus*) where the following expression in section 63(3) of the Workers' Compensation Act 1926–1960 (NSW) was under consideration: 'if he is satisfied that sufficient cause has been shown, or that having regard to all the circumstances of the case, it would be reasonable so to do'.

As to the scope of the power governed by this expression, Dixon CJ in *Klein v Domus* said:

We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case (1963: 473).

In *Li*, the plurality went on to say that the legal standard of reasonableness must be the standard indicated by the true construction of the statute.

The plurality referred to various existing concepts and principles which may assist in determining the standard of legal reasonableness in a particular case, recognizing that ultimately the decisive factor is the

scope and purpose of the statute. Those existing concepts and principles include the following concepts and principles.

First, the plurality said that the approach to appellate review of the exercise of a judicial discretion may also be of assistance in determining legal unreasonableness in a particular case. Many of the modern Australian authorities refer to the close analogy between judicial review of administrative action and appellate review of a judicial discretion (*Peko-Wallsend* 1986: 42 per Mason J). It is sufficient to refer to the leading case in Australia on appellate review of a judicial discretion, *House v The King* (1936: 505), where Dixon, Evatt and McTiernan JJ said:

It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred (*Lovell v Lovell* 1950; *Gronow v Gronow* 1979; *Mallett v Mallett* 1984).

In *Norbis v Norbis* (1986: 518), Mason and Deane JJ described a discretionary power as one involving assessments calling for value judgments ‘in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right’.

Secondly, albeit a case concerning the validity of by-laws, the plurality referred to the often-cited remarks of Lord Russell of Killowen CJ in *Kruse v Johnson* (1898) that by-laws may be struck down because: (1) the by-laws are partial and unequal in their operation as between classes; (2) the by-laws are manifestly unjust; (3) there is bad faith; (4) the by-laws involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.

The plurality in *Li* said that unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification. Chief Justice French said that the canons of rationality mean that administrative decision-makers exercising discretion must reach their decisions by reasoning which is intelligible and reasonable

and directed towards and related intelligibly to the purposes of the power. The Chief Justice went on to say that the requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters, or has made an evaluative judgment with which the court disagrees even though that judgment is rationally open to the decision-maker. Finally, his Honour noted that a distinction may be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. A disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterized as irrational, and it may also be characterized as unreasonable ‘simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves’ (*Li* 2013: 30).

Justice Gageler referred to the implication of reasonableness as a manifestation of ‘the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject-matter, scope and purposes of the statute’ (*Li* 2013: 90). His Honour noted that there will be room for disagreement in the judicial application of legal unreasonableness to the exercise of administrative discretion and, in that context, his Honour referred to the following observations of Frankfurter J in *Universal Camera Corp v National Labor Relations Board* (1951: 488–489) (*Universal Camera*):

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Finally, his Honour observed that a supervising court was in a better position to assess reasonableness in the case of the exercise of a power familiar to it such as the exercise or non-exercise of a power to adjourn than in a case where the exercise of the power is informed by policies of which the court had no experience.

The High Court and the Full Court of the Federal Court have considered the effect of *Li* in subsequent decisions.

In *Minister for Immigration and Border Protection v SZVFW* (2018), the respondents’ applications for protection visas were refused by a delegate

of the Minister for Immigration and Border Protection. The respondents applied to the Refugee Review Tribunal under Part 7 of the Migration Act for review of the delegate's decision. As required by the Act, they were invited to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review, but they did not appear on the scheduled date. They were also invited to provide documentation in support of their application for review, but did not do so.

Under the Act, the Tribunal was given the power, if the applicant did not appear before the Tribunal in response to an invitation, to make a decision on the review without taking further action to allow or enable the applicant to appear before it. The Tribunal took that course and it affirmed the delegate's decision.

The respondents sought judicial review of the Tribunal's decision and the court at first instance held that the Tribunal's decision was legally unreasonable because the Tribunal could not have been satisfied that the letter inviting the respondents to attend the hearing was received by them. The court said that the attendance of the respondents at the hearing was important to them and the Tribunal could have attempted some other action before proceeding to make its decision.

The decision of the court at first instance was upheld by the intermediate appellate court on the ground that the assessment of unreasonableness by the court at first instance involved a discretionary judgment and the principles applicable to an appellate court's interference with a discretionary judgment were engaged. The result was that the intermediate appellate court declined to interfere with the decision of the court at first instance.

On appeal to the High Court, the court held that the intermediate appellate court had erred in treating the decision by the court at first instance as to unreasonableness as one involving the exercise of a discretion. The High Court held that the Tribunal's decision to proceed was not legally unreasonable.

Of present importance are the High Court's observations as to the standard of legal reasonableness. Kiefel CJ said that one test of legal unreasonableness was that the decision lacked an evident and intelligible justification (*Li* 2013: 10). The Chief Justice said that, on any view, the test for legal unreasonableness is necessarily stringent (*Li* 2013: 11). Gageler J said that reasonableness is not exhausted by rationality and that it is inherently sensitive to context and that it could not be reduced

to a formulary (*Li* 2013: 59). Nettle and Gordon JJ said that it would be a rare case in which the exercise of a discretionary power was unreasonable where the reasons of the decision-maker demonstrated a justification for that exercise of power (*Li* 2013: 84). Their Honours also stressed that 'legal unreasonableness is invariably fact dependent and requires a careful evaluation of the evidence' (*Li* 2013: 84). Edelman J referred to the now abandoned distinction in Canadian law between patent unreasonableness reflecting Lord Green's formulation and unreasonableness simpliciter. There are not two tests of unreasonableness. There is but one test based on the statutory context, including the scope, purpose and real object of the statute (*Li* 2013: 134).

In *ABT17 v Minister for Immigration and Border Protection* (2020), the appellant was a citizen of Sri Lanka of Tamil ethnicity who arrived in Australia without a visa. He applied for a protection visa and stated his fear of persecution related to his treatment in Sri Lanka by the Sri Lankan army and the belief of the authorities that he was involved with the Liberation Tigers of Tamil Eelan. He claimed that he had been beaten by members of the Sri Lankan army and sexually tortured.

The legislative scheme under which his application was considered involved a decision by a delegate of the Minister for Immigration and Border Protection and then, if the decision was unfavourable to the applicant, administrative review by the Immigration Assessment Authority (the IAA). The IAA was empowered to consider the matter afresh and to make what it considered to be the correct and preferable decision. The IAA was provided with review material which had been before the delegate. It was not obliged to interview an applicant, but could do so in the exercise of a discretion.

The delegate interviewed the appellant in person before making a decision and the interview was the subject of an audio-recording, but not a video-recording. The audio-recording was part of the review material provided to the IAA. The delegate found that the appellant's account of being detained and sexually tortured by the Sri Lankan army was plausible, but rejected the appellant's application for a protection visa on an unrelated ground.

The IAA listened to the audio-recording and drew conclusions from it which were adverse to the appellant. It departed from the delegate's findings concerning the appellant's detention and sexual torture by the Sri Lankan army. The IAA did not interview the appellant.

The legislative scheme proceeded on the basis that the IAA would review the delegate's decision by reference to the review material which had been before the delegate, subject to an ability to obtain new information. The difficulty in the case before the High Court arose because of the informational gap in the information before the delegate who had both *seen* and heard the appellant, and the IAA who had only heard the appellant. The court observed that the opportunity to see the appellant is an opportunity to assess his demeanour.

The High Court held that the implied condition of reasonableness attaching to both the duty to review the delegate's decision and to the power to get new information had been breached by the rejection of the appellant's account of detention and torture without inviting the appellant to an interview.

The plurality (Kiefel CJ, Bell, Gageler and Keane JJ) said that the implied condition of reasonableness applied to not only why a decision is made, but also to how it is made and that a decision must not only have an intelligible justification, but also be arrived at through an intelligible decision-making process. In the case before the court, the IAA had not arrived at its decision through an intelligible decision-making process.

The Full Court of the Federal Court considered the effect of the High Court's decision in *Li* in *Minister for Immigration and Border Protection v Singh* (2014) (*Singh*) and in *Minister for Immigration and Border Protection v Stretton* (2016) (*Stretton*).

The Full Court in *Singh* made the following observations: (1) there is no single form of words that expresses the standard of legal unreasonableness in the sense of unreasonableness not involving a specific error; (2) one form of words used in *Li* and used in *Singh* is whether there is an intelligible justification for the decision; (3) where reasons are given, the intelligible justification must be found in those reasons; (4) the indicia for legal unreasonableness will be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case; (5) the analysis of legal unreasonableness will require a very close examination of the facts of the case before the court; (6) in the case of power of adjournment which was the power in issue in *Singh*, there is clearly potential for an overlap between legal unreasonableness and a denial of procedural fairness; and (7) if a proportionality analysis were adopted, there was a lack of proportionality between the object of proceeding expeditiously on the one hand, and the refusal of a short adjournment when the effect of the latter on the applicant for review is considered, on the other. In other words, the exercise of the power to adjourn will result in the delay of the

review. Nevertheless, there may be good reason to adjourn and a failure to adjourn may have severe consequences for the applicant for review. The refusal of a *short* adjournment may, and in *Singh* did, amount to a disproportionate response to the circumstances such that the exercise of the power was legally unreasonable.

In *Stretton*, Allsop CJ said that the proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Griffiths J considered that there might be support in the decision of the High Court in *McCloy v New South Wales* (2015: 3) (*McCloy*) for the proposition that the concept of proportionality is an aspect of judicial review of administrative action. His Honour considered that resort to formula distracted attention from the key question which is whether *the administrative decision is one which is within the authority of the decision-maker to make* and that, in turn, required close attention to be given to the statutory framework, including the subject matter, scope and purpose of the relevant statutory power (*McCloy* 2015: 62).

In summary, the effect of *Li* and the cases which have followed is that legal reasonableness is implied into the conferral of an administrative discretion and it is no longer appropriate to identify the standard by reference to Lord Greene's formulation. The standard is fixed by reference to the statutory context, including the subject matter, scope and purpose of the relevant statutory power. If it is to be reduced to a single question, that question is whether a reasonable decision-maker could have reached the decision under challenge, or could have reached the decision by the process adopted in the case under challenge? There is no indication that the move away from Lord Greene's formulation is intended to have any effect on the principles identified by Brennan J in *Quin* that the court is not to usurp the role of the principal decision-maker by involving itself in the merits of a decision.

The courts have used phrases which identify in different words the conclusion reached (eg within the area of decisional freedom) or identify general aspects of reasonableness or aspects that might arise in a particular case. Examples of phrases or expressions identifying general aspects of reasonableness are an evident and intelligible justification or an intelligible decision and an intelligible decision-making process. Examples of phrases or expressions that identify aspects that might arise in a particular case are the three paradigms referred to by Gummow J in *Fares Rural Meat* and the grounds upon which by-laws may be struck down identified by Lord Russell in *Kruse v Johnson*. Finally, as I have

said, in an appropriate case, a court may rely on the principles developed in relation to appellate intervention in the exercise of a judicial discretion.

Reference has been made in the authorities to an exercise of power being illogical, irrational or based on findings of fact or inferences of fact not supported by logical grounds. There is debate in Australia as to whether this is a subset of unreasonableness or a ground for setting aside a finding of jurisdictional fact which involves the reasonable satisfaction of the administrative decision-maker as to a particular matter (*Minister for Immigration and Citizenship v SZMDS* 2010: 39 per Gummow ACJ and Kiefel J, per Crennan and Bell JJ 129; *Li* 2013: 90 per Gageler J).

What role, if any, does proportionality play in determination of the standard of legal reasonableness in Australia in the case of judicial review of an administrative discretionary power? Obviously, it is not a free-standing ground of judicial review. Nor is it simply an alternative way of describing legal reasonableness. A lack of proportionality is an appropriate description in some cases of the feature in the case that gives rise to the conclusion of legal unreasonableness. Cases in which there are clearly defined purposes for the exercise of the power and a number of available options are more likely to attract a proportionality analysis. A conclusion of a lack of proportionality giving rise to legal unreasonableness does not involve the application of the highly structured test of proportionality applied in other areas of the law. Furthermore, it is not a form of proportionality which involves a consideration of the merits of an administrative decision.

[D] PROPORTIONALITY IN AUSTRALIA

A form of the proportionality principle is applied in a number of areas of Australian law. Even in cases in which it is not the actual tool of analysis, proportionality contributes to the formulation of legal principle. A great deal can be said about this topic, but I need make only three points.

First, Australian courts have applied a proportionality test in dealing with the implied freedom of communication of and concerning political and governmental matters under the Constitution (*McCloy*), the guarantee contained in section 92 of the Constitution that trade, commerce and intercourse between the States shall be ‘absolutely free’ (*Palmer v State of Western Australia* 2021: 54-68 per Kiefel CJ and Keane J, 264-276 per Edelman J; but contra Gageler J at 140-151 and Gordon J at 198), control orders under the Criminal Code (Cth) to reduce the risk of the commission of terrorist acts (*Thomas v Mowbray* 2007: 19 per Gleeson CJ); sentencing for offences under the criminal law (*Veen v The Queen* (No

2) 1988: 477 per Mason CJ, Brennan, Dawson and Toohey JJ; *Pattinson v Australian Building and Construction Commissioner* 2020: 41 per Allsop CJ, White and Wigney JJ) and in determining the validity of delegated legislation in certain circumstances (*Attorney-General (SA) v Adelaide City Corporation* 2013: 61 per French CJ).

Secondly, proportionality does not have one fixed meaning. It can range from a simple analysis of the balance between means and ends to the highly structured approach adopted when legislative interference with an implied freedom under the Constitution is in issue. The highly structured approach involves, at the stage of the analysis where the question being considered is whether the law is reasonably appropriate and adapted to advance an object determined at an earlier stage of the analysis to be legitimate, a consideration of whether the law meets the following criteria: (1) suitability, that is to say, it has a rational connection to the purpose of the provision; (2) necessity, that is to say, there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and (3) adequate in its balance, that is, a criterion which requires a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom (*McCloy* 2015: 2 per French CJ, Kiefel, Bell and Keane JJ). The value judgment referred to in (3) does not entitle the courts to substitute their own assessment for that of the legislative decision-maker.

Finally, a far less structured test of proportionality has, from time to time, been identified as a feature which can be used to determine the question of the legal reasonableness of the exercise of an administrative discretionary power. Gummow J's approach in *Fares Rural Meat* drew on such an analysis as did French CJ's example of using a sledgehammer to crack a nut in *Li*. More recent authority indicates that the terms of the legislation conferring the administrative discretion may carry with it a requirement of proportionality in the decision-making process. For example, Kiefel J took that view in *Wotton v State of Queensland* (2012: 91) in the case of a power to impose such conditions as the decision-maker 'reasonably considers necessary'. Furthermore, the task of imposing a penalty by the exercise of an administrative discretion will, in order to be judged as reasonable or unreasonable, inevitably involve a consideration of the relationship between the nature of the breach and the severity of the penalty, that is whether the latter is proportionate to the former (*Comcare v Banerji* 2019: 84 per Gageler J).

[E] DEVELOPMENTS IN ENGLAND

The law in England as to *Wednesbury* unreasonableness and the principle of proportionality has developed through a series of important decisions of the House of Lords (Supreme Court). The enactment of the Human Rights Act in 1998, including, as a Schedule to that Act, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European principle of proportionality, have been major influences.

The starting point is Lord Diplock's speech in *Council of Civil Service Unions v Minister for the Civil Service* (1985: 408). In that case, not only did his Lordship suggest that proportionality may in time become a fourth ground of judicial review, but he described *Wednesbury* unreasonableness in terms no less demanding than Lord Greene's formulation. His Lordship said that it comprised a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

In 1991, the House of Lords considered arguments in a judicial review application that certain directives issued under a statutory power in the Broadcasting Act and relating to the content of broadcasts by an independent broadcaster and a public broadcaster were invalid on the grounds of unreasonableness and a lack of proportionality: *R v Secretary of State for the Home Department, Ex parte Brind* (1991) (*Brind*). In support of their challenge, the broadcasters relied on the right to freedom of expression in Article 10 of the Convention. The court held that the statutory provision was unambiguous and the Convention had no role to play in its application. The court held that the Secretary of State who had issued the directives had not made a decision which was legally unreasonable. The possibility of applying a doctrine of proportionality to the exercise of power (in addition to the doctrine of legal unreasonableness) was rejected in the particular case because to do so would be to substitute the court's view for that of the Secretary of State. Lord Lowry made the following important observations: (1) the *Wednesbury* unreasonableness test may be reformulated as a question whether a decision-maker acting reasonably could have reached the decision with the qualification that in answering this question, the supervising court must bear in mind that it is not sitting on appeal, but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion; and (2) there is no doctrine of proportionality in English law and there are very good reasons why the courts do not involve themselves in a consideration of the merits of administrative

decisions. Lord Lowry's statement of those reasons reflects to a significant extent the reasons identified by Brennan J in *Quin*.

In *R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* (1999), the applicant for judicial review challenged the Chief Constable's decision about how police resources were to be allocated to deal with protests in respect of live animal exports. The decision was challenged on two grounds, namely, *Wednesbury* unreasonableness and a European Union (EU) element being a breach of Article 34 of the EC Treaty. The application for judicial review failed. In the course of his speech, Lord Cooke made observations to the following effect: (1) the application of European concepts of proportionality and a margin of application produced in the particular case, and is likely to in many cases, the same results as the application of *Wednesbury* principles; (2) Lord Greene's formulation is tautologous and may be described as an admonitory circumlocution; (3) unnecessary complexity is avoided by the simple test of whether the decision was one which a reasonable authority could reach. The converse of such a test is 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt', referring to the words of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1977: 1064). Lord Cooke concluded his remarks by saying: 'These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers' (*R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* 1999: 452).

In *R (Daly) v Secretary of State for the Home Department* (2001) (*Daly*), a prisoner serving a term of life imprisonment brought an application for judicial review in which he challenged a policy adopted by the Home Secretary concerning searches of prisoners' cells and, in particular, the examination by the authority in the prisoner's absence of legal correspondence. The application for judicial review was based on two grounds: (1) common law judicial review grounds; and (2) an alleged breach of the right in Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) as it appears in a Schedule to the Human Rights Act 1998 to respect for his correspondence.

The court upheld the challenge and held that the Home Secretary's policy was void insofar as it permitted searches of a prisoner's legal correspondence in his absence in all cases. The court noted that the common law grounds and the Convention ground overlapped and, in the case before the court, produced the same result as (it was said) they would often do.

Nevertheless, the court said that the common law test formulated in *Wednesbury* was not the same as the test of proportionality applied in the case of an alleged breach of a right in the Convention.

The court identified the proportionality principle as applied to the Human Rights Act and a Convention right as one which involves a three-stage process where the court asks itself the following questions:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective (*de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* 1999: 80 per Lord Clyde).

It is necessary to digress briefly to identify the heightened scrutiny test formulated by Sir Thomas Bingham *MR in R v Ministry of Defence, Ex parte Smith* (1996) (*Smith*). The Master of the Rolls formulated the *Wednesbury* test in terms of a decision being unreasonable if it is beyond the range of responses open to a reasonable decision-maker. Following *R v Secretary of State for the Home Department, Ex parte Bugdaycay* (1987) and *Brind*, the Master of Rolls said that the greater the inference by the exercise of power with human rights, the more the court will require, by way of justification, before concluding that the decision is reasonable. On the other side, the court will show greater caution than normal where decisions are policy laden or esoteric or security-based, ‘the test itself is sufficiently flexible to cover all situations’ (*Smith* 1996: 556).

Returning then to *Daly*, Lord Steyn identified the differences between the proportionality principle and the common law *Wednesbury* test as follows: (1) the proportionality principle may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational and reasonable decisions; (2) the proportionality principle may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) even the heightened scrutiny test formulated in *Smith* is not necessarily appropriate for the protection of human rights.

In *Bank Mellat v Her Majesty’s Treasury (No 2)* (20130 (*Bank Mellat*), an application for judicial review was made in relation to an Order in Council made under the Counter-Terrorism Act 2008. The effect of the Order in Council was that a major Iranian Bank, Bank Mellat, had restricted access to the United Kingdom’s financial markets because of its alleged connection with Iran’s nuclear weapons and ballistic missiles

programmes. A Convention right to the peaceful enjoyment of possession (First Protocol, Article 1) was in issue. The Bank's challenge to the Order in Council included a substantive challenge on the grounds of irrationality and a lack of proportionality. The Bank's challenge succeeded by a majority. The differences between the majority and the minority largely related to the application of the legal tests to the facts, rather than the formulation of the tests themselves.

Of note in the *Bank Mellat* decision is the apparent detail and structure of the proportionality principle applied in a case involving an interference by the exercise of power with fundamental rights. Lord Sumption identified the four steps in applying the principle as follows:

- 1 whether the objective of the measure is sufficiently important to justify a limitation of a fundamental right;
- 2 whether the measure is rationally connected to the objective;
- 3 whether a less intrusive measure could have been used without unacceptably compromising the objective; and
- 4 whether having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

These steps overlap in that the same facts will be relevant to more than one step and they involve the making of value judgments, the prime example being the third step and the notion of 'unacceptably' compromising the objective. Furthermore, it is important not to overlook the fact that the test cannot be applied mechanically and it involves matters of judgment and assessments of weight and balance.

Lord Reed made important observations about the different ways in which the proportionality principle itself is formulated and applied, for example, with notions of a margin of appreciation and deference to the national legislature by different courts—the national court, the court at Strasbourg or the Court of Justice of the EU—and in different contexts, for example, interference with human rights, on the one hand, and the interference in economic activity, on the other.

In *Kennedy v Information Commissioner (Secretary of State intervening)* (2015) (*Kennedy*), the issue concerned the construction of the Freedom of Information Act 2000 and Article 10 (freedom of expression) of the Convention. Lord Mance JSC said that the common law no longer relied on the uniform application of the rigid test of irrationality once thought applicable under the 'so-called' *Wednesbury* principle and that the nature of judicial review in every case depends on the context (*Kennedy* 2015:

51). The common features of reasonableness review and proportionality are that they both involve considerations of weight and balance and the primacy of context in determining the intensity of the supervising court's review and the weight to be given to the primary decision-maker's view. The benefit of using proportionality is that it brings structure to the analysis, 'by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages' (*Kennedy* 2015: 54).

The facts in *Pham v Secretary of State for the Home Department* (2015) (*Pham*) are not relevant for present purposes. The Supreme Court's consideration of the content of *Wednesbury* unreasonableness and its relationship to the proportionality is relevant. Lord Mance adopted the descriptions in an academic work of proportionality as 'a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction', 'just a rationalising heuristic tool' (Lübbe-Wolff 2014). His Lordship said that whether under EU law, Convention or common law, the context will determine the appropriate intensity of review (see also Lord Sumption JSC, *Pham* 2015: 105-110).

Lord Reed said that it was helpful to distinguish between proportionality as a general ground of review of administrative action where the exercise of power is limited to means proportionate to the ends pursued, from proportionality as a basis for scrutinizing justifications put forward for interferences with legal rights (*Pham* 2015: 113). Lord Reed noted that the authorities (ie *Daly* and *Brind*) were to the effect that the *Wednesbury* test, even the heightened scrutiny test, was not the same as proportionality as understood in EU law or as explained in the cases decided under the Human Rights Act 1998.

The decision of the Supreme Court in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* (2015) (*Keyu*) is an important one because it involved the exercise of a discretionary power where no Convention right was in issue.

In 1948, a British army patrol shot and killed 24 civilians in the State of Selangor. At that time, the State of Selangor was a British protected state within the Federation of Malaya. There were three investigations into the killings, all of which proved inconclusive. The relatives pressed for a fourth inquiry by the relevant authorities under the Inquiries Act 2005 (section 1(1)), but the relevant Secretaries of State refused. The relatives brought an application for judicial review.

The relatives' claims based on the Convention for the Protection of Human Rights and Fundamental Freedoms and customary international law failed. That left their claim based on traditional principles of judicial review. The relatives asked the court to take the step of replacing the traditional rationality basis for challenging executive decisions with the more structured and principled challenge based on proportionality. The court declined to take that step.

Lord Neuberger PSC (with whom Lord Hughes JSC agreed) held that the decisions were not irrational within the traditional common law principles. His Lordship said the submission that proportionality should be applied in place of rationality in all domestic judicial review cases had potentially profound implications in constitutional terms and implications which are potentially very wide in applicable scope because

it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the *balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest* (*Keyu* 2015: 133; emphasis added).

Lord Neuberger referred to two other matters which meant that the consideration of a move from rationality to proportionality in all domestic judicial review cases was more nuanced and complex than it might at first appear. First, his Lordship said that as the cases illustrated, the domestic law may already be moving away to some extent from the irrationality test in some cases. He referred to *Kennedy* and *Pham*. Secondly, his Lordship said that the answer to the question whether the court should approach a challenged decision by proportionality rather than rationality may depend on the nature of the issue.

Lord Neuberger did not consider it appropriate for a five-member panel of the Supreme Court to consider a move from rationality to proportionality. However, it was not necessary for the matter to be re-argued before a panel of nine justices because his Lordship went on to apply a test of proportionality and he concluded that the decisions were not disproportionate.

Lord Mance referred to the views he had expressed in *Kennedy* and *Pham* and said he did not need to comment further because he agreed that there was no ground for treating the refusal of an inquiry as either *Wednesbury* unreasonable or disproportionate.

Lord Kerr made, with respect, a number of important points: (1) the proportionality principle does not involve the supervising court substituting its decision for that of the decision-maker and, in broad

terms, the question is whether the decision is proportionate to meet the aim that it professes to achieve; (2) in the case before the court the relatives had no right to have an inquiry and, conventionally, inference with a fundamental right has been the setting where proportionality has been most frequently considered in recent times; (3) following what Lord Reed said in *Pham* (2015: 113), even if proportionality replaced irrationality as the relevant test in cases not involving fundamental rights, the four-stage test identified in *Bank Mellat* would not be feasible and a more loosely structured proportionality test of the type identified by Lord Mance in *Kennedy* (2015: 51) would be appropriate, that is to say, a test which directed attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.

Baroness Hale dissented on the basis that the Secretaries of State did not take into account relevant considerations and the decision was not one which a reasonable authority could reach.

Since *Keyu*, the Supreme Court has not had occasion to consider whether it should take the step it was invited to take in *Keyu*. The decision in *R (Youssef) v Foreign Secretary* (2016) was not such an occasion (see Lord Carnwath JSC at 55-57). The High Court of England and Wales declined to consider the matter in light of Lord Neuberger's comments in *Keyu (R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* 2019: 95-109 per Singh LJ and Carr J).

[F] CONCLUSION

In Australia, the requirement that the exercise of an administrative discretionary power meet a standard of legal reasonableness is based on an implication that the legislature intended that such a power be exercised reasonably. That issue is no longer determined by the application of Lord Greene's formula. If reduced to a single question, it is now whether, both as to outcome and process, a reasonable decision-maker could reach the decision under challenge, or could reach the decision under challenge by the process adopted.

