

Amicus *Curiae*

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EDITOR'S INTRODUCTION

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Hong Kong

Welcome to the first issue of the fifth volume of the new series of *Amicus Curiae*. We are grateful to contributors, readers and others for supporting the progress that the new series of the journal is making.

Daniel Newman and Roxanna Dehaghani in their article “Court Closures: Experiences from Wales” contribute an essay that examines the nature and impact of downsizing of courts over the past decade or so. England and Wales have implemented court modernization programmes since 2010, resulting in the closure of nearly half of all courts. However, the impact of these closures has been

disproportionately felt in Wales, where the rate of court closures surpasses that of England. This article examines the implications of court closures, with a specific focus on the experiences in south Wales. By conducting interviews with solicitors and barristers practising in the region, this article aims to gain insight into the impact of court closures on the communities they serve and the individuals who rely on the courts. The findings reveal that court closures pose significant challenges to access to justice, highlighting the need for further research on the effects of court closures in Wales and across the jurisdiction.

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

“Restorative Justice as a New (Sustainable) Paradigm of Justice” is contributed by Pierre de Gioia Carabellese and Camilla Della Giustina. Restorative justice is a growing topic of both scholarly debate and legislative progress. This article explores the history and evolution of restorative justice, as well as its recent applications, including resolving family conflicts. The process of restorative justice offers an alternative model for the judicial system, particularly in scenarios where traditional legal proceedings can incur high economic costs. Practical solutions are sought to meet the demands for justice and many such solutions are in due course codified within statutes. A particular concern at the present time is how artificial intelligence (AI) developments will impact on liability.

The paper by Luca Siliquini-Cinelli, entitled “Aristotle, Contract Law, and Justice in Transactions”, critically examines Peter Benson’s theory of transactional justice in relation to Aristotle’s conception of voluntary corrective justice. While Benson claims to engage with Aristotle’s ideas, this article argues that his theory fails to establish a meaningful connection and does not provide new insights into Aristotle’s thoughts on justice. Despite this, the article acknowledges Benson’s intriguing and logically consistent contract law theory. It also highlights the enduring influence of Aristotle’s

works on Western jurisprudence, particularly in the study and practice of law, despite the fact that the relevant recent literature has somewhat neglected Aristotle’s ideas on *nomos*.

“Jury Reform and Live Deliberation Research” by Lewis Ross examines the important issue of empirical research into the work of juries. Researchers studying live jury deliberation face significant challenges due to various legal and institutional barriers. This hampers the academic and legal communities’ ability to reach a consensus on important legal reform issues related to jury trials. Current limitations prevent the study of real juries in action or even the analysis of live jury deliberation transcripts. In the absence of such research, alternative methods have been attempted but vary in their effectiveness. These challenges highlight the need to remove legal and institutional barriers and promote real jury research for a better understanding of the jury system.

Amy Kellam’s essay “From Rope to River: Symbolic Executions, Colonial Dynamics and Trade Governance in the Golden Age of Piracy” delves into the symbolic elements of Captain William Kidd’s execution during the Golden Age of Piracy, primarily focusing on the visual messages conveyed. By examining the social and cultural context of the gallows in 1700s

England, the paper explores the unique aspects of Kidd's execution and its implications for colonial dynamics and trade governance. Through an examination of intended audiences and the multifaceted messages behind these executions, the article sheds light on the intertwined dynamics of piracy, colonialism and trade governance, and their impact on the evolving global order.

Two further essays contribute to the ongoing series of papers on issues of AI and its regulation.

The article "Copyright Protection for AI-generated Works: Solutions to Further Challenges from Generative AI" by Faye F Wang considers the complex issue of intellectual property rights protection for AI-generated works. It investigates existing regulations in the United Kingdom (UK), European Union, United States (US) and China, exploring whether AI technologies should be considered copyright or patent owners. The author advocates for the collective management of copyright for AI-created works via copyright management organizations, arguing that it could foster a well-functioning market. A comparative study of existing legislation and their interpretations for AI-generated works protection is presented, with a call for global policymakers and stakeholders to unify their efforts to achieve international harmonization

on intellectual property rights protection for AI-generated works.

"More Speed, Less Haste: Finding an Approach to AI Regulation that Works for the UK", an essay contributed by Simon McDougall, discusses the challenges of regulating AI as a separate activity and proposes utilizing the existing data protection framework in the UK for effective regulation. By expanding the scope and powers of the Information Commissioner's Office, the article suggests focusing on the risks of automated decision-making rather than defining AI itself. It emphasizes the need for ongoing agility in digital regulation and highlights the potential of the Digital Regulation Cooperation Forum to support member regulators. AI's constant evolution is a significant challenge, and means that we must approach regulations with flexibility, avoiding hasty legislation on the one hand while planning effectively for the future on the other. Expanding organizations like the Information Commissioner's Office and aligning with the General Data Protection Regulation in the UK can support responsible AI innovation and reassure the public.

Maria Federica Moscati's essay on "Diversity, Equality and Inclusion in Mediation for Family Relations" is a further contribution to our series of essays in the Special Section: ADR—Issues and Developments. Her paper explores

the manner in which diversity influences mediation in resolving family disputes. It considers the need for more inclusive mediation practices that accommodate diversity and promote equality. The author proposes a contextualized and integrated approach—including use of intersectionality as a principle and as a working tool—that takes into account the various manifestations of diversity within families. The article emphasizes the importance of understanding and respecting diversity in order to achieve fair outcomes that enhance inclusion and equality in family disputes.

In his Note entitled “An American Legal Scholar Returns to China” Neysun Mahboubi, an expert in Chinese law, shares his reflections on returning to the People’s Republic of China for a study and exchange visit after a four-year absence. He highlights the negative impact of, in particular, the Covid-19 pandemic on scholarly exchange, especially between the US and China. However, following his visit he now expresses cautious optimism for the future. Despite ongoing tensions between the two governments, he calls for renewed efforts to restart on-the-ground research and exchange between the US and China. This resumption of scholarly exchange could not only benefit academic work but also contribute to stabilizing US–China relations and pushing back against

restrictive political boundaries in China.

In the Review section, Patrick Birkinshaw contributes an examination of the new study *Sceptical Perspectives on the Changing Constitution of the United Kingdom*, edited by Richard Johnson and Yuanyi Zhu. This book of edited essays explores the topic of the Human Rights Act 1998 and the UK Supreme Court. He concludes that overall the book fails to deliver on its promise. The editors present arguments against shifting from a “political constitution” to a “legal one” and express scepticism towards legalistic solutions for political issues. While some contributors criticize the British constitution and propose a more legally determined system, others take the view that the current political constitution is sufficient. The book includes discussions on legislation, the role of courts, and the potential consequences of certain acts. The book contains essays that express nostalgia for a powerful and unrestricted executive authority, which contrasts with the more compassionate contributions made by this country and its people to global order, including the European Convention on Human Rights. However, this critique only applies to a minority of the contributors. The majority of the essays are well-written and substantial, offering a critical and nuanced approach rather than the

sceptical perspective proclaimed in the book's title.

In the Visual Law section, "Judging a Book by its Cover: Women, Legal Landmarks and Other Frontiers", Rosemary Auchmuty and Erika Rackley encourage us to see book covers as more than just packaging for the text; they serve as a window into the world of the book. They provide the first impression and interpretation of the text, representing and conveying what the book is about. A well-designed cover can go beyond the content of the book and offer an opportunity to explore new territories. In the case of the two volumes of *Women's Legal Landmarks* authored by the contributors, the cover images

combine symbols of women's freedom and progress in the context of English law, with the first book giving more attention to specific landmarks than the second. The images represent the slow but steady progress of justice for women and their liberation from patriarchal control.

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

Note: all intending contributors to *Amicus Curiae* are reminded that their final submission should be fully consistent with the journal's [Guidelines for Authors](#).

COURT CLOSURES: EXPERIENCES FROM WALES

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Abstract

England and Wales have seen court modernization programmes since 2010, which have led to nearly half of all courts closing. There has been a disproportionate impact on Wales, which has seen higher rates of court closures in comparison to England. This article explores the implications of these court closures by focusing on experiences in south Wales. The article draws on interviews with solicitors and barristers working in south Wales to further understand how court closures are impacting the communities that the courts serve and the people that use the courts. The court closures are shown to challenge access to justice, and there emerges a need for more study on the effects of court closures in Wales, and across the jurisdiction.

Keywords: courts; court closures; Wales; austerity; lawyers.

[A] INTRODUCTION

This article examines the impact of criminal court closures in England and Wales with a focus on magistrates' courts. The United Kingdom (UK) Government has been engaged in court modernization programmes over the past decade that claimed ambitions to reduce the number of courts with lower rates of utilization—often smaller courts in rural and remote areas—selling those no longer deemed suitable and investing money in updating remaining courts and promoting greater use of technology.¹ In 2022, the Bar Council introduced its new “Access to Justice” dashboard.² This online tool is an interactive map showing local, regional and constituency comparisons of key access to justice indicators in England and Wales. The dashboard opened with up-to-date data on court closures in England and Wales. On launch, it showed that, over the previous 12 years, there have been 239 court closures in England and

¹ This information is most clearly captured in the House of Commons' parliamentary briefing paper provided by Caird (2016).

² This can be accessed on the Bar Council website, [Access to Justice Dashboard](#).

Wales, meaning 43 per cent of all courts have now been closed. It revealed that, whilst 200 parliamentary constituencies and 178 local authority areas have an active local court, 373 parliamentary constituencies and 155 local authority areas do not. These court closures are important in how they challenge and undermine notions of access to justice for those who need to use courts. This threat is particularly pronounced for those living in rural areas, wherein many of the smaller courts were located or which they served; many remaining courts are increasingly centralized in cities and larger towns. This, amongst other issues, has resulted in increased difficulty in getting to court for victims, witnesses and defendants.

In examining the impact of court closures, this article follows Newman's (2016: 610-611) call for more research on rural access to justice in England and Wales:

In recent years, studies have been conducted in the US and Australia, but England and Wales lag behind, with the leading research ... up to two decades old and, as such, very nearly completely out of date, considering that the institutions of justice they looked at may soon become a rare sight in rural areas. This is not simply an opportune time for further research, but an essential moment at which to consider what impact these changes are having with regard to rural access to justice and how this affects communities. It may just be that such research could capture the end of an era and the start of a brave new world.³

Rural scholarship is most notably absent within legal studies (see Economides & Watkins 2022). Adisa's (2015: 8) research on court closures in east England is a rare example of research that examines rural experiences; these "court closures ... aggravat[e] issues already present in the system".⁴ Wales has also, until recent times,⁵ been neglected in legal scholarship,⁶ although Lee and Franklin's (2006) report (see also Franklin & Lee 2007) is a key exception; writing before court modernization programmes were implemented, they urged that "distinctions [be] made between ... rural and urban contexts" (2006: 15), with Wales serving as a strong example.

³ Echoing what Moody (1999) has previously labelled "rural neglect".

⁴ Such as the impact of austerity on courts (see Welsh 2022).

⁵ See eg Jones & Wyn Jones 2022; Newman & Dehaghani 2022.

⁶ As Newman (2016) highlights, there has been a general neglect of rural issues in access to justice scholarship in England and Wales over recent years, with little building on the important work of studies such as the "Access to Justice in Rural Britain" project in the 1990s (see Blacksell & Ors 1992).

Wales is also unique in that, whilst criminal justice is reserved (ie not (yet) devolved), there are distinct points of divergence, particularly where criminal justice intersects with currently devolved areas such as health and education (see Jones & Wyn Jones 2022). Wales is, however, typically hamstrung by the current devolution arrangements; the Welsh Government often has little influence over the trajectory of UK criminal justice policy.⁷ Wales, therefore, “remains out of step inasmuch as justice functions” (Wyn Jones & Lerner, 2020: 241) when compared to the other devolved nations of the UK. Wales also suffers from a lack of Wales-specific data: the recent Commission on Justice in Wales (2019),⁸ which provided the first review of justice in Wales for over 200 years, found a wealth of data on England or England *and* Wales yet a dearth of data on Wales alone.⁹ The Commission did, however, find that many of the taken-for-granted assumptions made in England did not apply squarely in Wales and, perhaps more importantly, Wales was quite different to England in many regards. As Newman and Dehaghani have outlined in the first book specifically focusing on criminal justice in Wales:

Whilst there are ... similarities between and within England and Wales, there are also, crucially, very clear points of divergence. Not only should these differences be reflected within academic and policy discourse, they must also be accounted for within policy and legislative initiatives. The “for Wales, see England” approach is indefensible when viewed in the broader frame of sovereignty, yet it is also unsuitable in practical terms when our criminal justice institutions are—and should be—deeply connected to communities in which they operate (2022: 212).

Picking up on this thread, this article examines court closures in Wales (specifically in the south Wales region) which is all too often ignored. The article provides insight from the criminal justice frontline in south Wales to stimulate and inform discussion into criminal justice in the country. Initially, the article will examine court closures across England and Wales as a unitary jurisdiction. Drawing on several threads above, we then propose that Wales should be examined alone; collecting Wales-specific data is necessary “to enable ... proper evidence-based policy development and as a basis for research” (The Commission 2019: 24). We examine rurality, in terms of areas remote from cities *and* areas within the post-industrial landscape of larger and small towns that have been similarly left

⁷ Although Evans & Ors (2021) suggest that they have not used all the freedom they possess.

⁸ The Commission on Justice in Wales (hereafter “the Commission”) urged for devolution of criminal justice, and the Welsh Government has established a Law Council of Wales to explore how this could be achieved.

⁹ Notable exceptions included work carried out through the Wales Governance Centre at Cardiff University.

behind by the retreat of key justice institutions (see eg The Commission 2019: 10). We supplement key studies already undertaken on access to justice in Wales, such as Lee and Franklin (2006), providing a crucial update two decades later and after the court closure programme, whilst also augmenting Newman (2016) by including the views of lawyers. After outlining the methods adopted, we explore in depth the semi-structured interview data that informed our examination of court closures, focusing on two broad themes: the impact on place and the impact on people.¹⁰ The article concludes by reflecting on how best to address the effect of court closures, including an appeal for greater attention on Wales.

[B] COURT CLOSURES AND THEIR CONTEXT

Since 2010, there have been two major court closure programmes: the, then, Her Majesty's Courts Service's Court Estate Reform Programme from 2010 and, thereafter, Her Majesty's Courts and Tribunals Service's (HMCTS) Estates Reform Project from 2015. According to Caird:

Successive governments have identified the courts estate as a target for efficiency savings. There are two main reasons given. The first is that the utilisation rate of some courts is low. This means that the workloads of these courts can be transferred, without pushing recipient courts beyond capacity. The second is the policy aim of reforming access to justice through modernisation, and by increased use of technology in particular. Increased use of online forms and video links for witnesses, for example, could help to mitigate the impact of the loss [of] court buildings upon access to justice (2016: 4).

All criminal court cases will start in a magistrates' court and the vast majority of cases are also completed there. As part of these court modernization programmes, 164 out of 320 of magistrates' courts in England and Wales have been closed with the money raised from the sale of court buildings purportedly being reinvested to improve the justice system (Bowcott & Duncan 2019). According to the UK Government, those courts that were closed were "underused and inadequate", and an annual magistrates' courts' bill of £500 million would be cut by £200 million (Caird 2016). The money saved from the closures would supposedly be invested in refurbishing courts and improving technology use within them (although not all courts have been sold to date). Most of the courts to be closed are located in rural parts of England and Wales. As such,

¹⁰ People and place are intertwined—an element of what constitutes a place is its people and people will be located in a place—and when court closures cause problems for one, so almost invariably do they cause problems for the other. All the same, the lawyers' discussions did lend themselves to being distinctly organized under these two themes. Setting them out as such in this article helps to communicate the perspectives of the lawyers with whom we spoke.

court closures have raised concerns around the growth of justice deserts in rural areas (Leftly 2014). The Ministry of Justice (2015) has previously responded to anxieties around the adverse impact of the court closure programme. First, it states that, following the court closures, 95 per cent of people would still be able to access their required court within an hour by car. Secondly, they suggest that it is not necessary to physically attend court in this information age. Thirdly, they propose the *ad hoc* usage of alternative public buildings.

The Law Society (2015) countered all three UK Government positions on court closures, raising concerns that court closures could have a negative impact on court users, including those from low-income households, those with disabilities or mobility issues, those with children or caring responsibilities, those from rural areas or without access to a car, and those who own a business. It further noted (Law Society 2022b) that some of these groups may not be best served by the increased remote hearings being proposed. For example, hearings involving vulnerable parties or witnesses are likely to be best served by an in-person setting. Such factors that may inhibit the fairness of remote hearings include caring responsibilities, disability, English as a second language, experience of trauma, learning difficulties, mental health problems and socio-economic background considerations. Despite the closures, communities have been reassured that they will have access to alternative courts if affected by closures (Ministry of Justice 2018). However, the nature, extent and quality of such access was not assured.

The discussions above relate to England and Wales. However, even before the court closure programmes under discussion were mooted, Kirby advocated for the specific importance of understanding court closures in Wales:

The Court Service appears to think that court closures based purely on numbers have no greater effect in Wales than anywhere else. This is simply not the case, and the approach fails to take into account the public interest in its widest sense. It ignores the dangers of creating further social exclusion by denying ready access to justice to people who live in remote areas and/or who may already be marginalised. In simple economic terms it fails miserably to take into account the real cost of court closures in terms of the cost of travelling time of practitioners, defendants, victims, witnesses and advisers (2002: 96).

Court closures in Wales need to be understood as a problem in their own right, and not simply lost in the mass of England and Wales data. The closures that have followed since Kirby (2002) was writing have borne out that concern. The figure typically given in discussions of court closures across the jurisdiction is that around half of magistrates' courts have

been closed in England and Wales since 2010. This figure masks the disproportionate impact of closures on Wales. In Wales, two-thirds of magistrates' courts have been closed meaning Wales has lost 22 out of its 36 magistrates' courts. By way of comparison, then, 59 per cent of magistrates' courts have been closed in Wales against 49 per cent that have closed in England. As a result of these closures, nine out of 22 principal areas of Wales are now without magistrates' courts. This includes five of the 10 largest towns in Wales. South Wales has borne the brunt of the cuts, with 12 of the 22 Welsh magistrates' court closures taking place in the region. South Wales has been left with six magistrates' courts. Although these six are in the main centres of population, the Valleys especially have seen their courts decimated. Following closures in Aberdare, Abertillery, Caerphilly, Llwynypia and Pontypridd, there are only two magistrates' courts in the south Wales Valleys—in Cwmbran and Merthyr. Figure 1 provides a visual representation of magistrates' court closures in south Wales between 2010 and 2020.

These court closures in Wales have gone too far and have adversely impacted access to justice in Wales. Yet, court closures in Wales have, as the Commission (2019: 349) notes, “occurred over a long period of time”, initially since 1846 and then again since 2000, “the majority ... in towns, often in rural locations in Wales”.

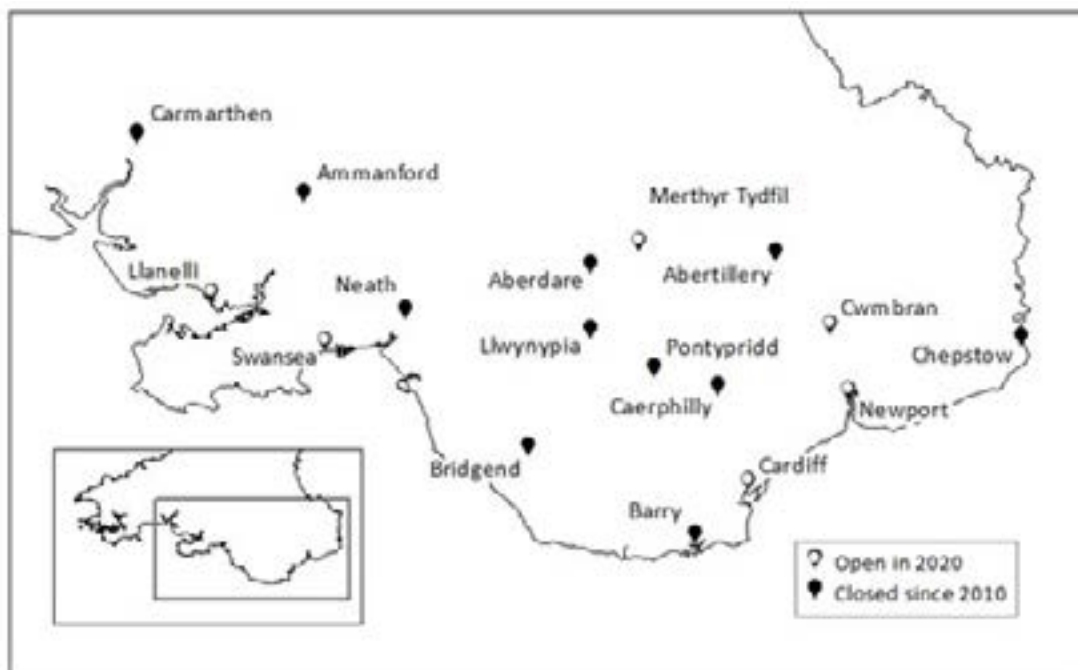


Figure 1: South Wales Magistrates' courts.

[C] METHODS

To provide a frontline insight into the impact of criminal court closures in England and Wales, this article draws from previously unpublished interview data with 20 solicitors (DS1–20) and 16 barristers (BS1–16).¹¹ Solicitors were drawn from nine of the 12 local authorities in south Wales, including all three south Wales cities (Cardiff, Newport and Swansea), rural areas (eg Carmarthenshire) and predominantly post-industrial areas (eg Pontypridd), and from 16 different firms of various sizes, including those practising crime only in addition to mixed practices. Barristers were drawn from five chambers covering criminal work in Cardiff and Swansea, within the Wales and Chester circuit (one of six geographical areas into which the administration and organization of the court system of England and Wales is divided). All solicitors and barristers served clients from across the areas impacted by court closures and most had experience of working in courts that had been closed.

We recruited initially by a mixture of “cold-calling” local law firms and taking suggestions from colleagues, thereafter using the “snowball method” of sampling to expand our sample as interviewees recommended others. We interviewed every lawyer that we contacted. The solicitors and barristers we encountered were responsive to the research: despite the working pressure they faced, they were pleased to see Wales represented and, also, keen to have a means through which their voices could be heard.

We conducted semi-structured interviews, which have been anonymized to protect the identity of those who took part. The interviews followed a schedule with flexibility to vary based on the expertise and interests of the participants, as well as the time they had available. Interviews with these lawyers lasted from 29 minutes to 2 hours and 2 minutes; the average length was 1 hour and 2 minutes. The interviews were transcribed by an external transcriber and were thereafter coded by the researchers in NVivo 12. The interviews were coded using thematic analysis, which is a method for identifying, analysing and reporting patterns across a data set allowing the authors to draw out new insights for the current exploration (see Braun & Clarke 2006).

The solicitors and barristers had differing schedules that reflected their varying roles but that overall followed similar patterns so as to offer comparable, cohesive data across the two parts of the sample. The

¹¹ Taken from a wider sample in a project that included police officers, and defendants and their families (see Newman & Dehaghani 2022).

interviews were broadly focused on the lawyer–client relationship, and the lawyer’s perceptions of how those suspected and accused of crimes experienced the criminal justice system. The lawyers were not routinely asked specific questions on court closures albeit some may have occurred in response to points that had been made by the lawyer—such is the nature of the semi-structured interview. The lawyers were asked direct questions on defendant experiences of court. The three most relevant standard questions for this paper were:

- ◇ Do many of your clients have to travel far for the court case?
- ◇ How do you think they experience their journey to court?
- ◇ How do you think your clients find the atmosphere at court?

We deployed a social constructivist methodology (Denscombe 2002), which is positioned between positivism—that broadly views reality as an objective fact to be discovered—and, interpretivism—that is largely grounded in the view that the recognition that objective knowledge of the social world is impossible to achieve, rather urging the need to look at the socially constructed nature of knowledge. Following Blumer (1969), our research has been informed by the notion that reality is not “out there” to be discovered but, more accurately, produced through interaction with others. Our research also took an integrative approach as outlined in Newman (2013). We were aware of the methodological debates between Bridges and colleagues (1997) and Travers (1997b) on criminal defence research. We thus sought to position our scholarship between structuralism—an outlook supposedly premised upon the development of largely politically motivated, theoretical frameworks that produce some manner of privileged understanding—and interpretivism—which emphasizes the truth as something which is constructed by individuals, thus leading to multiple realities in which the experiences of the participant need to be respected. Crucially, having not conducted related observations to complement these interviews, we did not feel in a position to readily contradict or discredit the accounts, and thus the views of participants were given due prominence alongside our own analysis.

Through our focus on those who had experience of the criminal process in one region, we can provide a “thick description” of how certain aspects of the criminal process are working in practice (see Travers 1997a). Such an approach improves understanding of what may have changed and how problems play out. We concentrated our research on south Wales to start to address the dearth of justice system research on Wales (Newman 2016). One of our aims was to produce scholarship that would mean Wales was represented in criminal justice debates. Thus,

this research means Wales is included, but it speaks to the England and Wales jurisdiction in just the same manner that an empirical study using participants from England would generally be accepted to do so; our data has synergies with England. Due to the research design that went for quality of input over quantity, with an in-depth understanding of criminal justice participations, our research cannot be claimed as being generalizable at national or jurisdictional level, but we are confident that it does have implications for criminal justice scholars across England and Wales.

[D] THE IMPORTANCE OF PLACE

A place-based impact of court closures can be found in the loss of local institutions. Courts represent significant establishments within a community. Lawyers in this study were concerned that the notion of the local court had been taken away in many instances by the closure programme:

The main examples are from, if you're in Pembrokeshire, so if you're in Haverfordwest or Aberystwyth, travelling to the Crown Court in Swansea is extremely difficult for a lot of people. Even if you live in Carmarthen, I'm not sure which magistrates' court you would be sent to. Probably Haverfordwest, was it? I'm not sure. I think then it gets split, but that's still a good forty-five, fifty minutes to your nearest magistrates' court then. And then again if you're sent to the Crown Court it's the same problem, you're sent to a different location again. So that's the effect of the closures, now some places don't have a local court, whether that's the magistrates' court or a Crown Court (DS13).

What we see is an interest in how places across south Wales were now without their courts. For Adisa (2015: 23), local people were concerned about the loss of “the court as a symbol of justice in a community [and] the disconnection that would have occurred because of the court closures”. In Newman's study, this was the most common way members of the community saw the court closure in their town:

Most of the respondents who expressed their belief in the importance of local courts did so by invoking the role that they might play in the community. For this group, taking a court out of a town, as with the Abergavenny magistrates' court, was seen as one more act of desecration with regard to the idea of community identity, another dissection from the core (2016: 15).