Central to the determination of that question is the ascertainment of the true limits of the power by reference to the scope, purpose and object of the statute and the statutory provision. There are various expressions (eg an evident and intelligible justification, an intelligible decision, an intelligible decision-making process) and tests in analogous areas (eg appellate intervention in the exercise of a judicial discretion) and existing authorities which provide guidance in the answering of the general question, but none of them are the ultimate question when legal

reasonableness is raised. Of course, a clear restriction on the court's power of intervention is that the merits of the decision are for the decision-maker, not the court.

This results in a somewhat open-ended test, but it is inherent in the ground of review, the importance of the particular facts and the particular statute and statutory provision in issue. Frankfurter J said in *Universal Camera* (1951: 489):

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Is the proportionality principle able to provide additional certainty and transparency to the formulation and application of the standard of legal reasonableness in the case of judicial review of administrative discretionary powers? Clearly, with no individual rights entrenched by the Constitution or statute at the federal level in Australia, there is no scope for a highly structured proportionality principle of the type identified by the High Court in *McCloy* or the Supreme Court in *Bank Mellat*.

There are at least three difficulties with adopting the more loosely structured proportionality principle suggested by Lord Kerr in *Keyu*. First, it involves another form of words which, arguably, does not add greatly in terms of certainty and transparency to the existing concepts deployed in Australia. Secondly, and importantly, it would have to be qualified by a proviso that made it clear that the court was not authorized to interfere with the decision by reference to its merits. Finally, even the more loosely structured proportionality principle would not seem to be appropriate in the case of all administrative discretionary powers. An example of where it would not be appropriate is a decision of the Parole Board assessing the risk posed by a prisoner (*Browne v The Parole Board of England and Wales* 2018: 41 per Coulson LJ).

The notion of proportionality has a role to play in the judicial review of the exercise of administrative discretionary powers in circumstances where, because of the nature of the power and the circumstances of the case, means and ends are at the forefront of the analysis. In such cases, it may provide a ready explanation of the reason the exercise of power is legally unreasonable.

About the Author

Justice Besanko is a Judge of the Federal Court of Australia. He was admitted to practise in 1978. He practised as a barrister and solicitor in South Australia until 1984 when he joined the independent bar. He was appointed Queen's Counsel in 1994. He had an appellate and first instance practice primarily in commercial, company and administrative law at the time of his appointment as a Justice of the Supreme Court of South Australia in 2001. He transferred to the Federal Court in 2006. The jurisdiction of the Federal Court comprises primarily the areas of Commonwealth power in the Federation and includes company law, competition and consumer law, migration and general administrative law, intellectual property law, taxation and defamation. His Honour has worked as a judge for over 20 years.

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- Rooke's Case* (1597) 5 Co Rep 99b; 77 ER 209

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014

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Veen v The Queen (No 2) [1988] HCA 14; (1988) 164 CLR 465

Wotton v State of Queensland [2012] HCA 2; (2012) 246 CLR 1

WHAT IS THE ROLE OF A LEGAL ACADEMIC? A RESPONSE TO LORD BURROWS

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Abstract

In his Lionel Cohen Lecture 2021 Justice of the Supreme Court Lord Burrows argued that the complementary role that academics and judges play is being threatened by a trend in legal scholarship away from practical (or doctrinal) legal scholarship towards one more concerned with ‘deep theory’ and with reasoning from disciplines other than law. This present article challenges some of the assumptions upon which Lord Burrows’ argument is based. In doing this, it asks why legal academics should see their role as one in which they are under a duty to aid the legal profession and the courts, especially given the present expectations about what amounts to good research, adequate methodologies and epistemological sensitivity. It also challenges the distinction between practical legal scholarship and ‘grand theory’. What is needed, the article suggests, is not less grand theory but a greater understanding both of the nature of disciplines and of some of the epistemological conundrums that attach to law as a body of knowledge.

Keywords: Burrows (Lord); epistemology; Frank (Jerome); hermeneutics; judges; legal scholarship; methodology; theory.

Justice of the Supreme Court Lord Burrows in a recent public lecture has examined what he sees as the complementary role that academics and judges play. He views this role as being threatened by the present trends in legal scholarship away from what he calls ‘practical legal scholarship’ towards a scholarship more concerned with ‘deep theory’. This latter kind of scholarship is unhelpful, he asserts, when it comes to

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what the courts find helpful in deciding cases. He is not the first judge, or indeed academic, to air such criticisms. Moreover, his implied defence of practical legal scholarship should be seen within the context of a wider debate about the role of law academics, about the epistemological and methodological foundations of legal scholarship, about the nature of reasoning in law, about legal education and about law as a discipline in itself. The purpose of this present article is, accordingly, to respond to Lord Burrows' lecture, but in a way that embraces more than just the content of the lecture itself. For there are assumptions and unexpressed implications in Lord Burrows' criticisms that need to be exposed and examined. What is the role of a legal academic? Is—and ought—an important part of this role to be one that is complementary to the role of the judge? Or is there much more to the discipline of law than just the judge-as-focal-point? Alternatively, is there much less to the discipline of law than perhaps one might think?

[A] INTRODUCTION: LORD BURROWS' CRITICISM

In his Lionel Cohen lecture Lord Burrows set out to explore three themes (Burrows 2021). These themes were the relationship between judges and academics; the work of academics and how it might help appellate judges; and how the work of a judge is different from that of an academic. There was, however, an overall contextual theme, namely the first of his three themes: that is the relationship between judges and academics. It is this overall theme that lies at the heart of the question that underpins this present response to Lord Burrows. What is the role of legal academics? Of course this is hardly a novel question. Yet what makes it once again pertinent is Lord Burrows' view of what he considers to be the present state of academic scholarship. Thus he said:

The sad truth is that the sort of practical legal scholarship that I am describing—that can directly help a judge in deciding a case—is now regarded by many in academia as old-fashioned and dull. The trend is towards providing deeper theories of the law, whether based on economic analysis, or sociology or philosophy. Plainly deep theory has a part to play in understanding the law. But it is a long way from what courts find helpful in deciding cases. It follows that, in my view, the pursuit of theory should not be at the expense of traditional doctrinal scholarship which can assist the law in action in its most direct form in the courts. The courts want the academic analysis of the law in language and at a level which they can understand and use in their judgments. They want legal reasoning—designed to produce practical justice—and not reasoning from another discipline (2021: 5).

There is, so to speak, much going on in this assertion. What is meant by ‘practical legal scholarship’? What is meant by ‘deep theory’ (and does that mean that there are ‘shallow theories’)? *Is* the role of the legal academic to assist judges in deciding cases? What is meant by the dichotomy between ‘legal reasoning’ and ‘reasoning from another discipline’? These are the sub-questions in need of some examination, although there are other issues as well that might well attract attention (‘practical justice’ for example).

However, before turning to these questions, it might be useful to recall an earlier lecture by Lord Burrows where he discussed the work of the late Sir Gunther Treitel (Burrows 2021a). This lecture is important because it developed in more depth his view of practical legal scholarship. It would be untrue to say that he had nothing but praise for Treitel’s work—Lord Burrows discussed what he considered some of its shortcomings—but on the whole he had mostly admiration. In particular he noted:

His scholarship falls squarely within what one may describe as ‘black letter law’ or ‘practical legal scholarship’ (also often referred to as ‘doctrinal legal scholarship’). It examines in great depth and detail what the judges have laid down in past cases and what precisely are the effect of statutes. His work engages hardly at all with other academic writing. And, in particular, he showed no interest in grand overarching theories, such as moral rights reasoning or economic analysis. Working out, and explaining as clearly and succinctly as possible, the sophisticated patterns of the common law were what inspired him. Perhaps not surprisingly therefore even his writing aimed at students appealed to practitioners and judges. Indeed, as successive editions of his textbook on Contract became longer and more detailed, it may be that judges and practitioners became his primary readership and admired his work the most (2021a: 7).

Lord Burrows also noted that Treitel’s lack of interest in grand theory led him to stop lecturing at one particular American university. He quoted Treitel’s own words on this matter:

[B]ecause at that time the Law and Economics movement held sway in the Law School there with an almost religious fervour; and my apostasy in that regard did not go down well with its high priests. ... I began to be perturbed at the lack of tolerance which was increasingly evident in some leading American Law schools of failure to adhere to this or that theory which was perceived as being the only one in which academic discourse was to be conducted ... I was also perturbed by the criticism, from adherents of such schools of thought, of so-called ‘black letter law’. This concept seemed to me to be a sort of Aunt Sally—an invention of the critics which was easy enough to demolish but which bore no relation to reality. I had long been convinced that the common law was a highly sophisticated instrument which, in its

practical application, was totally different from the ‘black letter law’ invented by such critics (2021a: 8-9; Treitel 2019: 168).

A further sub-question—or at least a question that is associated with the practical legal scholarship one—is, then, this notion of black-letter law (or practical or doctrinal legal scholarship). What is its status vis-à-vis other disciplines such as economics and (or) sociology? Is it somehow ‘theory-less’ and thus stands in opposition to ‘grand theory’? Indeed is there a distinction to be made between ‘theory’ (or ‘shallow theory’) and ‘grand theory’? What, equally, is its methodology? These sub-questions arise out of some of the observations and assertions made by Lord Burrows in his Cohen, and his Treitel, lectures.

[B] ASSISTING THE COURTS

Lord Burrows early on in his Cohen lecture referred to the late Peter Birks who asserted ‘the view that legal academia was a third branch of the legal profession alongside solicitors and barristers’ (2021: 3). Birks had, during the final decade of the last century, instituted a series of seminars and publications on the role of the law schools and on the law curricula. On the former, Birks was of the view that there was a definitional connection between law schools and the courts since ‘everything done in the law schools bears ultimately on decision making in the courts’. Indeed, he continued, a law school which professed to have no interest in decision making in the courts ‘would have defined itself out of existence as a law school’ (Birks 1996a: ix). In the same volume, the late Professor Gareth Jones also defended ‘traditional legal scholarship’ (Jones: 1996). This professor did, however, think that law schools should be pluralistic, but that ‘traditionalists’ should not have to apologize for their own scholarship.

Just what is traditional legal scholarship is in need of detailed examination. However, as such an examination has been carried out elsewhere and in some depth it will not be pursued here, save to say, in agreement perhaps with Treitel, that the reasoning models, schemes of intelligibility and range of acceptable arguments employed by common lawyers are more various and complex than one might at first think (see Samuel 2016; 2018). The problem, as will be seen, is the authority paradigm. For the moment, then, it might be useful to reflect on the question whether the role of a law school is primarily one of assisting the law courts.

There are several questions that might be considered here. Why might the courts need such help given that the common law seemed to develop and to operate over many centuries without any such assistance? Why

should underpaid law academics (in relation to what many practitioners and even judges earn) be obliged to assist a profession which does not itself make any serious financial contribution to university legal education? Indeed it makes no serious financial contribution to the issue of access to justice with the result that few people can ever afford to go to court, or even consult a lawyer? Why should university academics provide free advice to highly paid barristers? Why should a university academic be under a duty to a particular sectional interest (judges and practitioners) rather than owing a general and overriding duty to the public at large with regard to the pursuit of knowledge and to higher education? Lord Burrows in his Cohen and Treitel lectures gives no consideration to these questions. Instead, what we get by nearly all those who assert a Birks, Gareth Jones and Burrows line, is reference to an article published 30 years ago by an American judge in which the judge laments a growing distinction between legal education and the legal profession as reflected in the (American) law journals (Edwards 1992). To quote Lord Burrows:

Unfortunately, the disjunction that Edwards described in the USA is in danger of also becoming an accurate description of the relationship between law schools and the courts in England and Wales. We are hovering on the brink. From what I have already said, it can be seen that this turnabout has been remarkably swift. From having had relatively little influence on the courts until the late 1960s, legal academia appears to have enjoyed a golden age of influence for some 40 years but now looks as if it may be intent on throwing away the baby with the bathwater by giving the impression that what goes on in the courts, as a matter of legal reasoning and argument, is rather too dull and straightforward for high academic minds (2021: 6).

There are, in fairness to Lord Burrows, several responses that one might offer in respect of the critical questions set out above. The first is historical. It may be that the common law was able to develop without the help of law faculties, but in the civil law tradition the history of universities in Europe is almost synonymous, in the medieval period at least, with the history of law teaching and juristic commentary. It was the doctors and the professors who were the primary source of the law—at least the law of the *ius commune*—in the sense that it was these teachers and professionals who interpreted the Roman law texts and whose commentaries on them made Roman law, as interpreted by them, the living law of Europe (Brundage 2008). In other words, if one takes a European rather than just an English view of legal knowledge that knowledge is historically very closely associated with professors, with jurists, more than judges (Van Caenegem 1987). Given that legal education in England and Wales was to come in for some pretty devastating criticism by a Parliamentary Commission, which reported in 1846, and which recommended that

England adopt a ‘scientific’ approach to legal knowledge (Parliamentary Select Committee on Legal Education 1846) , it could well be argued that the European model was one that came to find official favour in England and Wales (see also Stein 1980: 78-92). Put another way, law in practice, as well as in books, needs its jurists. Against this argument, however, is the fact—as indeed recounted by Lord Burrows in his Cohen lecture—that judges never appeared to welcome this juristic input until the end of the last century. Some judges and practitioners were—and some still are—of the view that a law degree was (is) a waste of time and that law academics themselves are, at least if Megarry J was to be believed (as recounted by Lord Burrows), of rather feeble character (2021: 2). No doubt Megarry had in mind the robust character of a judge such as Lawton LJ, who had in his earlier days had been an admirer of Sir Oswald Mosely and whose tolerant views were sometimes displayed in his quoted remarks.

Another response is what might be termed an epistemological one. This is a response that sees legal knowledge as being a matter of rules and principles with the role of the appellate judge being twofold. He or she is to apply rules to particular factual situations while at the same time trying to develop a principled approach; and it is in this role that the judge could do with serious help. This is one of the key justifications employed by Lord Burrows. As he explained:

In understanding the complementary role that academics and judges play, it is clear that, crucially, the writings of academics can help to place a particular dispute into a larger context and can thereby assist the proper judicial development of principle. Practitioners and judges, by training, have had to deal with cases by spending a great deal of time focussing on the facts. In contrast, academics generally take the facts as a given and are primarily interested in the law and its application to the given facts (2021: 4-5).

And he continued:

The academic therefore approaches a case not bottom-up from the facts but top-down from the law. In simple terms, what the academic can bring to the appellate judge is the big picture of the law. He or she can provide the judge with how it is that the particular case fits or may fit within the larger coherent whole that comprises the common law. The academic is also well-placed to explain relevant policies and to offer critiques of past decisions (2021: 5).

This may be a justification that has some resonance, at least with some academics (Cownie 2004: 197-199). Yet there are a number of epistemological assumptions that other academics might find debatable.

[C] LEGAL ONTOLOGY

Is knowledge of law a matter of knowing rules and principles? One of the benefits of studying Roman law, which was once a core element in the university law curriculum, is that such an epistemological thesis is not that easy to apply to apply to the *Corpus Iuris Civilis*. That rules (*regulae*) and principles (*regulae iuris*) were a feature of the law cannot be doubted (Stein: 1966). Yet, equally, it cannot be doubted, either, that there was more to legal knowledge than just rules and principles. Indeed, the jurist Paulus specifically disclaimed rules as a source of legal knowledge; they are simply brief summaries (Dig 50.17.1). The notion that legal knowledge is knowledge of rules and principles is a much later idea associated with the jurists such as Jean Domat (1625–1696) and Joham Heineccius (1681–1741), although the roots are to be found in the work of the Post-Glossators (see generally Gordley 2013). Knowledge of law was as much about factual situations and their resonance in legal thinking as about learning a set of normative propositions. The Roman jurists were not top-down operators. They could certainly see the bigger picture as their *institutiones* demonstrate, but they equally operated within sets of facts using their concepts as a means of organizing a social reality so that they conformed with their legal reality (see further Samuel 2018: 33-56; Schiavone 2017).

Another assumption is this. Is knowledge of law a matter of fit and coherence? Such notions—fit and coherence—imply that there is something ‘out there’ which is separate from the mind of those observing it. Yet this assumption is not as solid as it might traditionally appear. What is supposedly ‘out there’ can only be accessed by the mind which in turn means that anyone attempting to describe the law is actually, at the same time, writing it (Forray & Pimont 2017). Each subjective description is nothing more than a subjective interpretation of what is supposedly ‘out there’. There are of course solid texts. Is there a text in English law dealing with the restitutionary issues arising out of a frustrated contract? Here one can say there is something ‘out there’, that is to say the printed Act of Parliament (Law Reform (Frustrated Contracts) Act 1943). But its words are meaningless until processed and interpreted by a subjective mind and such an interpretation is something that lodges only in the subjective mind. Now one might of course argue that with regard to a particular text a majority of lawyers—the ‘view of the profession’—all agree on the same interpretation and thus, one might conclude, there is an objective, ‘out there’ interpretation. Yet care must be taken here. One could point to a church full of people and declare that they all subjectively believe in the existence of the same God. However, this does not mean

that God is objectively ‘out there’. Fit and coherence are, then, simply notions used seemingly to organize something ‘out there’ which in reality is only out there as a mass of texts full of words. It is more subjective as a so-called science than astrology, this latter at least having an objective universe whose movements and conjunctions are observable (even if the observations derived from these movements are drivel).

Fit and coherence can, accordingly, be seen as a ‘map’ trying to make sense of a ‘territory’ (Mathieu 2014). The problem is that there is no territory; there is only the map. Black-letter law textbooks are nothing more than maps trying to chart a territory that is defined not in itself but by the map. The late Tony Weir—someone who admittedly detested ‘grand theory’ (1992: 1616)—came very close to recognizing this when he announced that ‘tort’ is what is in the ‘tort textbooks’ and that the only thing holding tort together is the binding of the book (Weir 2006: ix). Three centuries before the publication of Weir’s book there was no tort. There were cases that subjectively—that is to say in the minds of a group of later lawyers and jurists in awe of Roman law learning—came to be regarded as ‘tort’ but that is all (see generally Ibbetson 1999). Tort is just an invented map of a territory that tomorrow could be charted by a totally different map which of course would result in a completely different territory. Again, astrology, as has been seen, has a firmer base in that the map—as ludicrous as it may be—at least has an objective territory, namely the stars and the planetary system.

Two immediate questions arise. Cannot judgments be seen as an objective territory to be mapped? And, anyway, does it matter whether or not law is ‘out there’? With regard to the first question, Lord Burrows quotes from Professor Jane Stapleton:

A core feature of this type of [doctrinal] scholarship is that it takes the judicial role very seriously. It places at centre stage what judges do, how they understand their role, the reasons they give in justification of their decisions, and the vital constitutional responsibility they bear to identify and articulate developments in the common law. ... It is because of its tight focus on judicial reasoning that reflexive tort scholarship is so well placed to assist judges, and indeed to collaborate with them in the process of the identification and articulation of the common law ... [T]his is at least as thrilling a prospect for a young legal scholar as any offered by grand ... theories (2021: 6; Stapleton 2021: xvii).

That the judicial role should be taken seriously, few would doubt given the vital constitutional role that judges hold. They are very valid subjects of research. Yet doctrinal legal scholarship often only permits a certain kind of research. Thus the moment an Oxford undergraduate analyses a

string of precedents in terms of a sociological and (or) political programme of research—she analyses the cases in terms of the judges’ social and educational backgrounds or she treats all judges as expounding a political theory—the student is putting at risk her exam mark. She might have an extraordinarily good knowledge of the social science literature devoted to judges and their empirical role in society, yet this could well count for nothing. She might have an extensive knowledge of a range of cases and judgments dealing with causation in law, but if she argues that most of the judicial reasoning is little more than Latin-infested twaddle and what really seems to decide cases are the social, political and (or) economic ideologies of the judiciary she might well fail (one has to discuss notions such as ‘but for’ or ‘last opportunity’). If she discusses carefully, and on the basis of a solid feminist academic literature, the misogyny in play in the judgments in the case of *Miller v Jackson* (1977) or she focuses on the right-wing political and economic ideology seemingly approved by Lord Reed in the case of *R v Secretary for Work and Pensions* (2018: paragraph 66) she might well fail. This is not ‘legal science’, she might be told.

The second immediate question is this: does any of this matter? Arguably it does because fit and coherence are fictional devices. In saying this one is not intending a pejorative comment. Fiction is used here in the sense attributed to it by Hans Vaihinger who argued that all concepts in all the sciences are nothing but fictional devices whose value is to be judged only by their pragmatic utility (1924; and see Bouriau 2013). If Vaihinger is right, and that what is really in play is that doctrinal lawyers are acting ‘as if’ legal notions and concepts are true, then the only way in which they can be epistemologically validated is through pragmatic functionalism (otherwise law is difficult to distinguish from other fictional systems such as astrology). Are fit and coherence useful ‘as if’ notions? Much of course depends on the constructed model within which fit and coherence are to be assessed. In the civil law tradition this model, as Alan Watson has shown, is the institutional model as set out in the *Institutes of Justinian*; it was this model that got received into modern Europe (Watson 1994). In the nineteenth century it even influenced aspects of the common law, although the complete model itself can be made to fit the common law, if at all, only with great difficulty (Hackney 1997). The taxonomy of this model is too well-known to need repeating here, but the categories that have been adopted into the common law—contract, delict (tort), property and public law—are far more ambiguous than textbooks might like one to think. Are they repositories for rules, for principles, for rights, for duties, for remedies, for interests or for some other ontological focal point?

[D] THE CASE OF THE DEFECTIVE SWIMMING POOL

This question is important because each focal point can act as the basis for a ‘theory’. C (a very tall man) contracts with D for the latter to construct a swimming pool for an agreed price in C’s garden, the contract stipulating that the pool must be of a certain depth; on completion the pool is found to be nine inches short of the required depth. Does C have to pay for the pool? Can C claim damages for breach of contract and, if so, for what amount? How does the doctrinal lawyer approach these questions in terms of fit and coherence? The first approach is to focus on the textbook rules. One rule states this: a failure to conform to the stipulation amounts to a non-performance of the contract and in such a case the contracting party does not have to pay until there is full performance. However, there is another rule which states that where there is a substantial performance of the contract the contractor has to pay the contract price less an amount which represents the shortfall in performance. Yet another rule states that where there is a breach of contract the party in breach is liable in damages and that the amount of damages must be such so as to place the contractor in the position he would have been in had the contract been properly performed. Now this non-performance rule gives rise to a factual question. Has there been substantial performance? One difficulty here is that to make the pool conform to the stipulated depth it would have to be completely rebuilt from scratch so to speak. One cannot return with a few shovels and dig a bit deeper. So how is performance to be gauged? One could talk, as judges often do, in terms of reasonableness. Yet is a contractual item that does not conform to the contract a reasonable contractual item? If viewed in terms of the contract model (fit 1) it cannot be so by definition, for it is the contract that defines reasonableness. However, if one abandons the contract model and applies a definition using a model of assessment outside of the contractual one (fit 2), then it becomes possible to redefine the facts themselves.

As a result of this ambiguity, C might decide not to pursue the non-performance route given the clear alternative rule about damages (fit 3). There is a definite breach of contract and so, logically it would seem, he is entitled to an amount of money that will equip him to have a pool of the stipulated depth; in other words he is claiming damages that would amount more or less to the original contract price. The consequence of focusing on the rule, then, is that C has to pay D but D has to repay the money as damages. This solution is, seemingly, one that ‘fits’ a rule model

that is 'coherent' in its relationship between the measure of damages and the breach of a contractual term. C is advised, on the basis of this logic, by his lawyers to go to court and to claim damages. This he does, but he only gets a small fraction of the damages claimed and is landed with costs which, because the case has travelled all the way up to the top court, are enormous (*Ruxley Electronics Ltd v Forsyth* (1996)). He finds himself bankrupt, with no pool and no home and possibly no family. Well, one might say, so much for clear rules; so much for fit; and so much for coherence.

Why has C found himself in this position? The first reason is the finding of fact by the trial judge: C had received a 'reasonable' pool. But let us test this finding. Imagine that when the pool is completed C is unaware that the depth is less than the one stipulated in the contract. He dives into the pool and his head strikes the bottom so hard that he ends up paralysed for life. Expert evidence indicates that had the pool been nine inches deeper, C would have possibly hit his head but not in a way that would end with a catastrophic injury. Viewed in this light, can it really be said that the pool is reasonable? Would not the breach of contract be the cause of the catastrophic injury? The response might be that this is a hypothetical situation and that the actual case must be viewed within its own facts and with regard to the remedy being claimed. It is, it might be argued, unreasonable that C should have a reasonable pool for which he pays nothing. Indeed, if he pays nothing, then it is the constructor that might find itself bankrupt. So, as against the two parties, is it better from a remedies viewpoint that the consumer rather than the supplier is the one who goes bankrupt despite the clear breach of contract by the constructor? Against this question, the doctrinal lawyer will probably point out that the breach has not been ignored. C has been awarded some damages for his disappointment for not getting the pool for which he contracted (*Ruxley Electronics Ltd v Forsyth* (1996)). In other words there has been a subtle shift from the swimming pool to the mind of C; it is not the non-conforming pool that is the damage but the mental expectation of the consumer which has been harmed. In short the judges have moved from one fit-and-coherence model (rules) to another model (remedies) which permits them to see the whole of the case as one of reasonableness. Model-shifting allows courts to do what they wish. So much for doctrinal law and its fit and coherence.

Now it must be stressed that in itself there is not necessarily anything wrong with this model flexibility. What surely matters, from a Vaihinger epistemological viewpoint, is the result and what that result means in terms of its social, economic and (or) political consequences. So, why did

the judges decide for D rather than C? Simply focusing on the formal fit-and-coherence model might well be enough for some law academics, but it hardly tells the world very much in terms of knowledge. One might just as well focus on an astrological model and its fit-and-coherence characteristics. No doubt the academic lawyer can contribute something or other to this modelling. A comparative lawyer might write an article claiming that the swimming pool case is best seen from a rights model perspective; C had a right to a new pool but to enforce the right would have been unreasonable. It would have been an abuse of a right. Yet this does not really get one much further in terms of social science knowledge. In fact it begs a question. If the consumer in the swimming pool case was being unreasonable in enforcing his contractual right, why did the court find it reasonable in another case that a contractor could enforce what was clearly an abusive and absurd term in a leasehold contract (*Arnold v Britton* (2015: 36)? One law for the consumer and another for the commercial firm one might say.