Lawyers in our study recognized such views and took a similar stance. Indeed, the following lawyer—citing the same court closure as in Newman's (2016) study above—presents their own view as a member of one such community that has lost its court:

So many courts have closed. There is a lot more travel that's impacting upon people. But it's also a complete loss of the community as well, isn't it? There used to be a lot of local courts all around south Wales as you know only too well and they've gone. I live in Abergavenny and there's no court there anymore—there used to be a court there ... it's a loss of law and order (DS5).

When the lawyer talks of a loss of law and order, it does not appear to be lawlessness that they are discussing, as may commonly be associated with the phrase. Instead, the lawyer evokes the way that the court is the visible presence of the state—law and order as a notion of community, tying people together in a common identity, with the court as a manifestation of those binds that ground a location within the wider nation. By this line, the towns that lose courts lose a little of their identity, their standing; perhaps they are diminished in status as the state retreats.

The loss of courts can thus leave an absence, a gap that, if filled, may well be replaced with something of much lesser grandeur or significance. In the following quote, a lawyer talks about half a dozen courts spread across the south Wales valleys, from west to east but with a focus on what happened to the court building in one of these towns:

And the one thing that stands out in my mind about those days is the number of little magistrates' courts, all over the country. So, you know, I would go to Defynnog, which is just south of Brecon, and we would have a court in a little church hall; the same in Pontardawe—we used to use the village hall in Pontardawe. There would be courts in Pontlottyn, Bargoed, Aberdare, Mountain Ash. In fact, I can remember going to Aberdare court when it was in the centre of town, a very small building, you know, done out traditionally, I suppose—late Victorian, early Edwardian sort of decor. That place is now an amusement arcade, it's been converted. So that's a bit sad. And there is no court in Aberdare, there is no court in Mountain Ash, there is no court in Pontypridd, you know? It's the landscape, in terms of court closures, has changed dramatically (DS 20).

The lawyer provides a glimpse into both the scale of these losses and their impact. That this lawyer chose to give examples highlights the tangible effect of these court closures on places across south Wales. These are concrete examples; we were not engaging in an abstract debate but, rather, learning about changes that had been and were being experienced by people in and around each one of these locations. We see a court building now occupied by an amusement arcade; the invitation to open justice replaced by an occluded window that hides patrons inside, the pursuit of fairness usurped by rigged slot machines. As alluded to by DS20, there is a difference in these two usages, what they stand for, and how they position a place.

This decline was part of a wider loss of local services. Robins and Newman (2021) examined challenges to access to justice across England and Wales and, as part of a south Wales Valleys case study that they offered, spent time with Citizens Advice Rhondda Cynon Taff in Mountain Ash. They briefly considered the impact of court closures, which, here, was placed in the wider context of services leaving the area. It is worth providing an extended extract from their work to give a flavour of the sheer scale of the problem as they saw it:

“A lot of the banks have closed and statutory services have moved to Aberdare,” Taylor says. “There was a town hall and a police station; now, in Mountain Ash, we are one of the only organizations that are open five days a week. We see people coming in, outside of opening hours, desperate for help in really vulnerable circumstances.”

Citizens Advice runs from the local library so it’s accessible to residents in a town where even the job centre has been shut down. The branch runs two dozen outreaches across the local authority. “Our advice is supposed to be free. But if you have to travel from down to Ponty[pridd] it’ll cost you—so actually it’s not free. We need to be spread around all of the valley to make sure people are getting properly free advice.”

“We had somebody walking four miles to get to us. It’s 4.45PM and we’ve been there all day but we’ll try and sort them out and get them the help they need,” Taylor says. Residents have also been affected by court closures. “It was centralised in Port Talbot,” Taylor says. “All of a sudden, people weren’t paying their fines because they couldn’t get to the court to pay the fines.” She accepts the business case for centralising public services at a time of austerity. “But sometimes removing it from the community has a massive ripple effect. How can somebody who is on £75 a week afford to get to Merthyr and pay their £10 fine?” she asks (Robins & Newman 2021: 70).

The court closure was part of a wider deterioration, a deeper malaise afflicting the town. People who lived in Mountain Ash would now need to go elsewhere to access key services; services that people had grown up with and become accustomed to having on their doorsteps. Further, in this vein, Newman and Dehaghani have identified:

Concern for remote, ‘left-behind’ areas in the Valleys ... The amount and type of work available in Wales, it seemed, necessitated the existence of small firms practising in criminal only and high-street practices offering advice and representation in an array of areas; there were very few firms in Wales offering criminal defence alone ... Closures of banks and businesses, and the wider decline in the high street, is having an impact. Fee reductions and changes in legal aid regulation have also promoted the death of the high-street practice across many small towns of Wales, the effect of which is taking justice further away from communities (2022: 87).

The part that court closures play in these diminishing Welsh places is noteworthy. For example, lawyers in our study were well aware that, as part of this decline, there would be a knock-on effect of law firms leaving:

That's where we're based because that's where the court centres are. But if you're a client in Tredegar, we don't get paid travel or waiting anymore, so we don't travel to you, so if you want us, this is where we are ... with the rurality of Wales, that's very much a live issue that nobody has really thought too much about ... I think you're going to have lots of firms coming out of crime in the next five, ten years (DS9).

Such echoes Lee and Franklin's (2006: 103) research; they predicted that "more solicitors [will] choose to voice their dissatisfaction with the extra burdens that court closures place on them, by exiting this area of the legal market", quoting a lawyer who said that, "you get paid half of the peanuts for doing the travelling and people are just going to stop doing it".¹² What emerges, then, is the double loss of both local legal services from communities and, thereon, local expertise from more distanced law firms.

There is a knock-on effect beyond criminal practice in and of itself as noted by the following solicitor:

We're a nation of high street firms, we don't have national criminal practices. So, if you lose your criminal firm, you lose every area of practice. That will especially impact rural areas like the valleys. So, you might find that you only have one family firm for a whole community. What happens in a divorce case? The firm can only represent one side. Or in complex care proceedings? There could be four or five parties. It all falls apart without our high-street firms and the powers that be need to understand that. We might not be very popular, nobody likes solicitors but we're necessary. People are always going to fall out and have arguments, it's human nature. So you might not like us but you need us (DS9).

Due to the scale and volume of work, the lawyers told us there were very few firms in Wales offering criminal defence alone, so losing a criminal practice could compromise a community's legal services as a whole. Such is echoed by the Commission (2019: 391) finding that "most Welsh solicitors' firms are perceived and categorized as high street practices". The Commission (2019: 397) notes that such "high street firms are found throughout Wales" but "they are the category of law firm most generally found in rural and post-industrial areas of Wales" as articulated by the lawyer here. The Commission (2019: 10) identified "a serious risk to the sustainability of legal practice ... especially in traditional 'high street' legal services". Closures of courts, alongside the wider decline of the

¹² See also Law Society 2022a.

high street in terms of bank and business closures, is having an impact, alongside legal aid fee reductions (see Thornton 2020). Thus, the court closures are caught up in the decline of the high-street practice across many small towns of Wales, the effect of which is taking justice further away from communities, especially rural communities.

Beyond the practical, there was also a palpable sense of nostalgia in many of the interviews. Lawyers understood what a court represents to a town but, on a personal level, some lawyers simply enjoyed visiting the range of locations that presented themselves when there were more courts across a greater variety of locations. This quote encapsulates some of that sense of longing as the lawyer laments losing a pair of courts:

I much preferred it when we could have all of the others as well. I loved Carmarthen, loved Haverfordwest ... you know, getting away from it all. You know, we used to really enjoy that. The court in Carmarthen—it's just peaceful. It's a gorgeous court ... It's sat there empty now (BS16).

Lawyers were often regretful that the courts had closed because the places all had different characters that were appreciated and welcomed in their practice. The lawyers were thus losing out on experiences that they had found satisfying or beneficial. Such was the case in this example where working at some smaller, quieter courts may represent a change in pace for the lawyers, an opportunity to switch off from the hustle and bustle of a larger, busier court.

Nostalgia can sometimes inhibit progress, and the court closure programmes were couched in the language of modernization. However, some lawyers were concerned that, despite the UK governmental rationale to use cost savings to improve remaining court buildings, there was a general downgrading of courts:

They had some lovely buildings like Pontypool but they're just closed now. It's all part of the devaluation really ... of the system. It doesn't matter and we don't spend very much money on it. It's hardly a gold-plated service anymore, is it? The Ministry of Justice has had more cuts following austerity than any other government department, and apparently there's more still to be cut. And it's just unbelievable. Which is why they're closing magistrates' courts and the buildings that they have got are falling to pieces. You know, there's constant things on Twitter about, you know, rain coming through the roof and toilets not working and all that sort of stuff ... it's just everything is pretty shoddy (DS19).

This was the impact of cuts; even where courts remained, they were being run down. The modernization was not happening or, at least, was not

bringing palpable improvements. Such would have an impact on all who come into contact with the courts.

The lawyers were also sure to discuss the impact of courts being lost for defendants. The closing of a court means that the justice system is taken out of that community and that can be intimidating for those defendants who are forced to attend a court in a community they do not know, as well as the defendants potentially needing to have their case heard in a court with very different characteristics to the smaller courts that have been closed. The following account from a lawyer captures such a defendant experience:

By pulling it further away from the community, it creates an even bigger gap then. Because I think some of the old magistrates' court in the south Wales valleys, they were small courts. It was like some of the courtrooms weren't much bigger than a room in a four-bed house in Cardiff would be, you know? But then those courts have closed, and then you're moved then to Cardiff magistrates' court, an even larger court, makes it even more intimidating then (BS11).

There is a double layer of intimidation here. The defendants needing to leave their smaller court in their community for the larger courts, in the more populous locations means that their experience of the justice system is also altered in a detrimental manner. What lawyers saw, then, was that the defendants they represented were also affected by the removal of the court system from many of the places where it used to be present. Newman and Dehaghani (2022: 89) discussed the importance of local justice and knowledge of local issues as something pronounced in Wales:

Wales was said to have a much less homogenous population across its different towns and regions, with variation even within south Wales such as between the Rhondda Valley and Cardiff city (only 15 to 20 miles by car). The impact of court closures was such that cases from the Valleys were not being properly understood where they were now tried, i.e. in Cardiff. (2022: 89)

The quote indicates the existence and operation of local legal cultures (see Church 1985). These local legal cultures were increasingly undermined and dismantled by the centralization of justice procedures as discussed by these lawyers.

An important issue of this distance in Wales can also involve the language. Whilst our study was focused in south Wales where Welsh is generally spoken less as a first language than it is in the north or west of the country, language is nevertheless an important consideration. Indeed, for the Commission (2019: 441) "it is notable that in some parts of Wales with the highest proportion of Welsh speakers, people are faced with ...

much longer journeys to court venues as a result of the court closure programme”. The Commission noted that “this position is unacceptable” (2019: 441); we posit that studies in other regions of Wales would have included language-based access problems as a significant issue resulting from the travel expectations that are increasingly placed on defendants. The Welsh Courts Act 1942, the Welsh Language Act 1967 and the Welsh Language Act 1993 provide rights to speak Welsh in court proceedings, but the impact of court closures potentially takes defendants from first-language Welsh communities to first-language English communities. This needs to be better understood.

Having considered the impact of court closures on place, we will now move on to a more focused discussion of the people concerned, examining the impact of court closures on defendants and lawyers.¹³

[E] THE ROLE OF TRAVEL

The impact of travel on defendants was the most notable problem that the lawyers identified when discussing the effect of court closures, and we were provided with a great deal of insight into how defendants struggled as a result of having to travel greater distances for court appearances, across a range of examples demonstrating how these problems played out in practice.

Some of the court closures have led to long trips to the nearest court. Lawyers talked us through the kind of distances defendants would now need to travel including the following example in south-west Wales:

Yes, it is hugely significant in Swansea, because Swansea is, covers the whole of West Wales and it’s a massive geographical area. They closed Haverfordwest, they closed Carmarthen, they closed The Guildhall in Swansea. So, Swansea has gone from having effectively seven courts to four courts, but the significance—and I’ve always said this in terms of Pembrokeshire cases—you would have people basically travelling to Swansea from Pembrokeshire, taking hours and hours and hours to simply plead not guilty, and spend all their money for one hearing ... There is no justification for that at all, and it was a *fait accompli*. I mean, there were, allegedly consultations. I mean, there were huge, huge representations made saying, “This is just ridiculous”, and “if you think you could do it, come and do it, we’ll put you on a bus from Milford Haven, and let’s see what time you get to Swansea? And they’ll be a warrant for your arrest by the

¹³ Owing to the nature of our project, we did not consider the impact on witnesses and victims, although impacts should also be acknowledged, and share some similarities to the impacts on defendants, with notable exceptions.

time you've finished, because you won't get there in time, I'm telling you that" (BS15).

Haverfordwest, the largest town in Pembrokeshire, is around 60 miles from Swansea by car, a journey of nearly one-and-a-half hours. There is a train that takes a similar amount of time and a bus that takes closer to two-and-a-half hours. Even when the distance was not necessarily excessive on paper, the geography of areas such as the Valleys could make the trips deeply impractical. This lawyer identifies the obstacles that people in these south Wales Valleys areas can face:

But if you're one of my clients living in Rhigos or Treherbert, at the very top of the Rhondda Valley, then imagine how difficult it is, knowing east-to-west communication routes in Wales—normally you have to go down to the bottom of the valley before you come up the next valley, there are very few routes which go over the top. So, if you're living in Treherbert, to get to Merthyr would be—I say Merthyr because that would be the nearest magistrates' court, or Crown Court—it would be a huge task and a huge economic burden for that person. And they are challenged people. These people are not working, they have no riches to spare. It must make it very difficult for them (DS20).

Lee and Franklin (2006: 15) noted that, "in looking to plan for the future provision of legal services in rural and peripheral areas, this requires more than a simple understanding of distances on a map". Wales, where residents must travel through England if they want a train from the south to the north of the country, has many complications for those who wish to travel and the example of how hard it can be to leave one valley for the next in south Wales is something those outside the country may not realize.

The lawyers in this study noted problems for those in communities where travel was now required. Lawyers discussed how defendants were less likely to attend as a result of the court closures. In the following example, a barrister speaks about experiences of those in towns that had lost their courts and now needed to leave for a court appearance:

Bridgend magistrates' court closed, Pontypridd magistrates' court closed. And what happened then is that all the cases of those, in those areas are then sent to either Merthyr, Cardiff or Swansea. And people who live ... for example, ... very close to Pontypridd magistrates' court, and don't have a car, don't have a lot of money, are going to find it very difficult to get to Cardiff, or to get to Merthyr or to get to Swansea. And I've personally noticed when those court closures happened, there were more and more defence solicitors coming in, or I was coming in and saying, "Well I've had a telephone call this morning, they can't get here. They don't have enough money to get to court this morning" (BS13).

In Adisa's (2015) study in the east of England, the court closure meant that a trip by public transport required both train and bus components. Assumptions are often made about the accessibility of public transport: the reality is different in large cities as compared to more remote areas. However, public transport was often identified as a problem in many parts of south Wales:

Clients are stressed about getting to court on time, having to get up at silly times in the morning. And particularly Valleys. It's, the public transport is not great there, isn't it? You know, like if you're talking about _ London, Birmingham, Manchester, the public transport is much better there whereas south Wales, as you know, is much more difficult for people to get anywhere (BS8).

The Commission (2019: 361) suggested that, "given the geography and demography of Wales, the dearth of public transport ... there is after the extensive court closures little alignment between the justice system and communities and people in Wales". Need for public transport could still be problematic, as in Newman's study:

Respondents recounted personal stories about people close to them who had gone through such an experience and how upsetting they had found it, especially when the person they knew who had made the accusation found themselves surrounded, on public transport, by the family of the individual they had accused (2016: 15).

Even when there are services, lawyers highlighted that many defendants struggled financially. This echoes Adisa's (2015: 17) findings in England where, following the closure of the local court, "the generalised time costs of a defendant coming from rural and rural remote locations daily has doubled in almost all cases". In Wales, Newman and Dehaghani (2022: 93) cite an example of a defendant that had to spend £10 of their £50 a week wage on court travel due to closures; "previously, they would have travelled around six miles from Porthcawl to Bridgend but after Bridgend Magistrates' court closed in 2016, this left them with a journey of closer to 30 miles to Cardiff". Lawyers recognized how this could make travel even more difficult when so many local courts were removed from the equation:

There used to be courts in Barry, Bridgend, and they've moved to Cardiff. And I think those that were covered by Bridgend, particularly, might have to travel a long way. And yeah, that can cause people problems, yeah. Same with the Valleys, the Rhondda Valley, etc. They used to have their own courts in Pontypridd, and Rhondda and now they've got to go to Merthyr, so it's further, so I'm sure they've got problems as well. People who are on benefits are obviously going to have difficulties getting to court, if they've got to travel, you know, and then pay for their bus fare or train fare or whatever (DS4).

The cost of extra travel can be a major inhibitor for access to justice. And, even if defendants can get to court, all these problems can mean they are more likely to be late as noted by a barrister in the study:

Our clients, let's face it, really struggle with management of their time. They're deficient because of their upbringing and education, because of their lifestyles so it's difficult enough to get anywhere on time let alone to Cardiff Crown Court if they live up in Blaenavon, you know? I mean, the timescales to get public transport are ridiculous, so they have to rely on lifts. So, clients would regularly turn up late, risk being remanded into custody if the judge didn't accept their explanation (BS8).

Late appearances at court could lead to worse outcomes than might otherwise have been encountered by clients. Such is an additional problem for defendants created by the court closures programme.

There was also consideration of how these travel difficulties could make court appearances simply incompatible with the lived reality of day-to-day life for many:

You know if you're a single mother with three children, and you have some sort of dispute with your former partner over the children, you may not have childcare, you may have to drag the three kids with you. Or you have to be rushed back by a certain time, so if the court time is, you know, ten till four, whatever it is, you may have to pick the children up from school at half-past three, you may not have cover for that. So, these practical considerations, particularly where you do not have a local court. So, for that lady, living in Aberdare, or Pontypridd even, who would be able to dash from the court to pick their child up, no, that can't happen anymore, because you're on a bus for an hour or an hour and a half to get home. You have to leave the court by two o'clock to get home by half-past three. And you may have two or three bus changes to encounter along the way—you know, assuming that all the buses are running, or the trains are running on time. So these practical considerations, these practical difficulties for the court users are immense, I feel a real sense of sadness for them—cost, inconvenience, and the trauma that they're going through in having to attend court for whatever reason in the first place. It just compounds it, doesn't it? (DS20).

This lawyer highlighted the crux of the matter for many: that these extra stressors simply compound the negative experience of having to attend court in the first place. They add new trauma onto the existing distress. Adisa (2015) identified travel time as having a cost value in its own right every bit as significant as financial cost in and of itself. However, these additional values are neither recognized nor factored into discussions around the cost of forcing additional travel onto defendants.

The situation in Wales as it was recounted to us was that too many people are having to travel too far for access to justice. Fundamentally, there were not enough courts open following the closure programmes:

But you can go from quite accessible areas in south Wales to certainly very inaccessible areas. Cardiff can get you anywhere quite easily but certainly you go beyond the Brecon Beacons or Merthyr, it's a lot more difficult. There are issues actually with people who travel in from, you know, Blackwood across to Cwmbran, or they travel down from Brecon to Merthyr, and it is, it is quite tough. I think at the moment, there aren't enough magistrates' courts open (BS7).

Too many courts had been closed and this was making things much more difficult for defendants. For Lee and Franklin (2006: 15), it is not "fair to conclude that just because the demand for legal services may be lower in sparsely populated areas, the need is any less". This research was conducted before the pandemic, but these trends are only likely to be exacerbated now with the pre-existing court backlog massively extended (National Audit Office 2019). The House of Lords Select Committee on the Constitution (2021: 3) concluded that the justice system is "under strain" and that "actions that might have been capable of alleviating the effects of the pandemic" had not been taken, with the backlog of cases in the criminal courts now reaching "crisis levels".

[F] CONCLUSION

What is now required is further research within and of Wales. Such scholarship would look to expose the issues specific to Wales—and the areas herein—and general to the entire England and Wales jurisdiction. Important is the recognition of differential impacts per locality. Courts have closed at a much higher rate in Wales than in England. These closures present significant court access obstacles for those in rural and otherwise poorly connected areas such as the post-industrial south Wales Valleys. The investigation of the effects of policy decisions must have specific regard to demography and geography. Whilst our research contributes to the dearth of research on criminal justice in Wales, there is much more left unexposed.

On the matter of community need and involvement, we must be alert to changes within the court estate. The closure of courts across England and Wales, and particularly in the latter, may frustrate local justice, recognized by, grounded in and working for the community, as well as the unfavourable impacts of significant travel to court. Such may hinder participation in the criminal process and may increase the likelihood of miscarriages of justice through reduced understanding, increased stress,

or the need to pursue a swift resolution. Decisions seem to be taken by those in privileged positions who have little regard for and understanding of the effects on the already marginalized, deprived and disadvantaged. These decisions also seem not to have regard for or understanding of the geography of Wales: whilst 10 miles on a map may not look far or appear to be so from those sitting at a desk in the incredibly well-connected London, the difference is significant on the ground where a journey cuts across two different valleys. These decisions not only take criminal justice institutions away from communities, but also demonstrate a failure to recognize the specific requirements of—and absence of provision within—the locale.

We call on research to be commissioned that gives voice to defendants in the criminal justice system and collects their experiences of whether and how court closures have impacted upon them in Wales. This would help redress some of the evidence gap identified by the Commission (2019) and would represent a necessary follow-up to this article examining lawyer's perspectives. First-hand accounts are needed from defendants as those most likely to suffer as a result of court closures. This could entail interviews, but understanding of the impacts could be deepened through other methods such as accompanying defendants on their journey with participant observation or asking defendants to recount their journey through diary study. These would provide opportunities to capture real-time thoughts and feelings, which could, then, better inform policy decision-making.

On policy, the Commission (2019: 361) set out its position that, “it is clear that there should be no more court closures in Wales unless and until a clear overall strategy for Wales is produced”. Whilst justice remains a reserved issue, the Welsh Government is hamstrung from implementing these proposals and the impact of the Commission may be limited. Such is evident from the non-committal response the Commission received from the UK Government:

We asked for an assurance that there will be no more court closures. None has been forthcoming. We were told that there were no current plans to close more court buildings in Wales. HMCTS has, however, published a response to a consultation on its estate, which adopts new principles by which any future closure of buildings will be considered. HMCTS maintains that any further closures will be based on evidence, and it is more likely to look at the issue on a site by site basis rather than large blocks of closures. In the consultation, HMCTS said that it would be reasonable for court users to leave their home at 7:30am and return by 7:30pm. We do not consider this acceptable as it does not take into account childcare and family needs or the length of the day... [meaning] long distances to court,

particularly if the notice is short, may lead to people failing to attend to give evidence (2019: 360).

A key consideration of the Commission was for the need for the justice system to be devolved to Wales, and we believe that such a development is crucial to ensure the harms of the court closure programme can be mitigated or reversed. For the Commission:

Only full legislative devolution, combined with executive powers, will overcome the obstacles of the current devolution scheme. It will:

- enable the proper alignment of justice policy and spending with social, health, education and economic development policies in Wales, to underpin practical long-term solutions;
- place justice at the heart of government;
- enable clearer and improved accountability;
- enable advantage to be taken of Wales' size and ability to innovate, for example by integrating legal aid and third sector advice, bringing health and justice resources together to tackle drug abuse, and providing better means of dispute resolution through ombudsmen services;
- and, strengthen the constitution of the UK (2019: 16).

Creating a Welsh legal jurisdiction has the potential to improve access to justice for those living in Wales. As such, the mission of the Commission (2019: 32) could be realized, to make “the rule of law through access to justice relevant to everyone as the means by which the right to just, equal and fair treatment in all aspects of life is realized and Wales as a nation is just, fair and prosperous”. Moving justice powers to the Welsh Government could bring decisions closer to communities and increase the likelihood that decisions are taken with consideration of these communities. How to manage the court estate could be part of this process, carrying the possibility of improving the experience of places and people in Wales. The time has come to remedy the ills caused by lack of justice powers for Wales, and what happens with courts should be part of this.

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RESTORATIVE JUSTICE AS A NEW (SUSTAINABLE) PARADIGM OF JUSTICE

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Abstract

Not only is restorative justice (RJ) an increasingly developing area within scholarly debate, it is also a field where legislation is making significant progress. It is in statutes that practical solutions need to be sought out and eventually enshrined in law in order to accommodate individuals' demands for justice. Therefore, in a scenario where the economic impact of a traditional judicial matter may "skyrocket" to egregious levels, RJ may well represent a new and alternative model for the judicial system. Against this backdrop, this article, first and foremost, discusses and analyses the history and evolution of RJ. Thereafter, attention is turned towards the most recent applications of RJ, such as for the resolution of family conflict.

Keywords: restorative justice; legal costs; comparative analysis; United Kingdom; Scotland; Italy.

[A] INTRODUCTION

Based on a Hindu saying, the community mantra would be: "he who batones is forgiven" (Weitekamp 1989). Restorative justice (RJ) is a method whereby victims will be restored of the damages suffered, but it is also a means of restoring the community. The restoring activities encompass, among their objectives, property lost, personal injury and, more generally, a sense of security.¹ Furthermore, an additional aim is to restore harmony, in light of a shared feeling that justice cannot be served while an underlying injustice still persists (Braithwaite 2000).

¹ An example could be the failure of a justice system where it is stipulated within its own legislation that women cannot walk alone at night because that would not be safe.

It is crucial, first and foremost, to emphasize that RJ² should not bring to mind a romantic notion about the world and its “law and order”. Rather, the purpose that RJ strives to achieve is the re-establishment of fundamental rights, proportionality, rule of law and the separation of power (Braithwaite 2017). A corollary of this is that RJ does not aim to abolish the key elements of the criminal judicial system of the state. Nevertheless, thanks to RJ, power can be shifted—from central bodies to civil society. Consequently, the judicial system continues to be democratically administered by the community, within a pre-determined legislative framework.

RJ is “an old idea with a new name”:³ under the “umbrella” of RJ, potentially, scholars mean two different things. Moreover, not only does RJ have deep intellectual and cultural roots, but its origins can also be described as somewhat “mythical”.

This adjective is reminiscent of Greek tragedy (Soulou 2021). The real essence of the latter is close to contemporary social thinking, so long as tragedies can be considered representations in action of an experienced crisis (Morineau 2017). Additionally, RJ and Greek tragedies have other common roots.

The first one is compliance with a ritualized process; the second is the analogy between the “chorus” and the role of the facilitator. The latter element is the human-centric approach: the human being is in the centre of the process in order to understand both feelings and skills of an individual (Chapman & Ors 2018).

With regard to the intellectual and cultural aspect, the language also alludes to Judeo-Christian traditions:

History of service and advocacy of justice for the poor and needy as an act of love and obedience to God (Kuzma 2000).

Additionally, RJ is a “mythical” matter; indeed, it is a rhetorical and artificial venue and, because of this, there is “a presentation of distorted past” (Sylvester 2003) and, through forensic language and fantasy narrative, the main “actors” are able to find a reparative solution.

This practice involves two disputants (the “micro” or the “macro”) and involves long-standing societal ills, for example South Africa’s apartheid

² RJ is defined as “[d]esignating a form or concept of justice that punishes or rewards a person in accordance with, and in proportion to, their conduct ... Also in later use: designating a system of justice based on punishment of the offender, rather than on rehabilitation.” (The Oxford English Dictionary, *sub verbo* “retributive”, online).

³ [The Centre for Restorative Justice](#), Simon Fraser University.

era. RJ, in this first scenario, requires voluntary participation, since victims and offenders in conflicts are in the same venue.

The focus is both on victims and offenders in a conflict in order to restore social harmony. In contemporary practice, the best *loci* for RJ projects are multivarious, since they include indigenous groups, religious bodies, community organizations and government programmes (such as police, prisons and social welfare). More precisely, nowadays, the common features of RJ can be found in a shared vocabulary:⁴ “constitutional” charts and documents; the language of decolonization of social justice and of political partisanship.

The common element of RJ is the will to restore a social relationship in order to establish or re-establish social equality (Llewellyn & Howse 1999). In this context, the language remembers an oppressive “state” and, consequently, the victims’ marginalization. To summarize, RJ encapsulates, in itself, three main topics: firstly, violence and marginalization; secondly, an oppressive element; and, finally, the power of language in order to establish justice. The latter is the quintessence of RJ—as far as the offender has a “debt to society”, the reintegration price consists in the rehabilitative treatment (Fletcher 2006). A normal life for the criminal imposes an obligation that he or she repair a damage both with the victim and with society.

It is crystal clear that RJ has *per se* a definition problem, the latter, in fact, is a “vexed problem”. RJ, in other words, has grown significantly in terms of its use, and has become also increasingly hybridized. To elaborate, the term “restorative” is applied in a host of practices, such as community reparations boards, surrogate victims or offender meetings, community service. Additionally, this term is also applied both in a multitude of settings, for instance schools, prisons and workplaces and in a variety of contexts, for example, criminal justice, transitional justice, institutional responses to abuse and so on (Daly 2016).

Among scholars, it is possible to observe two different and also opposite stances. On the one hand, there is the position of the so-called “purists”: they argue that RJ is a process (Dünkel & Ors 2015). On the other hand there is the position of the “maximalists”, who argue that RJ is an “option” that encourages outcomes to repair harms caused by crimes (Walgrave 2011).

⁴ In relation to this expression, some scholars prefer “common vocabulary” (Chiste 2013).

Ultimately, RJ, from a United Kingdom (UK) perspective, could be defined as:

A process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future (Marshall 1995: 16; see also McCold & Wachtel 2012).

This definition encapsulates two minimum elements: 1) a meeting between victims and their offenders; 2) after this meeting, an outcome will ensue. From this standpoint, only three models of RJ meet these requirements, more specifically: 1) mediation; 2) conferencing; and 3) circles.

[B] RESTORATIVE JUSTICE AND ITS STRICT RELATIONS WITH THE COMMON LAW LEGAL SYSTEM

RJ is strictly connected with common law; hence it unfolds case by case via three different channels: an administrative one; legislative change; or community initiatives (Daly 2008). In the UK, RJ came from New Zealand via Australia because in New Zealand this practice in the criminal justice field was largely inspired by community practices well known amongst Māori peoples. More precisely, in New Zealand, RJ is an integral part of the youth justice process.

In the UK, it is the Scottish legal system that has veered significantly towards the main idea of RJ: indeed, the logo of Scotland Restorative Justice is a Celtic knot. The latter is a metaphor that

represents the intertwining of the ancient Celtic peoples. It is a symbol of peace with one's self and in one's relationships with others (Scottish Executive 2005).

Moreover, after the devolution of criminal justice authority from England to Scotland, Caledonia has been identified as the catalyst for the development of efforts to "tackle youth offending" (Scottish Executive 2012).

Along the same lines, devolution (the process whereby, since 1998, Scotland was given a certain level of autonomy) has led to other outcomes, for example the release of "Lockerbie Bomber", Abdel Basset Ali alMegrahi, and his return to Libya. The motivation was based on "compassionate grounds", and it highlighted that

Scotland's laws and Scottish values dictate that justice must be done but that mercy must be available. To act otherwise would be to

discard the values by which we seek to live and debase the beliefs we seek to uphold (*BBC News* 2009).⁵

A quite different application of RJ is the approach in Northern Ireland where the concept under discussion has grown up in a post-conflict society. It is crystal clear that RJ, in this scenario, had a utilitarian soul. After the Northern Ireland Peace Accord came into effect in December 1999, the first RJ scheme was encapsulated into different projects in both Belfast and Derry-Londonderry. The main goal was to deal with young offenders, their victims, families and communities (Schrag 2003).

However, it is the RJ Scottish experience that better shows the intimate link between justice, education and young people. The reference is to the Children (Scotland) Act of 1995 (c 36). This has consolidated the diversionary programme, thanks also to devolution from English to Scottish control (Chiste 2013).

The main idea is that RJ is crucial in order to build a society where a potential conflict between victims and offenders is resolved among themselves without a third party. In other words, offender and victim have a meeting in the same place to stage a trial. In the meeting, the parties discuss the facts, their feelings, how to realize a reparation and, finally, behaviour for the future.

[C] RESTORATIVE JUSTICE: COMMUNITY, JUSTICE AND CITY

The sociological approach of RJ in Scotland and Northern Ireland is based on the idea that RJ is a way whereby society—ie the community and the city—can show the balance existing in a social context.⁶ This also explains two other hot topics: namely, RJ as a methodology in family conflict and the new challenges of RJ.

As far as the first issue is concerned, it is important to clarify that family violence is not a unitary phenomenon, since it involves varying levels of violence, different levels of frequency and persistence and, not least, different interpersonal and structural dynamics. In the “patria” of RJ, New Zealand, an empirical study showed that the strength point of

⁵ This decision was also supported by the Church of Scotland and the Catholic Church in Scotland.

⁶ “Our challenge as practitioners, writers and trainers, in the effort to widen the scope and reach of Restorative Justice to embrace Approaches and Practices, is to ensure we do not dilute its powerful message, we do not lose its unique gifts to transform the way we respond when things go wrong between us, we do not undermine its capacity to transform justice systems across the planet” (Hopkins 2015).

RJ in domestic abuse is the protection of the victim. In other words, family and friends are more proactive and conscientious in safeguarding the vulnerable person/people.⁷

To elaborate, RJ is a vehicle against the isolation of both the victim and the offender: the dialogical activity builds a family and friends network, in order to provide social support during the rehabilitation process. As far as domestic violence and abuse are concerned, the priority, also after the possible reconciliation, is safety, therefore the network should also include an operator of justice. This is the peculiarity of RJ in a family violence context.

To summarize, RJ is incompatible with family violence, hence the emphasis on face-to-face processes and reconciliations between parties may not always be appropriate. By contrast, RJ is a community-based process in which the group does face at least two duties: to create a safety net for the victim; and to stimulate a discussion about the behaviour. This community framework becomes responsible for facilitating the appropriate solution to any harmful behaviour: not only is the attention drawn to ensure the safeguarding of the victim, but also the focus is on monitoring the offender's behaviour.

Based on the foregoing, it is worth stressing that RJ requires a discussion about the restorative city and the use of RJ in family violence is a good example. As RJ in a resolution of family violence alludes to the responsibility of the "group", the individual in a society is responsible for the impact on others. In other words, communities are responsible for the good of the whole and the latter also includes the well-being of each member. The interaction of any individual with any other individual affects those individuals and affects the collective impact and, at the very least, also the overall well-being of the collective. In this line of reasoning:

The mutual responsibility between individual and community at the core of restorative justice does not entail the suppression of individuality to serve the group, but entails attending the individual needs in a way which takes into account the impact on the collective and seeks to meet needs in a way that serves both, or at least balances the needs of the individual and the group (Pranis 2002).

Moreover, domestic violence is not merely a private matter, since it also involves a mutual responsibility and, at a minimum, it also represents a cost for both social services and medical care. Ultimately, it becomes

⁷ Also in this paragraph, it is important to highlight that the restorative process is not about decriminalization because often in family violence there is an imbalance of power. Nevertheless, this imbalance could be better managed via protection conferences than through a court. It is also clear that it is possible if there is also a protected social community or group.

crystal clear why RJ in family violence and restorative city are two sides of the same coins.

The concept of “restorative city” (Mannozi 2019) in a nutshell, is:

A big vision that has at its heart a long-term commitment to building a better future for the city and its people. The aim has been to generate a common restorative language through which all children and young people experience education, criminal justice, social services, and so on (Green & Ors 2013: 47).

Under the “restorative city”, RJ would unleash a triangle of relationships; the three corners of this triangle are the victim, the offender and the community (Cunneen & Hoyle 2010). An empirical case study was Hull city where, thanks to education, criminal justice, social services and social experiences, children and young people have resolved their own problems.⁸ More precisely, the objective was:

To build a highly positive school culture and an exceptional sense of community and helped its pupils develop the skills to feel respected, secure, happy and able to make the most of their lives (Mirsky 2009).

One more example is the Scotland experience of tackling hate crime.⁹ The recommendations of the Scottish Government were to “use the restorative justice methods with the victims and perpetrators of hate crime” (2016). In the following year, 2017, the Scottish Government launched its own guidance for the delivery of RJ in Scotland in which it specified the aim. In particular, the last goal was to

Ensure that, where restorative justice processes are available, these are delivered in a coherent, consistent, victim-focused manner across Scotland, and are in line with the EU Victims’ Rights Directive (Scottish Government 2017: para 1.1).

It is crucial, for the successful use of RJ, on the one hand, to implement an informational structure and, on the other, to remove social barriers. The purpose of this is to create a robust information-sharing agreement, as well as resources, training and gaining buy-ins. This new approach would engender alternative responses to the traditional forms of punishment of hate crime. A key, also important for RJ, is to ensure that participants feel represented by the communities to which they belong, hence the need for community involvement. Finally, it is essential to stress that RJ

⁸ This study in Hull was a Pilot Scheme run by the Youth Justice Board.

⁹ Although Scotland is considered one of the world’s friendliest countries, the most recent annual data published by the Crown Office and Procurator Fiscal Service (2020) showed that hate crime and prejudice in all their forms are “alive and kicking”. Additionally, this report demonstrated that there was an increase in the number of charges reported in 2019-2020 compared with 2018-2019 for all categories of hate crime.

is not “soft justice”: this is an elephantine mistake (Hamad & Cochrane 2020).

Additionally, RJ could lead to the creation of a restorative city and new forms of justice because the administration of justice is under strict control of the citizens themselves. However, this view of justice, in a purely orthodox interpretation, contrasts with the professional justice of lawyers (Braithwaite 2017). This sentence does not become the real aim of RJ, because RJ is not totally alternative to the criminal justice system but is a continuum. Not only is RJ after the “crime”,¹⁰ but it is also before it: social and criminal harms are both the cause and the consequences of a communication breakdown. This ultimately highlights that by the term “restorative city” we refer both to restorative practice and to RJ.¹¹ The first one provides the skills, the technique and format for building a relationship (Bankhead & Barry 2018). The second one repairs the relationship after the broken or damage.

A further development to RJ in the restorative city is the field of eco-crime. By this topic we mean a new subject, where the centre is not between intra-individual relations, but also inter-individual, where the victim is the environment. From this perspective, the “spokespersons” of the latter have not only become the aboriginal people and their heritage but also the environment itself. In some cases (*Urgenda v The Netherlands, Juliana v United States* 2015; *Future Generations v Ministry of the Environment* 2018), the court recognized as responsible the government and companies in order to extend greater protection of human rights and judiciary action for the climate.¹² According to this line of reasoning too, it was held that it is an obligation on the part of the state to take reasonable measures “to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources”. Consequently, the state was called for a “comprehensive clean-up of lands and rivers damaged by oil operations” (*Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria* 2002).

¹⁰ Not only does the crime break the law, but it also violates relationships: from the crime arises the obligation to make things right (Zehr 1990).

¹¹ The Council of Europe has defined RJ as a “any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the ‘facilitator’” (Recommendation on restorative justice in criminal matters, 2018, §3).

¹² See United Nations (UN) Framework Convention on Climate Change 1992. Article 1(1) requires duties of control pertaining to adverse effects on the: “Composition, resilience or productivity of natural and managed ecosystems”.

Thus, an environmental harm could be established, from a legal perspective, on the basis of two different criteria: both the sustainability mantra and human rights.¹³ The backdrop is the idea that humans and human activities are strictly integrated and connected within nature and the environment.¹⁴

[D] RESTORATIVE JUSTICE IN A RESTORATIVE CITY AND SMART JUSTICE IN A SMART CITY?

This article shows how city and justice or, better, society and RJ are two parallel “beings” that walk together. Such consideration is also corroborated by new developments in RJ, such that RJ may also be the “guarantor” of nature and ecosystems in an era where environmental and social governance is a mantra.

Moreover, it is the same concept of community that has evolved in the practice of RJ. Initially, the early models included only victim and offender and the mediator was represented by the community. Yet, the evolution of RJ has seen, first, the introduction of family support and, thereafter, there are different shaped models, for example conferencing and circle models, where we can see a third party who is a facilitator. The latter is expected to facilitate the understanding of this “process”. Finally, these other models—circle and conferencing—are based on programmes to provide social work services for individual victims, offenders and their families. In these, the facilitator role is limited to determine who should participate. Consequently, this facilitator will prepare the parties to ensure that they partake in both participation and organization of the restorative process (McCold 1999).

Thus, the burning question is concerned with the evolution of this particular form of justice in a technological city. If RJ brings to mind a restorative city, the question is whether a smart city assumes a smart

¹³ Principle 1 of the Stockholm Declaration 1972 states that: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” Additionally, the UNHRC (2012) has emphasized that there is also an existing human right, a “green” right: namely “human rights vulnerable to environmental harm”.

¹⁴ The reference is to the word “*milieu*”: the image of nature is shaped by humans who, in return, determine their own collective and individual subjectivity through such shaping activity. In other words, *milieu* designates a physical and sensorial action between human and non-human beings, such as natural resources or nature in general. Additionally, *milieu* also refers to the development of human personhood into a specific venue. See Hall (2013); Droz (2022).

justice. In this regard, the reference is to robotic justice, or robo-judge, and its implications in conflict resolution.¹⁵

First and foremost, it is important to highlight that often in literature the binomial smart-city and justice refers to social dividing as a result of the development of information technology (IT) in a city (Rosol & Blue 2022). By contrast, in this article, justice in a smart city is a judicial process with an alternative approach, such as RJ. In other words, the main issue is so-called e-justice—or e-RJ.

Inherent to e-justice is a digital approach to all the public services related to justice: for example, this could encompass an app for a lawyer thanks to which the latter would be in touch via smartphone with tribunals. This app is not utopia, since it already exists in two forms in the real world: namely, COLLEGA (in English “colleague”)¹⁶ and ANTHEA.¹⁷ The first is used to find a domiciliary, a substitute for a hearing, or a colleague who can carry out any type of administrative activity in one of the Italian judicial offices. The second one provides tools to divorced couples for managing affairs related to the new family status and the handling of children in cases of parental conflict. Also, with ANTHEA the parties in the divorce proceedings have a specific chat with restricted and regulated access that checks that communications are based on civil and appropriate language. The use of this app must be approved by the judge in charge of the case after studying the dispute.

It is clear that ANTHEA acts as a mediator in a specific controversy and the human judge stays in the background. Additionally, the court may also use this app if a protocol (ie an ANTHEA protocol) has been drafted in its region (Lupo & Carnevali 2022).

Another example is the “smart-court” in China to promote the modernization of China’s trials including the procedural system and the actual participation of the parties before the court (Zu 2019). All of this is based on an online mechanism in order to conduct the dispute resolution process in a transparent environment.¹⁸ The central point seems to be an enhancement of transparency, fairness and efficient and people-centric justice.

¹⁵ From a critical perspective, see Mackinnon & Ors 2022.

¹⁶ See the COLLEGA [official website](#).

¹⁷ See the ANTHEA [official website](#).

¹⁸ Supreme People’s Court, “Opinions on Accelerating the Building of Smart Courts” (Judicial Document, 12 April 2017) No 12.

Since 2017, also in China, there has been an e-justice process of information and judgment online: there is an IT platform that supports this service and collects the data of all the different participants (Shi & Ors 2021).

However, in the Western world, the UK was the first country, in 2018, to hold a video-trial in the tax tribunal: the appellants and representatives from the tax office attended remotely from their home or office (Acland-Hood 2018).

Since RJ is closely connected to community and its changing systems, this IT development could have an impact also on the “new” community. The standpoint is that in the some countries, such as China and Japan, in a restaurant the waitress may not be human but synthetic. Additionally, in most sectors, such as transportation or urban mobility, scholars are beginning to discuss the status of “remote operators” or liability of autonomous systems.¹⁹

As a result of this, potentially, in the near future, controversy may also arise from human and synthetic beings with regards to liability and, consequently, damages. For this reason, RJ could also change its own skin and reflect the new society. Although most scholars (Giuffrida 2019; Wendehorst 2020) say that liability lies with both manufacturer and operator, it also possible that, in future years, robotic beings will be liable. In other words, if an AI system has personhood (Allain 2013), a synthetic being would also be expected to be liable for damages (Select Committee on Artificial Intelligence 2018). In this case, AI becomes an independent “person” under the law, with rights and duties (Sullivan & Schweikart 2019).

To conclude, RJ too may change, and in a future world, seemingly, we could see human and synthetic beings that have meetings to resolve a legal conflict. This will be the most significant sign of an interaction, without discriminatory biases, between two different and opposite “worlds”.

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¹⁹ To summarize, the question is: “It is the year 2023, and for the first time, a self-driving car navigating city streets strikes and kills a pedestrian. A lawsuit is sure to follow. But exactly which laws will apply? No-one knows” (Kingston 2016).

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ARISTOTLE, CONTRACT LAW, AND JUSTICE IN TRANSACTIONS

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Abstract

This article sheds new light on Aristotle’s conception of voluntary corrective justice through an engagement with Peter Benson’s theory of transactional justice as expounded in his new work, *Justice in Transactions: A Theory of Contract Law*. Benson relates his theory of transactional justice to Aristotle’s conception of voluntary corrective justice. He also states that his theory “engages some fundamental themes and outstanding questions arising from Aristotle’s account” (2019: 30). The article provides a faithful reading of the nature and working logic of voluntary corrective justice as envisaged by Aristotle to argue that Benson neither thematizes the link between his theory and Aristotle’s conception of voluntary corrective justice, nor sheds new light on Aristotle’s thought on justice more generally. In fact, the article shows, Benson’s views on justice are incompatible with Aristotle’s. This is unfortunate, the article concludes, for Benson’s contract law theory is otherwise fascinating and analytically coherent.

Keywords: contract law; transactional justice; Aristotle; corrective justice; Peter Benson.

[A] INTRODUCTION

As is well-known, Aristotle’s analytical works (those comprising the collection known as *Organon*) have exerted a profound influence on Western jurisprudence, particularly in relation to epistemological discourses on the study and practice of law (Errera 2007). Equally significant for Western jurisprudential consciousness and thinking are Aristotle’s views on justice. Nonetheless, as George Duke (2019: 2) has recently pointed out, there has been a “partial neglect of Aristotle’s thought on *nomos* in recent Anglo-American literature”. Duke is right: save for

* I thank David Campbell for constructive comments on an earlier draft. Errors are mine only.

some specialist accounts (such as James Gordley's, Ernest Weinrib's and Nicholas J McBride's), the general sentiment in Anglophone legal scholarship has been that, as Donald R Kelley had put it as early as 1990, "[b]eyond [some influential] terminological prescriptions concerning [n]omos, Aristotle had little to say about law" (1990: 26, emphasis added).

Duke is also correct in holding that an examination of Aristotle's understanding of, and approach to, law is made difficult by the fact that Aristotle "[did] not propound a systematic legal theory in the modern sense" (2019: 1, see also 16)—or what we, modern subjects, would call "a science of jurisprudence" (ibid 1; see also Talamanca 2020: 47). This is somehow puzzling if one considers that Aristotle's was "probably the most comprehensive system of thought ever devised" (Stalley 2009: vii).

Given the limited amount of specialist scholarship on Aristotle's conception of justice in Anglophone legal literature, Peter Benson's attempt at framing, in his new monograph *Justice in Transactions: A Theory of Contract Law*, a theory of contract law inspired by Aristotle's thought on justice ought to be warmly welcomed. *Justice in Transactions* has been acclaimed as "magisterial" (Bix 2020: 363); "an outstanding work of scholarship" (Campbell 2020: 282); and "one of the most important contemporary contributions to the understanding and justification of the law of contracts" (Nadler 2022: 9). More enthusiastically still, it has been said that "if one seeks a detailed, systematic, deeply elaborated account of the common law of contract from a liberal theoretical perspective, *Justice in Transactions* has no rival" (Sage 2021: 922). It is hard to disagree with these comments: insofar as one considers the theory it sets forth in its own terms, *Justice in Transactions* is indeed a major contribution to contract law both as an academic discipline and professional practice.

Unfortunately, though, commentators of *Justice in Transactions* have overlooked an important detail—namely, that, right from the start of his analysis, Benson relates his theory of transactional justice to Aristotle's conception of voluntary corrective justice. In doing so, Benson also states that his theory "engages some fundamental themes and outstanding questions arising from Aristotle's account and subsequent theorizing about justice in transactions as a whole" (2019: 30). As this pivotal passage has gone unnoticed in the appraisals of *Justice in Transactions*, it is yet to be determined whether the contract law theory Benson sets forth is in fact compatible with Aristotle's thought on justice, as well as whether it sheds new light on it as it promises to do. Accordingly, this article specifically focuses on the link Benson draws between his theory and Aristotle's views on justice. Shedding new light on the nature and

working logic of voluntary corrective justice as envisaged by Aristotle, it argues that insightful though his account of contract law is, Benson neither thematizes the link between his theory and Aristotle's, nor engages Aristotle's philosophy of justice more generally. In fact, the article shows, pursuant to his aim to craft a contract law theory suitable to present-day regulatory and market dynamics, Benson's views on justice turn out to be incompatible with Aristotle's.

The article proceeds as follows. It first outlines the main tenets of Benson's contract law theory (Section B). It then expounds Aristotle's account of justice, situating it within its proper political-ethical context (Section C). Having set the level of discussion, it moves on to juxtaposing Benson's and Aristotle's conceptions of justice, showing why and how they differ (Section D). Concluding remarks follow.

[B] BENSON'S THEORY OF CONTRACT LAW

Benson's main aim is twofold: first, to develop "a public basis of justification" (2019: xii, 3, 12, 25, 29, 319, 395) for contract law; secondly, and relatedly, to move beyond promissory and economic theories of contract which, on his view, are unable to provide the "distinct normative conception" (ibid 3) informing the law of contract. The first aim takes its inspiration from John Rawls' political philosophy (ibid xii, 3). Specifically, it draws from Rawls' liberal "ideas of public justification and the reasonable" (ibid 11) and revises them so that they can be employed as normative referents "for transactional relations" (ibid, see also ch 11). Animated by this Rawlsian spirit, what makes Benson's justification of contract law *public* is the fact that it is grounded on "terms and reasoning ... [that] are open to view as well as common, available, and reasonably acceptable to parties generally" (ibid 13). More particularly, "[t]he justification is ... public only inasmuch as it is something that *all* parties can reasonably and identically be expected to share" (ibid, original emphasis). Thus understood, the terms and reasoning that make up the law of contract ought to be subjected to the professional scrutiny of those who are tasked with "the interpretation, assessment, and application of the ... considerations" (ibid) which compose it. As Benson observes, in Common law jurisdictions,¹ it is courts "performing [their] adjudicative function" (ibid) that are tasked with these activities. This, however, should not lead one to assume that the theory Benson envisages cannot be made to work

¹ Benson uses small "c" when referring to the Common law as a legal tradition. For my own part, I prefer using capital "C". "Common law" and "common law" are two different things: the former is a legal tradition; the latter is a part of the law of it which includes elements of both case law and customary law.

for “other modern systems of contract law” (ibid 29) as well, such as those “belonging to the civilian tradition” (ibid). Indeed, due to its drawing from a series of notions and values which define modern liberal political economies, Benson’s theory is, to an extent, well-suited for Civil law systems as well.

Regarding the second, and related, aim, it ought to be noted that the peculiar normative conception of contract law Benson sets forth is crafted from within the law of contract itself: “[it] is drawn from its principles and doctrines ... [it] constitutes their organizing idea, underpinning and explaining the whole of contract law as well as its various parts” (2019: 3). In short, Benson’s contract law theory aims to be analytically self-sufficient and internally coherent (ibid 395).

In setting out these two interrelated aims, Benson further specifies that his conception of contract law “embod[ies] a distinct conception of justice: justice in transactions” (2019: 30). The main point here is that, on Benson’s account, combining law and justice is a necessary step for a theory of contract law to be “morally acceptable” (ibid ix, ch 11). Referring to the *Nicomachean Ethics*, 1131^a–1133^b, Benson notes that the notion of “justice in transactions” was first theorized by Aristotle, who referred to it as “corrective justice” (ibid 30). He further specifies that justice in transactions divides into “voluntary and nonvoluntary” justice (ibid).

Crucially for our discussion, Benson not only hinges his contract law theory on Aristotle’s conception of *voluntary* corrective justice; he also claims that his theory “engages some fundamental themes and outstanding questions arising from Aristotle’s account and subsequent theorizing about justice in transactions as a whole” (2019: 30). As I shall argue in Section D, to the extent that Benson aims at fashioning a contract law theory “that is independent and complete in its own framework” (ibid 19, see also 28, ch 12), he can be said to have achieved his objective: his theory is indeed “intelligible in its own terms” (ibid 29). However, to the extent that Benson aims to relate his conception of transactional justice to Aristotle’s account of voluntary corrective justice and shed new light on Aristotle’s philosophy of justice more broadly, it regrettably misses the mark. For now, though, let us set out the theory’s basic thrust.

From the very outset of his analysis, Benson makes it clear that his conception of contract law is “latent in the main contract doctrines and principles” (2019: 9, see also 29, 320, 475) that make up this branch of law. Accordingly, *Justice in Transactions* embarks upon an intellectually rich and compelling journey through the whole of the contract law dimension, from contract formation to remedies, “to illuminate the internal rationality

of contract law” (ibid 5). Divided into two parts, one exploring various contract law principles and doctrines, the other substantiating the proposed theory in detail to demonstrate its “intrinsic reasonableness” (ibid 319), the book is testament to Benson’s profound knowledge of the law of contract and scholarly acuteness. It not only features a great variety of examples and insights regarding “the principles, standards, and values of contract law” (ibid 19); it also meticulously engages with a wealth of established legislative, judicial and scholarly views on the subject.