One might add that the case illustrates how the individualistic model is inadequate because one important issue that is in play is the general consumer interest. Does this case advance the consumer interest or the commercial interest of suppliers? The doctrinal lawyer can of course point out this interest conflict, but how much further in this analysis can she go? As will be seen, one comes up against the authority paradigm which, for the doctrinal lawyer working within this paradigm, will mean that the investigation has to stop short of any ideological investigation as to why a particular group of men chose to favour the commercial corporation—and not it would seem a very competent one at that—over the individual consumer. The truth is that all this fit-and-coherence formal modelling is a smokescreen for something else that is going on. And it is this something else that is likely to attract those academic lawyers who see only a limited knowledge exercise in playing formalistic reasoning games. This is one reason, perhaps, why a proportion of those in law schools are moving away from traditional black-letter work.

[E] REALISM VERSUS FORMALISM

One way the doctrinal jurist can dismiss this critique is simply to write it off as realism—the ‘jurisprudence of despair’ as one Oxford law professor has described it (Häcker 2019: 61). The primary culprit here, at least for the late Peter Birks, was Jerome Frank (Birks 1996b: 4). This jurist and lawyer—he had a serious legal career—is best known for his particular view of realism, that of ‘skepticism’. There were, he said, two groups: the rule skeptics and the fact skeptics. Frank himself focused on fact skepticism

and argued that the ‘chief obstacle to prophesying a trial court decision is, then, the instability, thanks to inscrutable factors, to foresee what a particular trial judge or jury will believe to be the facts’ (Frank 1949: xi). He argued that ‘the major cause of legal uncertainty is fact uncertainty—the unknowability, before the decision, of what the trial court will “find” as the facts, and the unknowability after the decision of the way in which it “found” those facts’. If one returns to the finding of the trial judge in the swimming pool case, it is extremely difficult to escape Frank’s words: the finding of ‘fact’ that the swimming pool was ‘reasonable’ was surely one element that contributed to the final outcome of the case. And what of the judges themselves? Frank also had something to say on this. ‘What’, he said, ‘are the stimuli which make a judge feel that he should try to justify one conclusion rather than another?’ (1949: 104) Certainly, he conceded, the rules and principles of law are one such stimuli. ‘But’, he continued, ‘there are many others, concealed or unrevealed, not frequently considered in discussions of the character or nature of law.’ (1949: 104-105) Interestingly, while he noted that reflection by any open-minded person would lead to an appreciation that political, economic and moral prejudices must be operating in the mind of the judge, these categories, he said, are too gross, too crude and too wide (1949: 105). There are multitudinous other hidden factors in play, ‘depending often on peculiarly individual traits of the persons whose inferences and opinions are to be explained’ (1949: 106).

These hidden factors have been discussed by others over the decades and will not be revisited, as such, here. But to describe Frank’s social science analysis of judge and jury as the jurisprudence of despair would surely give rise to a certain puzzlement on the part of academics from outside law. Indeed it would be odd if professional lawyers did not on occasions take into account some of these hidden factors when deciding whether or not to take a case to an appellate court. So what encourages an Oxford academic to make such a remark about Frank? There are two possibilities worth examining in a little more detail, although this is by no means to assert that there are not other possibilities worthy of attention.

The first possibility is the authority paradigm. This is a paradigm, which has been discussed elsewhere, that applies to texts that in themselves have a complete authority which cannot be questioned (Samuel 2009). In religious studies one thinks of the Bible or the Qur’an where these texts have for their scholars an absolute authority. The same authority applies to official legal texts, primarily legislation, but also judgments rendered in particular by the appellate courts. These texts can be criticized in terms of their style, scope, understanding and application of the law and so on,

but they can never be dismissed. Moreover the paradigm places limits on the nature of criticism permitted to commentators on official legal texts. Arguments considered *ad hominum* would not be acceptable to doctrinal jurists operating within the authority paradigm, nor would criticisms that attacked the integrity of the judiciary, although things might be different if a judge clearly made a case his or her own (as the Roman lawyers used to say). Even sociological arguments have been criticized by the judiciary as unhelpful. For example Lord Goff (a judge much admired by Lord Burrows) said in one case that after he had consulted the relevant academic writing:

I feel driven to say that I found in the academic works which I consulted little more than an assertion of the desirability of extending the right of recovery in the manner favoured by the Court of Appeal in the present case. I have to say (though I say it in no spirit of criticism, because I know full well the limits within which writers of textbooks on major subjects must work) that I have found no analysis of the problem; and in circumstances such as this, a crumb of analysis is worth a loaf of opinion. Some writers have uncritically commended the decision of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727, without reference to the misunderstanding in *Motherwell v Motherwell*, 73 DLR (3d) 62, on which the Court of Appeal relied, or consideration of the undesirability of making a fundamental change to the tort of private nuisance to provide a partial remedy in cases of individual harassment. For these and other reasons, I did not, with all respect, find the stream of academic authority referred to by my noble and learned friend to be of assistance in the present case (*Hunter v Canary Wharf Ltd* (1997): 694).

One wonders whether those academics who wrote commentaries on *Khorasandjian* felt rather surprised by Lord Goff's comment since the decision itself seemed obviously the right one from a functional analysis. Indeed, in the same case, Lord Cooke appeared both to accept this justice view and to cast doubt on the kind of 'analysis' that so appealed to Lord Goff. As Lord Cooke said:

In logic more than one answer can be given. Logically it is possible to say that the right to sue for interference with the amenities of a home should be confined to those with proprietary interests and licensees with exclusive possession. No less logically the right can be accorded to all who live in the home. Which test should be adopted, that is to say which should be the governing principle, is a question of the policy of the law. It is a question not capable of being answered by analysis alone. All that analysis can do is expose the alternatives (*Hunter v Canary Wharf Ltd* (1997): 717).

One might think that Lord Cooke's comment is reasonable enough. Yet for some academics it would, it seems, be verging on the kind of heresy to be found in the pages of Jerome Frank's book. Thus in his examination

of philosophical foundations of doctrinal scholarship, Dan Priel describes a certain type of doctrinal scholar—one he calls a conceptualist—as being ‘hostile to discretion’ and who thinks ‘of policy (and politics) as the antithesis of Law’ (Priel 2019: 171). Priel himself soon disposes of this conceptualist thesis for the nonsense that it is, but at the beginning of his chapter he makes an interesting observation about doctrinal scholars in general:

They see themselves as ‘practical’ scholars who aim to help the courts reach better decisions, and they do that by a careful reading of the cases seeking to derive from them a coherent set of rules and principles already found in them, a task for which there is no need for any serious knowledge of history, economics, psychology, or philosophy (2019: 165).

This is interesting not just because he supports this statement with a reference both to Andrew (now Lord) Burrows and to Gareth Jones’ defence of traditional legal scholarship but also because the doctrinalists are united by a fundamental idea, namely ‘that law is in some important sense autonomous from other disciplines’ which ‘makes appeal to other disciplines at best unnecessary and possibly confusing’ (2019: 166-167; see also Burrows 1998: 113; Jones 1996). There is, in other words, a common enemy: ‘interdisciplinary approaches to the study of law’ (Priel: 2019: 167).’

This leads us to the second possibility behind the remark that Frank represents the jurisprudence of despair. Frank and his Realist colleagues threaten the formalist and independent nature of law. As Priel puts it, ‘other approaches, perspectives or disciplines may provide observations *about* law (that it tends to contribute economic growth, that it favours the rich and powerful), but they cannot contribute to the study *of* law’ (2019: 167). Again Priel is able without much difficulty to dispose of this Kantian-based idea that law is, and should remain, isolated from other disciplines. ‘Truths about the world’, he rightly points out, ‘are not themselves “legal”, “chemical”, “economic”, or “psychological”’: these are human categories imposed upon reality that itself does not contain them’ (2019: 180). This imposition means that disciplines are also a matter of consensus; it is a question of social choice. In order to understand this choice it is equally important to understand the tensions that underpin such choices. Many of these tensions are epistemological. What is it to have knowledge of the discipline in question? In the case of law, what is it to have knowledge of law? Here there are several unresolved tensions, some of which have already been exposed. In particular there is this tension between formalism and realism, but within this tension

there is another: does knowledge of law embrace or exclude the law-maker? Frank's work embraces the law-maker (judge and jurors) within his vision of legal epistemology whereas the conceptual doctrinalists do not; for the doctrinalist law is something 'out-there'—for example a system of principles, rules or rights—which is separate from the law-makers. As one conceptualist has put it, '[e]ven if we closed all the courts, and civil recourse were completely abolished, this would not alter the existence of private law and its duties' (Stevens 2019: 121). Yet there is a paradox. The doctrinalists do in part end up including judges within their epistemology because they imply a normative methodology that is centred around fit-and-coherence. This methodology was well articulated by the late Ronald Dworkin: the judge 'must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well' (Dworkin 1977: 116-117). And it is this construction that provides the model for his or her interpretative reasoning.

However, what the doctrinalist is asserting about the discipline of law must not be confused with the question of knowledge of law (Lenclud 2006: 91). The two are separate. Knowledge of law is not subject to consensus in the same way in that its validation is open to other factors that are independent of assertions by the doctrinalists or indeed by others. This said, while the separation between discipline and knowledge is evident in the natural sciences, it is not so evident in law because the distinction between science (map) and object of science (territory) is not just unclear but may not exist at all (see further Glanert & Ors 2021: 1-30). There is thus an epistemological tension between discipline and knowledge which permits some doctrinalists to assert that only a certain type of knowledge—for example only authoritative texts (legislation, judgments and doctrinal commentary)—is to be included within the discipline. In other words, the discipline is truly a matter of discipline, one which must be policed to exclude certain forms of knowledge that is deemed to belong to other disciplines. This is reminiscent of the problem of heresy in Christian dogma. In fairness to Lord Burrows, he does not appear to be asserting this quite extreme position and he may even be aligning himself against some of the conceptual doctrinalists who are advocating a 'grand theory' with regard to, say, tort or private law in general. But what he perhaps is not appreciating is the fact that traditional doctrinal law now finds itself caught between a significant shift in the tension between discipline and knowledge as a result of research-funding developments within the university world.

[F] RESEARCH AND METHODOLOGY

When Lord Burrows started his academic career in the early 1980s advancement largely depended upon one's record of publication. Such publications would be refereed by other jurists and doctrinal works would probably be judged by other doctrinalists. One or two leading publications had no blind refereeing procedure, decisions being made by the editor with perhaps some input by a colleague (Anonymous 2021). Over the decades that followed this position was gradually to change, stimulated largely by the shift in the financing of research which became based on research assessment exercises (Cownie 2004: 136-137). Today advancement depends not just on publications but equally on the ability to attract research funding from various different, often non-governmental, funding bodies and academies. Funding applications and proposals would usually be assessed by panels that contained academics from outside law and who had sophisticated expectations regarding research questions and methodology (Van Gestel & Lienhard 2019: 447).

As two continental jurists have pointed out, this has created something of a problem for traditional legal scholars in that 'they have great difficulties in explaining their scholarly methods and how they approach theory building to reviewers from other disciplines' (Van Gestel & Lienhard, 2019: 447). More generally these two authors note from their own edited book project, which evaluated legal research in Europe, the following conclusion:

Perhaps the most important thing we have learned from this book project is that legal scholars are not particularly good at reflecting on their own discipline. What is almost entirely absent is a transnational debate with regard to the quality, methodology and scientific relevance of legal research. As far as there is debate in the national context, legal scholars often seem to be convinced that 'law is different'. However, they fail to sufficiently explain how and why (2019: 449).

Professor Mark van Hoecke has also been critical of legal doctrine. He says that 'it is often too descriptive, too autopoeitic, without taking the context of law sufficiently into account'. It equally 'lacks a clear methodology and the methods of legal doctrine seem to be identical to those of legal practice'. He concludes that 'it is too parochial, limited to very small scientific communities, because of specialisation and geographical limits'. As for the quality of the scholarship, 'there is not much difference between publications of legal practitioners and of legal scholars' (2011: 3).

This is pretty damning. Lord Burrows goes somewhat in recognizing this funding issue in quoting from the Australian judge the Hon Chief Justice

Susan Kiefel who herself mentions how funding pressures may be diverting law academics from the kind of research that helps judges and professional lawyers (2021: 6). However, Lord Burrows does not seem to help his case when it comes to methodology. He admits that judges do not in general articulate nor, perhaps, seriously think about their own methodology but then goes on to explain the academic's method. This 'practical legal scholarship tends to employ what is generally referred to as an "interpretative" methodology which seeks to provide the best interpretation of the content of the law applying criteria such as fit, coherence, accessibility, practical workability, and normative validity' (2021: 10).

This is by no means a mindless statement, but if set out in the methodology section of a research grant application it would probably, for the non-lawyers on the panel, raise more questions than it answers. Lord Burrows seems to be emphasizing a hermeneutical scheme of intelligibility ('interpretative'), but then moves quickly into conceptual structuralism (fit and coherence) and after that into a kind of functionalism (practical workability). So, the social scientist might ask, what is going on here? Is this just some kind of lightweight engagements at the level of schemes of intelligibility (on which see Berthelot 1990: 62-85; Samuel 2018: 273-276)? If not, how do the different schemes relate to each other in this doctrinal method? Is one scheme, say structuralism (fit and coherence), to have priority over another scheme, say functionalism? In sum, what is the principal methodology in play here and how does it operate in the production of (new?) knowledge? Moreover, what is meant by 'best' in this scheme? How is 'best' to be judged?

A film studies and literature professor might say that anyone who claimed to provide the 'best' interpretation of Alfred Hitchcock's *Vertigo* (1958) would surely be suffering under some kind of epistemological delusion, unless 'best' was clearly underpinned by a pre-articulated set of criteria. A specialist in hermeneutics on the panel is likely to pose questions about how one is going to engage with the texts in issue. Is it a text in which the author's intention seems evident or is it one in which the interpreter will bring her own world view into the text? What kind of pre-judgement or pre-understanding will the interpreter bring to her interpretation? Is she projecting meaning onto the text or is the text projecting onto her its own meaning? How will the researcher go about engaging with these questions? The historian is going to pose questions about old cases. What kind of language will be used to describe the factual situation in past cases? What if the case is several centuries old: is it to be engaged with via its own time period mentality where the social and procedural contexts were markedly different or through the mentality

of a contemporary analyst? Take a case like *Paradine v Jane* (1647) often discussed in contract textbooks under the chapter on frustration of contracts. How can one discuss this case in relation to contract and frustration when there was neither a general theory of contract in 1647 nor (obviously) any doctrine of frustration? Is one not indulging in historiographical nonsense? Turning to fact, how do the legal texts under examination relate to the facts of these cases which, presumably are also being examined? In brief, it will be asked by members of the panel: what is meant by 'fit', by 'coherence', by 'accessibility', by 'practical workability' and by 'normative validity'? And what are the methodological and epistemological implications attaching to these words and terms?

The doctrinal jurist can try to respond to these questions in a number of ways. The first, and one associated with Lord Goff, is that it is a matter of principle. 'It is in the formulation, if necessary the adaptation', said Lord Goff in a passage quoted by Lord Burrows, 'of legal principle to embrace that just solution that we can see not only the beneficial influence of facts upon the law, but also the useful impact of practical experience upon the work of practising lawyers in the development of legal principles' (2021: 10; Goff 1983: 325). The methodological pursuit, the doctrinalist might say, is the search for principle. This of course suggests an inductive exercise in which a number (perhaps quite large) of legal texts are examined in order to formulate from them an abstract *regula iuris* which would then be employed in something of a deductive manner to provide solutions for future cases. This was a method formulated by the medieval Italian jurists (see Errera 2006) However, as the late Christian Atias once pointed out:

In any event, the passage from a general rule—or anterior decision—to the solution of a concrete case cannot be analysed in a simple deductive process of application; the subsumption of an individual case under the rule brings into play multiple circumstances, elements and variables which prevent any claim to predict with certainty its result. Among these multiple givens always somewhat conflicting, debatable and indeterminate, where is the truth with regard to the law said to be positive? (1994: 119)

Where, then, is the truth, the panel might say? What kind of methods will be brought to bear on this passage from rule to solution? It is not clear how a doctrinalist might answer these questions, especially given both the authority paradigm and the apparent interdiction to refer to Realists such as Jerome Frank (the jurisprudence of despair).

A second response might be to refer to the late Ronald Dworkin's chain novel analogy. This legal philosopher suggested that the role of a judge is rather like that of an author participating in a chain novel:

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity In our example ... the novelists are expected to take their responsibilities of continuity ... seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be (1986: 229).

Whatever one might think of this analogy, it would make quite a sophisticated response to social scientists and humanities academics in as much as it suggests that doctrinal jurists are involved in a constructive intellectual exercise. Both judges and jurists are constructing a model that both makes sense of past decisions (precedents) and legislative texts and permits lawyers to predict how the courts will behave when faced with difficult cases. This is a similar form of modelling, it might be argued, to the one used by natural scientists who construct models which both explain a phenomenon and predict its future behaviour.

The difficulty with the model is how to explain its elements. Of what does it consist? Dworkin himself saw it as a rights model—judges should be concerned only with the rights not policy—but what lies behind these rights would appear to be legal principles (1977: 90). One is back to the problem of explaining how one gets from a principle to a solution. Dworkin did not avoid this issue; far from it, since he developed a thesis of legal reasoning founded on argumentation. Law is about interpretative arguments and these arguments are not equal in their weight. One argument is always superior *vis-à-vis* another and the role of the judge—perhaps aided by jurists—is to find the argument which is superior to all others and this will form the right answer in the hard case (well expressed in Dworkin 1995). This exercise, however, as Dworkin admitted, is superhuman and thus Dworkin again made use of fiction in creating his superhuman judge. His model, in the end, does not actually reflect the chain novel as an empirical exercise; it is entirely an exercise in idealism. What, then, it might be asked, is the social value of this model if it can only function at a superhuman level? The answer no doubt is to say that it is an ideal to which human judges (and no doubt jurists) should aspire. Yet, if the model does not actually reflect what judges do—for example judges in the common law world (and civil law world it would appear: Lasser 2004) do use policy arguments and many have been sceptical of a rights thesis (see for example Waddams 2011)—where does that leave the doctrinal scholar?

Another difficulty with the Dworkin model—indeed with many legal analysis and reasoning models—is the highly individualistic nature of a rights thesis. In the Roman model, private law is about relations between individual persons and individual things (law of property) and about bilateral relations between individual persons (law of obligations) (Birks 2014: 13-14). As for corporations, these are treated on the whole as if they are individual persons with the same status as human individuals (on which see Duff 1938). Such an individualistic model is not always inappropriate since individuals and their interests ought to be recognized and protected. Yet it is also inappropriate in that to view society as if it consisted only of individuals of equal economic status and capacity is to create a model that clearly does not represent a good many Western countries in which a range of corporations have such enormous economic power that they can influence economics and politics in profound ways. Moreover the industrial revolution gave rise to certain activities—on the roads and in the workplace in particular—which resulted in a largely predictable number of deaths and injuries each year. To apply a legal model that is, in the case of English law, no different from the one employed by the Roman jurist Alfenus in Republican Rome might well seem completely and totally bizarre to many in other disciplines (Dig 9.2.52.2; cf *Mansfield v Weetabix Ltd* (1998)). Appeals to commutative justice seems a bizarre method of dealing with the accident compensation issues arising out of activities that in themselves generate accidents.² Certain activities have human costs and surely, social justice demands, these costs should not be externalized onto the individual, especially as the activities in question contribute to the public benefit?

In fairness some law academics and even judges have urged reform. But when one looks at the response of some doctrinalists one wonders what academics from other disciplines might make of them. Take this example:

The fact that someone else may end up picking up the tab for A's negligence—A's insurer, or A's employer, or in the case where A is a public body or works for a public body, the state—is irrelevant: what is crucial is that there was a tab and it would have had to have been picked up by A if nobody else paid. In this way PI [personal injury] law shows that the duty of care that its first tier imposed on A for B's benefit was not an empty aspiration, but had real force (McBride 2020: 12).

And this professor later concluded:

² Comparative lawyers seem more rational with regard to accident compensation: see eg Jolowicz (1968); Tunc (1972).

When the Church of England proposed to update its forms of service, abandoning the traditional Book of Common Prayer, WH Auden asked, 'Why should we spit on our luck?' We would, I suggest, be guilty of the same were PI law to be dispensed with in this country (2020: 14).

This is a response by an academic lawyer to a speech by a retired Supreme Court judge who thought that serious reform was needed in the area of personal injury law (Sumption 2018). No doubt there will be young academic lawyers who will respond to this kind of individualistic morality often associated with philosophers who lived in times long before the advent of motor vehicles, trains, factories and multinational insurance companies. But as a reasoning model of contemporary society it is surely as reliable as the contents of the Book of Common Prayer. This latter book brings huge comfort to many—as indeed does astrology—but few astrophysicists and social scientists would see the book as providing an accurate model of the universe or of contemporary industrial societies. In short, doctrinal law seems, at least in the common law world, to be a 'map' charting a fictional social territory. Indeed, such an individualist model is nothing short of a right-wing political ideology hiding behind a legal model that is no more scientific than some astrological chart which assigns to humans various supposed characteristics and which warns them not to venture out on a car journey when Mars is in some special alignment with Jupiter.³ One is back to the fundamental (Vaihinger) question. What is the pragmatic value of doctrinal scholarship? The cynic might argue that it is the protecting of profits of insurance companies and incompetent builders.

[G] CONCLUDING OBSERVATIONS

Nothing said in this response to Lord Burrows should actually be taken as suggesting that there is something intellectually illegitimate in traditional legal (or doctrinal legal) studies. The aim has not been to assert some head-to-head opposition to Lord Burrows' views as set out in his Cohen (and other) lectures. Indeed, it was most unfortunate and quite wrong that Gunther Treitel should have been faced with hostility by colleagues in an American law faculty and it would be an intellectual crime if any judge, doctrinal jurist or legal practitioner were to be made unwelcome in any university. Rather, the aim has been to question some of the assumptions upon which he—and others—have built their arguments.

³ Perhaps Terry Eagleton's remark is apt in this respect: 'The difference between a "political" and "non-political" criticism is just the difference between the prime minister and the monarch; the latter furthers certain political ends by pretending not to, while the former makes no bones about it': Eagleton (2008: 182).

The principal assumptions are these. First, it is not obvious why the role of law academics is to assist the judges and the law profession in their professional roles. The duty of a university academic is, arguably, not towards a particular interest group but towards the advancement of knowledge in general. And it is not always evident, as Professor Mathias Siems has shown in a rather devastating chapter, that law professors in Europe are fulfilling this duty (Siems 2011). Indeed, one leading French social science epistemologist thought that law as a discipline had nothing to offer to epistemology in general (Berthelot 2001: 12). This is an unfortunate situation. If the judiciary and the legal profession feel that they need a legal scholarship institution to aid them in their work they should either fund university law faculties or establish their own institutions or think tanks. Expecting academics to do for free legal research that the professionals themselves should be doing is untenable as an academic obligation.

The second assumption is the distinction voiced by Lord Burrows between doctrinal scholarship and what he calls ‘grand theory’. Such a distinction implies that black-letter scholarship is not based on any grand theory. Terry Eagleton’s response to this kind of thinking was to observe (an observation whose origin he attributes to John Maynard Keynes) that those economists who disliked theory, or claimed to get along better without it, were simply in the grip of an older theory (Eagleton 2008: xiii). That doctrinal law is somehow not in the grip of a theory has been convincingly dismissed, as has been seen, by Dan Priel. Black-letter law is a highly theorized area of intellectual activity; it is just that few doctrinal scholars have been able, or willing, to articulate the theory other than through references to law somehow being different from other social science disciplines. Doctrinal lawyers and jurists are committed ‘systems theorists’ (Blanckaert 2006: 138-140), even if they are unaware of it and simply think in terms of weaker or stronger versions of legal positivism.⁴ Indeed, as again Priel implies, the aim of these ‘systems theorists’ (or a good proportion of them) is to impose a paradigm on those working within the discipline. This aim was bound, in the end, to fail because the tendency in the social sciences—in all disciplines perhaps—is to gravitate towards a plurality of different programmes. These different programmes will of course create tensions within a discipline (see further on this tensions point: Samuel 2019).

⁴ This does appear to be one of the implications of Professor Catherine Valcke’s recent book on comparative law: Valcke (2018). She insists on the notion of a system when looking for ‘law’ in other cultures.

The third assumption concerns methodology. In fairness to Lord Burrows, he sets out what he perceives to be the method of the doctrinal jurist aiming to aid the courts in their decision-making. Yet his ‘interpretative methodology’, which seeks to provide the ‘best interpretation’ of the content of the law, applying criteria such as ‘fit’, ‘coherence’, ‘accessibility’, ‘practical workability’ and ‘normative validity’, is asserted without any kind of epistemological programme within which these notions might have meaning. In other words, he assumes that they are somehow neutral and independent of any theory and (or) paradigm context. It would, perhaps, have been more valuable if he had presented these notions within, say, a Dworkinian framework which would at least have given them some theory underpinning. However, such a Dworkinian thesis comes with other baggage (so to speak)—such as the sharp distinction between principle and policy—which understandably makes the judiciary wary of aligning themselves with the late legal philosopher. Lord Burrows’ described methodology also fails to recognize that there are different reasoning models in play even within a doctrinal view of legal reasoning. These models have been identified elsewhere, supported indeed with examples from the law reports themselves, and will not be revisited here (see Samuel 2018: 87-116). However, the different focal points for these models inject into doctrinal methodology a diversity that can exist even within an approach governed by the authority paradigm.

On a more positive note, then, one might conclude by indicating that this last point about methodology contains within it the possibility of one area where doctrinal legal scholarship of the kind helpful to the judiciary could find some common ground with legal academics working outside of the authority paradigm and who operate within social science and humanities thinking more generally. This area is the relationship between the reasoning strategies and techniques used by judges and the methods and schemes of intelligibility employed by those working in other social science and humanities disciplines. One might object that such a domain is just another example of ‘grand theory’ or ‘reasoning imported from other disciplines’. Yet to think like this is to commit a grave error. For a start, such cooperation could result in law being taken more seriously by those outside the discipline and thus to be represented in works on social science methods and epistemology. That law finds itself excluded from a seminal work on epistemology in the social sciences is intellectually tragic. Furthermore it is idle to think that different schemes of intelligibility are somehow not as relevant to legal reasoning as they might be to reasoning and research programmes in any other discipline. They are just as relevant as induction, deduction and analogy. In addition

judges who do not take method very seriously usually end up like the literary critics described by Terry Eagleton:

Many literary critics dislike the whole idea of method and prefer to work by glimmers and hunches, intuitions and sudden perceptions. It is perhaps fortunate that this way of proceeding has not yet infiltrated medicine or aeronautical engineering; but even so one should not take this modest disowning of method altogether seriously, since what glimmers and hunches you have will depend on a latent structure of assumptions often quite as stubborn as that of any structuralist (2008: 172-173).