Of particular interest is Benson’s framing of contract as “transfer of ownership” (2019: 21). The latter is a central notion in Benson’s account. It recurs throughout the book and is discussed in detail in the first chapter opening the second part (ie ch 10). By it, Benson means that, juridically, contracts are “an interaction ... of representational acts” (ibid 320) by which “each party reciprocally and identically mov[es] a substantive content from its side to the other” (ibid 321). Thus, in and through this mutual (ie relational) interaction, of which the parties’ promises are the main propellant, “each side objectively recognized the other’s exercise of exclusive rightful control over what he or she either gives up or takes” (ibid, see also 386).

While, at first glance, this seems all rather straightforward, the following points are worth emphasizing. First, Benson’s conceptualization of contracts as instances of “transactional and ... representational acquisition [of ownership]” (2019: 25) is entirely dependent upon, and thus revolves around, the notion of consideration. This Benson states clearly in several key passages of *Justice in Transactions*. Thus, and by way of example, we read that “[the] promise-for-consideration relation is the basic contractual relation” (ibid 22). Accordingly, all “other [contract law] doctrines and principles” (ibid) are conceived as “fill[ing] out and specify[ing] its essential aspects and effects” (ibid). Not coincidentally, consideration is discussed in the book’s very first chapter (where Benson holds that it “provid[es] the basic and general framework for the contractual relation as such”: ibid 40), and then again in the chapter opening the second and last part of the book (ch 10), where the conceptualization of “contract as representational transfer of ownership” is fully thematized. On this point, Benson’s reading of the (Common) law of contract’s dependency on the bargaining logic of consideration is in line with earlier accounts emphasizing the pivotal role played by the “consideration-offer-acceptance” “indivisible trinity” (Hamson 1938: 234) in contract law theory (critically, see Siliquini-Cinelli 2017).

Secondly, categorizing contracts as platforms for the transfer of ownership requires one to clarify what is meant by “transfer” and “ownership”. Regarding the former notion, Benson specifies that, insofar as they are “transactional” (2019: 327), contracts are “derivative” (ibid) forms of acquisition. Among other things, this means that a juridical precondition for any transaction is that the object being transferred must already be under the parties’ “exclusive rightful control” (ibid 329, see also 349ff). Regarding the interrogative as to what can be transferred by means of contractual arrangements, Benson states that the answer can only be reached by reflecting on “the kind of ownership interest that is immanent, though not always explicitly operative, in all forms of derivative acquisition: a purely transactional ownership interest” (ibid 339). Accordingly, the object of a contract “may consist of goods, services, opportunities, liberties or currency” (ibid 431). The fact that the object of a contract can be any of these things is due to the role played by consideration in contractual settings: insofar as consideration is conceived and employed “abstractly” (ibid), “anything determinate” (ibid, see also 323) can be exchanged.

This leads me to another salient tract of Benson’s contract law theory—namely, its liberal character, which informs and shapes its moral foundations and implications. Benson discusses the moral–political aspects of his theory in the last two chapters of *Justice in Transactions*. The whole analysis takes over a hundred pages, excluding endnotes. It is simply impossible to set it out in its entirety in the remainder of this section. I shall therefore limit myself to pointing out what I believe to be its main elements.

Firstly, Benson grounds the moral justification for his contract law theory on two key individualistic principles, which he categorizes as “moral powers”. These are:

[A] moral capacity [for the contracting parties] to assert their sheer independence from their needs, preferences, purposes, and even their circumstances; and, second, a moral capacity to recognize and to respect fair terms of interaction that treat everyone as independent in the specific sense supposed by the first moral power (2019: 369).

The first is “a *negative* moral power” (Benson 2019: 370, original emphasis). That is, it situates both parties within an ideal contractual framework where they can act as individuals free from any constraints. It is precisely this understanding of the parties’ juridical positioning and contractual “potentiality” (ibid 371) that enables Benson to release his theory from any extra-juridical elements: as he writes, the public justification for contract law he envisages is freed from any “moral, aesthetic, religious,

or philosophical ideas about which transactors, as members of a liberal society, cannot reasonably be expected to agree” (ibid 14; see also 366, 474–547). The parties’ reciprocal respect for this, we may say, *ontological* condition expressing “the normative significance and implications of our independence” (ibid 371) constitutes the other half of contracts’ moral basis. Thus understood, the parties’ “juridical autonomy” (ibid 373, 394) expresses itself most completely in the notion of “private ownership” (ibid 26, 325, 362, 363) which, not coincidentally, and as just seen, lies at the centre of Benson’s theory (see also ibid 390).

The latter argument is taken up again in chapter 12, where the “stability” of contractual encounters *qua* transfers of ownership is made dependent upon the compatibility between the proposed juridical conception and “other domains” (Benson 2019: 396) beyond the juridical sphere, such as “market relations” (ibid). The whole of Benson’s analysis in this chapter, counting over eighty pages, is geared towards supporting this central claim. In a nutshell, while not dismissing the relevance of economic considerations for the correct appraisal of what contracts and contract law are for, Benson moulds his theory in such a way that it provides contracts with an “institutional role” (ibid 426) that ultimately takes precedence over an economic understanding of transactional encounters. According to Benson, it is *only* for the law of contract “to make explicit and to establish in its proper form the norms that are identically and reciprocally willed by individuals as such transactors in [the present-day] system of exchanges” (ibid). Thus, what readers are presented with is a hierarchy of institutions, so to speak, with (contract) law featuring at the apex, and economics (ie market dynamics) placed under it (see eg ibid 417, as well as 445, where Benson states that “legal institutions fix and guarantee the market’s normative, noneconomic *presuppositions* ... [its] *necessary conditions*”; emphasis added).²

Among the other elements comprising the moral basis of Benson’s contractual analysis, worth mentioning for the purposes of this article is the Kantian one. Benson draws from Immanuel Kant to provide his theory with the other-regarding connotation a too individualistic approach to contractual relations would lack. The Kantian ingredient of Benson’s theory comprises two duties humans owe one another: “a general noncoercible duty of beneficence” (2019: 404) and a duty to “respect” others as “free and equal” (see eg ibid 394, 466, 471, 476) members of a liberal–democratic society. The former duty is open-ended. It requires one to “promote the happiness of others” (ibid 405) in the sense that we

² Cf Irti (2011: 75); Campbell (2020).

shall do good to others “not primarily on the basis of one’s own notions of happiness, but by appropriately taking into account *their* own” (ibid, original emphasis). On this operational logic of (ethical) responsibility, an individual makes as her own the “interests and ends” (ibid) of another one. The latter duty brings to fulfilment, and thus is both theoretically and practically indiscernible from, the first one. It is a “duty of fidelity” (ibid 407) prescribing “[n]ot only [that] the promisor take[s] as his end the doing of something that is in some sense subjectively wanted by the promisee” but also, that:

[T]he promisor ... make[s] explicitly or implicitly clear to the promisee that this is what the promisor proposes to fulfill and must do so in such a way that the promisee can in turn incorporate the promisor’s adoption of this end as an ingredient in *her*—the promisee’s—own thoughts, feelings, and plans. (2019: 407, original emphasis)

The combination of these two moral elements, both of which presuppose the categorization of individuals as “responsible agents” (Benson 2019: 370), leads to what Benson identifies as “a liberalism of freedom” (ibid 468ff)—a pivotal notion in his theory of contract to which I shall return below (Section D).

Finally, for contracts as derivate, transactional modes of ownership acquisition to operate stably, a juridical correlation with the distributive type of justice is required. For, according to Benson, there cannot be justice in transactions, which are “nondistributive in character” (2019: 448), without a solid correlation with the other, distributive type of justice. Benson’s attempt at correlating the two forms of justice sets his contractual analysis within a coherent, closed analytical system of legitimation. The discussion Benson embarks upon to support his claim is, arguably, the most intellectually compelling of the whole book. For not only does Benson return to his earlier reflections on the structural relationship between the economic and legal dimensions contract law embodies; he also holds that, for this relationship to work, “transactional principles” (ibid 456) ought to take juridical precedence over distributive ones. This I gather from such Rawlsian (ibid 456) statements as those according to which distributive principles “only *indirectly* constrain individual transactions” (ibid, emphasis added) and “ought to accommodate fully ... the principles of transactions” (ibid 457). Ultimately, it is the law of contract that “accepts or, better, takes into account the norms of distributive justice” (ibid 466, see also 465)—not the other way around. In so arguing, Benson offers valuable insights on “the important and challenging issue” (ibid 462) of the interaction between fundamental rights (or “basic liberties”: ibid 465)

and contractual rights (for a comparative analysis, see Siliquini-Cinelli & Hutchison 2017; 2019).

[C] ARISTOTLE'S PHILOSOPHY OF JUSTICE

Aristotle's thought on justice is notoriously intricate. This is due to its structural embeddedness with the philosopher's other fields of expertise, such as ethics and political theory. On top of this, one must add that some important works where Aristotle expounded his views on the theme, such as the dialogue *On Justice*, are lost. It comes therefore as no surprise that Aristotle's take on justice has been a source of scholarly curiosity and controversy since the first century BC, when the so-called Aristotelian tradition took root (Falcon 2017). A journal article cannot possibly offer a comprehensive overview of the topic. Accordingly, this section outlines those elements of Aristotle's conception of justice which pertain to my argument only. As stated earlier, my argument is that despite claiming to do so, Benson neither thematizes the link between his theory and Aristotle's, nor sheds new light on the latter more generally. To show why that is the case, what follows sets out those aspects of Aristotle's views on justice which relate to Benson's contract law theory, further integrating them with some additional considerations.

Owing to his thought's extraordinary systematicity, Aristotle's conception of justice is inextricably linked to his conception of law. Thus, any consideration of the former requires engaging with the latter. As reported by Duke (2019: 10), Aristotle defines law (*nomos*) as "rational speech (*logos*) derived from practical wisdom (*phrónēsis*) and intellect (*nous*)" (cf *Nicomachean Ethics*, 1180^a21–23). Law is, therefore, a practical activity which combines the particularity and purposiveness of practical wisdom and the intellectual, universal capacities which *nous* embodies. Stated otherwise, *qua* "practical disposition" (ibid 55) towards concrete objectives, law blends together the plane of the particular (*phrónēsis*) and that of the universal (*nous*).

Now, while Aristotle is rather clear about what practical wisdom is and entails, he is, as is commonly remarked, rather cryptic as to what *nous* amounts to. Yet *nous* (also referred to as "noetic knowledge") is a crucial notion within Aristotle's philosophy. Leaving all epistemological debates aside, here it suffices to notice the following:

- (i) noetic knowledge is one of the five intellectual virtues through which the mind achieves truth (*Nicomachean Ethics*, 1139^b15–18; the other intellectual virtues are: *tékhnē* (art, skills), *epistēmē* (scientific knowledge), *phrónēsis*, and *sophía* (theoretical wisdom));

- (ii) it is a cognitive state; specifically, it “is the state we are in when we know first principles, not the faculty by which we get to know them” (Bronstein 2016: 229; cf *Nicomachean Ethics*, 1141^a5–7);
- (iii) when combined with scientific knowledge (*epistēmē*), it is theoretical wisdom (*sophía*) (*Nicomachean Ethics*, 1141^a19–20, 1141^b3);
- (iv) it is “human intelligence at its most fundamental level of operation”: Groarke (nd sect 13); it is “the activity of reason itself” (ibid);
- (v) it originates in perception (*Post Anal*, II 99^b35; *Nicomachean Ethics*, 1098^b1–4; cf Colli 1969: 216), “our lowliest cognitive ability” (Bronstein 2016: 237, see also 8–10, 78–80);
- (vi) however, and finally, it ought not be confused with *phrónēsis*, “which is concerned with action” (*Nicomachean Ethics*, 1141^b21), and deals with *both* universals and particulars (*Nicomachean Ethics*, 1141^b7ff, 1142^a14, 1143^a34), requires experience (*Nicomachean Ethics*, 1142^a15) and originates in a different type of perception, ie “not the perception of qualities peculiar to the [special sense that *nous* is], but that by which we get that the figure before us is a triangle” (*Nicomachean Ethics*, 1142^a28).

It is by virtue of their effective combination of practical wisdom (the plane of particulars) and noetic knowledge (the plane of universals) that legislators *qua* founders of the constitutional order (a category not to be confused with that of the “mere’ law-makers”: Duke 2019: 44) can act as good political rulers. In this sense, Duke correctly refers to the constitutional founder’s “rational activity” (ibid 22, see also 29, 146–148) as being “practically wise” (ibid 49, see also 14), further categorizing the constitutional founder’s “legislative expertise” (ibid 23, “*nomothetikē*” in Greek, 49) as being “charged with establishing laws which serve as rational guides to conduct in the realm of practical affairs” (ibid). More particularly, *qua* specific type of “*politikē technē*” (ibid 8, 41, 48–54, 63, 81), the law-giver’s expertise operates

[B]y deriving from a grasp of particulars universal proportions which serve the end of both individual and communal flourishing. The principal exercise of *nous* engaged in law-making—understood as a branch of political expertise—is thus best interpreted as involving an ascent from a grasp of particulars to universal legal propositions, which in turn govern particular actions (Duke 2019: 23, see also 9–10, 51, 59, 67, 111).

Thus understood, law plays a crucial role towards the establishment of a virtuous life (*eudaimonia*: Duke 2019: 4, 31, 35, 49, 54–62, chs 3–4, 126–127, 154). It is here, in the space opened up by the ontological blending of the particular and the universal that law’s purposiveness demands, that

justice enters the scene of Aristotle's political-ethical philosophy. For, as just seen, law exerts a political function with clear ethical implications. Not coincidentally, Aristotle expounded his views on law and justice in his *political* and *ethical* works. It is indeed by living in accordance with law's precepts—that is, in accordance with the law-giver's wise elaborations—that the *polis* as a community can prosper virtuously and, therefore, *justly* (see eg *Nicomachean Ethics*, 1129^b12-15). To the extent that the *polis* is “a unity of order” (Duke 2019: 88, 97, 101, 105-108), justice is, and cannot but be, a *political* objective: justice, Duke writes commenting on the *Politics* 1279^a18 and 1282^b17-18, *Eudemian Ethics* 1241^b13-15, and *Nicomachean Ethics* 1129^a7-9, 1134^a30, and 1134^b8-15, is a “political good” (ibid 85, 97) which takes the form of “existing in accordance with law” (ibid 97; see also Cambiano 2016: 100, ch 9). Law's “constitutive aim” is, indeed, “the flourishing of the community as a whole” (Duke 2019: 97).

Aristotle's famous distinction between distributive and corrective justice ought to be inscribed within this communitarian political-ethical ideal. Not doing so may lead one to think that the latter type of justice (the corrective type) operates exclusively or for the most part for the sake of individualist, or self-referential, interests. In fact, this is a rather common conception in private law scholarship employing Aristotle's thought. Yet this understanding owes more to a modern reading (with the due caution, one could say *liberal*: cf Duke 2019: 3) of Aristotle's views than to a faithful appraisal of his views on justice. To Aristotle, “[j]ustice is the communal virtue (*koinōnikēn aretēn*) ... of those who freely share in a political life” (ibid 101, commenting on *Politics*, 1283^a38-39). Accordingly, rather than being solely concerned with the correction of a *private* wrong as such (think of a breach of contract causing a loss), corrective justice's “primary object ... is a correct allocation of benefits and burdens, considered as an external distribution of a ‘right’” (ibid 100). In short, rather than denoting “a ‘claim-right’ considered as a subjective entitlement of an individual” (ibid), corrective justice is an exercise in the “fair allocation of the benefits and harms that arise in transactions” (ibid 101). Consequently, “[p]olitical justice”, including its corrective type, “is irreducible to private interactions of individuals” (ibid 102).³

At this point, the reader might object, with good reason, that Aristotle's philosophy of justice is prone to more than one interpretation. Were it otherwise, it would not (still) be the subject of intense academic debate. Thus, in a recent, compelling study, which is not mentioned by Benson

³ Borrowing from Dante, who followed Aristotle, we could say that the essence of political justice is to aim at the “*bonum commune*”, or “common good” (*Monarchia*: II.V.2; see also *Purgatory*: XVI).

and to which we shall return below, Alain Supiot has argued, following François Ewald and Clarisse Herrenschildt, that, rather than presenting two models of justice (distributive and corrective), Aristotle had in fact set forth three—namely, distributive, corrective and reciprocal justice. Quoting the *Nicomachean Ethics* V.5, where reciprocal justice is said to figure in “associations for exchange” and “sustain the community”, Supiot holds that:

This type of justice—which prefigures our social justice—is ... indispensable to exchange, which alone holds humans together, and it requires agreement on a standard which all citizens will respect when they exchange the fruits of their labour (2019: 76).

Supiot also refers to reciprocal justice as “[t]he justice of transactions” (2019: 77). In so doing, he employs the same exact terminology employed by Benson in relation to corrective justice. Inevitably, this leaves one wondering whether transactional justice as envisaged by Benson is corrective, reciprocal, both, or neither. Furthermore, the scholarly disagreement over how many types of justice Aristotle had conceived of is testament to how problematic a jurisprudential contextualization of his philosophy of justice can be. As an indication of the impervious challenges scholars face when embarking upon this task, consider that, while endorsing Aristotle’s account of human flourishing (McBride 2020: 54), McBride has suggested that “it would be best if no one involved in trying to explain private law used the phrase ‘corrective justice’ ever again” (2018: 36). McBride has affirmed thus after expounding the limits of yet another variant of Aristotelian corrective justice—Weinrib’s Kantian model, which he finds misleading. However, as said earlier, given Aristotle’s legacy within the Western tradition, the scholarly variety and disagreement over what his philosophy of justice amounts to should prompt one to (try to) understand it in its own terms, rather than dismissing it altogether.

[D] SOME REFLECTIONS

Are Contract Law and Contracts Really Just?

What is law, what is justice, whether they are one and the same, similar, or different are some of Western jurisprudence’s primary concerns. Consequently, Benson’s claim that there is justice in contractual transactions—the claim, that is, that the way contracts are conceived and dealt with by the branch of law regulating them is just—ought not be taken lightly. In fact, it calls for serious scrutiny. More particularly, given the general lack of engagement with Aristotle’s thought in Anglophone

legal literature, it is Benson's direct reference to Aristotle that mandates close analysis.

Now, employing Aristotle to argue for the justness of the law of contract implies the acceptance, if not the endorsement, of two views. First, that our present-day condition can be satisfactorily filtered and explained through the thought of an individual—Aristotle—who lived more than two millennia ago under socio-political and economic circumstances that in some significant respects were substantially different from those informing our society. In this sense, the sole fact that Aristotle has been playing a major—if not defining—role in the Western tradition in several fields (from biology to political theory, from metaphysics to ethics) should not lead one to uncritically assume that his views on justice can shed meaningful light on present-day contract law's nature, aims, benefits and operations. Put another way, we should refrain from reading and employing Aristotle's work through contemporary lenses for purposes without, at least, having tried to understand it in his own terms (Duke 2019: 3ff, 11ff, 26ff, 45, 93, 114, 157).⁴

The second, more general, theoretical premise on which an Aristotelian, justice-oriented conceptualization of contract law rests is that contract law is in effect capable of achieving justice. While this is anything but self-evident, one can be excused for thinking otherwise given how ingrained the equation of law with justice is in our jurisprudential consciousness.⁵ Not incidentally, as Émile Benveniste observed in his *Dictionary of Indo-European Concepts and Society*, “[i]t is necessary for law to [be] identified ... with what is just” (2016: 412). The widespread judicial use, in the United Kingdom, of the “fair, just, and reasonable” construct is a clear case in point.⁶ If a judicial decision is law, and if what is set out in the decision is “fair, just, and reasonable”, then one has a valid reason to think that law can indeed be just—and thus, that law and justice can

⁴ Relatedly and somehow more drastically, one could question our ability to learn from the ancient world in the first place, as Friedrich Nietzsche did: see Esposito (2016: 35).

⁵ Dig: 1.1.1Pr. Earlier jurisprudential examples could also be given: see Barmash (2020). Granted, there have been numerous instances in Western jurisprudence where justice and law have been *analytically* (in more philosophical terms, one could say *ontologically*) kept apart; see eg Kelsen 1967: 49.

⁶ “Fair”, “just” and “reasonable” are three prominent and related terms in English private law. In case law, see eg *Price v Strange* [1978] 1 Ch 337; *Caparo Industries plc v Dickman* [1990] UKHL 2; *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211; *Islington London Borough Council v University College London Hospital NHS Trust* [2005] EWCA 596; *Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28; *Mitchell (AP) and Another (Original Respondents and Cross-appellants) v Glasgow City Council (Original Appellants and Cross-respondents)* [2009] UKHL 11; *Vernon Knight Associates v Cornwall County Council* [2013] EWCA Civ 950; *Various Claimants v Catholic Child Welfare Society and Others* [2013] UKSC 56; *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736. With respect to statutory law, cf s 11(1) Unfair Contract Terms Act 1977.

in fact be one and the same (at least in relation to the dispute which the ruling purports to settle). Yet, there are two reasons to be wary of uncritically assuming that law and justice can be one and the same. First, as history teaches us, the mere fact that a legal authority, however legitimate, affirms that what it proclaims is just does not, *per se*, mean that which is being proclaimed really is just.⁷

The second reason to be cautious about presuming that contract law is in effect capable of achieving (or even, that it does achieve) justice has to do with the very role that both this branch of law and contracts have come to play in market societies. In the above-mentioned study, Supiot has placed the contract at the centre of today's global, profit-driven logic of trade. According to Supiot, globalization's aspiration to establish "the total market" (2017: 5) turns law's regulatory enterprise into a "[g]overnance by numbers [which] ... submits [laws'] contents to a calculation of utility designed to serve 'economic harmonies' which reputedly ensure the smooth function of human societies" (ibid 67). On Supiot's reading, the contract is the socio-political paradigm of law's ontological transformation into a utility-driven device. For while law's ideal "referent is ... justice" (ibid 1; see also Supiot 2007: xvii-xviii), the contract's referent is the harmonious (ie chaos-avoiding and cost-attentive) maximization of utility. By blending together empirical research and theoretical analysis, Supiot shows that the pre-eminence of the contract *qua* operational mechanism for the unlimited (ie capitalist and neoliberal) pursuit of wealth (2017: 105, 121, 182, 209, 215; see also 2007: x-xii, 155) is a socio-political phenomenon of the first order linked to both the weakening of the state as the main institutional actor of our time (2017: 3, 7ff, Ch 10; 2007, 100ff, Ch 5) and the related qualitative shift of law's regulatory prerogatives. We have reached a point where "laws themselves become the object of calculation, treated as legislative products competing on a global market of norms" (2017: 9-10, and see also chs 6-10; and 2007). This dire process of normative quantification reveals that, rather than seeking justice or fostering "free and fair transactions" as Benson claims (2019: 462; see also 316, 368, 372, 390, 393-395, 465, 476), "the law of contract ... [is] an instrument of subjection" (Supiot 2007: 104).

Supiot's contentions are in line with other recent accounts, such as that of Katharina Pistor. In *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), published in the same year as Benson's *Justice in Transactions*, Pistor presents contract law as the normative framework through which capital thrives. Rather than representing an obstacle

⁷ More philosophically, we could say that not always, in law, *Dikē* brings to the fore *Thémis*: see Cacciari (2019).

to capitalism's expansionist logic of accumulation, law in general and contract law in particular are the very mediums through which capitalist instances, practices and interests are fulfilled and reinforced (ch 9). Understood in these terms, the law of contract is capital's "legal code"—an indispensable tool for the maximization of utility and commodification of our socio-political existence (see also Zuboff 2019: 47ff, 64ff, 217ff). Of peculiar interest for our purposes is not only that there is little, if any, justice in the picture Pistor portrays; but also, that Pistor identifies in the Anglo-American law of contract—specifically, English and New York contract law (2019: ch 6)—the two regulatory paradigms of this socio-legal phenomenon. Yet, Anglo-American contract law is also the subject of Benson's theory of justice. If one combines Supiot's, Pistor's and Zuboff's accounts with Benson's, one cannot but wonder whether there is in fact justice in contractual transactions and, if so, whether the type of justice contract law embodies can be traced back to Aristotle as Benson affirms. To this interrogative I shall now turn.

Back to Aristotle

As the view that contract law is just is contested in legal literature, Benson's argument regarding its inner justness calls for a serious examination of the reasoning he employs to support it. For the purposes of this article, I am particularly interested in Benson relating his account to Aristotle's thought on justice. As noted, Benson explicitly hinges his theory of transactional justice on Aristotle's conception of voluntary corrective justice, further stating that his theory "engages some fundamental themes and outstanding questions arising from Aristotle's account and subsequent theorizing about justice in transactions as a whole" (2019: 30). In what follows, I shed new light on Aristotle's conception of voluntary corrective justice to argue that Benson neither thematizes the link between his theory and Aristotle's, nor engages Aristotle's philosophy of justice more generally. In fact, I show that Benson's theory is incompatible with Aristotle's views on justice.

My criticism ought not be taken as suggesting that Benson's account does not deserve our fullest attention. In fact, the opposite is the case: *Justice in Transactions* showcases a profound knowledge of, and attentiveness to, the whole of the contract law dimension. Learned yet accessible, it skilfully navigates through contract law's "internal complexity and richness" (2019: 22), providing readers with precious insights into contract law's complexities. Accordingly, both contract law theorists and practitioners have a lot to learn from Benson's comprehensive and detailed appraisal of contract law's intricate nature

and dynamics. Yet, to the extent that the book aims to both hinge itself on Aristotle's conception of voluntary corrective justice and shed new light on Aristotle's thought on justice more broadly, it regrettably misses the mark—or so I argue.

In this sense, *Justice in Transactions*' lack of engagement with Aristotle's thought on justice can be appraised from two different, yet interrelated, analytical angles: internally, as the book does not deliver on one of its objectives; externally, as yet another instance of transposing quintessentially Aristotelian themes onto an analytical plane—that of modern political-philosophical and legal thought—which does not belong to them. Readers are provided with a hint of this analytical shortcoming right at the outset of *Justice in Transactions*, where Benson affirms that the book “provides the most appropriate moral basis for contract law in a *modern liberal democracy*” (2019: 11, emphasis added). As a result, instead of exploring Aristotle's philosophy of justice in its own terms and contextualizing it for the purposes it pursues, Benson ends up crafting a theory of transactional justice which is incompatible with Aristotle's views on justice. Not incidentally, as seen earlier, Benson's main political-philosophical referents are Kant and Rawls.

To show this, let us consider one of Benson's key arguments, namely, that his conception of contract as transactional acquisition of ownership embodies the juridical paradigm of “entitlement”. Benson writes:

[T]he entitlement in contract, when viewed as a transfer of ownership, represents in the most complete and explicit way the very kind of entitlement that is strictly transactional and so necessarily presupposed, even implicitly, by every instance of justice in transactions ... It represents ... the paradigm of entitlement that is intrinsic to corrective justice (2019: 31).

He further claims that as a result of this conceptualization,

[His] theory of contract not only vindicates Aristotle's original insight that there two mutually irreducible and individually self-sufficient categories of justice—corrective and distributive—but also clarifies the relation between them, suggesting how they fit together in a more complete conception of justice acceptable in a modern liberal democratic society (2019: 31).

Unfortunately, though, not only does *Justice in Transactions* not clarify the relationship between the two types of justice as Aristotle had conceived it. More fundamentally, by purporting to adapt the thinking of an ancient figure for present-day regulatory dynamics and juridical sensibilities, it ends up severing itself from it. Take, for instance, the very notion of “entitlement”, central to Benson's account. As understood and employed

by Benson, the juridical entitlement contractual transactions give rise to has clear individualistic connotations.⁸ For not only is it structurally and operationally dependent upon the *modern*, liberal conception of ownership (transferred by one party to the other by way of the contract: see eg 2019: 335, 362; as well as Section B above), but it also presupposes a juridical scission between the plane of the political and that of the legal. Benson is clear about this: drawing, while also departing, from Rawls, he affirms that the law of contract is the most vivid exemplification of the fact that “contractual and political relations are different” (ibid 367). Accordingly, “so will be their justifications” (ibid). The relevance of this claim ought not be underestimated: the whole “moral basis” (ibid ch 11) of Benson’s theory rests upon the necessity to keep the legal and political dimensions apart in (and when analysing) contractual matters: if there is *justice in transactions*, it is precisely because the two planes are not (and cannot be, in Benson’s eyes) one and the same. Arguably, this emerges most clearly in Benson’s treatment of contractual remedies, where “the nature of [contractual] breach” (ibid 250) is interpreted and operationalized from the individualistic standpoint of what the defendant’s “failure to perform” (ibid 251) is and entails: the defendant’s nonperformance is “an interference”, Benson writes, “with the *plaintiff’s exclusive right* to an asset—the substance of the consideration—that has already been moved to her at formation in the promissory medium of representation” (ibid emphasis added, see also ibid 274). Not coincidentally, transactional justice is, to Benson, detached from “any particular comprehensive doctrine or a particular conception of [the] good” (ibid 475). What animates it—the Archimedean point, so to speak, on which it is premised and without which it cannot exert its juridical function—is the parties’ “subjective interests and ends” (ibid 407) and their reciprocal need, as actors operating in an economic, transactional “system of exchanges” (ibid 426, see also 470), for each other’s “cooperation” (ibid 466).⁹ Were it otherwise, the justice contractual transactions give content and form to would not “represen[t] ... a liberalism of freedom” (ibid 476).

A modern reader well-versed in and upholding liberal-democratic values would rightfully endorse Benson’s line of reasoning (cf Collins 2002: 17; Campbell 2017: 2020). Yet, as we have seen, if there is a fundamental proposition animating the whole of Aristotle’s philosophy of

⁸ This statement does not detract from the ethical, other-regarding spirit of Benson’s theory: see eg Benson (2019: 398, 408, 418).

⁹ Unsurprisingly, the natural consequence of this conceptualization is that one of contract law’s primary concerns is the crafting and implementation of rules “knowable and calculable” (Benson 2019: 425) *ex ante*, the clarity and effectiveness of which assure the juridical stability contracting parties expect. On this theme, Benson’s views are in line with mainstream contract law scholarship.

justice, it is precisely that the plane of the political and that of the legal *cannot be separated*—for they mutually require and define each other. As Duke writes in his critique of present-day, decontextualized readings of Aristotle’s political-legal thought that try to square it within a “liberal-democratic [conception of] order” (2019: 3):

While Aristotle views the function of law as to provide enabling conditions, these conditions are understood in terms of what is conducive to the virtue and flourishing of both the individual and the community, rather than instrumental to the protection of a sovereign domain of individual choice and action. Indeed, Aristotle is so far from such a view of freedom that laws are asserted to be (both descriptively and normatively) determined in the “political” choice for a certain kind of constitutional structure (Duke 2019: 3–4).

Aristotle’s conception of justice blends together the planes of the political and of the legal for the simple reason that, to him, justice is the chief virtue of the political community that the polis is. Aristotle himself states thus at the very beginning of the *Nichomachean Ethics*: “we may be content with securing the good of one person only; however, securing the good of the whole people, that is, of the *polis*, is nobler and more divine” (*Nichomachean Ethics*, 1094^b9–10; my translation). Unfortunately, due to its individualistic character, Benson’s contract law theory misses this crucial point. As a result, the type of justification Benson places at the heart of contractual transactions is both theoretically and practically very distant from what Aristotle had in mind when subsuming law (and justice) under *politikē technē* (see above, Section C, as well as Duke 2019: 11, 14, 17, 21–26, 37, 93, 114, 157). Owing to his ethical vision for human affairs, Aristotle’s take on matters of societal ordering is entirely communitarian. Let us not forget Ancient Greek’s “social and political history” (Ober 1998: 4)—specifically, the significant fact that:

[C]ity-state politics were characterized by intermittent civil conflict and by incessant social negotiations between an elite few who sought to gain a monopoly over political affairs and a much larger class of sub-elite adult males who sought to retain the privileges of citizenship or to gain that coveted status (Ober 1998: 4; see also Jaeger 1965: xiii, xixff, 9, 287).

Itself an expression of, and explicitly concerned with, these social-political dynamics, Aristotle’s ethics makes no room for contractual—that is, strictly legal or juridical—justice *as such*; rather, for Aristotle, there is only “political justice” (Duke 2019: 97) understood as “political good” (ibid 85, 97), the attainment of which requires “just laws” (ibid 93) satisfying the criteria outlined above. The fact that justice is *political* simply means that it is “irreducible to the promotion of individual interests” (ibid

97) and “freedom of choice” (ibid 37). In other words, insofar as it is entirely geared towards human flourishing, “justice is a state of affairs attributable to the polis as a whole and a shared good in the sense that it belongs to the community, not just to each of the individual members” (ibid, see also ibid 101, cited above, Section B). As Aristotle understands it, contractual action is reflective of, and inseparable from, this collective, political-ethical dimension.

[E] CONCLUSION

There is much to learn from Benson’s acute account of contract law. *Justice in Transaction* is a rich, intellectually rewarding journey through the complex rules and themes that make up what is, arguably, the most relevant branch of law in market societies (in addition to Collins 2002; Pistor 2019; Supiot 2017; and Campbell 2017, already mentioned; see also Zumbansen 2007; Mitchell 2013).

Yet, insofar as Benson’s theory also aims to hinge itself on Aristotle’s account of justice and to provide readers with new insights on some key Aristotelian themes on justice which have kept thinkers busy for over two millennia, one cannot but conclude that it regrettably misses the mark. As Werner Jaeger aptly observed, “[n]owadays we must find it difficult to imagine how entirely *public* was the conscience of a Greek” (1965: 9, emphasis in original). Aristotle’s conception of justice embodies this public political-ethical sentiment fully. As seen, it is precisely this public conceptualization of, and approach to, the domain of the legal as understood by Aristotle that is absent from Benson’s account of transactional justice.

Unfortunately, insightful though it is, *Justice in Transaction* falls prey to a peril hidden in any modern reading of Aristotle’s thought. Yet, rather than being a reason not to explore and engage with a thinker who has played a central role in the formation and development of the Western tradition as we have come to know and experience it, the latter consideration should be taken as a reminder of the necessity to analyse ancient thought on its own terms.

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JURY REFORM AND LIVE DELIBERATION RESEARCH

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Abstract

Researchers face perennial difficulties in studying live jury deliberation. As a result, the academic community struggles to reach a consensus on key matters of legal reform concerning jury trials. The hurdles faced by empirical jury researchers are often legal or institutional. This note argues that the legal and institutional barriers preventing live deliberation research should be removed and discusses two forms that live deliberation research could take.

Keywords: jury research; jury trial; criminal procedure; live deliberation research; rape myths.

The jury has a storied legal history, with some memorable highlights. The evolution of trial by jury served as a ward against the oppressive reach of the monarch, judiciary and other agents of the state in periods where freedom of expression, assembly and conscience were threatened. Juries played a valuable role in nullifying criminal laws accompanied by excessively harsh punishments, especially the mandatory death penalties for trivial crimes found in English law for great portions of the last 500 years. There have also been some terrible low points. These range from the morally execrable (such as racist juries in the Jim Crow-era United States) to the absurd (such as juries consulting Ouija boards to determine culpability for murder).¹ But throughout all of this, the jury has for centuries been a cornerstone of a broadly functioning criminal justice system in many states; surviving wars, pandemics and wholesale change in the constitution and content of the criminal law.

Recently, the jury is facing a new challenge. It has been argued that the use of jury trial is (partly) responsible for the problematically low conviction rate for sexual offences. The figures are stark: according to a recent report, the complaint to conviction ratio in the United Kingdom (UK) is below 2 per cent.² This cannot simply be chalked up to insensitive

* Correspondence on this note is welcome. Thanks to Léa Bourguignon for written comments on an earlier draft.

¹ On the latter, see Gans (2017).

² For example, see HM Government (2021).

policing or reluctant prosecutors—the rate of acquittals at trial for rape charges (involving adult women victims) is particularly high, with a 15-year average acquittal rate of around 50 per cent. The first tentative moves towards challenging the role of the jury as the arbiter of guilt for the most serious crimes are already underway, with the Scottish Government (at the time of writing) fighting against sustained protest from the legal profession to approve a pilot test of judge-only trials for rape offences. (It has already proposed the abolition of the unique Scottish third “not proven” verdict on similar grounds, believing that it encourages juries to shirk their duty to make the hard choice of convicting those accused of rape). Such pilot schemes are problematic in their own right, given that one of the only plausible criteria for success is an increased rate of conviction. This comes close to a “conviction target” for sexual offences—a controversial idea that can create perverse incentives for those involved in such trials. This is a deeply important debate. But here, I want to ask an even more basic question. Scrapping the jury for one of the most serious crimes on the books is a radical shift in how we administer criminal justice. So, one might wonder, what type of evidence justifies the supposed efficacy of such a change?

Despite the long history of the jury, we still debate against the backdrop of considerable ignorance about the internal workings of British juries, and indeed juries globally. It is currently not possible to study real juries whilst they engage in live deliberations, nor even to study transcripts of live jury deliberations. The roadblocks are both legal and institutional. Legally, revealing the content of jury deliberation in the UK risks being in contempt of court.³ Institutionally, there is little enthusiasm for real jury research. Both legal and institutional support are necessary; in other jurisdictions where such research is in principle permitted, it is not feasible without the active support of institutional gatekeepers.⁴

In place of live deliberation research, inventive researchers have attempted to devise work-arounds.⁵ These work-arounds vary wildly in their value. At the lamentable end of the spectrum, studies exhibit the worst flaws of social psychology—for example, asking unrepresentative samples to read short written scenarios and then, without any deliberation, offer an opinion on what should happen. Such studies differ so substantially

³ In the UK, see s 20D of the Juries Act 1974 and s 8 of the Contempt of Court Act 1981.

⁴ On institutional barriers, see Horan & Israel (2016).

⁵ Post-trial surveys of real jurors have been an influential and important tool informing policy debate in England and Wales, see eg Thomas (2010; 2020). However, it is not permitted to ask jurors details about their deliberations. And, even it were, this would only provide the subjective impression of the juror about their deliberations rather than objective evidence.

from the conditions of real jury deliberation that it is perfectly legitimate to question what relevance they have for debates about the actual jury system—especially since social psychology has recently been undergoing a “replication crisis” where vast numbers of studies have been claimed not to provide generalizable results. It is on the basis of such studies that the Scottish Government has formed the view that real jurors are systematically susceptible to “rape myths”, making them less accurate when judging accusations involving sexual offences.⁶ Other attempts to study real juries indirectly are much more valuable. For example, a small number of “mock jury” studies exhibit much higher degrees of realism by extending over multiple days, inducing real judges to take part, paying actors to simulate other roles like those of accused, victim and lawyers, as well as including ample room for deliberation among the mock jury.⁷ However, genuinely valuable mock jury studies are extremely expensive. As a result, gold-standard mock jury studies are uncommon and involve small sample sizes.

There is a partial solution to the economic problem of good mock jury research—one that combines the realism of a real trial with the use of mock juries. Mock jurors could be allowed to watch (either live or recorded) *real-life* trials and then be asked to deliberate before giving a verdict, just as the actual jury does.⁸ (Recording trials is something that once faced a great deal of resistance but has since been done without issue.) This would bypass some of the expense of setting up high-quality mock jury studies, since the trials would be occurring anyway—the need for actors and scripts would be otiose, although participants would still have to be paid. Such an approach would also allow the retention of some of the virtues of mock jury studies, namely allowing experimenters to change certain features of the mock jury—such as its composition, like gender balance or size—in order to test targeted hypotheses. This type of “real trial, mock jury” research has not featured at all in the debate about the contemporary performance of juries because such studies are not being conducted. Yet, they are possible. Over half a century ago, a successful proof-of-concept study of this nature was supported by the Ministry of Justice and conducted by the Oxford University Penal Research Unit.⁹

⁶ The Scottish Government cites Leverick’s recent review article (2020) in support of its reform proposal: while the review is extremely useful, the studies it unearths do not replicate the conditions of a real trial, with almost none involving time for deliberation or re-enactment of the trial process.

⁷ See Scottish Government (2019).

⁸ Of course, the mock juries who deliberate in parallel would not interact in any way with the actual trial jury who attend court in person.

⁹ See McCabe & Purves (1974).

That study did not address serious sexual assault trials and had some shortcomings, but the basic *approach* was sound. Resuscitating valuable research methods like this would go some way to improving the quality of evidence we have on jury deliberation, by allowing us to see how mock juries respond to realistic trial scenarios.

However, there remains a basic philosophical objection to any variety of mock jury research, regardless of its methodological credentials. This point applies even to mock juries who are asked to watch real-world trials. The concern is simple: *mock juries are not making decisions of any real-world importance*. Mock juries know that they are not really being asked to make a decision that will have any consequence, beyond having a tiny influence on an academic study. If we think it plausible to suppose that people approach high-stakes decisions (like those where the risk of error might lead to an innocent person being wrongfully imprisoned, or a rapist mistakenly set free) differently from low-stakes decisions (like the merely intellectual task of a mock juror) then there will always be a question mark over any extrapolation from mock juries to the real thing.

So, one might wonder why we do not allow researchers to study live jury deliberation. After all, there are various unobtrusive ways in which this research could happen, with the least disruptive being that live jury deliberations are transcribed and made available for academic researchers after the conclusion of the trial. Immediate concerns to do with the privacy of the jury or the potential for interference in ongoing legal proceedings (eg appeal processes) could be addressed by anonymizing the transcriptions and only releasing them some time—even years—after the conclusion of the original trial. Yet, the prohibition on live deliberation research is rarely challenged.¹⁰

I do not find any of the standard objections to this research convincing. For example, one worry is that real jury research would ruin public confidence in the jury, as its failings would be highlighted for all to see.¹¹ But public confidence is already being undermined by mock jury studies being cited in the press as “proving” that juries make widespread mistakes due to their belief in rape myths. And, surely, we do not want public confidence in the jury to be based on false premises. Would it not be better to have a mature debate about the future of the jury in full possession of the evidence? Other critics might worry that jurors would behave differently if they knew that their deliberations were being transcribed.

¹⁰ One notable exception is that there has been a successful instance of real jury research—on the use of juries in *civil* trials—in Arizona. See Diamond & Ors (2013).

¹¹ Eg Zander 2013.

This is an awkward line to press if you think that mock jury studies are themselves an instructive method of research, since these are also being recorded. Indeed, the recording of mock jury research is altogether more conspicuous; participants have willingly and self-consciously signed up to take part in an academic study. Real jurors, by contrast, are in an already unfamiliar situation where the high-stakes demands of the trial are likely to be more salient than any incidental transcription of their deliberation. Any distorting influence that observation might have is actually a much greater threat to the validity of mock jury studies.

We should, of course, be very cautious about introducing state oversight into the jury room. After all, we began this note by observing that the jury can serve as an essential counterweight to the power of the state. But my proposal is not to introduce any mechanism for overturning or regulating jury deliberation. The idea is simply to study the way that deliberation proceeds, after the decision of the jury has been made final. In any case, given that the centrality of the jury is already being challenged with an eye to its removal for serious offences, it cannot seriously be suggested that allowing the study of live jury deliberation is a greater challenge to the independence of the jury!

The benefits of live jury deliberation are obvious, since it would provide us with gold-standard evidence on how juries deliberate. The materials would be plentiful. Since trials must happen anyway, the cost would not be prohibitive in the same way as (high-quality) mock jury research. There would be reduced methodological and philosophical concerns about the mismatch between what experimental participants do and what happens in a real jury room. Given that the reform of legal processes is a slow business and reforms tend to stay in place for a long time, we should view this current moment as an opportunity. We are deciding on how to administer criminal justice for decades and likely centuries to come. Reforms will affect the lives of many thousands of people: accused and victims, as well as wider society. Any decision we do make should be informed by the best evidence possible. In my view, this requires live jury research.¹²

¹² For a fuller defence of this idea, see Ross (2023).

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FROM ROPE TO RIVER: SYMBOLIC EXECUTIONS, COLONIAL DYNAMICS AND TRADE GOVERNANCE IN THE GOLDEN AGE OF PIRACY

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Abstract

This article explores the symbolic aspects of the execution of Captain William Kidd during the Golden Age of Piracy, focusing on the visual messages conveyed. Examining the social-cultural milieu of the gallows in England *circa* 1700, it reveals the unique aspects of Kidd's execution and its implications for colonial dynamics and trade governance. By delving into the intended audiences and multifaceted messages behind these executions, the article sheds light on the intertwined dynamics of piracy, colonialism, and trade governance and their impact on the evolving global order.

Keywords: law of piracy; Captain William Kidd; early eighteenth century; public executions; Admiralty Sessions; gibbeting.

[A] INTRODUCTION

The dawn of the 18th century marked a complex chapter in the history of piracy, particularly in the cultural and social contexts surrounding executions. As the "Golden Age of Piracy" unfolded from the mid-17th century to the early 18th century, piracy activities increased alongside significant legal changes and anti-pirate initiatives launched by empire-building European nations. However, it is within the realm of the gallows that we can observe the visual and symbolic aspects that shaped public perceptions. The cultural milieu of the time positioned the gallows as a spectacle of justice and deterrence, framed by the shifting attitudes towards law and governance during the Age of Enlightenment. In this context, the execution of Captain Kidd holds particular significance, revealing how pirate executions became messages with varying intended audiences, leading us to question the changing dynamics of those targeted by these messages.

The trial of Captain William Kidd in 1701 was one of the most highly publicized piracy trials of the era. Formulated against a backdrop of international maritime commerce and colonial expansion, the trial

was a catalyst for a nascent legal structure grappling with piracy. The saga, unfolding from domestic, colonial and commercial imperatives, symbolizes the growing resolve to police the international seas and rein in maritime piracy—a journey spanning across geopolitical boundaries and revolving around legal loopholes, economic stakes and fierce political interests. Notably, Captain Kidd’s execution became much more than a mere imposing of justice; it was an embodiment of intricate socio-political communication, layered with symbolism and messages.

Capturing the essence of this historical turning point is a visual artifact unique to the 18th century—an illustration depicting a pirate hanging by Robert Dodd (1795).¹ While this illustration originates from a later period in 1795, it provides a glimpse into the symbolic nature of 18th-century pirate executions. It is through this contextual lens that we can unravel the intricate interplay of piracy, maritime law and politics within the early 18th century, revealing the cultural meaning attached to the body of the condemned—a potent symbol of power, obedience and the societal order being asserted.

[B] GALLOWS THEATRE: SPECTACLE, PUBLIC MORALITY AND THE BODY POLITIC

As shall be discussed below, pirate executions included ceremonial elements specifically designed to impact the maritime community. However, they were also situated within the broader social context of the gallows.

The spectacle of public execution in the early 18th century possessed its own macabre theatre, where social norms, power relations and political leverage played out against the backdrop of the state’s justice system. The act of execution was not solely a punitive act or a display of violent death; rather, it was a carefully choreographed event aimed at etching the consequences of law-breaking into the public consciousness. In a society where literacy was not universal, this public spectacle of justice served as a potent form of communication regarding the tangible repercussions of transgressing the law.

Underlying this concept of performative justice was the customary notion that the body of the condemned was a symbolic figure in the corporeal body politic. Just as a healthy body relied on the proper functioning of its parts, the stability and wellbeing of society rested on the cooperation and adherence to societal norms by its members. By

¹ The illustration reproduced here is from an engraving of the original made by Lieutenant Page.



Robert Dodd, “A Pirate hanged at Execution Dock” (Royal Museums Greenwich).

publicly destroying the physical body of the condemned, society sought to excise the “corrupt” element and thus restore the overall well-being of the body politic. The execution served as a reminder to citizens of their interdependence and their individual responsibility to maintain the integrity of the collective body. In this sense, the act of punishment was not just an act of retribution but also aimed at restoring harmony and balance to society (McGowen 1987: 665).

While the metaphor of the “body politic” was customarily invoked to justify capital punishment, it offers only a partial glimpse into the perceptions and experiences surrounding public executions, particularly by the time of Kidd’s execution. In 1651, Thomas Hobbes’ influential work, *Leviathan*, had challenged the concept of the state as a natural body by highlighting its artificiality, a philosophical shift that saw the metaphor fall out of circulation.

Moreover, the ability to witness these public displays of punishment was limited to a minority of the populace, as only a select number had the opportunity to witness one of the several hundred hangings that took place each year.² Also, the execution process itself was often crude and *ad hoc*, lacking strict solemnity or ceremonial flair. Instead, these public displays were characterized by a more pragmatic approach, with a “shabby orderliness” and a subdued iconography of punishment (Cockburn 1994: 161-162). The engraving by Dodd that illustrates this article is in keeping with this, depicting a small and subdued crowd.

Nonetheless, by the late 17th century, public executions started garnering larger crowds, indicating a growing appetite for the spectacle of judicial violence. But this increased interest in witnessing such events did not necessarily imply a profound reflection on the social virtues of lawfulness. While public executions involved the presence of clergymen (visible as the black-gowned figure in Dodd’s engraving) who sought the confession and repentance of the condemned, their involvement often served to further publicize the event rather than instil moral values. Clergymen capitalized on the popularity of public executions by publishing and selling accounts of gallows speeches delivered by those about to be executed. These publications aimed to serve as moral lessons and cautionary tales for the wider population, highlighting the consequences of straying from societal norms. However, they inadvertently contributed

² Most hangings occurred in London, accounting for as many as 300 per year. Between 1560 and 1790 the number of public hangings across England remained consistent (Cockburn 1995: 158-159). See also Hay (1988: 48-49).

to the populace's fascination with and engagement in the spectacle (Cockburn 1994: 168).

Kidd's execution was presided over by the Ordinary of Newgate, Reverend Paul Lorrain who published numerous "Last Dying Speeches and Confessions" of criminals. It is notable that Kidd refused to confess to any crime, a fact consistent with his protestation at trial that he had been perjured against (England and Wales High Court of Admiralty 1701: 60). Lorrain, displeased by this recalcitrance, had to be content with Kidd's statement that he

desired all seamen in general, more especially Captains in particular to take warning by his dismal unhappiness and shameful death and that they would avoid the means and occasions that brought him thereto, and also that they would act with more caution and prudence, both in their private and public affairs by sea and land, adding that this was a very fickle and faithless generation (Dalton 1911: 212-213).

The behaviour of the crowd during public executions in the early 18th century was multifaceted and varied. While some individuals may have attended with a sense of moral superiority, believing in their own adherence to societal norms, others approached the event as a form of entertainment or even an opportunity to indulge in immoral behaviour. This diversity of motivations could attract a wide range of attendees, from curious onlookers seeking to witness the gruesome spectacle to thrill-seekers and individuals looking for a chance to partake in illicit activities.

Hangings, particularly in London, became occasions of social disorder. The mob reached enormous proportions: thirty thousand people witnessed an execution in Tyburn 1776; eighty thousand an execution in Moorfields in 1767 (Zirker 1964: ii). Streets thronged with spectators, mixed with a motley crowd of hawkers, often becoming scenes of drunkenness, riots and other criminal activities. The carnival-like atmosphere drowned the solemnity of the event, instead creating an ambiance of chaos and debauchery, contradicting its intended purpose. In 1725 Mandeville (1964 [1725]: 20) described the crowds at Tyburn as:

The Days being known before-hand, they are a Summons to all Thieves and Pickpockets, of both Sexes, to meet. Great Mobs are a Safeguard to one another, which makes these Days Jubilees, on which old Offenders, and all who dare not shew their Heads on any other, venture out of their Holes; and they resemble Free Marts, where there is an Amnesty for all Outlaws. All the Way, from *Newgate* to *Tyburn*, is one continued Fair, for Whores and Rogues of the meaner Sort.

This led him to conclude “it is not the Death of those poor Souls that is chiefly aim’d at in Executions, but the Terror we would have it strike in others of the same loose Principles: And, for the same Reason, these Executions are little better than Barbarity” (Mandeville 1964 [1725]: 36).

The changing dynamics of public executions, coupled with the growing disconnect between the spectacle and the wider society, laid the groundwork for shifting attitudes towards notions of punishment and justice in the coming Enlightenment. As the century progressed, public executions faced increasing scrutiny and criticism, leading to a major debate about their true efficacy in social reform and crime deterrence. Thinkers like Cesare Beccaria, who advocated for proportionate punishment and condemned public execution as cruel, gained ground. Their philosophies contributed to a growing dissent and formed part of a broader discourse around legal reform. Gradually, the nature of public ridicule and the spectacle of public execution began to be seen as brutalizing and demeaning, rather than serving as a salutary lesson. By the latter half of the 18th century, voices calling for the abolition of public executions had become more prevalent. This culminated in the decision to end public executions in the United Kingdom (UK) in 1868. The symbolic value that executions once held in society had eroded, replaced by a belief in the need for more humane and less sensationalized methods of punishment.

[C] THE SILVER OAR: POWER, DETERRENCE AND PIRATE EXECUTIONS

If public executions afforded an opportunity to reinforce the state’s imposable law and order, pirate executions carried their own symbolic weight. They were often held at Execution Dock, a designated place on the Thames River in London, further signifying their association with maritime crime. The convicts were hanged on shorter ropes, initiating a slow suffocation rather than neck-breaking, embodying their transgression against maritime law. Bodies of the more notorious pirates were tarred and hanged in an iron gibbet to serve as a warning to sailors. This visual representation of the state’s power was intended as a deterrent.