This is not to suggest that judges and jurists should regard themselves as scientists using methods similar to those employed by medics and aeronautical engineers. The most dominant methodological scheme of intelligibility used by these scientists is the causal scheme—a scheme that often encounters difficulties in the social sciences. As Lord Burrows recognizes, one predominate scheme in doctrinal law is hermeneutics, although the dialectical scheme perfected by the Roman and medieval jurists is still a central legal tool of analysis (Samuel 2018: 212-213). Hermeneutics is of course the subject of ‘grand theory’ and thus all judges, whether they know it or not, are operating within such a theory (Glanert & Ors 2021: 47-58, 102-106). Thus the distinction between doctrinal legal scholarship and ‘grand theory’ is a false one, just as the distinction between ideology and legal modelling is a false one. In the end it is the Vaihinger (functionalism) question that prevails: what is the pragmatic value of the fiction in play?

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THE SLOW TRAIN TO REFORMING ANTI-DUMPING MEASURES

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Abstract

This essay examines the need for and slow progress towards a revision of the Anti-Dumping Agreement. There are ongoing negotiations on the Anti-Dumping Agreement, but they are without positive outcomes. Several reasons account for this failure such as the deadlock in the Doha Development Round, mega trade agreements and the unwillingness of top anti-dumping users to engage in meaningful reform. In this paper, alternative solutions are proposed to settle the hidden trade protectionism in anti-dumping investigations. Normative solutions include a comprehensive reform of the Anti-Dumping Agreement. Such a revision has already been suggested in the literature, but this study departs from most others by prioritizing procedural issues rather than substantive ones. The study proposes changes to enhancing procedural justice in anti-dumping processes.

Keywords: World Trade Organization; Anti-Dumping Agreement; Negotiating Group on Rules.

[A] INTRODUCTION

This essay highlights the need for a modification of the anti-dumping mechanism, preferably through the revision of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement). There are ongoing negotiations on the Anti-Dumping Agreement; however, these negotiations seem to be getting nowhere. There are several reasons for this, such as the deadlock

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of the Doha Development Round,² the advent of giant trade agreements, the unwillingness of top users of anti-dumping measures to reach agreement on various issues, and the latest crisis at the World Trade Organization (WTO). Nonetheless, alternatives can be discussed to resolve these problems, which include the misuse of anti-dumping procedures.

The revision of the Anti-Dumping Agreement has been on the table since the Doha Round Negotiations. There are controversial issues in the anti-dumping negotiations. The United States (US) proposed during the negotiations that zeroing³ should be permissible (Chaisse & Chakraborty 2016: 236). On the other hand, some WTO members denounced others for abusing the Anti-Dumping Agreement and called for clearer rules (Liu 2014: 129). The need for the revision of the Anti-Dumping Agreement is also highlighted by the literature (Andrews 2008: 263), but the present study departs by prioritizing procedural revisions rather than substantive modifications. The article proposes improvements in procedural justice standards in anti-dumping procedures as priorities before reform of the substantial rules. A standard anti-dumping investigation questionnaire to be used by all members would be helpful in dealing with most of the procedural problems arising from different enforcement by WTO members (Andrews 2008). An exporter could defend itself accurately against different anti-dumping investigations and would cooperate with investigating authorities more readily if each member adopted the same anti-dumping questionnaire. In addition, a detailed handbook or guidelines on procedures could be added as an annex to the Anti-Dumping Agreement to prevent problems. Furthermore, provision by non-governmental organizations of low-cost legal assistance is felt to be useful by exporters and WTO lawyers. This article aims to highlight the general suggestions for a comprehensive reform of the anti-dumping agreement and practical constraints.

² The Doha Round was held between 2001 and 2003. The deadlock was more due to the disagreement between developing and developed members on the liberalization on agricultural goods. For more details on Doha Deadlock please see '[Deadlock in the WTO: What is Next?](#)'.

³ 'Zeroing' is a calculation method which generally leads to a larger dumping margin. In WTO dumping procedures, an investigating authority usually calculates the dumping margin by calculating the average of the differences between the export prices and the home market prices of the product being scrutinized. When the export price is higher than the home market price, if this is disregarded, disregard or a value of zero is applied, the practice is called 'zeroing'. This practice is seen to artificially inflate dumping margins.

[B] GENERAL SUGGESTIONS FOR A COMPREHENSIVE REFORM OF THE WTO'S ANTI-DUMPING AGREEMENT

Elsewhere I attempt to show that the anti-dumping mechanism is no longer serving its original design purposes (Yilmazcan 2021). It is the most contentious issue under the dispute settlement mechanism. There are several inconsistencies in the Anti-Dumping Agreement, as well as some grey areas, such as zeroing. The Anti-Dumping Agreement does not explicitly prohibit zeroing but the Appellate Body considers this practice to be inconsistent with the fair comparison of prices under Article 2.4.

Furthermore, empirical findings indicate that anti-dumping procedures are not transparent, objective or fair, especially for Chinese exporters, when companies cooperate with investigating authorities and defend interests (Yilmazcan 2021). Empirical findings also show that investigating authorities are biased and overprotect local industries—as a result, exporters do not stand to gain even if they bear high legal costs and spend days preparing submissions. Rather, some companies choose to circumvent the duties which eliminates the expected balancing effect of anti-dumping obligations. In this context, the revision of the Anti-Dumping Agreement is the first option to be addressed.

Current Negotiations

The current negotiations on anti-dumping matters are led by the Negotiating Group on Rules, which was established in 2002 at the Doha Ministerial Conference. The Doha Development Agenda of 2001 was deadlocked in many ways due to busy negotiating schedules, tight deadlines and the single undertaking model (Martin & Mercurio 2017: 49-66). Apart from the technical side, agriculture was the main concern of developing members who argued that concessions agreed at the Uruguay Round had not been fulfilled (Martin & Mercurio 2017). As several attempts failed to successfully conclude the Agenda, the Nairobi Ministerial Declaration officially ended the Doha Development Agenda (Hannah & Ors 2018: 2578-2598). The Nairobi Package of 2015 brought some momentum to the ongoing negotiations, especially on export competition and agricultural subsidies (Martin & Mercurio 2017). However, dumping issues were mentioned neither in the closing statement nor the Ministerial Declaration. In 2017, the Buenos Aires Ministerial Conference ended with some decisions on fisheries subsidies, e-commerce, the TRIPS Agreement (on trade-related aspects of intellectual property rights) and

a work programme on small economies. The 12th Ministerial Conference was planned to be held in Kazakhstan in June 2020 but was cancelled due to the pandemic.

There are evident problems with the WTO and the Anti-Dumping Agreement and these need to be fixed. GATT has been successful for more than 70 years but, due to the well-known ‘spaghetti bowl phenomenon’, WTO’s relevance is questioned by members such as the US (Panezi 2016: 5). Free trade agreements and customs unions are exceptions to the general principles of the GATT, as regulated under Article XXIV (11th WTO Ministerial Conference). However, the use of Article XXIV exceptions exceeds all expectations while harming the multilateral trading system. As Panezi states:

WTO members should seriously consider formally adopting a more assertive approach that allows FTAs, RTAs and PTAs to continue to exist, although not to the detriment of multilateral rights and duties, especially for developing and least-developed countries (Panezi 2016: 5).

With the recent crisis at the WTO, the Director-General was re-elected in 2021. Depending on the direction of the deglobalization trend, the negotiation agenda may primarily be aimed at saving the gains of the rules-based system. Revising the agenda for anti-dumping rules may seem a secondary matter, but there is a need for revision. If the new agenda can be determined according to the most disputed areas, then anti-dumping should be the first issue to be discussed. Canada proposed that initially problematic areas should be identified—and dumping comes first. In this context, the rules and negotiations are not only proposing an important role for an improved Anti-Dumping Agreement but also the WTO as a whole.

The Negotiating Group on Rules discusses two main topics: anti-dumping and subsidies on fisheries. The mandate related to the anti-dumping negotiations states:

In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 ... while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants (Doha WTO Ministerial Conference 2001).

The reason for the anti-dumping matters to be on the Doha agenda was that many WTO members denounced abuse in anti-dumping investigations (Liu 2014). Therefore, these members acknowledge the

need for improving discipline under the Anti-Dumping Agreement, but the problem is the way to achieve this goal. The Negotiating Group on Rules also has a Technical Group where members exchange ideas in an informal setting.⁴ The negotiations under the Negotiating Group on Rules take place among three groups. The first group, Friends of Anti-dumping Negotiations (FANs), consists of several WTO members pushing for more transparency and due process.⁵ FANs argue that the Anti-Dumping Agreement is being abused and, therefore, they aim to fill the gaps in the Anti-Dumping Agreement with clearer rules (Lu 2015: 85-13; Choi 2007: 25). The second group, consisting of developed countries such as the US, aims to maintain the status quo (Choi 2007). China, Egypt and India, as the third group, call for developing country concerns to be taken into consideration while revising the Anti-Dumping Agreement. The People's Republic of China (hereafter China) has submitted relatively few proposals, although it is the most affected member as it is the top anti-dumping target (Qin 2008: 20). Apart from these groups, members such as the European Union (EU), Canada and Australia agree on the revision but do not agree to amend their domestic laws (Qin 2008: 20).

Driven by these interest groups, the Negotiating Group on Rules managed to announce its first draft in 2007 (Kazeki 2010: 940). The draft consists of procedural amendments, such as the clarification of the exchange rate source, limitation of the anti-dumping measures to 10 years, and legalization of the zeroing methodology (Draft Consolidated Chair Texts). The majority of members opposed the draft due to the legalization of zeroing. FANs submitted a statement specifically on zeroing:

The Chair's text, as it now stands, permits the practice of zeroing, thus running counter to the above. Zeroing is a biased and partial method for calculating the margin of dumping and inflates antidumping duties. If the use of such practice prevails in the future, it could nullify the results of trade liberalization efforts. In Marrakesh, Ministers expressed their determination to resist protectionist pressure of all kinds. They believed that trade liberalisation and strengthened rules achieved in the Uruguay Round would lead to a progressively more open world trading environment. We call upon all Members to ensure that the Multilateral Trading System is not undermined through zeroing (Negotiating Group on Rules 2007 TN/RL/W/214).

Thus, FANs believe that the draft did not adopt a balanced view, contrary to their expectations. The US, as a supporter of zeroing, was dissatisfied with other revisions of the Anti-Dumping Agreement. The second text

⁴ The Rules Negotiations.

⁵ Chile, Colombia, Costa Rica, Hong Kong China, Israel, Japan, Korea, Norway, Singapore, Switzerland, Chinese Taipei and Thailand. See World Trade Organization (2015).

was circulated by the chairperson in 2008 and the latest in 2011. The 2011 draft text includes bracketed issues just like the 2008 text (Negotiating Group on Rules 2011 TN/RL/W/254). The bracketed issues are controversial in the draft where the final amendment is left to further negotiation: zeroing, causation of injury, material retardation, the product under consideration, information requests to affiliated parties, public interest, lesser duty, anti-circumvention, sunset review, third-country dumping, and technical assistance for developing countries. On zeroing, the comment of the chairperson is as follows:

ZEROING: This issue remains among the most divisive in the anti-dumping negotiations, and there have been few signs of convergence. Positions range from insistence on a total prohibition on zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorised in all contexts. Some delegations however hold more nuanced positions, and there is openness among some delegations to undertake a technical examination of this issue in particular contexts, such as for example the third ('targeted dumping') methodology provided for in Article 2.4.2 (Negotiating Group on Rules 2011 TN/RL/W/254).

It is mostly procedural issues that divide WTO members into at least two groups. China's position is that the Anti-Dumping Agreement is being abused and this harms efforts on trade liberalization (Choi 2007: 52). China suggests revising the Anti-Dumping Agreement to avoid misuse of anti-dumping measures (Choi 2007). The EU also supports reform of the Anti-Dumping Agreement to keep the rules-based system working and wants new approaches in negotiations to hasten progress (Yan 2019: 65). The following presents the main positions under the Negotiating Group on Rules regarding procedural matters.

The Reform of the WTO's Anti-Dumping Agreement

The Anti-Dumping Agreement has been an agenda item since the Doha Declaration, where it was expected that negotiations would improve disciplines while protecting the basic concepts and principles of the Anti-Dumping Agreement (WTO Negotiations on Anti-Dumping Agreement 2005). In this context, several proposals were submitted, but negotiations have not been successful since the establishment of the Negotiating Group on Rules in 2002. This is mainly because users and target members take different positions in terms of regulation or deregulation of the Anti-Dumping Agreement. Some proposals submitted by the members are presented below.

The European Union

The EU acknowledged the need to revise the Anti-Dumping Agreement at an early stage, in 2002, stating:

The EC would be ready to engage in discussions on the issues outlined below as well as other issues that may be presented by Members in this context.

- ◇ Disclosure and access to non-confidential documents are key procedural rights for interested parties, in particular exporters and domestic industries ...
- ◇ In the experience of the EC, a mandatory lesser duty rule leads to stronger disciplines. It significantly limits the level of the measures to what is strictly necessary for removing injury to the domestic industry.
- ◇ A public interest test (in terms of an examination of the impact on economic operators), even if discretionary in nature, provides for a wider and more complete analysis of the situation on the domestic importing market. Linked with appropriate substantive and procedural provisions the public interest test could be a useful additional condition before measures can be imposed.
- ◇ Provisions governing the settlement of disputes lead to long delays before disputes are settled and measures modified. The very initiation of an investigation can already put a heavy burden on exporters, importers and ultimately the domestic user industry. Consequently, a reflection could be made as to whether and under which conditions initiations of investigations could be made subject to a swift dispute settlement mechanism, taking into due account the relevant provisions and practice under the Understanding on the Settlement of Disputes.
- ◇ A strengthening of the disciplines could also, by definition, reduce the costs of investigations. Indeed, a major problem of today's anti-dumping practice, identified in particular by developing countries, is the cost which firms incur when they want to cooperate effectively in such proceedings. It could be explored whether a further and beneficial improvement could be achieved by screening all procedural aspects with a view to identifying those areas where changes can bring about a reduction in the cost of cooperation while at the same time maintaining the quality of the investigation. Areas such as simplifying and standardising information collection, particularly at the initial stages of the investigations, could be a further issue to be discussed under this heading (Negotiating Group on Rules 2002 TN/RL/W/13).

The submission by the EU is objective and accurate in that the procedural burdens on the exporters are recognized. In terms of access to non-confidential files, the EU is criticized and even the EU Ombudsman decided against the Commission (Gambardella 2011: 157-163). Delay in

the dispute settlement system is also another reality with anti-dumping measures related to transparency. The EU suggested in a more recent communication that increased transparency is beneficial from a common-sense perspective and may reduce the number of disputes at the dispute settlement mechanism (Negotiating Group on Rules 2015 TN/RL/W/260: 2). The public interest test is not mandatory under the Anti-Dumping Agreement but, nonetheless, the EU adopts the test before imposing anti-dumping measures, and so any additional duties do not serve only the interests of domestic industries. The EU, therefore, suggests that the public interest test should be covered by the Anti-Dumping Agreement (*ibid*: 2). Another remarkable point in the submission is that the EU acknowledges the cost of cooperation for exporters and suggests screening all procedures and revising those that are burdensome and costly. One concrete suggestion is the standardization of the information collection method at the early stages of the investigation, which could be accomplished with a standard questionnaire for all members as is proposed in this study.

In 2003, the EU called for model/standard questionnaires to be used by all members (submission by the European Communities and Japan, Negotiating Group on Rules 2003 TN/RL/W/138). The EU points to the benefits of standard questionnaires as time and money-saving, as well as easing preparation of submissions. This would increase the level of cooperation and reduce the discretion of investigating authorities. In 2006, the EU sought procedural improvements, stating that the information required, verification visits, and the selected language create uncertainty during investigations, (Submission from the EU 2006) which discourages exporters from cooperating. While only a few companies cooperate, breaches of the Anti-Dumping Agreement cannot be monitored effectively, and the anti-dumping mechanism is more likely to be abused by members. The EU also contends that the dispute settlement body is not able to manage all these issues in practice.

In this context, the EU proposes a review mechanism to ensure transparency in anti-dumping investigations (Communication from the EU 2015: 2). Given that there is a more general review mechanism (Trade Policy Review Mechanism) that also covers anti-dumping matters, this additional review mechanism would be burdensome unless it was empowered to enforce sanctions on violating members.

A document which was circulated in 2018 by the EU Commission reflecting the EU position is called the 'European Commission Presents Comprehensive Approach for the Modernisation of the World Trade

Organization' (European Commission 2018). This document highlights the problem of the lack of a review mechanism for anti-dumping investigations, resulting in inefficient notification of subsidies, growing numbers of state-owned enterprises which are not managed by market principles, and trade-distorting measures (Yan 2019: 62). The need for improved transparency is also once more suggested in the document (Yan 2019: 62).

The EU's suggestions seem ambitious compared to its practice. The EU has been challenged in several disputes, such as DS405. The EU in several submissions has highlighted the need for improved transparency. However, in DS405, the EU was found to be violating Article 6.5.1 of the Anti-Dumping Agreement by failing to disclose non-confidential summaries to interested parties who submit confidential information (DS405 Report of Panel 2011: 282).

The United States

As a frequent user, the position of the US is to amend Articles 2.4 and 9.3 of the Anti-Dumping Agreement so as to legalize the use of the zeroing methodology (Cho 2012). FANs strongly opposes the US proposals in this regard. The USA submission in 2002 acknowledged that procedures differ widely among WTO members (Negotiating Group on Rules 2002). The US also indicated that it saw procedural justice as a key principle of the Anti-Dumping Agreement, and some issues should be discussed under the Negotiating Group on Rules. The outcomes of disputes heard by the dispute settlement body, especially on zeroing, indicate that the US position during the negotiations contradicts its actual practice. The contradiction also appears in other Articles of the Anti-Dumping Agreement.

Regarding Article 6.4 of the Anti-Dumping Agreement, the USA argued that interested parties should have timely opportunities to see all non-confidential information used by the investigating authorities. The USA suggested a public record system of non-confidential files which would be accessible by all interested parties so as better to promote public accountability, consistency and predictability.

The US finds the language of Article 12 of the Anti-Dumping Agreement inadequate, as the requirement for 'sufficient detail' to be disclosed on public notices is not clearly defined. Therefore, the US is calling for the inclusion of more information in public notices, such as calculation methods. The US is considered to be more transparent than the EU in

allowing parties to access confidential information and the calculation method (Hambrey Consulting 2010).

Regarding Article 6.7 and Annex I of the Anti-Dumping Agreement, the results of verification visits should be made available to the parties, but the level of detail in this disclosure is not clear. Therefore, the US suggests revising these Articles and setting clearer verification procedures, especially concerning verification reports (Negotiating Group on Rules 2002 TN/RL/W/35), which are considered internal documents and confidential by many WTO members. However, non-disclosure of these documents by the parties subject to verification visits obstructs exporters from meaningfully participating in the procedure (Horlick & Vermulst 2005: 68).

In terms of Article 18 of the Anti-Dumping Agreement, domestic regulations should conform to the Anti-Dumping Agreement. The US has suggested detailed local regulations and administrative guidelines in order to improve predictability and due process (Negotiating Group on Rules 2002 TN/RL/W/35). The US recognizes the need to reduce the costs of investigations as a requirement of procedural fairness. Such detailed domestic regulations would increase the predictability but, on the other hand, if each member regulates detailed anti-dumping provisions, it would be more burdensome for exporters to cooperate in anti-dumping investigations. They need to comply with more detailed rules in different jurisdictions, which would discourage them from cooperating with each investigation. Instead of regulating anti-dumping procedures domestically, it would be more practical and beneficial to harmonize procedures globally, so that exporters do not face different rules in each investigation. In that regard, the EU's model/standard questionnaire proposal is more practical and solution-oriented than the US proposals.

China

Since its accession to the WTO in 2001, China has submitted many proposals for revising the Anti-Dumping Agreement, as being the top target for other members. The overall position of China on anti-dumping is that members enjoy too much room for discretion, so they arbitrarily abuse anti-dumping mechanisms which harms free trade (Liu 2014: 129). In 2003, China proposed reassessing some of the issues regarding the Anti-Dumping Agreement. China expressed concern about back-to-back anti-dumping investigations and proposed adding a provision to Article 5 of the Anti-Dumping Agreement in order to prevent new anti-dumping investigation initiation if the previous initiation resulted in a negative finding (Negotiating Group on Rules 2003 TN/RL/W/66). This

suggestion would be helpful to prevent the abuse of anti-dumping because, otherwise, exporters would face questionnaires regularly and, if they fail to cooperate, the outcome would be positive. China also suggests that some terms, such as ‘product under investigation’, ‘particular market situation’ or ‘major proportion’ need to be defined clearly in order to limit the discretion of the investigating authorities. China also suggested that Article 2.4.2 of the Anti-Dumping Agreement highlights the prohibition of ‘zeroing’. One of the main concerns in the submission from China is the ‘non-market economy clause’. China argued that Article 2.7 and the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 acknowledge that members may not be able to compare domestic prices due to monopoly or prices fixed by the state. Under these clauses, members are able to compare third-country or surrogate prices with export prices. China argued that, while selecting the surrogate country, members enjoy a degree of discretion and generally choose the countries at a more advanced level with higher costs and prices. This inflates anti-dumping duties and overprotects domestic industries. China also expressed concern that, under the Anti-Dumping Agreement, exporters do not have the right to respond to the initiation of an anti-dumping investigation (Choi 2007: 37). Therefore, China suggested a 20-day response period before initiation.

In 2007, China also suggested revisions to limit the discretion of members. One of the suggestions was to limit sunset reviews to one, so that the total duration of an anti-dumping duty would be limited to 10 years (Liu 2014: 129). In the current setting, anti-dumping measures can be in force as long as the investigating authority renews them at sunset reviews. China also suggested special and differentiated treatment for developing members in anti-dumping investigations.

In 2008, China joined other members in a statement supporting the prohibition of zeroing (Negotiating Group on Rules 2008 TN/RL/W/215). China and other members took the view that the zeroing issue should be addressed clearly to avoid long-lasting problems. The position of the submission can be summarized by the following statement: ‘We believe continued disputes between Members on zeroing should be avoided by clearly codifying the prohibition of zeroing at all stages of procedures under the DDA’ (ibid). In 2008, China, Hong Kong and Pakistan submitted a separate communication about the anti-circumvention provision on the Chair’s Consolidated Text in Anti-Dumping Agreement (Statement of China; Hong Kong, China; Pakistan 2008). Currently, anti-circumvention is not regulated under the Anti-Dumping Agreement, which results in local regulations to combat circumvention of anti-dumping duties. However, as

there are no uniform rules on anti-circumvention, members enjoy room for discretion on how to respond to circumvention. Also, circumvention is more likely to occur where anti-dumping measures are used excessively to protect domestic industries.

A proposal by China in 2017 on trade remedies highlighted five issues: enhancing transparency and strengthening due process, preventing anti-dumping measures from becoming ‘permanent’, preventing anti-dumping measures from ‘overreaching’, special consideration and treatment of small and medium-sized enterprises (SMEs), transplanting similar provisions from the Anti-Dumping Agreement to the Agreement on Subsidies and Countervailing Measures (Submission by China, Negotiating Group on Rules 2017 TN/RL/GEN/185). In this context, China proposed certain revisions, such as the introduction of a notice before the initiation of an investigation, standardization of evidence for subsidy accusations, and limiting sunset reviews (Submission by China 2017).

FANs

FANs have submitted several papers to the Negotiating Group on Rules. Three papers by FANs were submitted in 2002 stressing the ‘abusive interpretation of the current AD Agreement’ (Illustrative Major Issues Paper 2002 TN/RL/W/6). The first paper calls for clearer guidelines for procedural issues, such as constructed value, zeroing, facts available, and public interest. In the second paper, FANs emphasized the ambiguous definition of the like product, the lax standards of initiation, grey areas on sunset reviews, abusive calculation methods for constructed value, and the scope for discretion on all others rate and cost data (Second Contribution to Discussion 2002 TN/RL/W/10). The third paper of 2002 also underlined transparency in public notices regarding Article 12.1 of the Anti-Dumping Agreement (Third Contribution to Discussion 2002 TN/RL/W/29). FANs used the words ‘procedural fairness’ in the 2005 submission, stating:

The FANs suggested in this paper a transparency provision for this purpose, and may consider to propose, in the course of negotiations, to expand this type of discipline on procedural fairness and transparency to a broader context of the Agreement, inter alia, to other provisions that contain the word ‘normally’ (Further Submission On Proposals, Negotiating Group on Rules 2005 TN/RL/GEN/44: 2).

The suggestion is to improve the ‘procedural fairness’ by adding the word ‘normally’ to Article 9.6.⁶ However, the word ‘normally’ is ambiguous and may leave more room for discretion. Members would claim that the conditions were not ‘normal’ for the case. In addition to the above submissions, FANs also proposed another communication in 2005 (Senior Officials’ Statement, Negotiating Group on Rules 2005 TN/RL/W/171). Six objectives were identified to prevent the abusive use of anti-dumping: mitigating the excessive effects of anti-dumping, preventing anti-dumping measures from becoming ‘permanent’, strengthening due process and enhancing the transparency of proceedings, reducing costs for authorities and respondents, terminating unwarranted and unnecessary investigations at an early stage, and providing discipline to improve and clarify substantive rules for dumping and injury (Senior Officials’ Statement 2005). These objectives reflect the previous submissions by FANs urging members to agree clearer rules. The objectives summarize anti-dumping today as the problem has only increased since then. Zeroing, for instance, became a chronic disease among WTO members leading to several cases.⁷ More than 30 Panel or Appellate Body reports have found the zeroing methodology to be inconsistent with the Anti-Dumping Agreement (Mavroidis & Prusa 2018: 239-264). As one of the top zeroing practitioners, the US lost several disputes over zeroing. Consequently, these defeats before the Appellate Body triggered US criticism of the Appellate Body for judicial overreach and blocking of the appointment of Appellate Body members (Schott & Jung 2019). Therefore, either way, zeroing should be the first issue to be revised under the Anti-Dumping Agreement. Other procedural improvements are also essential as underlined by FANs, such as the burden of participating in anti-dumping investigations, especially for SMEs (Senior Officials’ Statement 2005). Thus, procedural justice should be improved for a fair, transparent and cost-effective anti-dumping mechanism.

There has not been much change in the position of FANs after 10 years. In 2015, FANs proposed that:

Transparency of AD investigation procedures and due process rights are fundamental and are critical aspects for improving the disciplines, principles and effectiveness of the AD regime while preserving basic concepts. Transparency and due process are vital to interested

⁶ FANs suggestion is: ‘The provisions of Article 2 shall apply to all determinations pursuant to paragraphs 3 and 5 of this Article. The authorities shall normally use the same methodologies consistently in determining a margin of dumping in an investigation initiated pursuant to Article 5 and in subsequent determinations pursuant to paragraph 3. If the authorities use a different methodology, the parties concerned shall be provided with opportunities to make comments, and a full explanation shall be given why such different methodology was used.’

⁷ There are 18 disputes filtered by the subject of ‘zeroing’ according to the [WTO database](#).

parties. Parties need information and reasonable procedures in order to participate effectively in an investigation and defend their interests. This will be impossible unless the parties are kept fully informed of all individual steps and procedures undertaken by the authority from the initiation of the investigation until the imposition of AD duty, have the opportunity to access all public/non-confidential information on the record of an investigation in a timely manner, are given sufficient time to prepare their factual and legal submissions, and are provided with an explanation (either in a published notice or a separate report) which provides details on the authority's assessment of the evidence and its consideration of comments from interested parties.⁸

FANs also emphasized that if a certified translation is required by the investigating authorities, then additional time should be granted to the participants to respond to questionnaires. The issues touched upon are subject to several disputes. FANs believe by improving transparency and due process, the dispute settlement body will need to manage fewer cases, so both interested parties and investigating authorities would benefit. FANs also support the view that the lack of clear rules causes arbitrary use of Anti-Dumping Agreement provisions.

Other Members

Other members also contribute to discussions by pointing out their views on how best to revise the Anti-Dumping Agreement. As a FANs member, Japan individually stresses the importance of transparency and procedural fairness.⁹ South Africa also emphasizes the importance of meaningful participation in anti-dumping proceedings,¹⁰ and believes this can be achieved by improving the transparency and predictability of the proceedings. South Africa has also highlighted the adverse effects of detailed questionnaires on the level of cooperation and proposed amendment of Article 6 of the Anti-Dumping Agreement to guarantee a reasonable opportunity to complete the submission (Negotiating Group on Rules 2006 TN/RL/GEN/137). Mexico recommended that price undertakings should be used more efficiently, as the bilateral trade is adversely affected by anti-dumping investigations.¹¹ The Anti-Dumping

⁸ Anti-Dumping: Issues of Transparency and Due Process Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republic of; Norway; Singapore; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, Negotiating Group on Rules 2015 TN/RL/W/257: 2.

⁹ Anti-Dumping Follow-Up Paper on the Issues of Transparency and Due Process, Communication from Japan, Negotiating Group on Rules 2015 TN/RL/W/265: 3.

¹⁰ Proposals on Issues Relating to the Anti-Dumping Agreement Paper from South Africa, Negotiating Group on Rules 2006 TN/RL/GEN/137: 4.

¹¹ Price Undertakings, Communication from Mexico, Negotiating Group on Rules 2005 TN/RL/GEN/76: 1.

Agreement, in Article 8, allows members to use price undertakings as an alternative to final anti-dumping measures. Canada suggested two approaches to the negotiations: determining the problematic provisions of the Anti-Dumping Agreement and developing practices to avoid injurious dumping while considering both developed and developing countries (Submission From Canada, Negotiating Group on Rules 2003 TN/RL/W/47). Canada further acknowledged that existing rules on transparency and procedural fairness should be improved, especially regarding the initiation standards, disclosure of information, public hearings and sufficient explanation of determinations (ibid). Also, clarification is needed for some terms, such as the ordinary course of trade, like product, domestic industries, sunset reviews, and divergences between the Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures (ibid). India, as the top user of anti-dumping, has also demanded clarification of Anti-Dumping Agreement provisions (Proposals on Implementation Related Issues and Concerns, Negotiating Group on Rules 2002 TN/RL/W/4). India highlighted the unfair use of back-to-back anti-dumping investigations, which dilute the gains from free trade (ibid). India also noted the need for more favourable provisions for developing members, such as mandatory application of the lesser duty rule or increasing the *de minimis* margin (ibid). Australia has concerns about providing timely opportunities to establish transparency, as regulated under Article 6.4 (Submission by Australia, Negotiating Group on Rules 2003 TN/RL/W/43). Australia further shared its own practice of transparency during the investigation, where all non-confidential information and correspondence are publicized (ibid). Egypt similarly emphasized that ‘the active participation of all parties concerned, including the respondents, in an AD proceeding is essential to ensure transparency and fairness of the system’ (Submission by Australia, Negotiating Group on Rules 2003 TN/RL/W/56). Norway holds the view that Article 6.9 of the Anti-Dumping Agreement is not clear in defining the disclosure requirement for preliminary determinations of final anti-dumping measures as well as provisional measures.¹² Norway agrees that due process requires disclosure of all relevant factors leading to the final and provisional measures and proposed a 20-day period for commenting on the factual considerations before the adoption of final or provisional measures (Negotiating Group on Rules 2003 TN/RL/GEN/87). This approach was also suggested by China and can be helpful to provide meaningful participation of the relevant parties to the investigation.

¹² See Further Proposal on Issues Relating to Article 6.9 of the ADA, Paper from Norway, Negotiating Group on Rules 2005 TN/RL/GEN/87.

Some members jointly proposed amendments to the Anti-Dumping Agreement covering the inclusion of a public interest clause.¹³ As well as being a part of the previous submission Hong Kong separately stated that:

members should strike a balance between concerns of 'administrative burden' and the merits of the issue at hand. Ultimately, the proposal is about good governance: due process, procedural fairness, proportionality and public accountability. Due regard should be given to these objectives.¹⁴

In addition to members, the International Chamber of Commerce (ICC) (2007) holds the position that the current Anti-Dumping Agreement leaves room for discretion by investigating authorities. The ICC suggested that investigating authorities should have less discretion in calculating constructed normal values, zeroing should be prohibited, injury margin calculation should be standardized, and a mandatory lesser duty rule should be introduced. The ICC paper concluded that:

Antidumping duties should in no case exceed the dumping margin and should not exceed the injury margin. Disproportionate information requirements and inadequate procedural rules increase prohibitively the costs of cooperation in anti-dumping investigations. These increased costs are particularly hurtful to parties in developing nations where resources are scarce, to small and medium size enterprises, and to exporting producers that only ship relatively small quantities (ICC 2007: 4).

Other members and the ICC generally support revising the Anti-Dumping Agreement by clarifying problematic provisions, such as zeroing and enhanced transparency. These revisions, in turn, will prevent the abuse of the anti-dumping mechanism and develop procedural justice thus reducing the number of disputes at the global level.

Discussion on a comprehensive reform of the Anti-Dumping Agreement

The reform of the Anti-Dumping Agreement has been discussed in the WTO as well as in the literature for many years. The previous section presented the main arguments and submissions by WTO members to reform the Anti-Dumping Agreement. While most of the literature discusses WTO reform as a whole, some studies focus on reform of the Anti-Dumping Agreement. Kazeki examined the negotiations about the Anti-Dumping Agreement

¹³ Original: Public Interest Paper from Chile; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republic of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, Negotiating Group on Rules 2005 TN/RL/W/174/Rev.1.

¹⁴ Further Explanation of the Public Interest Proposal, Paper from Hong Kong, China, Negotiating Group on Rules 2005 TN/RL/W/194: 6.

from the FANs' perspective (Kazeki 2010). Chaisse and Chakraborty contend that the increasing use of anti-dumping investigations by developing countries underlines the misuse of grey areas in the Anti-Dumping Agreement and call for reform of the Anti-Dumping Agreement rather than its abolition (Chaisse & Chakraborty 2016). Thus, both literature and policymakers agree on the idea of reforming the Anti-Dumping Agreement.

Furthermore, exporters encounter difficulties due to procedural burdens reducing the motivation to cooperate. For instance, one company mentioned that, 'we understood it's unavoidable from the very beginning, what we can only do is [achieve the] minimum the anti-dumping duty to us [sic]'. Another believes anti-dumping has a macro perspective which is problematic enough. The company asserted that 'dumping is a result of global economic problems so it is very hard to solve'. A similar macro-scale analysis was set out by an exporter: 'When anti-dumping actions are used for retaliatory purposes or as a result of lobbyist political agenda, levies bring more harm than benefits. Unfortunately, biased political views may go ahead of investigations and their force the application of actions in an untimely manner' (Yilmazcan 2021). On collection of empirical data about these problems, the US and EU investigation authorities were asked for their comments on a possible revision of the Anti-Dumping Agreement; however, neither provided responses to the surveys.

The need for revision of the Anti-Dumping Agreement is obvious, but it not so easy to achieve. Reform proposals include the revision of the provisions, attaching standard questionnaires for anti-dumping investigations to the Anti-Dumping Agreement, and adopting best practice guidelines. A paper by the ICC is a useful summary suggesting that standard/model questionnaires drafted by the WTO anti-dumping committee would be helpful for exporters to defend their interests (ICC 2007). The need for a clear prohibition of mandatory representation by lawyers is stressed. This suggestion particularly would be helpful for Chinese exporters to cooperate in US investigations. Revision of the timelines has also been suggested, in order to provide a short investigation procedure while ensuring enough time for participants; however, it is not clear how to balance these two requirements. Limiting the time span of anti-dumping measures through sunset reviews is another point to improve (ICC 2007). Currently, there is no time limit for an anti-dumping measure, which means that some members use anti-dumping measures as long-term trade policies.

There is a need for clarification of several Articles, and many proposals have been submitted to improve the rules. The submissions aim to re-establish the original rationale of the anti-dumping tool, which is to

provide a level playing field by prohibiting predatory pricing and price discrimination between markets (Andrews 2008: 32). On the other hand, more regulation may not limit the discretion of investigating authorities as expected, especially the facts available provisions. The current provisions are descriptive and designed in a way that investigating authorities may use the information that supports the investigation (Andrews 2008: 32). The selection of the information creates room for discretion which is an abuse of the Anti-Dumping Agreement provisions. The revision attempts should avoid the potential to abuse the rules.

To prevent abusive use, the public interest clause in the Anti-Dumping Agreement could be made mandatory (ICC 2007). This would limit the lobbying effect by businesses while supporting the interests of the consumers and other industries. Furthermore, circumvention can be defined under the Anti-Dumping Agreement to guide WTO members against fraudulent practices that avoid anti-dumping duties. Transparency, predictability and consistency are key issues supporting the better functioning of the Anti-Dumping Agreement:

The anti-dumping negotiations present a difficult challenge as WTO members will have to find a delicate balance between transparency and protecting confidentiality. Furthermore, flexibility and the desire for complete accuracy need to be balanced against practicality and the desire to reduce administrative costs and minimize the burden on companies subject to an anti-dumping investigation. ICC hopes that adoption of the above recommendations by WTO members will help achieve an appropriate balance and encourage a more harmonized, disciplined and transparent approach in the implementation of the ADA (ICC 2007).

To summarize the normative revisions on the Anti-Dumping Agreement, zeroing should be explicitly prohibited (Article 2.4.2); a public interest test should be mandatory; circumvention of anti-dumping duties should be regulated; modal/standard anti-dumping investigation questionnaires should be introduced; the additional review mechanism for transparency should be regulated; timely opportunities to access non-confidential files should be included (Article 6.4); the term 'sufficient detail' should be clarified under Article 12; clearer verification methods should be introduced under Article 6.7 and Annex I; the prohibition of back-to-back investigations under Article 5; limitation of the non-market economy methodology under Article 2.7; improving transparency in public notices under Article 12.1; and improving the disclosure requirement under Article 6.9. These revisions would strengthen the reliability of the anti-dumping mechanism.

[C] PRACTICAL CONSTRAINTS ON POSSIBLE REFORMS

Certainly, the revision of the Anti-Dumping Agreement is not an easy task. Different players are trying to use the Anti-Dumping Agreement to further their interests. Also, negotiation and revision procedures are complicated and slow. Regarding the complexities of the revision, the chairperson of the Negotiating Group on Rules in 2011 urged members to adopt a pragmatic, flexible and less doctrinaire approach during the negotiations (Hartman 2013: 411-430). In doing so, there should be a balance between effectively restoring the injury caused by dumping and unduly harsh trade restriction (ICC 2007). Preserving the level playing field and avoiding too much room for discretion is a challenging task, and achieving this through negotiations at the WTO is also a distant goal. Andrews explains:

for any reform of the Anti-Dumping Agreement to be warranted, the proposed reform should help reduce the gap between the objective or goal of the Anti-Dumping Agreement and its instruments of preventing discriminatory, below cost and predatory pricing behaviour and the Agreement's actual practice (Andrews 2008: 21).

Furthermore, current US policies represent a threat to further progress in the anti-dumping negotiations. The recent policy shift of the US after 40 years, from special protection such as anti-dumping, countervailing or safeguard measures, into unilateral tariffs against China constitutes a serious threat to the rules-based WTO (Bown 2019b). The US formerly protected its domestic industries with traditional measures, such as anti-dumping, but Chinese subsidies and the Appellate Body's unfavourable reports triggered the US Government to take actions that led to a crisis with China and the WTO (Bown 2019b). On bilateral trade, the US has increased tariffs since 2018, resulting in retaliation from China. Countries using escalating tariffs in a retaliatory manner in a trade war, rather than using other negotiation mechanisms, have been shown empirically to be harming their economies (Fetzer & Schwarz 2019). On the WTO side, the US blocked the appointment of new Appellate Body members, which paralysed the appealing body of the dispute settlement mechanism (Hillmann 2019). The first blockade was against the reappointment of the Korean Appellate Body member in 2016 (Bacchus 2018). The US accuses the WTO's Appellate Body of judicial overreach, especially regarding several reports finding that the zeroing practice violates the Anti-Dumping Agreement (Petersmann 2018: 185). This move has been criticized, as the system may return to the pre-GATT94 era (Bown 2019a: 21).

Regarding the reforms of the dispute settlement mechanism, Hoekman and Mavroidis classify negotiators into four types. The hawks are the US, requesting a severe modification of the current system, especially on deadlines or the elimination of the formation of panels (Hoekman & Mavroidis 2019: 5). The US proposals are triggered by the lobbies, such as steel, seeking more protectionism (Panezi 2016: 5). Therefore, the US proposals are not aimed at promoting the predictability or objectivity of the WTO (Panezi 2016: 5). The doves, Japan and Korea, do not seek to change what was accomplished with the GATT (Hoekman & Mavroidis 2019: 5). Hawkish doves, like Australia and Canada, follow the US to some extent. The dovish hawk, the EU, currently plays an objective mediator role, aiming to sustain the rules-based system in favour of both developed and developing countries (Hoekman & Mavroidis 2019: 5). The EU's constructive role in the rules-based system can also be traced to the proposed initiative interim appeal arrangement for WTO disputes after the US blockade of the Appellate Body.

Ensuring an objective and fair revision of the Anti-Dumping Agreement also depends on other areas, such as the dispute settlement mechanism, Agreement on Subsidies and Countervailing Measures and even GATT94 as a whole. Furthermore, WTO members take different positions regarding these issues. The same challenges existed before GATT47 and GATT94, so multilateral compromise is needed again to gain the advantages of free and fair trade.

Another major limitation to revising the Anti-Dumping Agreement are the problems faced during negotiations. Unlike the Bali and Nairobi Ministerial Conferences, Buenos Aires did not result in any commitment (Wróbel 2020: 161-175). Several factors can be linked to this dysfunctionality, such as developments in international trade, and the shift in the balance of power in global trading (Wróbel 2020: 161-175). One year after Buenos Aires, the US-China trade war broke out. In 2020, the WTO faced a serious crisis due to the US blockade of Appellate Body members and the stepping down of the Director-General.

In this context, serious challenges lie ahead for the reform of the WTO and the Anti-Dumping Agreement. There are polarized views about how to reform the Anti-Dumping Agreement. US foreign trade policy is the greatest threat to clear and more transparent rules in the Anti-Dumping Agreement. The selection of the new Director General of the WTO and a new US President might give a fresh impetus to trade liberalization. Also, China announced that its subsidies to the steel sector have been reduced (Tan & Ors. 2021). China is also purchasing US goods, as agreed in 2020,

during the trade war (Bown 2021). These developments should help reduce the rivalry between top economies and ease the tension at the WTO level. Perhaps it should once more be acknowledged by all WTO members that the rules-based system provides a greater benefit to the global economy than do power-based trade policies. At this point, changing the approach to negotiations is essential. Rather than discussing both the substantive and procedural rules of the Anti-Dumping Agreement, perhaps it would be more practical to focus first on procedural rules. Improved procedural rules would limit room for discretion and reduce the number of disputes. Furthermore, other suggestions need to be considered that do not require a revision of the Anti-Dumping Agreement.

[D] CONCLUSIONS

This article has examined the ongoing negotiations on the Anti-Dumping Agreement through the Negotiating Group on Rules. The negotiations on anti-dumping started in 2002 with the mandate to establish the Negotiating Group on Rules. Three main groups have different interests and take different positions in the Anti-Dumping Agreement negotiations. FANs push for transparency and more regulation. The second group of developed members tries to protect existing rules so that the investigating authorities can enjoy more discretion. The third group consists of several members that echo developing country concerns. Thus, even though there are some particularly useful suggestions for improving the Anti-Dumping Agreement and addressing procedural problems, due to the multipolar positioning of members, meaningful revision may not be possible in the short term. Furthermore, the Ministerial Conference in Buenos Aires was not successful and, afterwards, the rules-based system of the WTO was damaged by US foreign trade policies, which include the trade war with China and the blocking of appointments of Appellate Body members. Revision of the Anti-Dumping Agreement is the best solution to avoid the misuse of anti-dumping investigations. However, due to the malfunctioning of the WTO negotiations, this does not seem to be achievable in the short term. The main players in global trade, notably the US and China, have opposing views on issues such as the zeroing methodology.

Zeroing is the key issue to be solved, as it is behind most of the disputes between WTO members. It is a procedural issue with substantive effects because it has a huge impact on the level of anti-dumping duty. The EU could play a balancing role in the case of zeroing. Although it opposed an explicit prohibition of zeroing during the negotiations of the Uruguay Round, after losing two disputes, the EU stopped practising zeroing in its

anti-dumping investigations (Hoekman & Mavroidis 2019). The EU has also taken a constructive role in trying to solve the Appellate Body crisis (Sharma 2020: 239-254). Therefore, currently, the EU is the most suitable candidate to negotiate between the US and China in order to protect the rules-based system of the WTO and reduce tension. Considering the consistent rulings of the Appellate Body and Panels, it is more acceptable to prohibit zeroing in line with the fair comparison requirement of the Anti-Dumping Agreement. As fair comparison is a general principle, a revision of the Anti-Dumping Agreement should consider previous interpretations by the Appellate Body and Panels as guidance and prohibit zeroing. Consequently, other revisions to promote transparency and objectivity would follow. While this would be an ideal solution for the most litigated topic under WTO adjudication, it is unlikely to happen soon. Therefore, more practical solutions are needed.

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BORDER CITIES AND INTERNATIONAL LAW

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[A] [INTRODUCTION]

There is a good deal of interest in a) cities as international law actors and b) borders. Essentially, what I do in this paper is bring these two areas together in a look at the role of border cities in international law and diplomacy.² I do that through a case study of one urban borderland namely, Windsor (Ontario, Canada)–Detroit (Michigan, United States (US)).³

Let us start with the interest in the role of cities in international law or, as it is sometimes termed, the local turn in international law. This local turn was preceded by, and parallels, an interest in subnational entities, especially in federated states. But the ‘buzz’ now is definitely around the urbanization of international law. In one sense of course, this is not new. City-states played major roles in antiquity and there has long been interest in microstates such as the Vatican City, as well as disputed border cities with a history of unique governance, such as Trieste and Danzig. But, until relatively recently, cities have often been ignored as international law players. Ignored at least as important players engaged in activities beyond ‘sister city’ diplomacy (which should not be discounted in terms of a contribution to peace and cultural and economic

¹ Professor, Faculty of Law, University of Windsor. A version of this paper was delivered as part of the Institute for Advanced Legal Studies (IALS) Director’s Seminar Series on 4 November 2021. The author thanks Professor Carl Stychin and the IALS for the opportunity to present. The research assistance of Andrea Bracaglia is gratefully acknowledged.

² ‘City diplomacy involves the institutions and processes by which cities engage in relations with actors on an international political stage with the aim of representing themselves and their interest to one another’: van der Pluijm (2007).

³ The case study was first written as a ‘city report’ for the ILA’s Study Group on the Role of Cities in International Law. This article relies on the substance and text of that report throughout: Waters (2021). See also [ILA City Reports](#) online.

exchange).⁴ Part of the reason for this is that cities lack a constitutional mandate to engage in diplomacy in most jurisdictions. In Canada for example, cities were the definite losers at Confederation in 1867. The Supreme Court of Canada recently highlighted the lack of constitutional status for municipalities in its decision regarding provincial cuts to the size of Toronto's city council during the 2018 election campaign. The majority noted that 'municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit' (*Toronto (City) v Ontario (Attorney General)* (2021): paragraph 82). However, whatever one's views of the appropriate jurisdictional division between cities and higher orders of government, there can be little doubt that, as a matter of practice, cities have entered a wide variety of areas unforeseen by the drafters of constitutions or legislation on municipalities.⁵ In other words, generally speaking, cities have been left with scope for free action in international relations and some are rising to the occasion. This is certainly true of megacities, but it is also true of many mid- and small-sized cities. The spheres in which cities have engaged with international law vary, but have clustered around climate change, migration and sanctuary, and human rights and human development. In the wake of COP26, and the leadership role cities attempted to show at that conference, climate change is the most prominent issue around which cities have engaged.⁶ The activities of cities have been accompanied by a burgeoning scholarly sub-field, including the publication of a *Research Handbook on International Law and Cities* as well as an International Law Association (ILA) Study Group on the Role of Cities in International Law⁷ (Cartier 2021; see also Beaudouin 2021).

At the same time as there is growing interest in cities and international law, there is an abiding interest in borders generally. The border studies field is interdisciplinary and all over the map, if you will. Borders and borderlands are described, in popular accounts and scholarship alike, as everything from quirky to marginal, to suspect and oppressive. Of course, which border is under consideration is often the determining factor in how it is perceived. As an example of the 'border as quirk' school, take an excerpt from the well-regarded Invisible 99% podcast:

⁴ And indeed, these relationships can occasionally be controversial: see Braich (2021).

⁵ In other words, while cities may have no explicit mandate to engage internationally under existing constitutional orders, they are generally not excluded from doing so. See Cartier (2021).

⁶ See [Global Covenant of Mayors for Climate & Energy](#); [C40 Cities](#) (a global network of 97 member cities and mayors taking action against climate change).

⁷ [ILA City Reports](#) online.

The United States and Canada share the longest international border in the world and, ever since Canada got the keys to the place in 1867, we've been pretty peaceful and genial neighbours to each other. The previous landlord, Great Britain, well the US had a bit more of a spotty relationship with them. We invaded them, they burned down our house. It was a whole thing. But even though the border with Canada is now pretty tame, when two countries touch each other over a stretch of 5500 miles it can result in some surprisingly weird disputes, misunderstandings, geographical quirks and some really good stories.

By contrast, on the US's southern border, a much more critical perspective is typical. Harsha Walia, in describing the US's southern border writes: 'The US–Mexico border must be understood not only as a racist weapon to exclude migrants and refugees, but as foundationally organized through, and hence inseparable from, imperialist expansion, Indigenous elimination and anti-Black enslavement.' (Walia 2021: 21) To be clear, a critical lens is also required at the US's northern border, where for example, the pandemic exposed Canada's treatment of migrant workers, but the focus of analysis is often very different (Tungohan 2021). At the very least, it can be said with confidence that the US's southern border has received many times the amount of attention than its northern counterpart.

Surprisingly, linking the urbanization of international law together with border studies yields a sparse field: border cities are an underexplored phenomenon. When they are not ignored, border cities are often considered marginal hinterlands, or suspect (sometimes because loyalties are seen to be divided, or because of perceptions of smuggling and other vice inherent to border life). In my view, however, they have unique, practical interactive and interpretive experience of international law and diplomacy which provides insights into new urbanism, borderland governance, and international law and relations by actors other than the nation-state. I don't want to overstate the case that border cities are ignored. Notably, under the auspices of the Council of Europe and the European Union, there have been studies, tool kits and even treaties on the subject in place for some time.⁸ And there has been more recent attention around border cities and migration governance. Despite border cities being the location where international decision-making takes practical effect (whether as host cities or transit cities), border cities have been largely left out of the

⁸ See, for example, European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, Council of Europe, 21 May 1980, European Treaty Series–No 106 (Madrid).

policy-making process. Some of them are pushing back.⁹ Nonetheless, in broad brushstrokes, it is fair to say that border cities are understudied, especially outside of the European context.

[B] WINDSOR–DETROIT

I turn now to Windsor–Detroit as a case study, seen through the eyes of a Windsorite, in an account that was originally written as my contribution to the ‘city reports’ of the ILA’s Study Group on the Role of Cities in International Law.

Windsor sits opposite Detroit, Michigan, on the Detroit River, along the Canada–US boundary. It is tempting to say that the two cities sit on a ‘natural’ border, but there is nothing natural or traditional about the river being a border. It was neither a border for the Indigenous peoples of the area (from the Three Fires Confederacy of the Ojibwa, the Odawa and the Potawatomi peoples) (Hoy 2021), nor one for the French settlers (Teasdale 2019).¹⁰ Indeed, the French settlement of Detroit (a derivation of ‘rivière du détroit’ or ‘river of the straight’) existed on both sides of the river; the water was a conduit rather than a barrier for the settlement. The river is just over half a kilometre wide in places and the cities are tangibly close. As a resident of Windsor, I can see and even hear Detroit (concerts and festivals, as well as sirens and the elevated ‘People Mover’ train screeching on bends in the rails) (University of Windsor 2012). For a decade, some Windsorites could even feel Detroit. A mysterious low frequency rumbling or hum sparking conspiracy theories was eventually linked to a Detroit industrial island on the US side of the river (Martin & Ors 2020). Fishers and boaters from both countries intermingle on the river and try to stay clear of Great Lakes shipping. The border region is integrated economically, culturally and through interpersonal relations. From manufacturing to sports, and from dating to family dinners out, Windsor is in many ways part of metro Detroit. Despite these ties and the obvious potential for transnational sensibility, neither Windsor nor its big cousin across the Detroit River have sought a prominent role as international actors. Windsor and Detroit are border cities but not world cities. The governance links between the cities are low-key and informal. Further, as suggested earlier, they are border cities which have been

⁹ Formed in 2019, the Border Towns and Islands Network agreement, for example, was signed between seven local authorities based on an initiative of the Municipality of Lampedusa and Linosa in Italy. Other members include municipalities in Malta, Cyprus and Hungary. The network was formed to promote cooperation and support as border cities and islands, and to present a unified voice at the European Union and international institutions.

¹⁰ See also early maps of Detroit in Manning Thomas & Bekkering (2015).

relatively ignored in the field of border studies, certainly vis à vis the US's southern border with Mexico, or border cities within Europe. Let's now pull back the 'screen' between the two cities (Darroch & Nelson 2012).