In addition to the visual spectacle of the execution itself, the procession to Execution Dock was a carefully orchestrated event, laden with symbolic iconography. One prominent symbol of authority was the silver oar, carried by the Admiralty Marshal or one of his deputies. In Dodd’s illustration, the oar is visible in the hands of the mounted Marshal. Similar to a ceremonial mace, the silver oar represented the power and jurisdiction of



John Deacon, Waterman's Oar (Victorian & Albert Museum)

the Admiralty Court in maritime matters. It was also customary for the oar to be present in the execution of Admiralty Court processes such as the arrest of a vessel or cargo, and it was laid before the bench during Court hearings. One such example dating from around 1780 is displayed in the Victoria and Albert Museum in London (Deacon *circa* 1780).

Records of prisoners tried for piracy in the Admiralty Courts describe the procession to Execution Wharf, accompanied by the Admiralty Marshal or one of his deputies, bearing the silver oar. This procession would also include the Deputy Marshal, two City Marshals on horseback and Sheriff's officers (Niekerk 2012: 142).

The distinctive pageantry of the Admiralty Court reflected its equally distinctive legal framework. Shaping its own identity, from as early as 1361, the Court operated independently from common law. This established a unique system of law and legal procedure that integrated elements of Roman civil law, European maritime codes, and customs into Admiralty law (Pritchard 1984: 43; Rubin 1988: 66-121; Durston 2017: 12). The Court initially handled piracy cases but was modified by the 1536 "Act for Punishment of Pirates and Robbers of the Sea". This Act created the Admiralty Sessions within the Court, which used common law procedures. It also resolved the challenges of complex evidentiary requirements of civil law which had hindered the prosecution of pirates.³

The rate of pirate executions leading up to 1700 remained fairly consistent and amounted to two or three a year. However, notable spikes in punitive measures occurred during James I's reign, including the execution of 19 pirates on a single day in December 1609. The turn of the 18th century marked a significant shift. Following a confrontation between the French ship *La Paix* and the English frigate *HMS Shoreham* in 1700, 24 members of the defeated French crew, including several Britons, were executed in Wapping. Captain Kidd's execution in 1701 fits within this pattern of intensified anti-piracy measures, aligning with the time when piracy was considered a significant threat to international trade and maritime security. This was followed by a notable decline in such executions after the early 1700s, with instances becoming increasingly infrequent and even years passing without any hangings (Durston 2017: 141).

³ Civil law characteristics remained discernible: 18th-century Admiralty Sessions were exemplified by thorough documentation processes that extended from examinations of defendants to witness interrogations. These records, much more extensive than the contemporaneous records of common law courts, were remarkable for their diverse non-legal content, including accounts of maritime history, atrocities aboard convict transport ships and more (Pritchard 1984: 45).

A unique feature of pirate executions was that after execution the bodies were often displayed in a gibbet, hung at low watermark. Gibbeting, a distinctive and expensive practice, involved displaying an executed individual's body in a bespoke iron cage fitted on a substantial, 20 to 30-foot gibbet post, often fortified to discourage theft (Dyndor 2015; Tarlow 2017). The cage was personalized by local blacksmiths and was linked to the post in a manner that permitted rotation—for maximal visibility. Historical records testify to the fiscal implications, with 1749 documents showing individual costs for the infamous Hawkhurst gang up to £24/1s. Despite this, authorities persisted with gibbeting, valuing its potent message of deterrence. However, its usage diminished after the 1752 Murder Act, when dissection was preferred for over 80 per cent of convicts (Dyndor 2015). There was no specified length of time in which a gibbet remained hanging; frequently they remained until the structure disintegrated (Tarlow 2017: 79).

However, the effectiveness of such a deterrence strategy is questionable. While the sight of rotting bodies along the Thames might have instilled a certain level of primal fear, it is uncertain that the messages of the gibbet successfully reached the intended audience (Hartshorne: 1891: 74-76). Certainly, the audience present at the gallows was largely civilian, not seamen, indicating a disconnect between the targeted deterrence message and its audience. Nevertheless, pirate executions had the potential to signify meaning to other audiences, suggesting that the act of executing pirates served multiple purposes. To understand who these audiences were, it is necessary to examine the wider context of pirate executions.

[D] THE TRIAL OF CAPTAIN KIDD, LEGAL REFORM AND COLONIAL DYNAMICS

Examining the historical patterns of execution as related to piracy, it emerges that the hanging of Captain William Kidd in 1701 was part of a relatively brief period where piracy was punished severely. The spectacle of his execution and the multilayered messaging brings to light the shifting societal perspectives and the intricacies of English legal, domestic political and colonial frameworks of the time.

The sequence of events leading to the trial and execution of Captain William Kidd unfolded as follows. In 1695 Kidd, initially a lawful privateer, was given two commissions by King William III. The first was a Letter of Marque, authorizing him to seize vessels from France, England's enemy at the time. The second, a much rarer pirate hunting commission, designated him to capture pirates threatening trade in the Indian Ocean and the Red

Sea. Particularly, the latter aligned him with the interests of the British East India Company, at that point still an embryonic powerful entity striving to safeguard its trade monopoly from piracy and interlopers.⁴

The trouble began when Kidd seized the *Quedagh Merchant*, a ship hired by Armenians sailing under French passes but which belonged to a Moghul. Though Kidd believed this seizure was lawful under his commissions, shifting political tides would argue otherwise. Back in England, Kidd's Whig backers were embroiled in political conflict. At the same time, the British East India Company was pressuring the Government to act. Furthermore, colonial governance was being questioned, with New England colonies often seeming to foster lawlessness, necessitating a strong stand against piracy. Together, these events combined to reshape perceptions of Kidd's actions.

Kidd was arrested in Boston in 1699, accused of piracy and murder. Transported to London a year later, his trial was put to stage not merely as a judicial proceeding but a political manoeuvre underpinned by these considerations of domestic, colonial and commercial pressures. Kidd's conviction was virtually ensured: his claims about French passes were ignored and his backers stayed silent to preserve their reputations.

As discussed above, the visual messages inherent to Kidd's execution—an iconography that traversed the pre-execution procession (the silver oar), the execution itself (the visceral effect of the shortened rope), and the subsequent exhibition of his tarred body in the gibbet (which also imposed audible and olfactory sensory experiences)—all of these messages, notwithstanding their grotesqueness, can be considered to have in some way failed in their delivery. The broader socio-legal lessons intended by public execution were manifestly failing to make an impact upon the populace. Meanwhile, the targeted symbolism of pirate executions at Execution Dock remained disconnected from the social and cultural milieu in which piracy thrived. This then begs the question of who was the intended audience for this spectacle of performative justice?

In terms of geographical proximity, the English nobility formed the most immediate audience for Kidd's execution. In this context, the underlying objectives of the execution were closely intertwined with the political conspiracies between the Whigs and Tories. The Tories aimed to discredit the Whigs who had financially supported Kidd's expeditions by accusing them of colluding with pirates. The suspicions surrounding these allegations were further fuelled by the delayed arrival of the ship

⁴ Kidd's commissions are reproduced in Dalton (1911: 229, app A). The originals are held at The National Archives of the UK (HCA 1/15).

Rochester, which was dispatched by the Lord Justices to bring Kidd back to England for trial.

The prolonged delay of the *Rochester* raised suspicions that the Whigs were attempting to avoid parliamentary scrutiny of their alleged collusion. In response, the opposition demanded that Kidd not be tried, discharged, or pardoned until Parliament reconvened. However, the King's reply, assuring the retrieval of Kidd, only served to intensify the opposition's anger. This eventually led to a resolution to permanently remove Lord Somers, one of Kidd's backers and the Lord Chancellor of England, from the King's presence and influence, due to his alleged involvement in the affair (Dalton 1911: 131). To refute such claims, the Whigs wanted to portray Kidd as a villain who had betrayed them. They argued that, instead of fulfilling his mission to hunt down pirates, Kidd had joined their ranks.

The fact that the scandal reached as far as the crown demonstrates the deep-seated interest numerous parties had in Kidd's execution. However, if domestic political intrigue undermined the fairness of Kidd's trial, then so too did colonial political dynamics.

England's trade policies with the American colonies were primarily governed by the Navigation Acts, a series of laws passed between 1651 and 1673. These Acts sought to ensure that trade between the colonies and England, as well as the wider British Empire, remained under English control. The Acts required the use of English or colonial ships for colonial trade and stipulated that certain goods, known as enumerated goods, could only be exported to England or other British territories. This system effectively limited the colonies' ability to engage in direct trade with other European powers and favoured the exports of raw materials from the colonies to England.

However, in practical terms, the enforcement of these Acts was often lax. Smuggling, including piracy-related activities, was prevalent as colonists sought to bypass restrictive trade regulations and benefit from direct trade with other countries. This illicit trade allowed the colonies to obtain goods not available or more expensive in English markets and contributed to the development of a thriving informal trade network, much to the detriment of English merchants. Historically, the offence of piracy carried severe punishment: death by hanging. Yet, achieving convictions proved challenging due to difficulties in obtaining reliable testimonies, corruption among officials, and the blurred lines between privateering and piracy. Consequently, successful piracy prosecutions were relatively low before the 18th century.

A year after Captain Kidd set sail with his commissions, his main supporter, Lord Bellemont, became colonial Governor of New York. This appointment, made by the King, aimed to enforce the Navigation and Plantation Acts more rigorously following the lax administration of Bellemont's predecessor, who had allowed piracy and smuggling to flourish. Also during this period, there was increased attention on legal reform led by the Board of Trade, which sought to address the challenges associated with prosecuting pirates who operated within the colonies. Sir Charles Hedges, Judge of the High Court of Admiralty, presented a draft proposal on 6 April 1698, known as "An Act for the more effectually Suppressions of Piracy" (Piracy Act). This Act replaced the outdated 1536 Offences at Sea Act and established Vice-Admiralty Courts in the colonies, bringing to an end to the logistical challenges of transporting defendants to England for trial.

It is against this backdrop that Kidd's arrest occurred in 1699. Whilst the Piracy Act was not presented to Parliament until 1700, Lord Bellemont, as a colonial governor, would have been aware of its imminent passage and the potential legal repercussions associated with piracy-related activities. Personal scandal and political considerations have often been cited as primary factors for Bellemont's betrayal of Kidd, however, the potential legal implications under the emerging piracy laws provide additional context. The Piracy Act expanded jurisdiction and introduced stricter provisions for prosecuting pirates and those who aided them. Section 10 specifically addressed the issue of "several evil-disposed Persons, in the Plantations and elsewhere, have contributed very much towards the Increase and Encouragement of Pirates" and subjected them to the same legal proceedings and penalties as the principals involved in piracy and robbery.

Furthermore, alongside the creation of Vice-Admiralty Courts, the Piracy Act returned civil law procedures to the fore, removing juries and displacing any role for local judges and colonists. Instead, the Piracy Act established a seven-man council comprising naval officers, government officials and merchants, who owed their positions to royal postings and thus were more amenable to Crown influence. These councils held full authority over piracy prosecutions, serving as investigators, indicters, judges and jury simultaneously. Through these reforms, Parliament sought to close the loopholes that allowed the colonies to collude with pirates.

Arguably, these reforms came somewhat late. By 1700, the plundering of pirates in the Caribbean had largely come to an end. In 1670, the Treaty

of Madrid, also known as the Godolphin Treaty, marked a significant shift in the approach towards piracy in this region. Signed by England and Spain, the treaty aimed to resolve long-standing territorial disputes in the Caribbean and quell disruption to colonial trade, caused by piracy in these waters. Before the treaty, in response to the exigencies of war, both nations had often given tacit approval, indeed issued formal Letters of Marque, to privateers who were effectively acting as pirates, attacking and seizing each other's vessels. With the treaty, both powers sought to mutually disarm and curb this practice by agreeing to suppress piracy, marking a clear delineation between state-sanctioned privateering and unofficial, illegal piracy. As a result, Caribbean pirate communities became scattered, and piracy became focused upon Eastern trade routes between Madagascar and India. By 1700, major acts of piracy on par with the naval forces of sovereign states, such as Henry Morgan's infamous sack of Panama in 1671 with his fleet of 1,800 men, had largely ceased (Norton 2014: 41).

However, as the era characterized by large-scale piratical events came to an end, so too did the previous fluidity between lawful privateering and unlawful acts of piracy. The distinction between privateers and pirates became more clearly delineated. This shift in attitudes is evident in the case of Captain Kidd, whose crimes, although of a considerably less significant scale, occurred during a period when the lines were tightly drawn and the boundaries were less forgiving. Thus, for Morgan, although his actions resulted in his arrest, they also paradoxically elevated him to the status of a hero, and by 1674 he was appointed as Governor of Jamaica. For Kidd, on the other hand, despite the possibility of his alleged crimes being acquitted in previous years, the outcome was ultimately a sentence of death.

[E] THE EAST INDIA COMPANY'S INFLUENCE: TRADE GOVERNANCE AND COUNTERING OF PIRATE THREATS IN THE INDIAN OCEAN

Given that piracy in the Caribbean was substantially reduced by the turn of the 18th century, it is necessary to examine other factors that drove the impetus for legal reform. One key catalyst can be traced to the efforts of the East India Company, which had expanded its sphere of influence to encompass the trade routes operated by the Moghul Empire in the Indian subcontinent. Not only did they seek to protect their own investments and trade ventures but also aimed to foster a collaborative approach with

the Moghul Empire, promising to guarantee the protection of Moghul ships from pirates.

However, this agreement fell into dispute following the *Gunji-Suwae* incident in August 1695, in which pirates led by Henry Avery and Thomas Tew seized the vessel owned by the Moghul Emperor. The incident had significant repercussions, as it not only involved the theft of valuable cargo but also included acts of violence and atrocities committed against the ship's crew and passengers. These actions sparked outrage, prompting a riot against the East India Company in Surat. The Emperor Aurangzib, infuriated by the looting of his vessel, imposed an embargo on all English trade until convoy protection could be guaranteed. In response to these escalating tensions and the potential threat to the India trade, the East India Company sought support from the British Government to apprehend the pirates and prevent such future incidents. It was as a direct result of this petitioning that Captain William Kidd came to be commissioned as a privateer in the same year.

Not long after Kidd set out on his ill-fated voyage in 1696, Avery was arrested. During the subsequent trial, the King's Advocate made it clear to the jury that a conviction was imperative to avoid war with the Mogul Empire, preserve national honour and protect England's trade. However, to the surprise of many, the jury returned a verdict of not guilty. The accused pirates were promptly tried for attacking another ship and were found guilty, leading to their execution, but the initial failure to secure convictions for the pirates brought the need for new legislative measures to the fore. When Kidd seized the *Quedagh Merchant* in 1698, these tensions erupted anew, fuelled by the scandalous fact that Captain Kidd had been the privateer commissioned by the Government on behalf of the East India Company. Aurangzib declared an embargo on European trade, and the East India Company redoubled its lobbying efforts (Nutting 1978: 208). By this point, the interconnected web of vested interests—political, commercial and personal—had become so intertwined that Kidd's defence claiming the *Quedagh Merchant* was sailing under a French pass proved futile in halting the forces aligned against him. In an unfortunate turn of fate, Kidd was ruined by the very system he had once served.

[F] CONCLUSION

Overall, from the gallows to the river, the execution of William Kidd sheds light on the complex interplay between socio-legal dynamics, colonial expansion, trade governance and the pursuit of economic prosperity during the Golden Age of Piracy. Kidd's public execution was an orchestrated

spectacle that conveyed strategic messages to several audiences: it served to dissociate his Whig backers from scandal, it signalled an end to tolerance of corruption in the colonies and, beyond the borders, the spectacle was a clear message to other nations that Britain was determined to safeguard global economic interests. In essence, Kidd's execution was not simply about a pirate facing his due punishment, but a conscious enactment representative of broader geopolitical interests and nascent international law, hallmarked by Britain's growing empire and naval dominance.

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Special Section:
AI and its Regulation (Part 2), pages 88-125

COPYRIGHT PROTECTION FOR AI-GENERATED WORKS: SOLUTIONS TO FURTHER CHALLENGES FROM GENERATIVE AI

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Abstract

Since the 2010s, artificial intelligence (AI) has quickly grown from another subset of machine learning (ie deep learning) in particular with recent advances in generative AI, such as ChatGPT. The use of generative AI has gone beyond leisure purposes. It has now been widely used to generate music, news articles and image-based art works. This prompts a regulatory interpretation as to how AI-generated works should be appropriately used to eliminate their potential harm to society, but at the same time how it should be protected to foster human creativity and promote a well-functioning market.

This article is an update from the author's evidential report and speech on "AI and Intellectual Property Rights: IPR Protection for AI-Created Work" for the evidence meeting of the All-Party Parliamentary Group on Artificial Intelligence on 24 January 2022. It considers whether AI technologies should be granted status as copyright or patent owners by looking into existing regulations in the United Kingdom, European Union, United States and China. It further considers how generative AI copyright protection should be managed in the digital society to protect users and strike a fair balance among rightsholders. It argues that it would be beneficial to a well-functioning market if AI-generated works could be subject to collective management of copyright via copyright management organizations within countries. In addition, the article provides mapping of existing legislations in a comparative study and their interpretation for the application of AI-generated works protection and aims to bring together global policymakers and stakeholders to initiate joint efforts to promote international harmonization on intellectual property rights (IPR) protection for AI-generated works.

Keywords: artificial intelligence; generative AI; AI-generated works; collective copyright management; computer-generated work; copyright protection.

[A] INTRODUCTION

Artificial intelligence (AI) bears two distinctive characteristics of “adaptivity” and “autonomy”, ie being adaptive and autonomous (AI White Paper 2023: para 39), which could “make appropriate generalizations in a timely fashion based on limited data” (Kaplan 2016: 5). However, outputs of AI technologies may not always be predictable. AI is not a new concept as AI technology has been developing since the 1950s. It has steadily progressed with a subset of “expert systems” and “machine learning” since the 1980s. And, since the 2010s, it has quickly grown from another subset of machine learning (ie deep learning), in particular with recent advances in generative AI such as ChatGPT. Generative AI is known to “create text, images, music, speech, code or video based on learning from existing available content” (HM Government 2023: 8).

In the light of the Open AI Terms of Use 2023, when users provide input to OpenAI ChatGPT, OpenAI will not claim any rights over the users’ input. That is, the users’ input is owned by themselves subject to copyright protection, whereas ChatGPT’s output is assigned to users to use for any purpose as long as it does not infringe any applicable law or terms of use (Open AI Terms of Use 2023). This has raised concerns over the fairness of placing the sole responsibility on users for both input and output content in terms of copyright management based on two main considerations:

- ◇ Firstly, when deploying OpenAI ChatGPT in organizations in the European Union (EU), the concern is whether ChatGPT has the obligation to disclose any copyrighted materials that it uses to develop the system, including data feed and data training. If so, under what level of risk assessment should ChatGPT be considered in case of copyright infringement in the light of the four-tiered risk framework in the Proposed AI Act—“minimal risk”, “limited risk”, “high risk” or “unacceptable risk” (Proposed AI Act 2021: article 5).
- ◇ Secondly, currently ChatGPT’s output does not typically include any references or quotations. When users generate answers to the same questions within ChatGPT, the generated answers are fairly similar in terms of content, but with some slight changes in the order of answers and wordings. It is also declared by OpenAI that “due to the nature of machine learning, Output may not be unique across users and the Services may generate the same or similar output for OpenAI or a third party” (Open AI Terms of Use 2023). If users are placed to be solely responsible for the use of output that happens to infringe other users’ copyright, it does not appear to be fair, if users

did not have any awareness of the sources due to lack of disclosure from ChatGPT.

The above two considerations are interconnected with a classic academic debate in recent years as to whether it is justifiable to grant AI technologies as owners for their generated works. This article further evaluates whether AI-generated or AI-created works should be subject to copyright protection (Wang 2022). The discussion is an update from the author's evidential report and speech on "AI and Intellectual Property Rights: IPR Protection for AI-Created Work" for the evidence meeting of the All-Party Parliamentary Group (APPG) on Artificial Intelligence on 24 January 2022, which considered whether AI technologies should be granted status as copyright or patent owners by looking into existing regulations in the United Kingdom (UK), EU, United States (US) and China (Wang 2022).

This leads to further consideration as to how generative AI copyright protection should be managed in the digital society to protect users and strike a fair balance among rightsholders. This article seeks to promote best practices for collective copyright management in the generative AI environment, even though OpenAI may claim fair use to copyrighted materials in its generative AI applications, such as ChatGPT. It argues that there is a need to establish an appropriate risk-assessment framework and a fair collective copyright management system for the adoption of ChatGPT for use in organizations in order to protect users and strike a fair balance of protection among different rightsholders. Finally, it looks into whether it is feasible to create an international consensus or harmonization framework on the intellectual property rights (IPR) regulation on generative AI (Wang 2022).

[B] THE LEGAL STATUS OF AN AI ALGORITHM

In order to grant an AI algorithm status as an owner, the law would need to recognize the legal personality of an AI algorithm. However, it is debatable whether an AI algorithm should be granted legal personality. Some scholars have argued that AI is capable of performing similar tasks to human beings and thus should function as a legal person (Kurki 2019: ch 6). Although advanced AI may be able to perform human tasks via deep learning, AI currently does not have emotions. It has been argued that if AI algorithms could have human consciousness, they should be given legal personality (Papakonstantinou & De Hert 2020). However, even though a recent study has shown that a generative AI application such as ChatGPT may have a significant ability to understand and articulate emotions (Elyoseph & Ors 2023), this is still not equivalent to human

consciousness to have independent legal capability. One of the most common analogies is to compare the legal personality of an AI algorithm to the “most common artificial legal person”—a company, organization or corporation (Chesterman 2020: 820). Granting an AI algorithm as an independent and new legal person status does not appear to be necessary if there is already a legal person such as a corporation which could be responsible for an AI algorithm, or if there are human contributors, such as the owner, creator, software engineer or user, who could be attributed to such an AI algorithm. It could also be argued that granting an AI algorithm an independent and new legal person enables legal entities and natural persons (who would otherwise be liable for such an AI algorithm’s wrongdoings) to escape liability. In order to balance the allocation of the risk and enhance the safety of an AI algorithm, it was also suggested that liability could be further allocated in that a separate entity (such as an “Automated Driving System Entity (ADSE)” in the case of an automated driving system) should undertake ongoing responsibility for the safety tests and standards (Law Commission & Scottish Law Commission 2018: 4.107, 4.109).

There is currently a growing trend of consensus among jurisdictions that an AI algorithm should not be granted legal personality. For example, in China in the case of *Shenzhen Tencent Computer System v Shanghai Yingxun Technology* (2019), the court did not recognize legal personality for Tencent’s Dreamwriter software. In the US, 17 US Code chapter 1 also indicates that “original works of authorship” are restricted to works “created by a human being” (17 USC §102(a)). In the EU, the EU Commission on Civil Rules on Robotics in 2017 considered giving legal status of an electronic person to robots (European Parliament 2017: para 59(f)), while a European Parliament report in 2020 confirmed that “it would not be appropriate to seek to impart legal personality to AI technologies and points out the negative impact of such a possibility on incentives for human creators” (European Parliament 2020: para 14). That is, granting legal personality to AI removes the essential reason for IPR protecting the “human endeavour and spirit” (British Copyright Council 2020) and disrupts the social order of the established human society. In the UK, in the case of *Thaler v Comptroller General of Patents Trade Marks and Designs* (2021), the Court of Appeal also confirmed that AI cannot be given legal personality as an inventor. The inventor must be a human. The owner of the AI-based machine could apply for patent but not the AI-based machine itself (*Thaler v Comptroller General* 2021: para 148). In Australia, there is a different view in a comparable patent case, concerning whether an AI algorithm could be considered

as a patent inventor. For example, in the case of *Thaler v Commissioner of Patents* (2021), the Federal Court of Australia confirmed that the AI-based machine can be given the status of an “inventor” (though there is no legal effect), but the applicant and the owner of the AI-based machine must be a human who is granted patent rights (*Thaler v Commissioner of Patents* 2021: para 226).

[C] OWNERSHIP AND PROTECTION OF AI-GENERATED CONTENT

Even though AI should not be granted legal personality, AI-generated works should still be protected in order to encourage technological innovation and investment to the benefit of economic development, efficiency and the advancement of human society. Currently, although there are no direct regulations concerning copyright protection for AI-generated works, there is relevant legislation concerning copyright protection for “computer-generated work”. For example, the UK Copyright, Designs and Patents Act 1988 (CDPA) (s 9(3)) already recognizes “computer-generated work” which is similar to the New Zealand Copyright Act 1994 (s 5(2)(a)); the Indian Copyright Amendment Act 1994 (s 2(d)); Hong Kong Copyright Ordinance 1997 (s 11(3)); the Irish Copyright and Related Rights Act (CRR) 2000 (ss 21(f) & 30); and the South African Copyright Act 1978 (amended 1992) (s1(1)(h)) under the definition of “author”. That is, in the UK, the CDPA (s 178) defines “computer-generated work” as work being “generated by computer in circumstances such that there is no human author of the work” (CDPA: s 178). Its section 9(3) specifies authorship of work that: “In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken” (CDPA: s 9(3)).

Accordingly, consensus could be established among the UK, New Zealand, India, Hong Kong, Ireland and South Africa that the authorship of the outputs of generative AI should be taken to be the legal person by whom the arrangements necessary (ie AI algorithm, data feed and data training) for the creation of the work, along with the natural person or legal person by whom the additional arrangements necessary (ie inputting of questions or information) for the creation of the work were undertaken. For example, in ChatGPT’s case, OpenAI should be the legal person for generated works, and there may also be a human author of the work—the person entering the questions to ChatGPT—who should be deemed to be the joint author or owner of the outputs. This is because forming

the question is a skilled/creative process. In case of another AI machine automatically generating questions to be input on ChatGPT, the person(s) by whom the arrangements necessary for the creation of the work are undertaken should be considered as joint authors.

With regard to the duration of protection in AI-generated works, the duration of copyright in “computer-generated works” is different in the UK and Ireland, in that Ireland’s protection is 20 years longer than the UK. In the UK, CDPA stipulates that “if the work is computer-generated the above provisions do not apply and copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made” (s 12(7)). In Ireland, the CRRA (s 30) provides that “the copyright in a work which is computer-generated shall expire 70 years after the date on which the work is first lawfully made available to the public”.

The duration of copyright in “computer-generated work” is already shorter than that of a human creator. Further shortening the duration of copyright in “computer-generated work” may improve data accessibility and availability to foster the digital economy but, arguably, may be perceived as downgrading the value of “computer-generated work” and thus reduce the incentives for AI investment or hinder innovation. In this regard, the balance of these two factors should be carefully weighed.