As a border city, Windsor provides a unique perspective on cities and international law and diplomacy. In the ILA report, I highlight the lack of formal governance links between Windsor and Detroit. Despite the thick integration of the two cities on many planes—economic, cultural, and personal—there are few formal cross-border governance mechanisms in place at the city-to-city level. Part of the reason for this is that well-established nation-to-nation governance links which regulate the Canada–US border are firmly in place. Trade (the 'new NAFTA'),¹¹ security (up to co-locating border staff)¹² and boundary waters (through the International Joint Commission, among other regimes)¹³ are all managed without obvious involvement of the neighbouring cities. Scratch a little below the surface, however, and there is a large, often obscure, swathe of international relations between Windsor and Detroit.

Much of this diplomacy lies not in city council chambers but in broader public sector entities and 'authorities'. I borrow this latter term from Valverde and Flynn, who suggest in an article focused on Toronto, but with implications for most cities, that

[s]pecial-purpose public authorities are ubiquitous, indeed are more numerous than governments. Some are time-limited (say an urban development corporation set up to revitalize a particular urban intersection), but many are ongoing, such as transit, housing and conservation authorities, and public utilities. (Flynn & Valverde 2020).

This concept seems especially *à propos* in understanding diplomacy at the Windsor–Detroit border (Herzog 1991).¹⁴ From the Windsor–Detroit Tunnel Corporation (jointly controlled by the City of Windsor on the Canadian side and outsourced to a private corporation on the US), to emergency services cooperation, to cooperation between harbour masters, to policing and to cooperation over sporting/recreational events (marathons, cycle tourism and joint annual fireworks held on the river commemorating both national holidays), practical diplomacy takes place on a large scale.

¹¹ Canada–United States–Mexico Agreement 2019.

¹² Pursuant to the Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America 2015.

¹³ The Boundary Waters Treaty of 1909, United States of America and Great Britain, 11 January 1909.

¹⁴ On 'transborder regional microdiplomacy', see Herzog (1991).

This binational city governance is not always apparent or transparent, but it is real and exists along multiple points of contact. Often these links rely on the influence of individuals and non-governmental organizations who are ‘boundary spanners’.¹⁵ (As an aside, given Windsor–Detroit’s industrial heritage, I particularly like the term ‘spanner’, with implications both of a tool as well as someone who straddles). My own law school, with its links to Detroit law schools, would fall into this category. In addition to direct links, these boundary spanners also impact—sometimes in coalitions across the Detroit River—nation-nation governance schemes. To take one simple example involving an ‘authority’, construction of a new bridge over the Detroit River—named after Gordie Howe, a Canadian player for the Detroit Red Wings hockey team—is currently ongoing. Following advocacy from active transportation advocates on both sides of the river, the Windsor–Detroit Bridge Authority agreed that the new span will have multi-use paths for cyclists and pedestrians and not just vehicles.¹⁶ (Interestingly, the bridge is itself an example of innovative and collaborative border management between Canada and the US with implications for border city life (Lawson & Bersin 2020); the Bridge Authority is a not-for-profit Crown corporation owned by the Canadian government, but it is established by an agreement between Canada and a subnational entity, the State of Michigan.)¹⁷

There is an increasing recognition that relying on informal boundary spanners will be insufficient to meet the sustainability and liveability agendas that the two cities are pursuing. More formal cross-border governance links are needed. In some ways the pandemic highlighted the importance of the border region having a voice with national and provincial/state governments. None of this is to say that informal integration is or will be steady, organic or easy. For starters, given the differences in scale,¹⁸ Detroit matters more to Windsor than vice versa. More broadly, there is a transnational unease which permeates interactions between the two cities. Border securitisation post 9-11, racial profiling and other structural barriers to access for marginalised communities (passport

¹⁵ Boundary spanners are ‘vital individuals who facilitate the sharing of expertise by linking two or more groups of people separated by location, hierarchy, or function’: Egan & Loë (2020). On the availability of boundary spanners in the Windsor–Detroit beyond water resource issues, see Levina & Vaast (2005).

¹⁶ ‘The decision to include a pedestrian and bicycle lane is the result of public consultation and feedback from communities on both sides of the border’ (Gordie Howe International Bridge 2017).

¹⁷ Crossing Agreement between Canada and Michigan, 14 June 2012. The fact that the Authority is solely Canadian reflects the unwillingness of the US or Michigan to pay for the Bridge’s construction.

¹⁸ Although the City of Detroit has a population of roughly 670,000, metro Detroit has a population of over 4 million people (US Census Bureau 2021).

requirements, crossing fees, current lack of active transportation links), trade friction/'America First' policies, and vacillations of perceptions of Detroit (bankrupt/depopulated/crime-ridden or a great-American comeback story/the next Brooklyn) are all among the reasons for simultaneous division as well as integration.¹⁹ Perhaps unsurprisingly, the number of border crossings has been on the decline in recent years,²⁰ even before the pandemic. Despite this transnational anxiety, the extent of the economic and cultural linking of the cities—in some ways both on their own national peripheries—is remarkable. And the potential for inter-city diplomacy along the border—hopefully, in my view, in a way which engages international legal standards around climate change and beyond—is a goal worth shooting for.

[C] CONCLUSION

While this study takes Windsor–Detroit as a case study, my initial impression—and additional work will be needed to confirm this—is that the experience of this borderland is not atypical. Border cities provide a rich and underexplored site of engagement with international law and diplomacy. This rich practice is often informal, facilitated by 'boundary spanners' who can influence and interpret broad conversations around binational as well as borderland governance. Border city diplomacy could be ratcheted up to provide more effective borderland governance around issues of sustainability, climate change, migration, human rights and development, and health. In sum, there is tremendous potential in the urban spaces between states.

About the Author

Christopher Waters is Professor at the Faculty of Law, University of Windsor. He was Dean of the Faculty from 2015–2021. He has extensive human rights and election-monitoring field experience in post-conflict areas, including with the Organization for Security and Cooperation in Europe. His academic interests include international humanitarian law, the use of force in international law, international legal history and the role of cities in international law. Dr Waters is the author of several books and his articles on international law have appeared in journals such as the *Canadian Yearbook of International Law*, the *American Journal of International Law*, and the *University of Toronto Law Journal*. He is co-editor of the *Canadian Bar Review*.

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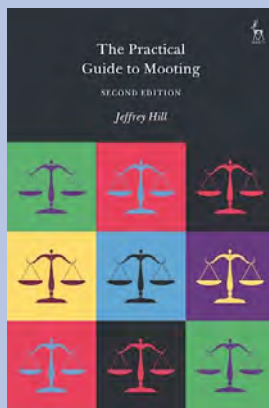
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THE PRACTICAL GUIDE TO MOOTING (2021)

BY JEFFREY HILL

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Jeffrey Hill (2021) *The Practical Guide to Mooting* 2nd edn is published by Hart (Bloomsbury): Oxford in paperback, priced at £23.99.

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Until the early nineteenth century it was not possible to study English law at an English university. Roman law was an option, but English law was not regarded as an academic subject. The only way to study English law academically was at the Inns of Court, which became known as England's Third University. Study was in two forms. The first was lectures, known as 'readings'. The second was through moots. The moots were extremely complicated and sometimes a whole term could be spent on studying one moot.

Mooting still plays an important part in legal education, not only in common law countries, but in many other countries where students can participate in international moots. This writer has taught mooting in China to Chinese students in preparation for an international competition.

Not so long ago there were few, if any, books on mooting. More recently several have come out. In my experience one of the earliest and still one of the best is *How to Moot* by John Snape and Gary Watt. The first edition

was published in 2004. Another good one is *Mooting and Advocacy Skills* by David Pope and Dan Hill, the first edition of which was published in 2007. 2009 saw the publication of first edition of *A Practical Guide to Mooting* by Jeffrey Hill. A second edition of Snape and Watt appeared in 2010, and of Pope and Hill in 2011 (followed by a third edition in 2015). There is now a second edition of Jeffrey Hill's book. (References to Hill hereafter are to Jeffrey Hill, second edition.)

Mr Hill is very well qualified to write about mooting. He has extensive experience of organizing and teaching courses on mooting, and of successfully coaching moot teams. He is a member of the Advisory Board for the Essex Court Chambers/English Speaking Union National Mooting Competition. It is interesting that apparently neither he nor any of the other authors (except perhaps David Pope) have personal experience of arguing a case in the Court of Appeal or Supreme Court. Nevertheless, he is clearly familiar with the process.

Like Gaul, the book is divided into three parts. The first is introductory; the second is practical, giving advice on how to prepare for and take part in moots; the third is miscellaneous, dealing mainly with how to organize and take part in mooting competitions.

The first edition of this book contained links to an online recording of a moot, with commentary on the links. The new edition replaces that with links to online recordings of argument in the Supreme Court. The links are to short excerpts from the arguments. The book helpfully references these links to commentary on them, illustrating what is said in the book. This is a very useful and, I believe, unique feature of the book. The links are listed on pages xv to xvi of the book. The author says that they are selective. They are drawn from rather limited sources. Of the 16 links listed, nine are drawn from the prorogation case of *R (on the application of Miller) v The Prime Minister* (2019) (for which a wrong citation is given), and six from the family law/conflict of laws case, *Villiers v Villiers* (2020). Although the advocacy is excellent, and the links are relevant to the commentary, it would be good to see a wider range of advocates. Many years ago Richard du Cann in his book, *The Art of the Advocate*, gave examples of the different styles in which famous advocates might have approached the same argument.

The book is very comprehensive and thorough. There are certain points which I disagree with or would have liked to see. There are references to senior counsel and junior counsel in the moots. This is not uncommon in books about mooting. I think it incorrect. The references should be to lead counsel and junior counsel. Queen's Counsel are known as 'leading

counsel' or 'leaders'. Any barrister who has not taken silk is a junior barrister. Barristers who have practised for many years but not taken silk are often referred to as senior juniors, but never as senior counsel. A junior counsel may lead another junior.

I have been unable to find anywhere in the book advice about how lead counsel should open the moot and introduce the other mooters. She should begin in the traditional manner, 'May it please your Lordship/Ladyship', and then go on with words such as, 'I appear for the appellant, together with my learned friend, Ms X. The respondents are represented by my learned friends, Mr Y and Mr Z.' Neither the lead appellant nor any of the other mooters should tell the judge their own name, unless, of course, the judge specifically asks for it. As a moot judge I have found it irritating when I invite a mooter to begin, 'Yes, Mr Smith?' and he then gets up and says 'My name is Mr Smith'.

This is based on a misunderstanding of the purpose of the introductions. It is not to introduce the mooters to the judge as if one were introducing strangers at a party. The theory is that the judge knows all the barristers in practice. A couple of hundred years ago, with a small bar, this may well have been true. What the lead appellant is doing is to tell the judge which of the barristers thronging Westminster Hall is appearing in the case. Nowadays in all courts, including even the magistrates' courts, the bench will have been provided with a sheet or other document setting out the names of counsel.

The last point I wish to make is the way counsel should end their submissions. On page 186 Hill says, 'At the end of your submissions, it is normal to ask the judges if they have any further questions for you.' This is true, but it is a feeble ending and is trotted out by mooters as if it were set in stone that this is the way to finish. If the judge has any further questions, she will ask them; she does not need an invitation from you. If you have come to the end of what you wanted to say and the judge has then asked you a question or questions, it would be appropriate to check that the judge has no more questions before you sit down. If the judge is not asking you questions at the end of your submissions, it is better to end not with a question, but with a punchy submission, e.g. for the appellant, 'On those grounds I respectfully submit that the learned judge below was in error and the appeal should be allowed', or for the respondent, 'With respect to my learned friends, this appeal is misconceived and should be dismissed.'

These are minor points. The book is well written, full of good advice, and would be of great benefit to any mooter, prospective mooter or anyone interested in mooting, however experienced or inexperienced.

About the Author

Barrie Nathan is a Visiting Professor at Sun Yat-Sen University, Guangzhou, China, and a Visiting Lecturer at SOAS, University of London. After graduating with an LLB (Hons) from King's College, University of London, he was called to the bar and has spent most of his working life practising as a barrister in a wide range of common law and chancery areas. He has appeared in virtually every type of court except the House of Lords/Supreme Court, although he was a pupil when he observed the leading trusts case of *Gissing v Gissing* argued in the House of Lords. He was the Principal Lecturer on the Lord Chancellor's Training Scheme for Young Chinese Lawyers for 10 years until the scheme came to an end. He has had articles published in *Trusts and Trustees*, the *Journal of Comparative Law*, the *New Law Journal* and the *Solicitors' Journal*. He currently teaches contract law at SOAS on the LLB course, and has previously taught *Civil and Commercial Conflict of Laws*, and *Procedural Principles and Ethical Standards* on the LLM. His research interests include the judiciary. He has an MA in Applied Linguistics from Birkbeck College, University of London. He is a keen photographer and some of his photos may be viewed on his [website](#).

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Villiers v Villiers [2020] UKSC 30

***ELECTRONIC EVIDENCE AND ELECTRONIC
SIGNATURES (2021) BY STEPHEN MASON AND
DANIEL SENG (EDS)***

NICOLA MONAGHAN

University of Worcester



Stephen Mason and Daniel Seng
(2021) *Electronic Evidence & Electronic
Signatures* is published by the University
of London Press, OBserving Law Series,
priced at £55pb/75hb or as a free pdf.

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The complexities relating to the treatment of electronic evidence have become increasingly multidimensional as technology has developed. Today, electronic evidence may present in a variety of different sources. Modern day technologies, such as smartphones, tablets, laptops and wearable technologies, which may be connected to the internet via wireless technology or a mobile network, along with the development of cloud computing, the internet of things, the deep web and the dark web, have raised nuanced questions about the reliability and admissibility of electronic evidence.

The new and updated fifth edition of *Electronic Evidence and Electronic Signatures* offers an innovative and comprehensive insight into this area and provides an exhaustive explanation and analysis of the complexities of electronic evidence. Published by the Institute of Advanced Legal Studies for the School of Advanced Studies, University of London Press in 2021, the fifth edition of this book also incorporates Stephen Mason's book on *Electronic Signatures in Law* (Mason 2016), thus offering a detailed

examination and analysis of issues relating to both electronic evidence and electronic signatures.

The editors and authors, Stephen Mason and Daniel Seng, are both leading authorities on electronic evidence. Together with a team of expert contributors, they have compiled 10 unique chapters which deal with a wide variety of aspects relating to electronic evidence, including topics such as the sources and characteristics of electronic evidence and artificial intelligence, hearsay, the presumption that computers are 'reliable', the authentication of electronic evidence, encrypted data and proof (the technical collection and examination of electronic evidence). The book claims to take a traditional approach to the subject and focus primarily on the law in England and Wales, although a number of the chapters provide significant consideration of cases and legislation from other jurisdictions. As such, in some areas, the book offers a comparative perspective (this is most notably, although not exclusively, the case in chapters 5 and 7, which explore these areas in extensive detail). The book is dedicated to Colin Tapper, Emeritus Professor at Magdalen College, University of Oxford, who was pivotal in developing academic scholarship in the law of electronic evidence.

The authors begin each edition of the book with a short vignette. The opening vignette for the fifth edition paints an enlightening, fictional courtroom scene involving a pre-trial application requesting the disclosure of evidence relating to the defendant, Positively Open Ltd's, software system, EarthSkyMeet. This scene serves to contextualize some of the key issues relating to the reliability of electronic evidence. It is upon this foundational depiction of a fundamental procedural process that the chapters in the book are built. It is worth noting that the vignettes used to open previous editions of the text can be found at the end of the book (in appendix 2).

The first chapter of the book provides an overview of the nature of digital evidence. It explores the various sources and characteristics of electronic evidence and artificial intelligence and introduces the reader to key terms and concepts which feature throughout the book. The authors draw attention to the challenges facing legislators in avoiding overly abstract legislation which, while technologically neutral, fails to provide sufficiently precise provisions, and overly specific legislation which quickly falls out of date as technologies advance. The authors offer a helpful and much needed definition of the term 'electronic evidence' which seeks to strike a middle ground. Chapter 2 covers the foundations of electronic evidence. It discusses traditional evidential issues, such as the categories of evidence, means of proof, disclosure, authentication of

evidence, and the best evidence rule in the context of electronic evidence. The chapter outlines the types of electronic evidence that are admissible and considers some areas in which electronic evidence is frequently admitted, including as video and audio evidence in lieu of testimony, or as identification or recognition evidence. The admissibility of computer-generated animations and simulations is also discussed in the context of both civil and criminal proceedings.

Chapter 3 focuses on the rule against hearsay and its relevance in the context of electronic evidence. This is a highly relevant chapter which provides a useful tool for evaluating the admissibility of electronic evidence under the hearsay rule. The authors propose that, first, the *type of device* that is used to produce the evidence should be classified (in accordance with whether human input is supplied) and, second, the *use* that is made of the output of the device should be analysed (on the basis of whether its use is testimonial or non-testimonial). This chapter deals with the admissibility of evidence such as telephone calls, text messages and body-worn camera footage (which has now become an everyday feature of policing), as well as business and other documents. It concludes by drawing upon the importance for lawyers to remain aware of the dangers of admitting hearsay evidence. Chapter 4, which is entitled, ‘Software Code as the Witness’, illustrates how software code can affect the admissibility of electronic evidence. The author discusses the categorization of digital data and offers an analysis of the evidence falling within each category, drawing upon existing jurisprudence and academic commentary.

Chapter 5 is a significant chapter which challenges the common law presumption introduced by the Law Commission in its Report on *Evidence in Criminal Proceedings* (Law Commission 1997) that computers are reliable. The author critically evaluates the use of a presumption of ‘reliability’ and explores the nature of software errors. The chapter catalogues a range of errors in a variety of different types of software, including aviation software, medical software, and the software that led to the Post Office Horizon scandal. These topical and interesting accounts are used to challenge the presumption of reliability. The chapter also offers a broader international perspective, drawing upon jurisprudence from Canada, Australia and the United States. The author calls for reconsideration (or a more careful understanding) of the presumption that software code is ‘reliable’ and emphasises the importance of the disclosure of software code. The chapter concludes with detailed recommendations.

Chapter 6 is about the authentication of electronic evidence. This chapter explores the issues of admissibility and authentication and

draws upon comparative approaches in Australia, Canada and the United States. Central themes, such as identity and integrity, and reliability, are considered, before an examination of methods of authentication. The chapter then considers challenges to the authenticity of evidence. Chapter 7 on electronic signatures, is a new addition to the fifth edition of the book. This substantial chapter is derived from Stephen Mason's book on *Electronic Signatures in Law* (Mason 2016). The chapter begins by explaining the purpose of a signature and the evidential (and other) functions of a signature. There is a discussion about manuscript signatures and the extent to which a manuscript signature can be disputed; however, the focus of the chapter is the electronic signature. The chapter considers the elements of an electronic signature, and the variety of forms in which an electronic signature can manifest are explored (including the use of electronic sound, 'click wrap', personal identification numbers and passwords, typing a name into an electronic document, scanning a manuscript signature, and a biodynamic version of a manuscript signature, such as signing a handheld device) along with the different types of situations and legal fields in which these signatures might be employed and their authentication.

Chapter 8 covers encrypted data and is primarily concerned with the use of encryption to hide material. The chapter considers the disclosure framework in England and Wales and the power to compel the disclosure of a password to break the encryption in order to access encrypted data as set out under Part III of the Regulation of Investigatory Powers Act 2000 and its accompanying Code of Practice (Home Office 2018). The chapter explores the extent to which compelling someone to disclose the key infringes upon the privilege against self-incrimination, and the position in England and Wales is usefully compared to the approaches taken in other jurisdictions namely, the United States, Canada and Belgium.

Chapter 9, entitled 'Proof: the technical collection and examination of electronic evidence', is concerned with the way in which electronic evidence is gathered and handled. The chapter calls for lawyers to understand not just the need to scrutinize digital evidence professionals in relation to their qualifications and conclusions, but also to question the manner in which the evidence was obtained. It explores the importance of the correct handling and gathering of electronic evidence, as well as the preservation and analysis of such evidence, and the preparation of a report setting out the findings and conclusions of the digital evidence professional. The importance of this topic is apparent when considering the useful examples of cases which illustrate various failures and errors made by the police and digital evidence professionals and the consequences, which may vary

well be the exclusion of the evidence and the collapse of the case. The final chapter of the book, chapter 10, briefly examines the competence, knowledge and qualifications of witnesses called to give evidence in relation to electronic evidence through an examination of case law.

The book offers a unique and valuable insight into the evidential issues that arise in relation to electronic evidence and electronic signatures. The authors took the decision to make the book available under a Creative Commons licence in order to promote a better understanding of electronic evidence. This enables a wider audience to have access to this authoritative text and to the benefit of the combined scholarship and expertise of the authors. It is a much-appreciated and welcome decision. The electronic open access version of the book is available in the School of Advanced Studies Humanities Digital Library, University of London. The book is also available in hardback and paperback formats. Whilst the book makes a valuable contribution to the field, there could be scope for greater parity in terms of the lengths of chapters in future editions. Overall, this book serves as a valuable practitioner text and will also be of interest to academics and postgraduate students researching in this area.

About the Author

Nicola Monaghan is a Principal Lecturer at the University of Worcester. She teaches Criminal Law and the Law of Evidence on the LLB. Nicola has been teaching law at higher education institutions since 2001 and has published textbooks on criminal law and evidence: *Criminal Law Directions* (Oxford University Press) and *Law of Evidence* (Cambridge University Press). Her research interests include jury misconduct and the criminal trial, and she has published a wide range of journal articles and contributed to edited collections. Nicola is a non-practising barrister and a member of the Honourable Society of the Middle Temple.

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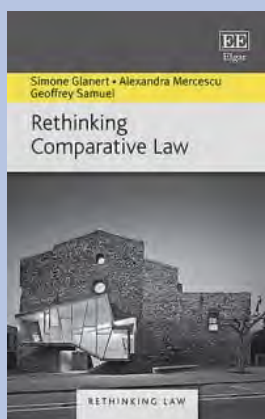
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RETHINKING COMPARATIVE LAW (2021)
SIMONE GLANERT, ALEXANDRA MERCESCU AND
GEOFFREY SAMUEL

JAAKKO HUSA

University of Helsinki



Simone Glanert, Alexandra Mercescu, Geoffrey Samuel (2021) *Rethinking Comparative Law* is published by Edward Elgar priced at £100.

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Front covers of books often tend to be more artistic and less about what they say in relation to the content of the book itself. The front cover of this book is an architectural black and white photo of a building that consists of three different elements. The authors aver that the front cover picture situates the book project to excellent effect. Three elements can indeed be found inside the covers of the book, but these elements do not mix. Importantly, the authors openly admit that they would not want to present a deceitful consensus. Even though undoubtedly this starting point is intellectually admirable, it does bring about difficulties for the reader who ends up reading the chapters more as separate essays than as a book arranged according to a somewhat coherent view. In the epilogue, the authors declare that book's 'fragmented and unsystematic approach ... seeks opinionatedly to distance itself from epistemic strategies that have governed comparative law's intellectual life for many decades' (302).

Incontestably, the authors do not lack scholarly courage and boldness, even though at times the reader may wonder if some of the

courage resembles that of Don Quixote. Regardless, the book is clearly an important contribution in the field of comparative law as broadly understood. This is a theoretically challenging, serious piece of legal scholarship on comparative law/comparative legal studies. The book seeks to rethink comparative study of law by providing both teachers and students with intellectual tools enabling them to study foreign law in a meaningful manner.

Even though chapters are separate essays, the underlying idea that binds the three scholars together is the notion that comparative law research should be undertaken meaningfully. In this regard, the book is an addition to a rich and voluminous literature that draws intellectual inspiration from the idea according to which comparative law research is done poorly. Following this line of thinking, comparative study of law is in a constant state of malaise, and something must be done about it. In this, the famous textbook of Konrad Zweigert and Hein Kötz is a symbol of malaise and a target for discussions and arguments that seek to criticize the Zweigert and Kötz paradigm.

As someone who has been working in the field of comparative law from the mid-1990s, I must admit that I fail to see that Zweigert's and Kötz's textbook really holds such a strong position among the rank of comparative law scholars today. Then again, many of the ideas that these German scholars express in their book are still present in the field, so in this regard attacking their views makes sense. Regardless, perhaps it would be time to move on and leave the outdated Zweigert and Kötz paradigm where it rightly belongs, namely, to the intellectual history of comparative law scholarship. Notwithstanding, none of the comments above is to undermine the scholarly quality and usefulness of this book.

The first chapter, written by Samuel, asks provocatively: does law exist? He admits that this question may seem somewhat esoteric even among critical comparative law scholars. Samuel discusses so-called fiction theory, which he ends up defending as an epistemological attitude. This means that a scholar chooses to act as if ideas about law are true and as if law exists. Essentially, the idea is to avoid the difficult philosophical question about law's existence and simply act *as if* law is real. This, it is explained, is a legitimate fiction. Importantly, Samuel does not claim to offer a definitive answer but, rather, seeks to stimulate rethinking about law as an object of comparative study.

The second chapter, written by Glanert, addresses the illusion of law's autonomy and the comparative study of law. The nature of the discussion is critical as the main points are presented against the idea according

to which the comparatist could operate as an objective or neutral observer, conceiving foreign law from an epistemic point of view from nowhere. Glanert speaks for an essentially hermeneutic understanding of epistemology as she relies on Gadamerian notions. What this means in practice is to underline the comparatist's historical and epistemological situatedness of understanding law.

In the third chapter, Samuel focuses on the methodology of comparative law and analyses methodologies as programme orientations. Here the key idea is to look at methodology not from the viewpoint of a particular method in a technical sense but to conceive broader research programmes or paradigms. The crucial starting point is that comparative lawyers need to go beyond traditional methods of doctrinal legal scholarship based on the idea of the authority of law. The established research programmes that are presented and analysed are structural programmes (legal concepts seen in relation to other elements of a legal system), functional programmes (focusing on social functions of legal rules), causal programmes (law and economics, legal origins), actionalist programmes (stressing the role of individual legal actors), and legal consciousness programmes (seeking to develop law). Instead of arguing in favour of any of these programmes, Samuel points out that the comparatist needs to be aware of the differences and tensions between them.

Chapter 4, written by Glanert, continues the discussion on method but assumes a different point of view and a more sceptical take on comparative methods. Crucially, she criticizes the focus on method in comparative law scholarship. Moreover, she fundamentally doubts the epistemological usefulness of method. Glanert relies on Feyerabend, Derrida and—again—Gadamer when she warns about the limits and dangers of scientification and commodification of the method-oriented notion of comparative law.

The following chapter by Mercescu directs the discussion towards an issue that was referred to in the earlier chapters: interdisciplinarity. The key argument is that the comparatist cannot rely on disciplinary monolingualism. Put differently, the chapter is a call for more interdisciplinarity in the comparative study of law. By combining the importance of culture for the comparative study of law and the paradigm change from a more doctrinal towards a more context-sensitive study of law, she argues that it is not enough for the comparatist to merely absorb the vocabulary of a non-legal discipline. Instead, she speaks for critical interdisciplinarity, which means openness toward other than legal approaches to law and sensitivity toward other fields of knowledge. I read this as an attempt not to reduce other disciplines to mere methods in a

technical sense but openness towards the substantive content of other disciplines. At the same time, interdisciplinarity does not require that the legal scholar should abandon law.