Before any consensus on the duration of copyright protection in “computer-generated work” can be reached worldwide, the pre-requisite question still lies on whether there could be an international consensus on copyright for AI-generated works, in the light of copyright protection for “computer-generated work” in the UK, New Zealand, India, Hong Kong, Ireland and South Africa. This is because, currently, there are different judicial views and regulatory solutions from and within the EU, China and the US. It is confirmed that “under European (and US) law AI cannot own copyright, as it cannot be recognized as an author and does not have the legal personality which is a pre-requisite for owning (intangible) assets” (European Commission 2023). Furthermore, even though AI cannot own copyright, it is debatable whether AI-generated works should be subject to copyright protection. If AI-generated works can be freely used without copyright protection, such works will directly compete with human-authored works (Trapova 2023) due to the possibility of users escaping copyright infringement liability.

In the EU, the parliamentary report in 2020 considered that AI-generated works should be copyright protected, although “copyright to such a ‘creative work’” should be granted “to the natural person who prepares and publishes it lawfully, provided that the designer(s) of the

underlying technology has/have not opposed such use” (European Parliament 2020: paras 8-9). It is worth noting that in the UK case *Temple Island Collections* (2012) and EU case *Infopaq* (2009), the judgment of *Temple Island Collections* amalgamated “skill and labour” with “the author’s intellectual creative effort” in *Infopaq* and made them equivalent (Guadamuz 2017: 182).

In China the amended copyright law in 2020 retains its position that computer software can be copyrighted and does not extend copyright protection to “computer-generated work” (China Copyright Law 1990: art 8(3)), despite the fact that a leading district court in December 2019 held that an article automatically written by Tencent’s robot Dreamwriter software should be subject to copyright protection (*Shenzhen* 2019). That is, the court ruled that the AI-created work/article should be owned by the company Tencent—a legal person—because the article is “the overall intellectual creation by the overall intelligence of multiple teams and multiple divisions of labour” including the editorial team, the product team and the technical development team employed by Tencent using Dreamwriter software (*Shenzhen* 2019).

Contrary to most jurisdictions, in the US, “computer-generated work” is not subject to copyright protection as US copyright law only protects an original work of a human author (United States Copyright Office 2021), which amounts to “the fruits of intellectual labor” that “are founded in the creative powers of the mind” (US Supreme Court 1879). In the case of *Naruto v Slater*, the monkey selfie photo taken by a monkey pressing a camera button cannot be protected by US copyright law (*Naruto v Slater* 2018). However, there is a different view among US practitioners that “the person in control of the bot is the author worthy of Constitutional protection” (American Bar Association 2017). Setting aside the current restriction of US IPR legislation on AI-generated works, the US Government has established strategic plans and guidance to foster AI development and remove the obstacles of its deployment through the National Artificial Intelligence Initiative Act of 2020 (division E, s 5001). Most recently, there are several lawsuits concerning OpenAI copyrights infringement. For example, on 19 September 2023, a group of authors launched a class action, suing OpenAI for feeding the authors’ copyrighted work into their “large language modules” to provide outputs to users’ prompts and queries, without authors’ prior permission and without paying a licensing fee (*Class Action Case against OpenAI* 2023). On 27 September 2023, another group of authors including Sarah Silverman also sued OpenAI for the misuse of authors’ work to train their AI, and alleged claims for

direct copyright infringement and vicarious copyright infringement (*Open AI Case 2023*).

The UK is currently seeking international regulatory harmonization to ensure market access to innovative AI technologies, boost users' confidence and protect rightsholders (HM Government 2023: 3). Presuming that there is an international consensus to recognize IPR protection for entirely AI-generated (AI-created) works, one of the challenges of protecting AI-generated works in copyright would be when a human cannot be identified for AI-generated works in copyright. If the machines can learn and produce work from each other, those AI-generated works in copyright may not be able to be attributed to specific owners as it would be very difficult to know the proportion of actual contribution to the creation of works. That is, AI algorithms may obtain input data from a wide variety of sources, including those generated from other AI algorithms. Likewise, it is conceivable that multiple AI algorithms could combine to produce their output. As complexity grows, it will become harder to attribute the output to specific owners and harder still to determine the proportion of contribution to the creation of works. In such situations, legal and technical mechanisms should be established to determine humans who make primary necessary arrangements for an identified primary AI algorithm. Those humans should be protected as the joint owners of the copyright work. Humans who make primary necessary arrangements include the creators/programmers/developers/designers of identified primary AI algorithms, the persons who select, input and train the data, and the operators/users of AI algorithms. They could be either joint ownerships (where each contribution cannot be distinguished) or co-ownership (where individuals work is collaborative but separate) (British Copyright Council 2019).

However, if the owners of an AI algorithm do not initially make such a system publicly accessible, they could always establish partnerships with other data providers and AI algorithms' owners and work out the proportion of contribution among them via a contract or licensing agreement. Moreover, it may be reasonable if the owner of the AI algorithm were to be the person solely in charge of determining the split in contribution of effort between the input data and the algorithm itself.

The same analogy may apply for AI-devised inventions in patent protection. In general terms, an AI algorithm can be patented if it meets the standard patent criteria (something that can be made or used, new, inventive). A specific example would be a tech company producing a new face-recognition system, for face-recognition login, that it wishes to

patent. While it is commonly known that facial recognition has been in existence long before such new work, if the new face-recognition algorithm is considered to contain innovations that improve the end result in terms of dealing with challenges such as low light, partial images and different orientations, the new algorithm may contain new technological inventions which should be patentable.

Furthermore, the AI algorithms may be intelligent enough to create new inventions through learning from other AI algorithms and data, without human intervention, and beyond the original AI algorithm's developers or creators' expectations and predictions. In such a situation, legal and technical mechanisms should be established to determine the humans who made the primary necessary arrangements for identified primary AI algorithms. Such AI-devised inventions (the end product/results of these multi-AI algorithms) should be entitled to patent protection if they meet the criteria, and the owners of patent should be the primary "inventors" (Intellectual Property Office (IPO) 2021: 28). That is, provided that "the person(s) responsible for making the arrangements necessary for the AI to devise the invention would be identified as the inventor(s)" (ibid). Accordingly, the most appropriate persons include the creators/programmers/developers/designers of identified primary AI algorithms, the persons who select, input and train the data, and the operators/users of AI algorithms.

It is worth noting that regulatory development may not easily keep up with the pace of fast-moving technological innovation, and thus it is important to maintain technologically neutral regulations. While regulatory solutions are vital to create legal certainty in the longer term, practical and technological solutions are key to boosting public confidence and encouraging investment in the more immediate term. In view of that, it has been suggested that "there is an urgent need to prioritize practical solutions to the barriers faced by AI firms in accessing copyright and database materials" (HM Government 2023: 9). In this regard, the UK is promoting a regulatory sandbox, ie "a live testing environment" to "allow innovators and entrepreneurs to experiment with new products or services under enhanced regulatory supervision without the risk of fines or liability" for a limited time period for the benefit of keeping regulators informed of feasible rules in relevant areas (HM Government 2023: 6). Besides practical solutions, it was also suggested that "technological solutions for ensuring attribution and recognition, such as watermarking, should be encouraged, and could be linked to the development of new international standards in due course" (HM Government 2023: 9). In the UK, the government review has also recommended that the IPO be responsible

“to provide clearer guidance to AI firms as to their legal responsibilities, to coordinate intelligence on systematic copyright infringement by AI, and to encourage development of AI tools to help enforce IP rights” (HM Government 2023: 9).

[D] COLLECTIVE COPYRIGHT MANAGEMENT FOR AI-GENERATED WORKS PROTECTION

The use of generative AI has gone beyond leisure use. It is now widely used to generate music, news articles and image-based artworks. In the UK, Court of Appeal, judge Lord Justice Birss used ChatGPT to assist him in the summary of a judgment where the ChatGPT output formed part of the summary of a judgment (Farah 2023). More recently, in the US, two US courts have even issued notices to ban using ChatGPT to prepare and create legal documents and file legal cases which “create novel risks to the security of confidential information” (United States Court of International Trade 2023; and Thomsen 2023). This prompts a regulatory interpretation as to how AI-generated works should be appropriately used to eliminate their potential harm to society, but at the same time how they should be protected to foster human creativity and promote a well-functioning market. It is posited that one of the prerequisites for a well-functioning market is via “individual licensing and collective management of copyright” which ensures reward for rightsholders (World Intellectual Property Organization (WIPO) 2023: 10). Collective management of copyright is used to facilitate legal access to copyrighted materials via an intermediary (ie a copyright management organization (CMO)) between rightsholders and users, in order for users to avoid a complex and sometimes impossible task to seek direct permissions from authors or publishers individually (WIPO 2023: 14).

In the case of AI-generated works, it could be an even more complex task for users to seek permissions for the use of AI-generated copyrighted materials as that may involve a wider range of authors and rightsholders all over the world. For example, even though ChatGPT claims that it does not own its generated content but is subject to OpenAI’s licence and terms of use as a machine-learning module (European Commission 2023), this is not in line with the current regulatory stand of “computer-generated work” in the UK, as discussed earlier. This is because the authorship and ownership should be shared among the creators/programmers/developers/designers of identified primary AI algorithms, the persons who select, input and train the data, and the operators/users of AI algorithms who make arrangements necessary for the work to be generated. It is

concerning if AI algorithm providers are permitted in law to make a disclaimer to detach themselves from authorship and ownership so as to avoid any responsibility and liability for the AI-generated outputs.

As shown above, it could be a complicated task to determine appropriate persons concerned as owners or authors of AI-generated works, and thus individual licensing for the use of AI-generated works may become infeasible. It would be beneficial to a well-functioning market if AI-generated works could be subject to collective management of copyright via CMOs in countries. In the UK, there is usually one CMO per sector (Gov.uk 2016). There are also specialized CMOs, such as reproduction rights organizations, in the text and image sectors (WIPO 2023: 15).

Accordingly, specialized CMOs for AI-generated works could be established for publishers, and all who make arrangements necessary for the work to be generated, to join and receive awards efficiently in case of their works being in commercial use. In the UK, the consultation outcome on AI and intellectual property has already indicated that it may be helpful to have a “pilot licensing scheme for small AI developers to access scientific and technical material” for training AI systems using text and data mining (Gov.uk 2022: paras 31 and 45). It was also suggested that “collective licensing could be considered where rights holders are represented by CMOs” (Gov.uk 2022: para 45). Academics have also recommended introducing mandatory collective licensing for AI developers who should acquire a licence for AI-generated works via CMOs (Matulionyte & Selvadurai 2020).

[E] A RECOMMENDATION FOR INTERNATIONAL HARMONIZATION

The guidance on National AI Strategy supports “the Plan for Digital Regulation, which sets out our pro-innovation approach to regulating digital technologies in a way that drives prosperity and builds trust in their use” (Gov.uk 2021). The independent AI Roadmap report from the AI Council calls for “robust and flexible regulation”, “clear and flexible regulation”, “adaptive and informed regulation” and “responsive regulation” for all areas including good data practices, ensuring that “existing regulations and regulatory bodies had not only the capacity, but also the capability to fully consider the implications of AI in areas such as labour, environmental, and criminal law” (AI Roadmap 2021). The AI White Paper further addresses the concern over “the absence of cross-cutting AI regulation” which may “create uncertainty and inconsistency” in public trust in AI (AI White Paper 2023). It encourages “a clear and

unified approach to regulation” and “cross-cutting, principles-based regulation” for AI technologies, promotes “central regulatory coordination” and recognizes the importance of “promoting interoperability with international regulatory frameworks” (AI White Paper 2023: para 14).

Although the new overarching framework for AI regulation in the UK proposed in the AI White Paper does not include crucial issues on generative AI such as “the balancing of the rights of content producers and AI developers” (AI White Paper 2023: para 34), the general regulatory approach proposed in the framework in the White Paper (AI White Paper 2023: paras 37 & 48) would nevertheless provide some benchmarking of regulatory approaches and interpretation on these wider issues, along with the “Pro-innovation Regulation of Technologies Review: Digital Technologies” (HM Government 2023). In the AI White Paper, it was suggested that the regulatory framework should be “pro-innovation, proportionate, trustworthy, adaptable, clear and collaborative” whilst implementing “five values-focused cross-sectoral principles” of “safety, security and robustness”; “appropriate transparency and explainability”; “fairness”; “accountability and governance”; and “contestability and redress” (AI White Paper 2023: paras 37 & 48).

Pursuant to the UK National AI Strategy (Gov.uk 2021), AI Roadmap and AI White Paper, the UK should devote more effort to developing regulatory and non-regulatory guidance to encourage development and investment of AI and protect the public interest, safety and values if existing law does not have an adverse effect on the path towards an AI-enabled (or AI-driven) economy and changing the current law brings rewards that outweigh the disadvantages.

In the author’s opinion, the UK should make no legal change to current copyright protection concerning “computer-generated work” as this clause is terminologically and technologically neutral and could adapt to any anticipated technological change. However, as new technologies develop, supplementary regulatory interpretation of IPR legislation is required, for example, the application of the current legislation to AI-generated works should be further interpreted to bring about legal certainty and strike a balance between the protection of rightsholders and the incentives for technological innovation and investment.

In this regard, the UK could set out an initiative to promote international harmonization on IPR protection for AI-generated works in that AI algorithms would not be granted legal personality because when AI algorithms cause harm, a thorough investigation on liability would be required; simply allocating a risk to an artificial electronic person is

not ethically and morally correct. Ultimately, humans should have full accountability and responsibility for their conduct from a social and commercial context. Moreover, granting legal personality to AI does not improve legal accountability. However, AI-generated works should be granted IPR protection to promote innovation and investment. The public should be made aware that if an algorithm has no trace of human owners, the liability will fall to the user of such an algorithm. In addition, there is the possibility of smart contracts within AI algorithms that can negotiate licence fees/royalties for their use on behalf of their owners. Existing IPR legislation would not preclude such embedded terms. A specialized and internationally harmonized collective management system of copyright for AI-generated works would also promote a well-functioning market and encourage continuous technological innovation.

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MORE SPEED, LESS HASTE: FINDING AN APPROACH TO AI REGULATION THAT WORKS FOR THE UK

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Abstract

Artificial intelligence (AI) regulation is in vogue, with proposals around the world to regulate AI as an activity separate to other types of data processing. This article argues that this approach is problematic, given the difficulties in defining AI. It notes that the more *laissez-faire* approach of the United Kingdom (UK) risks subsequent hasty legislation being introduced when innovative applications of AI cause moral panic.

The article proposes a way forward, utilizing the UK's existing data protection framework to accelerate the shift to meaningful regulation. This approach leverages the substantial overlap between data protection regulation and the risks of AI and enables greater regulatory certainty and effectiveness by expanding the scope and powers of an existing regulator—the Information Commissioner's Office—rather than creating something from scratch. Doing so mitigates the challenges of defining AI by focusing instead on the risks presented to individuals, organizations and society by all automated decision-making.

Finally, the article notes that the speed of change in this area will require ongoing agility from all the bodies involved in digital regulation in the UK and outlines the potential for the Digital Regulation Cooperation Forum to support its member regulators.

Keywords: artificial intelligence; data protection; innovation; technology.

[A] AI: SOMETHING MUST BE DONE?

Every now and then, society encounters an issue about which “something must be done”. Often this notion includes a dose of moral panic, and a sense that the current order is not equipped to address the new perceived threat. In my world of privacy and data protection, Warren and Brandeis developed the notion of the “right to be left alone” as a response to concerns in the United States (US) around the consumerization

of photography (Samuel & Brandeis 1890). More recently in the United Kingdom (UK), we can recall furore around “video nasties” (British Board of Film Classification and Video Recordings Act 1984), dangerous dogs (Bennett 2016; Dangerous Dogs Act 1991) and genetically modified foods (Burke 2004; Harvey 2023), all examples of when media and societal concerns have driven a hasty legal and regulatory response.

AI inspires similar emotions, but this time (with all due respect to dog lovers) the stakes are higher. AI already has an impact across our daily economic and social lives; it is proving to be disruptive and destructive, as well as fun, transformative and productive. Use of AI has been normalized in everyday technologies such as image recognition and natural language processing, while applications of technologies such as generative AI are capturing the imagination and the fears of the public.

It is appropriate that policymakers and legislators around the world are thinking about new law and regulation to address AI, but it will take cool heads and clear minds to get this right.

[B] THE UK HAS FALLEN OFF THE PACE IN POLICY AND REGULATION

The discussion is lent some urgency by the sense that the UK has lost ground. For a while, the UK led the AI policy discussion, with groundbreaking research by the [Royal Society](#) and the [British Academy](#), Dame Wendy Hall’s formative paper on growing AI in the UK (Hall & Pesenti 2017) and the subsequent foundation of the [AI Council](#), the [Office for AI](#), the [Centre for Data Ethics and Innovation](#) and the [Ada Lovelace Institute](#). Granted, there were many cooks in the kitchen during this period, but there was also a level of energy and cross-disciplinary engagement which was lacking elsewhere in the world.

The political crises around Britain’s exit from the European Union (EU) meant that from 2019 onwards momentum was lost. Government thinking in the July 2022 paper on AI (Gov.uk 2022) and March 2023 International Technology Strategy (Gov.uk 2023b) used a lot of words to say that, essentially, not much new was going to happen.

Meanwhile, the rest of the world pushed on apace. The AI Principles of the Organization for Economic Cooperation and Development (OECD) (adopted in 2019) established broad intergovernmental agreement, followed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) Standard on the Ethics of Artificial Intelligence (UNESCO 2022). The EU’s draft AI Act 2023 led the way for AI-specific

legislation (for better or worse), and China introduced AI regulation for some use cases (Holistic AI 2023), including a framework for generative AI scheduled (at the time of writing) to go live in August 2023 (Ye 2023). In the US, the White House’s Blueprint for an AI Bill of Rights (White House nd) set the policy tone and has been followed up with a Request for Information regarding federal rulemaking (Federal Register 2023) and a voluntary framework agreed with the largest US AI companies releasing foundation models to the general public (White House 2023). Congress has made a range of legislative proposals (Lenhart 2023) and the National Institute of Standards and Technology (NIST) AI Risk Management Framework (NIST 2023 (AI RMF 1.0)) has set a new standard for risk management and self-regulation.

In recent months, there has been a welcome re-engagement in the UK, perhaps reflecting the new Prime Minister’s interest in the area. The AI Regulation White Paper (Gov.uk 2023b) is an excellent analysis of the current challenges. However, the White Paper shies away from legislative intervention, relying instead on an iterative approach by existing regulators, a vaguely defined “central risk function” to “identify, assess, prioritise and monitor cross-cutting AI risks” and a general intention to monitor the situation for now (Gov.uk 2023a).

[C] PASSIVITY EXPOSES THE UK TO MORAL PANIC

I am concerned that the current approach leaves the door open for knee-jerk legislation—whenever something awful happens that the media links to AI, a moral panic ensues.

We have a recent precursor, which happened during my time as a Deputy Commissioner at the ICO. In August 2020, we saw the first algorithmic (albeit not AI) backlash, as the public responded to the Government’s approach to awarding exam grades during the Covid pandemic (Hao 2020). The until-then abstract policy debate felt much more real when crowds in Whitehall were chanting “F*** the algorithm”.

That crisis dominated the headlines but—whilst damaging to many students’ academic opportunities (Duncan & Ors 2020)—was remedied (as best as it could be) without legislation. The Government simply reversed its initial position. However, this episode may be a portent of things to come, as society engages with deepfakes, autonomous weapon systems, driverless cars, persuasive but inaccurate AI chatbots, and emotionally appealing AI companions.

Next time, the harms to individuals and society might not be sufficiently addressed by a simple government backdown. The gap between society's understanding of AI and its likely impact is too great. An AI moral panic, in some shape or form, feels inevitable.

[D] OVERREACTION CAN LEAD TO BAD REGULATION

My reservations about the UK's current inaction do not place me in the "something must be done" camp. Hasty law is unhelpful; the aforementioned Dangerous Dogs Act is shorthand in Whitehall for misguided and badly built legislation (MCB Chambers 2021). Heavy-handed regulation could hinder innovation and, ultimately, the UK's productivity and global competitiveness. There is undeniably a global race to harness the powers of AI with a sense that, to the victor, the spoils (AP News 2017; Schmidt 2022).

Furthermore, I think AI-specific regulation faces three major implementation challenges. It is hard to:

1. define AI;
2. identify new risks and harms from AI; and
3. envisage a new regime being sufficiently scalable and effective.

Challenge 1: it is hard to define AI

Firstly, what on earth is AI? When we issued our AI guidance at the ICO in 2020 we dodged the question, stating that: "We use the umbrella term 'AI' because it has become a standard industry term for a range of technologies." We discussed this approach at length internally and concluded it would be unproductive to get pulled into a discussion around exact definitions.

Currently, discussions around AI can point to at least three different scenarios:

- ◇ recently it has been used to describe different types of generative AI, and often simply an individual experience of ChatGPT;
- ◇ among more informed people, more formal definitions are utilized, such as those noted below;¹ and

¹ Giacomelli (2023) provides an excellent overview of how many use cases can be envisaged just from the commercial application from Large Language Model (LLM) AI tools.

- ◇ among those less engaged in the details of AI, the scope can expand somewhat, to be a vehicle for all our hopes and fears around new technology.

Any AI-specific law will have to find a meaningful definition to use.² Definitions used recently include:

- ◇ “Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal ... they can also adapt their behaviour by analysing how the environment is affected by their previous actions” (European Commission 2019.)
- ◇ “an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy” (AI RMF 1.0) (adapted from: OECD Recommendation on AI 2019; ISO/IEC 22989:2022).
- ◇ “highly autonomous systems that outperform humans at most economically valuable work” (OpenAI Charter 2018).
- ◇ “by reference to the 2 characteristics that generate the need for a bespoke regulatory response.
 - The ‘adaptivity’ of AI can make it difficult to explain the intent or logic of the system’s outcomes:
 - AI systems are ‘trained’ – once or continually – and operate by inferring patterns and connections in data which are often not easily discernible to humans.
 - Through such training, AI systems often develop the ability to perform new forms of inference not directly envisioned by their human programmers.
 - The ‘autonomy’ of AI can make it difficult to assign responsibility for outcomes:
 - Some AI systems can make decisions without the express intent or ongoing control of a human” (HM Government 2023).

² The recent report by the US Chamber of Commerce’s Commission on Artificial Intelligence Competitiveness, Inclusion, and Innovation (2023) includes a thoughtful and thorough discussion of the challenges of defining AI.

Each of these definitions differs substantially, but all cast a wide net, and to the semantically ambitious interpreter, can cover most modern computing activities. This should be a warning light for AI-specific law. It is not a specific technology of AI that we are seeking to regulate, it is just the activity of completing tasks by processing data.³

The challenges here are evidenced by the EU's efforts to define AI in its draft AI Act 2021, which in March 2023 shifted from a long definition which incorporated machine learning to a definition more closely aligned with the OECD definition.⁴ The March 2023 revisions also included additional wording to ensure that recent generative AI models were captured by the Act (Bertuzzi 2017). Overall, the evolution of the AI Act should be applauded. There has been genuine engagement and refinement in the drafting that will hopefully result in a better product through the trilogue process, but the need to redefine the most fundamental definition in the draft Act does not broker great confidence in any definition's durability.⁵

³ The White House's Blueprint for an AI Bill of Rights comes full circle on this, ending up close to our original ICO position. Having positioned itself as an AI-focused document, and having covered the principles it espouses, the Bill then expands its scope by stating: "While many of the concerns addressed in this framework derive from the use of AI, the technical capabilities and specific definitions of such systems change with the speed of innovation, and the potential harms of their use occur even with less technologically sophisticated tools. Thus, this framework uses a two-part test to determine what systems are in scope. This framework applies to (1) automated systems that (2) have the potential to meaningfully impact the American public's rights, opportunities, or access to critical resources or services."

⁴ The original definition read: "(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning; (b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; (c) Statistical approaches, Bayesian estimation, search and optimization methods." (Annex I of the European Commission's Proposal for a Regulation of the European Parliament and of the Council laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act).") And now reads: "'artificial intelligence system' (AI system) means a machine-based system that is designed to operate with varying levels of autonomy and that can, for explicit or implicit objectives, generate outputs such as predictions, recommendations, or decisions, that influence physical or virtual environments." Source: [AI Act \(14 June 2023\)](#).

⁵ Some would argue this has been a structural challenge within data protection regulation in the last 20 years. The Data Protection Act 1984 was driven by fear that large central government databases could support an Orwellian future. The Act also addressed the private sector, but in hindsight the role of data in our lives was still rudimentary. The GDPR-driven Data Protection Act 2018 seeks to regulate aspects of personal data processing across the full data lifecycle, a huge challenge given how personal data permeates everyday life. Resource challenges for Data Protection Authorities, the slow buildup to meaningful enforcement, and an ongoing flow of cases to higher courts to establish precedent can all be seen as symptoms of building a "regulation of everything". Adding another such layer of regulation through defining "AI" to cover most new technology over the next few years does not seem wise.



Figure 1: From NIST Artificial Intelligence Risk Management Framework (AI RMF 1.0) (NIST 2023)

Challenge 2: it is hard to identify new risks and harms from AI

In these circumstances, I question why new AI-specific regulation is a worthwhile exercise. Clearly, advances in machine-learning technology are accelerating our capabilities and exacerbating existing challenges, but in terms of the risks of harm it presents, I struggle to see the novelty.

For example, the NIST Framework (Figure 1) provides a model for describing harms related to AI systems. The Framework identifies real risks, which can easily increase in likelihood and impact when AI is involved but are inherent in any decision utilizing data, whether it is a deep-learning model or a spreadsheet built on a home personal computer. I am reminded of the 2017 case the American Civil Liberties Union (ACLU) brought against the state of Idaho, where the Department of Health and Welfare refused to disclose the reasons for cutting individuals' Medicaid assistance, claiming the third-party AI software contained "trade secrets" (ACLU 2016). When the ACLU prevailed, it found a badly built Microsoft Excel spreadsheet using incomplete historical data and a flawed statistical approach (Stanley 2017). Closer to home, the Post Office Horizon scandal destroyed lives without a whiff of AI.⁶

Why should an individual receive less protection if they are harmed by a technology that falls outside an arbitrary definition of AI? Clever lawyers for the state of Idaho, or for the Post Office, could likely have argued that the algorithms used were not AI; the harm for postmasters in the UK, or Idahoans needing Medicaid, remains the same.

⁶ See the Post Office Horizon IT Inquiry [website](#).

This is why I remain sceptical about specific AI regulation. Trying to define AI is a valid and challenging activity for academics and other experts, but it is a time sink for policymakers and a sitting duck for future legal challenge.