In chapter 6, Samuel compares comparisons. What this means in practice is that he examines how other disciplines have dealt with the issue of comparison. First, epistemological issues in historiography are addressed. Next, Samuel discusses comparative literature. A special issue that is analysed is the inequality of status, which concerns how the relationship between Western law and customary law has been conceived in comparative law scholarship. Finally, the analysis concerns cinema studies where comparison forms a natural part of scholarly work but seems to take place without a theory. The central conclusion is that merely looking at foreign law is not really comparison but simply referencing. Consequently, much of what is labelled as comparative law is not really comparative but a mere description of foreign law in the form of references to it.

The following chapter, written by Glanert, places the problem on the translatability of law in the focus. The starting point for discussion is that comparatists have not paid sufficient attention to the central role of translation in the comparative study of law. The key argument is that, if one ventures to study law comparatively, then one needs to pay careful attention to translation of foreign law. Interestingly, she defends the idea of an 'alienating' strategy that seeks purposefully to create a feeling of strangeness. The motive behind this kind of 'bad' translation is to preserve the alienness of foreign law and not to hide it behind 'too' good a translation that makes foreign appear too familiar in the target language. As much as I find this idea intellectually appealing, I must admit that it seems to go against what translators see as their job. Then again, if one accepts the theoretical reasons on which her point is based on, then it becomes difficult to reject the idea of 'alienating' translation at face value.

Chapter 8, also by Glanert, continues the hermeneutically oriented discussion on comparative law and the challenge of understanding foreign law. Her analysis employs bullfighting as an illustration of the difficulties involved. Here, she neither defends nor praises bullfighting as such but, rather, asks to what extent is it possible for the comparatist to meaningfully understand the French regulatory framework of *corridas* (bullfighting). Importantly, Glanert criticizes the conventional insider-outsider distinction against the backdrop of comparative study of law. Finally, she claims that even though the comparatist must make every effort to understand foreign law, at the end of the day it is impossible to

reach a truly genuine complete understanding of foreign law. Again, this is a theoretically sound argument, but the reader cannot but wonder if anyone ever in any legal system has a complete understanding of the law. In other words, there seems to be an implicit assumption that it would be possible to have a complete, in my view clearly fictional, understanding of law, against which the understanding of the comparatist should be measured. None of this is to undermine the scholarly discussion in this chapter. Yet, it might be a good idea also to inject a certain everyday realism into highly learned discussions on the comparative study of law.

In the following chapter, Mercescu discusses the notion of culture and criticizes its use as a cultural defence in legal practice. Essentially, she argues that the theoretical utility of culture for comparative study of law is different from the way culture is used in the courtroom. What is more, she claims that ‘the majority of comparatists have proved themselves reluctant to embrace culture’ (209). As a result, this chapter has a double-edged critical nature. Importantly, Mercescu draws a conclusion according to which there are differences between cultural practices, which in turn means that some cultural practices cannot be justified. This is basically very much an identical argument to that presented by H Patrick Glenn in his *Legal Traditions of the World*, although Mercescu does not cite Glenn. The take of culture is that the law is thoroughly cultural as to its nature.

Chapter 10, written by Samuel, takes the reader to the beach. This surprising and insightful discussion is based on the idea of moving beyond theory and methodology and looking at comparative law in action. What follows is certainly not a comparison of black-letter law but, instead, challenging scholarship on the legal notion of the beach. Samuel discusses the heritage of Roman law, the distinction between public and private law, the Feudal English model, and then takes the analysis to the level of legal mentality and method. The overall conclusion is that ‘[T]here is no absolute “truth” as to what the law is concerning beaches’ (249). The fact that a beach can be both a private and a public space at the same time is not, however, a problem as it proves the importance of epistemic and legal tolerance. Curiously perhaps, Samuel does not cite Glenn here, yet underlining tolerance is very much what the late Glenn argued in *Legal Traditions of the World*.

In the next chapter, Mercescu criticizes the possibilities of quantifying law. The focus is targeted toward the theory of legal origins. Criticism is, essentially, epistemological as it fundamentally doubts comparisons based on quantifying and measuring. She also claims that comparative lawyers have had a tendency to see themselves as closer to ‘sociologists

and political scientists who themselves argued for metric comparisons' (253). Without going into the details of this chapter, it can be said that Mercescu is highly suspicious of measuring and quantifying legal rules across countries. Scholarship by Rafael La Porta and Ors is analysed and criticized from the point of view of culturally focused (ie Legrandian) comparative law. Interestingly, she does not distinguish between different knowledge interests even though it seems clear that a quantitative comparative study of law seeks to produce very different knowledge from that to be gleaned from culturally oriented comparative law. I find it difficult to swallow that comparative study of law would allow only one kind of knowledge interest that would always and necessarily be that of culturally oriented comparative law.

The final chapter, also written by Mercescu, is a detailed critique of David S Law's idea of generic constitutional law. The theoretical basis of the arguments against Law's idea stems from a cultural view of comparative law. In my view, the discussion in this chapter is the same as in the previous chapter because the core of criticism is directed against quantifying law for numerical comparative research. Criticizing the idea of generic law seems like an extension of the cultural argument underlining the cultural differences across countries.

A brief afterword reiterates what was already said in the preface.

All in all, this is a book that can be recommended for those interested in serious comparative study of law. It contains fascinating and intellectually stimulating ideas and critique that may, indeed, help to rethink or reshape the endeavour of comparative law as a form of dedicated scholarship. However, it is a bit hard to believe that this book would be of interest to legal scholars who have less passionate views on comparative law. That is, in my view, also the greatest problem of the book: it calls for a rethink about comparative law, but the style of demanding and theoretically thick scholarship will probably not appeal to a great number of legal scholars who are interested in more modest comparisons. In this sense, one can ask who it really is that Samuel, Glanert and Mercescu call upon to rethink comparative law? Moreover, Glanert's and Mercescu's chapters are also somewhat merciless towards comparative lawyers as the undertone seems to imply that, if you do not take this or that into account, then you are doing it wrong. Treading carefully here is needed as their arguments make sense and their scholarship is on a very high level indeed. The problem is that their style of scholarship does not feel engaging and inspiring. Then again, alas, that probably applies to comparative law scholarship in general.

To conclude, it would seem like a good idea to rethink comparative law so that it would appeal to a large group of legal scholars and not just the tribe of its devotees. Or as Vernon Valentine Palmer says: '[T]he message from Mount Olympus must not be that comparative law is always forbidding and difficult.' Then again, as I readily admit, this may be the very message of *Rethinking Comparative Law*.

About the Author

Jaakko Husa is Professor in Law and Globalization at the University of Helsinki, titular member of the International Academy of Comparative Law, and a member of the Finnish Academy of Science and Letters. Currently, he serves as the President of the Finnish Committee for Comparative Law and as a Vice Dean (research) of the Helsinki Faculty of Law. He has held visiting positions at Edinburgh University, Hong Kong University, Riga Graduate School of Law and Maastricht University. He has published extensively on the theory and methodology of comparative law, comparative legal linguistics, comparative constitutional studies and comparative legal history. His most recent book in English is *Advanced Introduction to Law and Globalisation* (2018). His next book is entitled *Interdisciplinary Comparative Law* (forthcoming 2022). Professor Husa is also a co-editor of the forthcoming 2023 edition of the Elgar Encyclopedia of Comparative Law.

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NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

Academic Promotions

In December, the Institute of Advanced Legal Studies (IALS) was pleased to announce the promotion of two staff members in the most recent University promotions process.

Dr Colin King, Reader in Law and Director of Postgraduate Research Studies, has been promoted to Professor. The founding director of the Centre for Financial Law, Regulation and Compliance, his primary focus is on proceeds of crime and anti-money laundering law and practice, corporate crime, and the use of deferred prosecution agreements. He has published widely in these areas, including *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery and Deferred Prosecution Agreements* and *The Handbook of Criminal and Terrorism Financing Law*. Colin is currently examining non-conviction-based confiscation assets, which will be published as a book in 2022.

Dr Nóra Ní Loideáin becomes a senior lecturer in law. She is Director of the Information Law and Policy Centre. Her

expertise lies in governance, human rights, and technology, particularly in the fields of digital privacy, data protection and state surveillance. Her monograph, *EU Data Privacy Law and Serious Crime*, is forthcoming from Oxford University Press.

IALS 75th Anniversary

To mark its 75th birthday, IALS will be running a series of events throughout 2022, showcasing the broad range of research that is supported and enabled by the Institute. This includes the WG Hart Workshop on 9 and 10 June 2022, our flagship academic conference; collaborations with partner organizations such as UN-Habitat and BAILII; and events led by our research centres.

Inns of Court Research Fellow 2022–2023

The Institute looks forward to welcoming the Hon Justice Forrie Miller of the New Zealand Court of Appeal. Justice Miller will be undertaking research on Unforeseen consequences: the impact of a new apex court on the work of New Zealand intermediate appellate courts.

Selected Upcoming Events

The Director's Online Seminar Series

Co-POWeR, Cultural Competence and Covid-19

Speaker: Professor Iyiola Solanke, School of Law, University of Leeds

Date and time: Wednesday 23 March 2022, 16:00-17:30

Chair: Professor Carl Stychin, Director of the Institute of Advanced Legal Studies

See [website](#) for details.

Two viruses—Covid-19 and racial discrimination—are currently killing in the UK, especially within BAME families and communities (BAMEFC) who are hardest hit. Survivors face ongoing damage to wellbeing and resilience, in terms of physical and mental health as well as social, cultural and economic (non-medical) consequences. Psychosocial physical trauma of those diseased and deceased, disproportionate job loss, multigenerational housing, disrupted care chains, lack of access to culture, education and exercise, poor nutrition, 'over-policing' hit these families and communities severely. Local 'lockdowns' illustrate how easily BAMEFC become subject to stigmatization and discrimination through 'mis-infodemics'.

This presentation will draw upon the investigations conducted

by Co-POWeR to investigate the combined impact of these viruses on practices for wellbeing and resilience across BAME families and communities in the UK. The aim of Co-POWeR is to create an holistic idea of vulnerabilities damaging BAME families and communities. Historical research shows race/class dimensions to national emergencies (e.g. Hurricane Katrina). Co-POWeR's recommendations will emerge from culturally sensitive social science research on wellbeing and resilience providing context as an essential strand for the success of biomedical and policy interventions (e.g. vaccines, mass testing).

Searching for Care Labour in African Social History

Speaker: Professor Ambreena Manji, School of Law and Politics, Cardiff University

Date and time: Monday 9 March 2022, 16:00-17:30

Chair: Professor Carl Stychin, Director of the Institute of Advanced Legal Studies

See [website](#) for details.

Professor Manji writes: 'This paper explores the method I am developing in my forthcoming book which seeks to reread key texts in African social history for care. I explore three texts: Luise White's *The Comforts of Home*; Jane Parpart's *Gender and Labour on the Zambian Copperbelt*; and Tabitha Kanogo's

African Womanhood in Colonial Kenya. I show that these works can be read as “supportive texts” (Marks 2000: 106) for studying the history of reproductive labour. Works of African social history have often recorded the provision of reproductive labour and the experiences of women when this form of labour comes under strain. My objective is to show that although in the first instance authors of these texts have not explicitly labelled reproductive labour as such, they have provided us with rich accounts of this work. I suggest that these accounts provide us with an opportunity for rereading. My method in this book can be summed up as going back to texts to look for care. What forms of care have been provided by women and recorded by social historians? Often these accounts of reproductive labour are incidental to the main text—a text concerned with women’s work will contain rich accounts of care work but will not have this as its central concern. Or an account of women’s relationships with each other can be reread as an account of social reproduction being negotiated, redefined or contested. My method in the book is founded on Shula Marks’ (2000) observation that ‘as new questions break the surface’ it might be possible to “suggest new ways of hearing and seeing old stories”.

How to Get a PhD in Law

IALS welcomes students enrolled for an MPhil/PhD in law from across the UK to these specially tailored days of presentations, library tours and networking opportunities.

Thursday 17 March 2022

Day One

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Friday 29 April 2022

Day Two

The PhD in Law and research methods.

Friday 18 May 2022

Day Three

How to get a PhD in Law: Researching, disseminating and publishing in the digital world.

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- ◇ **Saturday:** 10.00am to 8.30pm on
- ◇ **Sunday:** 12.30 to 8.30pm

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A VISUAL AUTOETHNOGRAPHY OF A PhD JOURNEY

CLARE WILLIAMS

Kent Law School, University of Kent¹

Abstract

Responding to a paucity of research student autoethnography in the law school, this piece introduces a visual autoethnographic resource in the form of an online, interactive computer game that describes my PhD ‘journey’. It explores the relevance and impact of how we do, talk and think about our research projects, on their success and on our wellbeing as researchers. It invites us to pay attention to the metaphors we use, identifying how these might empower or undermine, and offers an alternative framing that might support research students, especially those with disabilities in a wider context of shrinking support.

Keywords: autoethnography; visualization; metaphor; student resource; legal research.

¹ This paper, like the Mountains of Metaphor resource, is the result of the support, encouragement and generosity of many people over many years. Firstly, to Professors Amanda Perry-Kessarlis and Diamond Ashiagbor, whose willingness to consistently go above and beyond to support me enabled me to complete the PhD. I will forever be indebted to my mentor, who prefers to remain anonymous but who provided crucial guidance in helping me create the concepts and mental worlds that are set out here. In creating the Mountains of Metaphor online interactive game, I am indebted to Emily Allbon of tldr.legal for her support and encouragement, and to Howard Richardson and Tegan Harris for turning my drawings and text into something magical. Thanks are also owed to Professor Michael Palmer for the kind feedback on this piece, and to Marie Selwood for being so reliably on the ball with both typesetting and editing. Last, but by no means least, I am grateful for the generous funding of the ESRC-SeNSS Postdoctoral Fellowship which has allowed me to both develop my PhD substantively as well as reflect on the journey leading to this point.

[A] THE MOUNTAINS OF METAPHOR: A 'SIDE QUEST'²

The way we talk matters. The words we choose and the concepts we invoke combine to shape the mental models that we use to make sense of the world. Metaphor, or the comparison of one phenomenon to another, is an important means through which we conceptualize (our) reality and frame what we perceive, how, and why (Lakoff 1992; Ortony 2008).³ This relates equally to substantive legal research projects and to the ways in which we approach such projects. Metaphors, so often ubiquitous to the point of invisibility, can both reveal and conceal, framing problems in such a way as to suggest a narrow list of potential solutions (Schön 2012). By paying attention, then, to *how* we talk about specific phenomena, we can gain insights into alternative responses. This piece explores the importance of metaphors in framing a PhD journey, offering an alternative metaphor that has been developed into an online, interactive game. Using my personal experience as data to 'describe, analyse, and understand' the 'cultural experience' of undertaking a PhD in law, this piece offers an autoethnographic, or 'self-narrative', account through the lens of a 'journey' metaphor to reflect both on the PhD, but also on the process of creating a resource about the PhD experience (Campbell 2016: 96).

In October 2019, I completed my 'main quest' by passing my doctoral viva without corrections. This brought an unexpectedly abrupt end to an eight-and-a-half-year journey that had seen elated highs and desperate lows, as well as several 'side quests' along the way. Chief among these, and the focus of this piece, was the development of a supportive and helpful working metaphor for approaching any sustained piece of research. In 2020, my working metaphor framework was developed into an online interactive computer game called 'Mountains of Metaphor' which is offered both as a reflective record of my own experiences, and as a guide for research students to develop their own metaphors that enable and support.⁴ This piece charts the development of the resource, its launch and the feedback I have received, offering an autoethnographic account of

² The terms 'main quest' and 'side quest' are borrowed from the language of computer games where the 'main quest' or central storyline is supplemented by 'side quests' that do not progress the player through the game but offer a diversion. The metaphor is apt for academia where entire days can be lost to 'side quests' (admin, applications, reviews, networking, etc) when we might rather be focusing on the 'main quest' (completing the book draft, etc).

³ Theories of metaphor dispute its definition, although there is consensus that, as the archetypal trope, metaphors are 'class inclusion statements' (Glucksberg & Keysar 2012).

⁴ See [Mountains of Metaphor: Interactive Map](#).



Figure 1: The Journey Begins. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

the creation of both my time as a research student in the law school and of the creation of the resource. It sets these reflections in a wider context of shrinking support for students with disabilities, questioning how this cohort might be supported to become active yet reflective members of the scholarly community.

The Context: Metaphors and my ‘Main Quest’

‘Human thought processes are largely metaphorical’, and our ‘ordinary conceptual system’—how we think and act—relies on largely invisible metaphors (Lakoff & Johnson 1980: 6). Metaphor is so ubiquitous and deeply entrenched in our everyday communicative realities that we could not banish it even if we wanted to, but a recognition of the power of metaphors to frame our mental models is an essential element of analysing the world around us (McCloskey 1998; Geary 2011: loc 771). Metaphor had been central not only to the side quest introduced in this piece, but to my ‘main quest’. The research focus of my PhD explored how we do, talk and think about the relationships between law, economy and society. In the wake of the 2008 financial crash, questions began to emerge about

whether the economy (and its regulation) was ‘embedded in’ society, or whether society had come to be ‘embedded in’ the economy (and its regulation) (Earle & Ors 2017; Raworth 2018). By exploring the relevance of these questions through an economic sociology of law (ESL) lens, I took a deep dive into our ongoing use of one metaphor—‘embeddedness’—and its effects. As the core concept of ESL, this lens offers rich and illuminating insights into how embeddedness structures the way we perceive and analyse the nexus between law, economy and society. While ubiquitous, the concept of embeddedness conceals as much as it reveals, functioning as a generative metaphor that frames the problem in such a way as to suggest a narrow range of solutions (Schön 2012). Moreover, our ongoing commitment to embeddedness allows the repetition of metaphors that have the analytical tools and normative preferences of neoliberalism ‘baked in’. In short, repetition of ‘embeddedness’, and the ontological metaphors of ‘the law’ and ‘the economy’ on which it depends, entrenches those mainstream ways of doing, talking and thinking that led us into the financial crisis in the first place. It became clear, then, that, if we want to innovate in our responses to financial crashes, social crises and environmental catastrophes, we need new vocabularies, grammars and mental models that move us beyond limiting concepts like embeddedness. My PhD duly suggested an alternative, exploring how this might look and function in three empirical settings: academic research, policy formation and lay discourse. Extending this awareness of metaphor from my research to my research *processes*, therefore, seemed natural.

[B] WHY VISUALIZE?

Metaphors, then, are ‘models of things rather than things in their own right’ and have the power to mislead just as much as they have the power to illuminate, inspire, rouse or pacify (Lewis, cited in Geary 2011: loc 2999). Visualizations of law, be this of substantive, procedural, methodological or theoretical approaches, can also be understood as (visual) metaphors and offer an alternative way of apprehending or framing. There is a long history of making things visible, from the birth of the ‘wall of tariffs’ metaphor in the post-Second World War economic reconstruction of Europe (Slobodian 2018), to the more recent ‘legal design’ movement to make legal rights and responsibilities accessible to all (Haapio & Hagan 2016; Hagan 2017; Hagan nd). In legal education, there has been a growing awareness of the utility of ‘making things visible and tangible’, both for the student and for the teacher (Allbon 2019; Allbon & Ors 2020; Perry-Kessarar 2020), and a recognition that visual approaches can construct ‘enabling ecosystem[s]’ for approaching legal problems and their solutions (Perry-

Kessarar 2020). By visualizing, we can simultaneously bring ‘practical-critical-imaginative mindsets’ to bear, offering alternative points of entry and perspectives (Perry-Kessarar 2020). In a pedagogical context, such approaches can open up alternative channels of communication. In a research context, they allow reflection on complex issues that can reveal alternative connections, links and relationships (Williams 2021a). Finally, visual and creative approaches can offer a means of communication that sidesteps some of the limitations of linguistic framing that my ‘main quest’, described above, was beginning to uncover.

My own Metaphors

The children’s board game, Snakes and Ladders, had long been my reliable metaphor for describing the process of studying with a disability or long-term health condition. It was an unthought metaphor though; one that I performed without awareness. Yet, each time I had a flare-up or became ill, I ‘landed’ on a snake and slid back to square one. My peers, of course blissfully unaware of the game we were playing, forged ahead, leaving me no option but to race to catch up as soon as I was able. I never disclosed

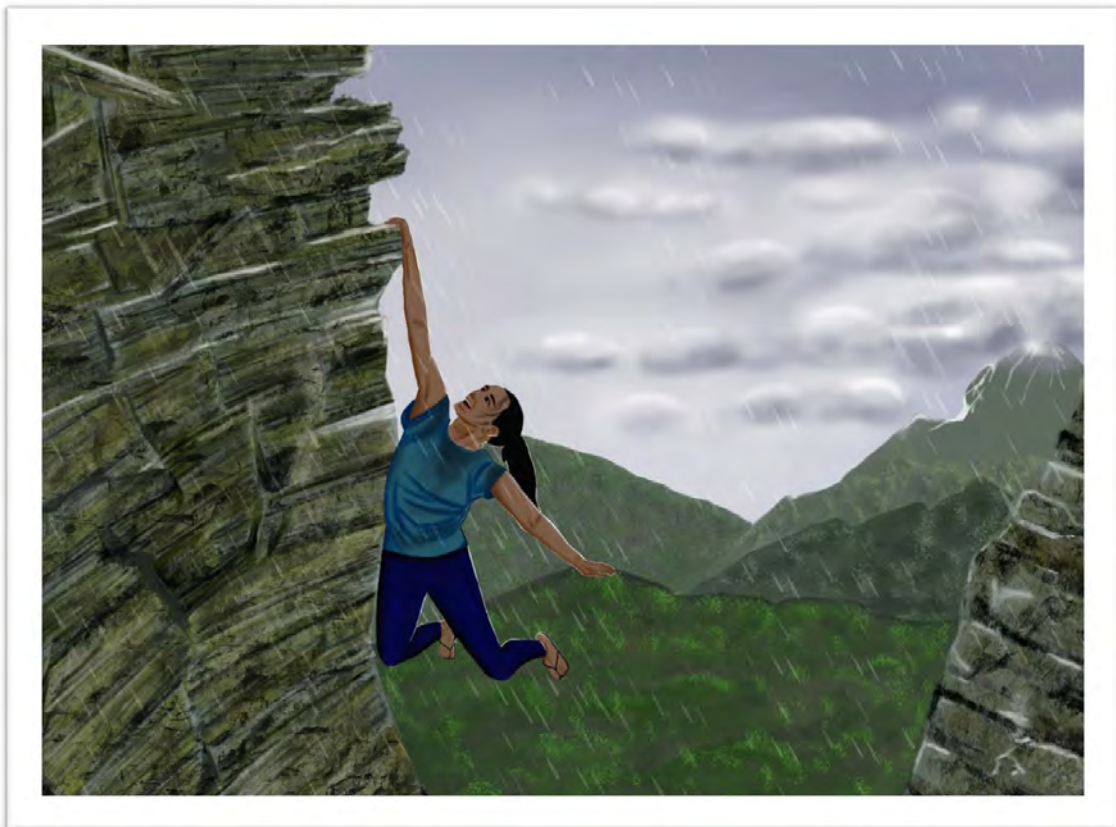


Figure 2: Sheer Drop. Metaphors are models of things that can offer us different perspectives. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

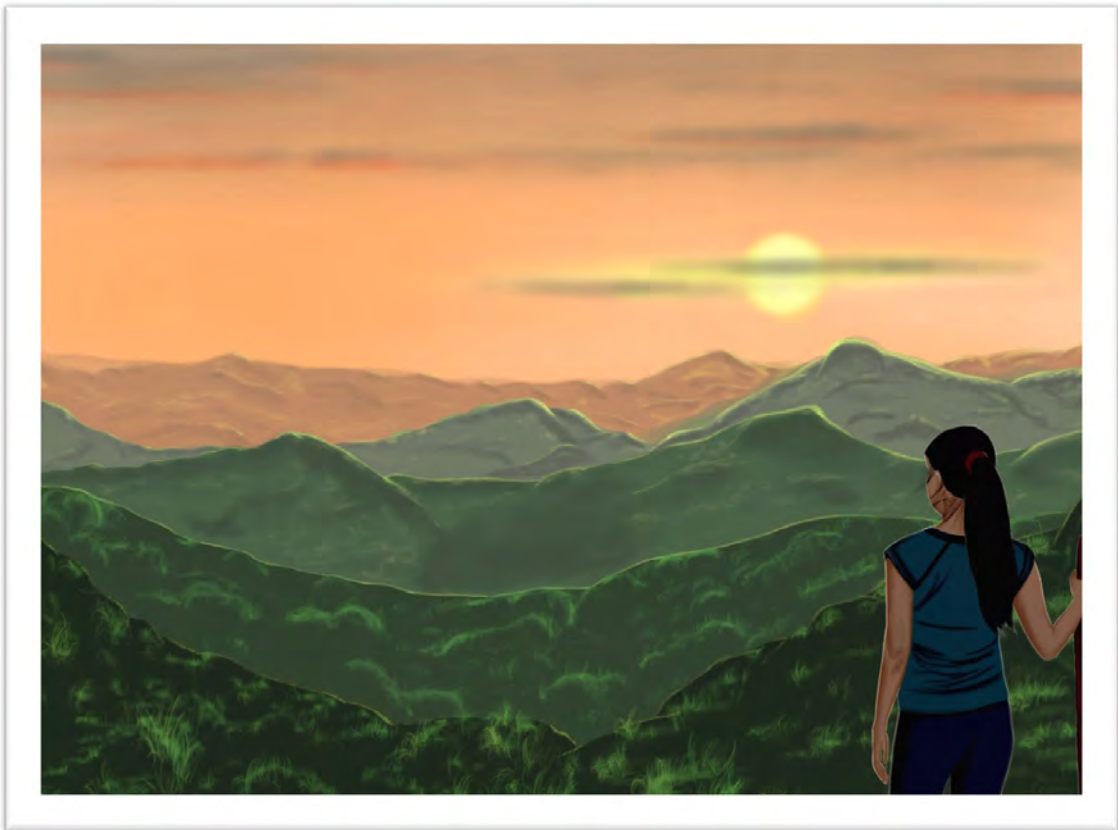


Figure 3: Easy Going. Sometimes the going was easy, and I could enjoy beautiful views. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

my health conditions. What was the point? There was a syllabus to be covered whether I was ill or not. So, whenever I was able, I pushed myself to study. As is often the nature with chronic health conditions, additional stress such as that caused by unhelpful metaphors exacerbated the problem, triggering more flare-ups and more ‘sliding back to square one’. The mental model I was using was patently inadequate, and yet it took the support of my mentor, funded through Disabled Students’ Allowance (DSA), to point this out. She suggested that we look for a kinder narrative that might better support me, and the mountainous landscape based on a journey metaphor was born.

While the completion of the PhD was represented by the highest peak in the landscape, and reaching the summit was my overriding goal, there were other features along the way. Sometimes the going was easy, and the landscape gently undulated, allowing me to enjoy the journey, the sunshine and the gentle breeze.

At other times, I was caught out, scaling a sheer rock face in the middle of a storm, or attempting to climb a mountain in an avalanche. The journey

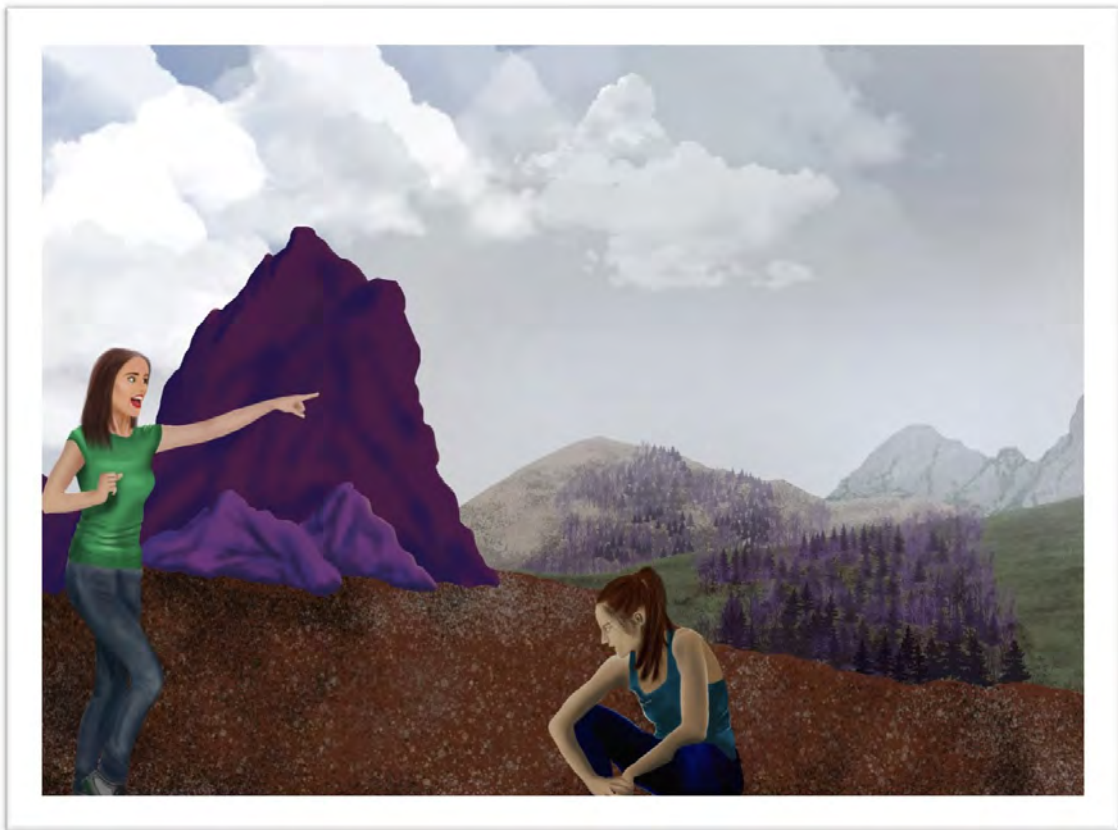


Figure 4: But Look How Far You've Come. A journey metaphor offered the perspective to enable me to look back, usually with a prompt, to appreciate the journey so far. A pause did not mean sliding back to square one, as it had with my previous working metaphor. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

metaphor offered a reliable way to 'bypass sceptical left-brain thinking processes to access the resources and change promoting capacities of the right brain' (Strong 1989: 210). It reframed my problems and, by allowing me to take a step back from my immediate predicament, whether this was illness, bereavement, or simply overwhelming life administration, offered a lens through which I could reassess difficulties that had arisen and consider my response. In distancing myself from the whirlwind of life's troubles, the metaphor allowed me the space and the time to realize that all was not lost or hopeless. Now, caught in a metaphorical storm, I was not sliding back to square one, but simply setting up my tent, lighting a fire and waiting for the storm to pass. At any time, I could look back and see how far I had come, and how much work I had put into the PhD to get me this far. Pauses and interruptions were no longer the catastrophic occurrences that they had been, but simply facts of life. Moreover, the knowledge I had gained did not fall out of my head when I was forced to take a break, but in fact gave my subconscious time to work out some of the conundrums in my research.

Indeed, the ‘lightbulb’ moments so crucial to completing the PhD often came during such pauses. In the later years of my PhD and having been ill for a while, I had fallen out of the habit of regular academic reading, and my brain refused to engage in the heavier, denser material that I needed to focus on. In an attempt to re-engage, I began reading around the subject, beginning with a couple of books that had been written for general audiences in response to the 2008 financial crash. Both books used the word I had come to focus on—embeddedness—without any definition or explanation. Both books claimed conflicting accounts of embeddedness and yet neither acknowledged the implications of their wording and arguments. This was it! Popular discourse, captured in these two generalist books, perfectly mirrored the debates about embeddedness that had troubled ESL literature for decades. A metaphorical lightbulb went on in my metaphorical cave, seemingly illuminating not only my current surroundings, but my path to the summit.

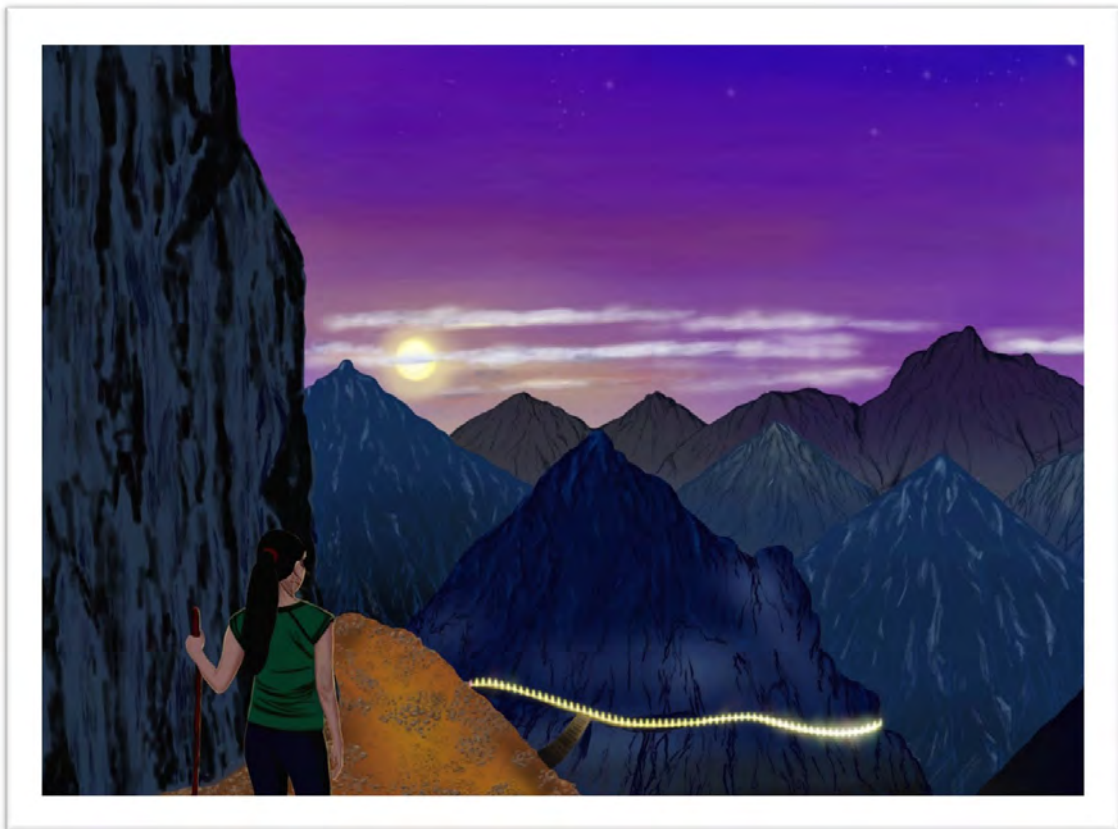


Figure 5: The Unknown Bridge. By pausing, and then revisiting my research, a metaphorical lightbulb went on in my metaphorical cave, illuminating my path to the summit. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

[C] CREATING THE RESOURCE

From Concept to Resource

In the process of designing a postdoctoral research proposal, I reached out to Emily Allbon at City University, whose expertise in communicating legal concepts visually has driven the development of the fields of ‘legal design’ and visual teaching methods. Her sites, [LawBore](#) and [tldr.legal](#), are leading UK-based resources on the visualization of legal concepts and analysis (Allbon 2002; Allbon 2021). We agreed that a visual piece about the *process* of doing a PhD might be a useful resource for other postgraduate research students. The obvious candidate here was a visualization of the metaphors that I had found most helpful.

As with all ‘good ideas’, the original concept snowballed from a small, illustrated PhD journey to a fully interactive web-based game. Working with Howard Richardson who constructed the web interface and who manages the [tldr.legal](#) site, I planned 12 paintings with accompanying narrative that would tell my story. Hotspots in the form of numbered signposts

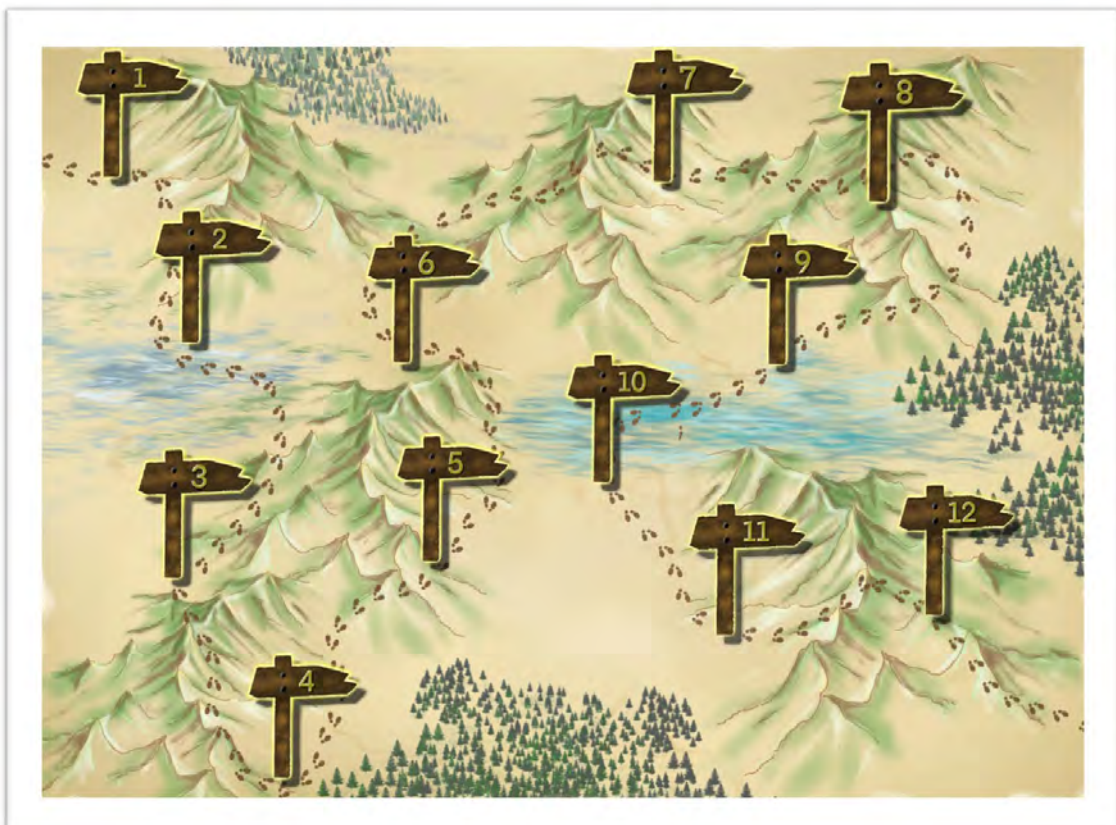


Figure 6: Creating a Map of my Journey. Each numbered signpost is a hotspot that, when clicked, takes the viewer to a different painting and narrative. (Copyright 2021 Clare Williams; reproduced here with kind permission of [tldr.legal](#))

on a map would link to each of these paintings, with a voiceover reading the narrative aloud automatically when each painting was loaded. Background music was also added.

One of the first discussions I had with Howard was about voicing the narrative, as I was certain that this was something I could do myself. Fortunately for me, and for the quality of the final product, Howard kindly insisted that a professional with the requisite skills and equipment could achieve a better result. Despite my initial disappointment, I came to appreciate the value of collaboration and of relinquishing control: a departure from the usual solitary self-reliance that characterizes PhD study in the social sciences and humanities. This approach was affirmed on hearing Tegan Harris's recordings of the narrative, which elevated the project, bringing the story to life with gravitas, authenticity and professionalism. I was especially humbled when Tegan later emailed, via Howard, to say that working on the project had been 'inspiring and motivating' and had prompted her to explore options to start her own PhD (Richardson 2021).

The process of creating the resource was relatively straightforward, if laborious. I began sketching the paintings on my iPad with an Apple Pencil using the digital art app ProCreate. My starting point was the background scenery, onto which I would add figures and other details that were sketched separately. The app allows a choice of hundreds of digital brushes as well as palettes and effects, allowing me to experiment with colour, tone, textures and so on. While there are some techniques that digital painting shares with its more traditional counterpart, in many respects it is quite a different endeavour. Perhaps the most obvious example of this is the use of layers. These act as transparent sheets similar to layers of cling film over a traditional canvas. By splitting elements of each painting across many layers, each can be returned to, altered, multiplied, resized, distorted, or discarded individually meaning that each element of a painting can be reworked in numerous forms. This offers a non-destructive working style whereby the painting can be altered in myriad respects without any change or damage incurred to the original.

Initial responses to the resource before its official launch were positive, emphasizing its value to the community. However, I soon realized the difficulties of asking PhD students to draw their own research journey maps. Accordingly, I developed a PowerPoint file of supplementary materials that could be downloaded from the website. This briefly explained the project, why we might visualize, and how metaphors can

help us approach a research journey, and then included a blank map along with some elements; mountains, water and a forest. As images with a transparent background, these elements can be duplicated and moved around by anyone wishing to build their own research journey map.

Using the Resource

The Mountains of Metaphor is offered both as an autoethnographic account of my PhD journey, and also as a procedural tool for research students to navigate what can be a lonely yet highly pressurized environment in a context of shrinking support and funded resources. The value of metaphor as a tool for reframing experiences has long been recognized in psychology and psychotherapy, particularly with regard to the Gestalt tradition. Metaphors can offer ‘new perspectives’ that identify areas of difficulty whilst also suggesting possibilities for change (Ferrari 2020). As an ‘indirect form of expression’, metaphors offer ‘windows into people’s phenomenological worlds’ that allow for problem and solution reframing in a manner that avoids confrontation (Brooks 1985, cited in Strong 1989: 203). Finally, metaphors can offer us some distance from our most powerful affective experiences, deflecting ‘the threatening directness of two-way communication’ and providing a forum, in this case visual, for ‘recalibrating’ the research, as well as our research practices (Strong 1989: 205, 208).

The ‘journey’ metaphor is undoubtedly common, but is amenable to expansion and flexibility of application, offering broad applicability. So, for example, a student may wish to ‘draw’ their own map of their PhD journey, plotting their start and end points, and drawing their journey trajectory with certain landscape features or obstacles along the way. They may then indicate on their map where they think they are, before asking their supervisor to also mark where they believe them to be. If both student and supervisor mark similar points on the map, this indicates that both have a similar sense of the student’s progress. A difference in understandings of progress might indicate the need to explore the metaphor further. While this might be an unpleasant discussion for both student and supervisor, this exercise is both valuable and, being less direct through the use of metaphor, potentially kinder and less confrontational.

Promotion and Feedback

To promote the resource once it was live, I tweeted links to the site along with some of the paintings and time-lapse videos of their creation, receiving 35 retweets from my personal account and 54 likes. Some tweets were

retweeted multiple times with many more additional likes. Engagement was overwhelmingly positive, with comments that the resource was ‘beautifully written’ and offered a different ‘perspective’ on what progress looks like, notably giving permission to ‘pause’ and not see this as ‘lost’ time or ‘being stuck’ (Patton 2021; Adkins 2021). Additionally, it encouraged researchers to reappraise their own working metaphors and the environment these create for colleagues and peers (Munro 2021). I also wrote blog posts about the resource for various professional bodies and learned societies and shared a link to the website on forums for PhD students (Williams 2021b; Williams 2021c; Williams 2021d; Williams 2021e; Williams 2021f). Returning again to social media, I approached the ‘mods’ of Reddit’s r/PhD forum to ask permission to promote the resource.⁵ My post, entitled ‘Being kinder to ourselves’, received 176 upvotes and one community ‘wholesome’ award (Williams 2021d).⁶ Other Redditors noted that the resource had ‘opened [their] eyes’ to aspects of their own journey. The resource was a ‘cool idea’, and I was thanked for sharing it. Two pieces of constructive criticism noted that more map elements in the supplementary materials would be useful, and that the resource might benefit from a gallery view to allow visitors to view the images without the text overlay. These have now been implemented.

[D] APPROACHING AUTOETHNOGRAPHY SENSITIVELY

The creation of the ‘Mountains of Metaphor’ resource required deep and personal reflection about my own PhD journey, as well as an acute awareness of my positionality during the creation of the resource. Autoethnography, as ‘both process and product’, is ‘hyper’ or ‘ultra-reflexive’ in the creation of a ‘self-narrative’ that places the self within a specific social context (Adams & Ors 2014: 2; Campbell 2016: 96). It entails the ‘critical study’ of oneself ‘in relation to one or more cultural context(s)’, offering ‘nuanced, complex, and specific knowledge about particular lives, experiences, and relationships’ that focuses on ‘human intentions, motivations, emotions, and actions’ (Reed-Danahay 1997: 9; Adams & Ors 2014: 21).

⁵ ‘Mods’, or moderators, are the gatekeepers to a forum, monitoring the content and tone of ongoing discussions. As there is a ban on self-promotion in the r/PhD forum, it was advisable to request permission before posting. I received immediate permission.

⁶ A wholesome award is a free community award that anyone can gift to another “Redditor” (Reddit user) to thank them for sharing content that is both original and “wholesome”, or uplifting. There is no monetary value.

While autoethnography suffers from a perceived lack of rigour when compared to other methodological approaches in the social sciences, this rather misses the point. The personal nature of an autoethnographic account requires the subjective, the non-scientific and the partial to be placed centre stage. While qualitative methods that abstract and extract the researcher onto the objective (and therefore more acceptable) sidelines can offer one form of knowledge, Campbell argues that '[w]e need stories of lived experience in order to amass multi-layered knowledge of a phenomenon, understand its truths and meanings and its place in the culture' (Campbell 2016: 98). There is arguably, then, a need for autoethnographic accounts of student experiences in the law school, in particular those with long-term health conditions or disabilities and those studying part time. The completion of a PhD in law is not simply the act of carrying out and writing up a piece of legal research, but of learning how to be researcher, and how to be a sensitive, reflexive and responsible member of an active research community. However, as maps of old used to warn, 'here be dragons', and, as Adams notes, the necessarily personal nature of any autoethnographic account entails risks associated with revealing information about oneself (Adams & Ors 2014: 6-7). Early on in the process of painting my metaphorical PhD journey, I was confronted with the realization that any such resource would involve some form of 'coming out'; as disabled, as a slower worker than most of my peers, as something 'other to' or 'less than' the professional image I had carefully crafted over the course of my PhD. This was more than imposter syndrome, and constituted a deep and gnawing fear that by sharing an honest version of my journey, I could potentially undermine my future career prospects.

To address this problem, I decided to extrapolate a narrative from my experiences while toning down some of the traumas that might be too personal to share. After all, the resource aims to share a metaphor and encourage others, not to traumatize the audience, and I wanted the journey to be widely relatable. Upheavals that interrupt or derail research projects come in all shapes and sizes, but all have the same effect. I felt that this justified a deviation from the strict honesty demanded by autoethnography, and chose to blunt some of the sharpest traumas to broaden the metaphors' applicability. For example, while I may have used a storm to indicate bereavement, for another researcher, a storm might reflect a different personal trauma or upheaval that has an impact on their research.

The institutional context in which I completed my PhD constituted another factor for developing the Mountains of Metaphor, as it 'pays forward' the enabling support I received. In addition to having supervisors



Figure 7: Never Alone. During my journey, I realized that I was never alone, and that I simply needed to reach out for support. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

who consistently went above and beyond in supporting and believing in me, I was able to access DSA that offered mentoring for students with disabilities. DSA is a non-means tested, non-repayable payment to help with the ‘essential, additional expenditure a disabled student incurs while studying, because of their disability’ (Johnson & Ors 2019). Over the years, budgetary cuts and devolved responsibilities to higher education institutions to make ‘reasonable adjustments’ under the Equality Act 2010 has meant shrinking levels of support for disabled students in reality. A report from the Department for Education in 2019 estimated that 60 per cent of eligible students were unaware of DSA-enabled support that they could access, with the application process proving both problematically complex and exclusionary (Rose 2019).

In 2011 when I started my PhD, mentoring was available to students with physical disabilities, providing weekly sessions with a trained individual to focus on devising suitable work patterns and approaches. While disabled students are usually experts in their conditions, they may not be experts in the work and study practices that allow them to optimize their talents (Aguirre & Duncan 2013). By spending time with

a professional to devise physical, mental and emotional ‘work-arounds’, disabled students can be guided to devise approaches that compensate for their impairments and limitations, and this additional support can be life changing.

Mentoring allowed me to appreciate that I did not need to run at full tilt to ‘keep up’ with my peers, nor see ‘progress’ in terms of health-wrecking schedules. It provided a space where I could learn to appreciate and respect my own limitations while learning how to be kinder to myself at times when I had lost sight of both my mountain summit as well as the reason that I was on that mountain in the first place. Nevertheless, were I to apply for DSA-funded mentoring now, I would no longer qualify for the support that enabled me to succeed. The Mountains of Metaphor resource responds to the current environment in which research students with disabilities are increasingly being left to ‘sink or swim’, offering supervisors a tool for support that might help students with long-term health conditions succeed.

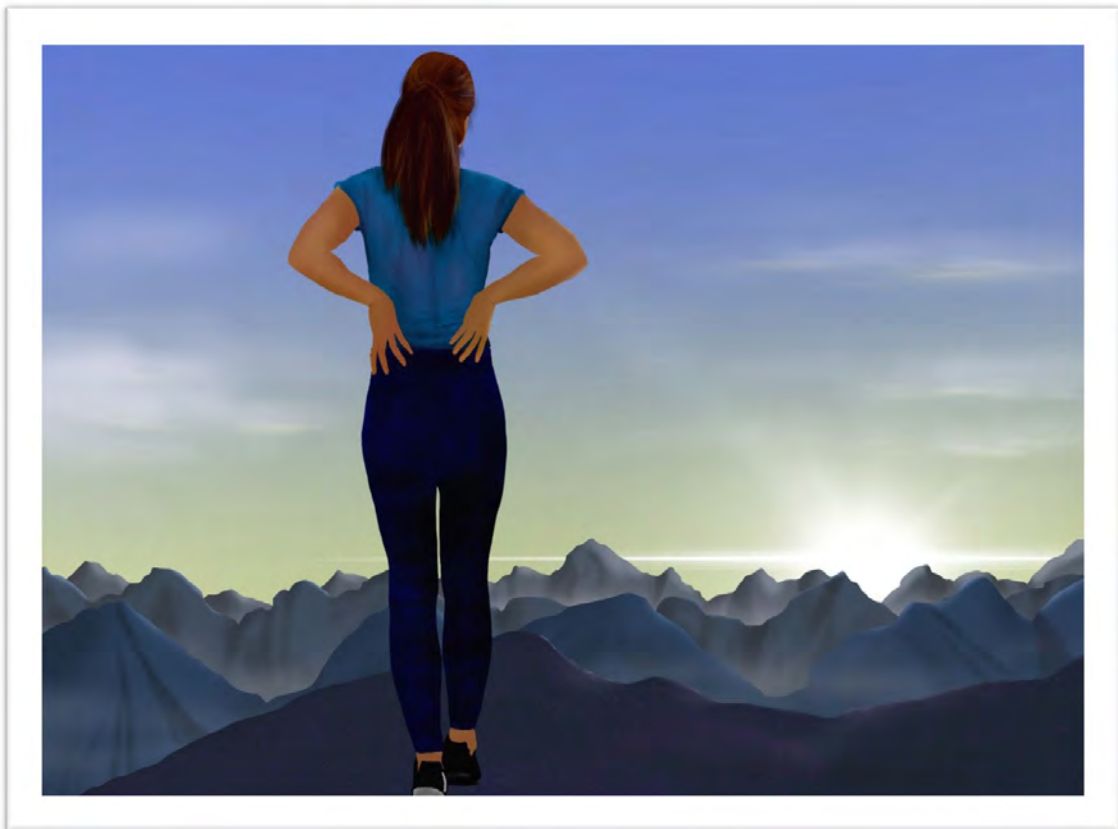


Figure 8: The View from the Summit. The Mountains of Metaphor is one way of responding to reduction in support for students with disabilities. (Copyright 2021 Clare Williams; reproduced here with kind permission of tldr.legal)

[E] CONCLUDING THOUGHTS

This piece has introduced the [Mountains of Metaphor](#) interactive web-based game as an autoethnographically inspired account of a PhD journey in law as a disabled, part-time researcher. Citing theories of metaphor and the importance of framing, both of research and of research *processes*, this piece has highlighted the central role of appropriate and supportive metaphors. Then, citing legal design as the latest movement to recognize the importance of making law visible and tangible, the Mountains of Metaphor applies this to the way we approach a legal research project, suggesting a meta-understanding of how and why we might approach our research practices with kindness and self-compassion. Finally, by drawing attention to the ways in which we do, talk and think about our approaches to research, this piece hopes to contribute to ongoing discourse within the law school about how early career researchers—especially those with long-term health conditions or disabilities—can best be supported to become active and confident members of the research community.

Dr Clare Williams is ESRC-SeNSS Postdoctoral Research Fellow at Kent Law School, University of Kent, where she is expanding her doctoral research looking at how we do, talk and think about the relationships between law, economy and society. She uses digital and creative methods and media to communicate insights from an economic sociology of law lens and is developing visual ways of asking how we can reframe these relationships and what that might mean for our ability to respond to financial crashes, social crises and environmental catastrophes. She blogs at [Clare's Research Blog](#) and tweets at [@clare_williams](#).

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