Challenge 3: it is hard to envisage a new regime being sufficiently scalable and effective

The current output from data protection authorities has to be compared with the time it would take to build new frameworks and the time it would then take new regulators to regulate AI effectively. In the realms of both online harms (Gov.uk. 2020) and digital competition (Digital Competition Expert Panel 2019), the UK Government was contemplating legal and regulatory responses at least four years ago. At the time of writing, legislation addressing these areas has not yet been passed.

Once laws are passed, there will be many months and years of a fledgling regulator working out how to promote, educate and enforce around a new regime. Across Europe, it took most data protection authorities the first 18 months to get up to speed after the General Data Protection Regulation (GDPR) went live. Thinking up new structures and regulators is fine, but it is easy to forget the gap between desk work and the real world.

Contrast this with the speed at which AI is evolving. I must admit some personal pain here; in the time I've been writing this article, GPT-4, BARD and various other generative AI technologies have been made available to the general public, the UK's AI White Paper has been published, and the plans for the UK's AI Summit have been announced. This piece needed to be tweaked numerous times to cover the way the world has changed in recent months. Some references will be out of date by the time it is published. This pace of change will only continue, with an ongoing growth stage that will commoditize and consumerize AI and place real strain on our ability to distinguish the real from the fake and the fair from the unfair. Innovation, yet again, will outstrip new law and regulation.

[E] AN ALTERNATIVE APPROACH

In some ways the UK AI White Paper is proposing a middle way, with its reliance on sectoral regulation and a willingness to consider legislation at a later date. But there are material gaps that need to be addressed in the current regime, both in terms of legislation to address harms and in the powers and resources available to regulators.

The pessimist may think that we have a choice between no regulation and bad regulation. I hope there may be scope for an alternative approach, which utilizes existing law—especially in the world of data protection—and adapts them for the new world. This is not to say that the current UK data protection regime addresses all the risks AI presents, or that the current ICO can regulate AI as-is, but rather that it provides a platform and framework through which a new era of information regulation can emerge relatively quickly, alongside a regulator with the competence and capability to quickly cover this new challenge. Domain expertise of regulators is a pre-requisite for understanding the risks AI may bring, and data protection regulators are best positioned among their peers to move quickly and effectively.

To assess the viability of this option, we need to assess the gaps and synergies between current data protection regulation and a future AI-driven world.

[F] THE GDPR AND AI: POTENTIAL GAPS

The gaps between existing data protection regulation and the harms arising from AI data processing were well explored in the early years of the GDPR. The most obvious are in scope; the GDPR only regulates personal data processing, and so does not address societal or environmental harms, and struggles when harms are visited on a group rather than an individual.

Wachter & Mittelstadt argued that there were also potential limitations on how well the GDPR protects people even when their personal data is processed, stating:

even if inferences are considered personal data, data subjects' rights to know about (Art 13-15), rectify (Art 16), delete (Art 17), object to (Art 21), or port (Art 20) them are significantly curtailed, often requiring a greater balance with controller's interests (e.g. trade secrets, intellectual property) than would otherwise be the case. Similarly, the GDPR provides insufficient protection against sensitive inferences (Art 9) or remedies to challenge inferences or important decisions based on them (Art 22(3)) (Wachter & Mittelstadt 2018; 2019).

Furthermore, there are specific pain points that different proposals for AI-specific regulation seek to address, many of which reflect our recent experience. These include:

- ◇ addressing issues in training datasets for AI, especially around bias, which some would argue could be covered by the “fairness” within

the GDPR, but at the risk of straining that concept to its breaking point;

- ◇ further developing the *ex ante* nature of the current data protection regime to fully address the risks posed by AI models being deployed rapidly and irreversibly—the GDPR already places some obligations on data controllers to undertake privacy assessments and sometimes pre-emptively engage with regulators, but does not envisage the speed and scale with which harmful AI could be deployed and propagated; and
- ◇ addressing redress and rectification when harms have been caused through data to generate a model, but the value (and possibly traces of the original data) resides in the model, and not the data in its original form. As noted below, the US Federal Trade Commission (FTC) has been experimenting with “algorithmic destruction”, which may be part of the response to this new scenario, but this approach was not envisioned by legislators as current data protection/consumer protection law was drafted.

Finally, there is a conceptual difference between the GDPR and the EU’s prospective AI Act that could be seen as a feature or a bug. The AI Act utilizes a “product safety” approach, placing the onus on the developer of the AI system, as opposed to the GDPR, which focuses on the data controller, being the entity that determines the means and purposes of the processing. Crudely, the AI Act focuses on the maker of an algorithm, whereas the GDPR follows the activity of who is deciding what to do with the data.⁷

Overall, I have a preference for the GDPR approach, which seems better suited for a world of flexible foundational models, easily distributed functionality and long supply chains. However, it may be that we see a best-of-both model evolve, with some responsibilities on developers for taking a safety-by-design approach for reasonably anticipated usages, and then further obligations on entities taking subsequent decisions on how they deploy the technology.

⁷ This is an oversimplification in both directions. The GDPR enshrined the concept of “[data protection by design and default](#)” which looks squarely at the developer of a personal data processing system whilst the EU draft AI Act places some obligations on deployers of AI systems, as explored in a blog by Demircan (2023).

[G] THE GDPR AND AI: POTENTIAL SYNERGIES—ARTICLE 22

More recently, there has also been a focus on what AI activities and harms are covered by the GDPR. This question is explored in a May 2022 Report (Barros Vale & Zanfir-Fortuna 2022a) from the Future of Privacy Forum (of which I am a Senior Fellow) which reviewed over 70 court judgments, decisions from data protection authorities, specific guidance and other policy documents issued by regulators, as they applied to real-life cases involving automated decision-making (ADM).

The report notes that much existing commentary has been focused on article 22 of the GDPR. Article 22 addresses data processing “which produces legal effects concerning him or her or similarly significantly affects him or her”. It limits the lawful bases for processing personal data (to the performance of a contract, if required or authorized by domestic law, or with the data subject’s explicit consent) and gives the data subject the right not to be subject to a decision based solely on automated processing.⁸

This represents a meaningful check on many AI use cases, introducing a form of appeals process for higher-impact decisions about people and requiring that data controllers “implement suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests”.⁹ There remain challenges with this mechanism, both in ensuring that there is sufficient transparency so that people know when they should appeal,¹⁰ and also in placing a reliance on fallible humans to form judgements on an appeal, but it is currently the most direct, established regulation we have.

⁸ The scope of the “right” here is a bit unclear. In the eyes of the EDPB—comprised of the EU Data Protection Authorities—(which coordinates some work between those regulators, produces its own guidance, and sometimes makes decisions on enforcement cases) it is essentially a prohibition on higher-risk automated processing without a human in the loop, as the Article 29 Working Party noted in its [2016 Opinion](#), that was re-adopted by the EDPB in 2018: “The term right in the provision does not mean that Article 22(1) applies only when actively invoked by the data subject. Article 22(1) establishes a general prohibition for decision-making based solely on automated processing. This prohibition applies whether or not the data subject takes an action regarding the processing of their personal data.”

The EDPB’s position carries a lot of weight in Europe, of course, and may still serve as a reference point in the UK, but it is a strong interpretation of the article. This feels like an aspect of both the EU and UK GDPR that may become subject to case law in the future.

⁹ This involvement of humans and automated decisions remains appealing to policymakers and the public alike. When the Prime Minister-commissioned Taskforce on Innovation, Growth and Regulatory Reform recommended removing article 22 from UK GDPR, in June 2021, the suggestion was picked up by the Department for Digital, Culture, Media and Sport in its September 2021 consultation “Data: A New Direction”. Following substantial criticism from civil society, this was subsequently dropped as an idea in the Government’s subsequent consultation in 2022.

¹⁰ The Public Law Project “[Tracking Automated Government register](#)” is a good example of this visibility and how it can particularly affect vulnerable groups.

[H] THE GDPR AND AI: POTENTIAL SYNERGIES—BEYOND ARTICLE 22

Although Article 22 clearly has direct relevance to many AI use cases and is already subject to a wide range of case law and ongoing cases, it is not the only part of the GDPR relevant to ADM. As the authors of the FPF Report note:

there are several safeguards that apply to such data processing activities, notably the ones stemming from the general data processing principles in Article 5, the legal grounds for processing in Article 6, the rules on processing special categories of data (such as biometric data) under Article 9, specific transparency and access requirements regarding ADM under Articles 13 to 15, and the duty to carry out data protection impact assessments in certain cases under Article 35 (Barros Vale & Zanfir-Fortuna 2022b).

This is, of course, then supported by the broader sweep of the GDPR, and its reliance on principles which are broadly similar to those in the 1995 Data Protection Directive, and to other data protection regimes around the world. In particular, the concept of “fairness” in the GDPR is both promising and open to challenge. Fairness is enshrined in Article 5 of the GDPR, and was also in the preceding Data Protection Directive 1995. For a long time, data protection authorities and courts only referred to fairness in the context of transparency and privacy notices, but the lack of further definition of fairness in the GDPR means the term can be interpreted widely to cover many of the challenges of AI. When discussing AI, data protection authorities often lean heavily on fairness, although the scope of this concept, in the context of the GDPR, has not yet been fully explored through case law. The ICO attempted to bridge this gap in March 2023 (ICO 2023c) as part of this updated guidance on AI (Hunton Andrews Kurth 2023).

It is important to note that in these areas of overlap there is already extensive enforcement and, to some degree, emerging case law. This is unsurprising. Data protection regulation in Europe is now fairly mature, and data protection regulators have had time to staff up, communicate expectations and start their work. Recent enforcement cases range from inadequate disclosures by Klarna Bank (*Klarna Bank* 2022) during credit applications, Uber’s allocation of rides to drivers (*Uber* 2023), and the Slovakian Tax Authority’s profiling of entrepreneurs for risk of tax fraud (*Slovakian Tax Authority* 2021). It is striking how clear the risk of harm

is in such cases, and how existing principles are already being used to address new challenges.¹¹

[I] IN DEFENCE OF DATA PROTECTION AUTHORITIES

Data protection authorities have often been criticized for a lack of speed and/or ambition, and it is true that regulators can be cautious, given their constraints of resources and scope. But data protection regulators are increasingly intervening with confidence and sophistication.

- ◇ There is now meaningful global coordination, reflected in the increased activity and professionalism of the Global Privacy Assembly,¹² that has already taken action on Clearview AI (Swift 2022).
- ◇ There is a focus on deepening specialist skills in AI; in the last year, many regulators have followed the lead of the ICO in establishing a specialist AI function, including the Coordination Algorithms Directorate as part of the Dutch Data Protection Authority (Autoriteit Persoonsgegevens 2023; Iapp Daily Dashboard 2023), and its French counterpart, establishing an Artificial Intelligence Department (Commission Nationale de l'Informatique et des Libertés 2023).
- ◇ There are efforts to support innovation, with the ICO and subsequently many other data protection authorities introducing sandbox schemes to encourage engagement with innovators and specific projects.
- ◇ There is a wider use of enforcement powers beyond fines. The FTC is utilizing the sanction of “algorithmic destruction” to ensure that the inappropriate use of data does not result in a residual benefit to the controller in terms of a better-trained model (Caballar 2022; Federal Trade Commission 2022; Riley 2023). European regulators have leaned heavily on accountability provisions, in particular expecting or mandating the use of a data protection impact assessment, effectively forcing the data controller to fully engage with and address any risk that may arise from the processing (Hunton Andrews Kurth 2021).
- ◇ There has been a (relatively) rapid response to new developments in AI, with the ICO’s swift updates to its AI guidance (as noted above) and the Italian regulator taking unilateral action against OpenAI,

¹¹ A common theme is how often AI is being used to make decisions about the less advantaged and the vulnerable; children, gig workers, benefits claimants. In the real world, AI is often used to make quick decisions about people who cannot push back.

¹² See the [Global Privacy Assembly](#).

which resulted in changes to its disclosures and management of individual's rights (Mukherjee & Vagnoni 2023)—followed by the European Data Protection Board (EDPB) establishing a working group to engage with OpenAI on ChatGPT (EDPB 2023).

Here in the UK, the ICO continues to comment, guide and intervene on AI matters with increasing confidence, providing practical guidance on how to assess risk (ICO 2020), warning against risky applications of AI (ICO 2022b), enforcing in the most harmful cases (ICO 2022a) and maintaining a flow of blogs that provide guidance and insight as AI continues its rapid evolution (2023a; 2023b). The ICO's confidence reflects a competency built on years of experience gained from engaging with AI since its seminal paper on Big Data in 2017.

The ICO, now with the help of the Digital Regulation Cooperation Forum (DRCF), is also doing a great job at being a horizontal regulator in a world of (predominantly) sectoral regulators. Over the last few decades every sector has been digitalized and often personalized, meaning that the ICO has had to engage with different sectoral regulators over time. The same is true of AI, but we do not have the same luxury of time. Retailers are using AI at the same time as financial services firms and the Government. Understanding how to play well with other regulators—and avoiding a spiral into conflicting sectoral rules—will be a thematic challenge for AI regulation.

Put this all together, and you have a network of regulators that, albeit within their current scopes and not always with the speed others would like, are nevertheless building up an impressive competency and capacity to guide and intervene on AI cases.

[J] EVOLVING THE UK'S EXISTING INSTITUTIONS BRINGS SPEED, NOT HASTE

Given how long any AI-specific regulation would take, I think it is preferable that we use existing regulators and regulatory instruments, utilizing resources, skills and muscle memory to face the challenges of AI now, rather than in the second half of the decade.

The potential benefits go beyond speed and convenience. I believe that the GDPR approach of placing responsibility on the data controller, as opposed to the AI Act approach of placing more responsibility on the original developer of the AI, is more flexible and practical. The former approach links responsibility to data usage, which makes more sense when dealing with foundational applications with a broad scope of usage,

which may be utilized across a long supply chain. As I note above, it may be that in time we could evolve a best-of-both approach that places further obligations on AI developers, but we can leverage the existing data protection model to cover a lot of issues quickly.¹³

This is not to say that the current UK data protection regime covers all the risks arising from AI. As we have noted, there are some key limitations—both in the GDPR not fully addressing harm to individuals from their data being used in automated decision making, in terms of societal harms through the use of generative AI for misinformation/disinformation, and environmental harms incurred through the huge carbon costs of many deep-learning algorithms. And there are broader questions around areas such as IP, liability for harm, and discrimination which may sit outside of this overlap. But the large majority of use cases that advocates, policymakers and legislators refer to when discussing AI regulation are around the direct negative impacts on individuals through the use of their data.¹⁴

The remaining harms can then be addressed by adjustments to the existing UK data protection regime. These are unlikely to threaten the UK’s “adequacy” status in the eyes of the EU, as they will be additive to the UK GDPR.

In terms of the UK’s global competitiveness, the ICO has had to have regard for the UK’s economic growth since the Deregulation Act 2015 (HM Government 2017), so this could easily be tweaked if it was felt AI was not adequately covered.

The heavier lift here is ensuring that the ICO has the resources to have adequate competency and capacity to develop AI guidance and pursue AI cases, which will require agility and technical skills that any regulator struggles to maintain. This would probably require additional funding for the ICO, but likely at a fraction of the cost of setting up a brand new regulator.

It should be noted that much of this approach is similar to the UK AI White Paper (in terms of avoiding brand new AI law for its own sake and

¹³ I think in the medium term the global model will settle on a “best of both” approach, placing obligations on developers of AI to build transparent, explainable, controllable models, and obligations on users to deploy them responsibly. If this is the case, the UK can evolve its approach from a position of strength, in having moved swiftly to address the challenge of AI using its existing tools in the first instance.

¹⁴ Using the EU AI Act as an example, the European Parliament’s LIBE Committee proposed bans on remote biometric identification systems in publicly accessible spaces, predictive policing systems and emotion recognition systems. All these areas involve personal data processing and have been considered by Data Protection Authorities in various cases through the years.

leaning on existing regulatory frameworks) and the Ada Lovelace Institute's report "Regulating AI in the UK" (Davies & Birtwistle 2023) (which notes the need for urgency and recommends changes to the UK data protection regime, and also the creation of an AI ombudsman scheme). And it also mirrors some of the current trends we are seeing, such as the Dutch Data Protection Authority taking on formal responsibility for algorithms. But this approach goes further and faster by leaning into existing frameworks, and reduces the risk of the UK being slow off the mark.

[K] WHAT ELSE NEEDS TO BE DONE?

We are contemplating new regulation in a period of great uncertainty. AI is both an immediate use case in this new world, but is also a secondary factor in driving ongoing change in how technology is shaping our society and economy, such as through the hoarding of training data by large technology companies to gain market dominance against competitors. During my time at the ICO we recognized that the traditional boundaries of digital regulation were collapsing and worked with the Competition and Markets Authority (CMA) and Ofcom to set up the Digital Regulation Co-Operation Forum (DRCF) (which now also includes the Financial Conduct Authority).

The DRCF is already doing fantastic work on the intersection and tensions arising from our new world (CMA 2021), and the approach is being utilized in several other countries (Authority for Consumers and Markets nd). It feels like it could have a critical role to play in keeping up with the fast-moving world of AI, supporting all regulators in co-ordinating their efforts. The DRCF already plays this role to an extent,¹⁵ but it feels like the DRCF could be fortified, formalized and better funded to ensure regulation is informed and fit for purpose. Depending on the role it had to play, this could include placing it on a statutory basis with some powers to intervene to meet its mandate.

To me, this makes much more sense than creating a new body as envisaged by the UK AI White Paper, which proposes a somewhat nebulous "central control function" to oversee the activities of existing regulators. The DRCF is already maximizing what can be achieved without supporting legislation, and is the ideal body to support further coordination between regulators in terms of obligations to mutually

¹⁵ Objectives 4 and 5 of the DRCF are "Anticipate future developments by developing a shared understanding of emerging digital trends, to enhance regulator effectiveness and inform strategy" and "Promote innovation by sharing knowledge and experience, including regarding innovation in the approaches of regulators".

inform, support and even resolve differences between the regulatory scopes the existing regulators work under.

[L] CONCLUSION

The only thing we can be sure of is change. AI continues to surprise, delight and challenge us in equal measure, and there will be applications released that we cannot yet imagine. To anticipate this through rigid regulation is hubris, but to do nothing is equally unwise and risks us ending up with law written in haste. Otherwise, we risk chasing our tail, writing law with misguided aims (such as defining AI) to be enforced by regulators that will be late to the party.

For these reasons I think we should be planning for new regulation, but seeking to build on existing foundations, leveraging the substantial overlap in data processing and automated decision regulation that already exists with the UK GDPR, expanding the scope and resourcing of the ICO to enable it to match the speed and the complexity of the challenge we face, and asking the DRCF to help coordinate the mosaic of regulators to keep up with this new world.

That way we can create an environment which reassures the public that AI can be a force for good and support the innovation that will benefit us all.

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DIVERSITY, EQUALITY AND INCLUSION IN MEDIATION FOR FAMILY RELATIONS

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Abstract

In this article, I discuss how diversity shapes mediation when the latter is adopted for the purpose of resolving quarrels between family members, and I explore how mediation can become more inclusive to accommodate diversity and enhance equality. Diversity permeates how families are created, their structures and the relations within them. Similarly, diversity involves the roles that family members play within the family unit. There is also the diversity brought by the various social identities of the family members who are in dispute, and those identities in turn intersect with the family members' identity as disputants. All these manifestations of diversity have an impact on the nature of family disputes and their resolution. However, the current institutional and professional approaches to mediation practice seem to oversimplify the nature of family, family relations, family disputes and family disputants, especially in terms of diversity. Thus, research and improvements in understanding and practice are needed to ensure that resolutions are reached respecting diversity and enhancing equality and inclusion. Here, I propose a contextualized and integrated approach that shapes mediation interventions in accordance with family diversity. Reflecting on diversity as it manifests in family relations and mediation will foster a renewed understanding of access to justice that builds upon kinship studies and intersectionality, whereby diversity, in all its manifestations, is a value.

Keywords: family relations; diversity; inclusion; mediation.

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[A] INTRODUCTION

“La diversità che mi fece stupendo ...” (Pasolini 1950)¹

Diversity and inclusion initiatives are on the agenda of mediation providers and organizations.² Research has addressed some aspects of mediation and diversity within the mediation sector (Shimada & Stephens 2017), for example: how to measure diversity; how to identify the perils that mediation might present to some social groups (Delgado 1985; Grillo 1991; Gunning 1995); and how to accommodate cultural diversity in family mediation (Irving & Ors 1999). However, data and reflections are needed on how the various social identities of family disputants intersect during mediation and how inclusion can be achieved. This article aims to start a conversation on how best to fill this gap and address the question: how does diversity manifest itself in mediation involving family relations?

An immediate answer to this question might be that, in family disputes, the diversity of family relations and structures intersect with the variety of social identities of the parties involved in the dispute (including but not limited to gender identity, sexual orientation, race, socioeconomic status, religion, disability, health, language and age) and influence, to different extents, the resolution of the dispute. At the same time, parties' diversity interacts with the diversity brought by the mediator.

Related to the previous question is a concern as to how to ensure that legislative developments concerning family mediation and mediation practices embed equality and inclusion. Putting it bluntly, the premise here is that policy and practice should *see and learn from families*, as I shall explain.

Families are sites where knowledge is created-knowledge for the surrounding society as well as the individuals that compose the family unit (Carsten 2003). However, the multiplicity of family forms in society makes it clear that the current mediation practice, the legal framework concerning mediation, and the legislative proposals to introduce compulsory mediation, do not truly reflect diversity in all its manifestations within family relations. Consequently, initiatives for diversity and equality may appear to be anachronistic, not contextualized and have limited impact.

¹ My translation: “The diversity that made me wonderful.”

² See further in this paper the policy of the College of Mediators on Diversity and Inclusion, or the category of the [National Mediation Awards](#) on Diversity and Inclusion.

To overcome this limitation, acknowledging the existence of various family forms and relations first and then shaping mediation accordingly, will foster a renewed understanding of diversity, equality and access to justice. This renewed understanding will also bring about a broader conceptualization of family disputes which in turn will widen the scope of mediatory intervention. Learning from such variety means also to adapt the language used in family mediation theory and practice. A more befitting terminology would be family relations and mediation for family relations. Using the term *relations* encapsulates the heterogeneity of family ties and dynamics, how they constantly change, how disputes transform them, the “everyday sense of (kin-focused) relationality” (Strathern 2020: 128), and how interpersonal relations within the family are influenced by external relations.

Why does discussing diversity in mediation for family relations matter?

One might wonder why talking about diversity in mediation for family relations matters. In discussing diversity in alternative dispute resolution and focusing on mediation, Volpe points out that paying attention to and fostering diversity is important for building trust in the process, nurturing unbiased settings and mediators’ personal preferences, and putting the parties at ease (2019).

I would add that discussing diversity is important to improve access to justice. Although the aim of mediation is to resolve disputes, its key quality is “its capacity to reorient the parties towards each other ... by helping them to achieve a new and shared perception of their relationship” (Fuller 1971: 325). At the same time, mediation processes, as every other type of dispute resolution, are permeated by social and personal factors, and those involved in family disputes perform different roles—as disputants but also as individuals and members of a family. Thus, looking at the personal, social and political functions that family relations have and appreciating their innate characteristics of being changeable and creating changes, the reasons that justify talking about diversity are both procedural and personal—to reach a fair and equal resolution of the dispute; to support the well-being and mental health of family disputants that enable their agency during mediation; to educate family members to perceive wrongdoing within the family and not be limited by family relations in putting forward their claim—in short, access to justice.

Enhancing access to justice is, of course, a good reason to address the issue of diversity in mediation. Academic literature has suggested that

access to justice has political, theoretical and practical dimensions that aim to transcend inequalities of substantive and procedural instruments in resolving disputes. Its understanding has been broadened to include informal dispute resolution mechanisms like mediation (Cappelletti 1993). There is also a subjective dimension of access to justice that must be considered—how disputants perform and function during the process, their perception of the process and their consciousness about the dispute (Moscati 2017). Access to justice also means giving an opportunity to the parties in a dispute to express themselves and put forward a claim. However, personal and contextual factors limit access to justice. These include limited legal knowledge, court delays, high costs, complicated rules, limited availability of dispute resolution mechanisms, the location of courts, the structure of the courtrooms, a limited number of interpreters, difficulties in accessing files and a shortage of staff. There are, however, additional limitations that specific groups of people might face depending on diversity. And I would suggest that unique barriers exist for family disputants—barriers that are rooted in the very nature of family relations, and on the way these relations are negotiated with the personal characteristics of the members of the family.

Using families as interpretative lenses will contribute to developing further the meaning of access to justice in mediation. Mediation and access to justice share the same aim of reaching a fair resolution of disputes. But, for both, the fairness principle runs the risk of being taken away by state (direct and indirect) control. One could argue that one of the principles of mediation is party control and that this filters state control. However, parties cannot fully control their dispute if their intersecting identities are not acknowledged and protected during mediation. Thus, the value of access to justice in mediation is infringed upon. Mediation, access to justice and, likewise, the family, have political dimensions. And so does diversity. A broader understanding of family relations will shape access to justice in mediation in a way that transgresses the normative model of family portrayed in official policies.

The discussion that follows first portrays diversity within families. Then the article moves on to set up some practical steps on how to shape inclusive mediation practices for family relations. To assist this research, I draw upon dispute resolution discourse and studies about kinship and family.

To show some of the broader and various scenarios of diversity within family relations, I will use four vignettes and will draw in part upon auto-

ethnographic notes of my personal experience in co-drafting a diversity and inclusion policy for the College of Mediators.

Positioning myself

Before continuing, I wish to position myself in relation to the issues discussed in the article. I am a white woman, born in Italy, trained as a lawyer, and a former dancer, who moved to the UK in my thirties and started a new career. Thus, I am aware of my privileges, and I have been always conscious of how to use my privileges to negotiate (ethically) when in a dispute.

However, cognitive limitations following Covid (including at times being unable to spell my own name) have forced me to rearrange the ways in which I learn, communicate, prepare for negotiations, and then negotiate. At the same time, as a researcher and activist, I have always been interested in diversity and equality. So, what is the connection between my cognitive issues and my work with diversity and equality, the reader might ask? The answer is that, after initial feelings of desperation and drama, I have decided to use those cognitive limitations to develop my reflections on diversity and equality on mediation.

[B] THE LIVED EXPERIENCES OF FAMILY MEMBERS AND FAMILY DISPUTES

How I approach diversity as a concept

To prepare for this article, I have analysed the websites of mediation providers and family mediation organizations in England and Wales and have looked for policies concerning diversity, equality and inclusion. Undoubtedly, the need to ensure that diversity, equality and inclusion are embedded into mediation practices is a recurrent theme. My analysis also shows that policies and initiatives generated to promote equality draw mainly upon the Equality Act 2010.³ But diversity and inclusion policies provided for mediation are not always specific to family relations—when in my view they should be.

Although a full discussion of the limits of the Equality Act 2010 is beyond the scope of this article, by observing the multiplicity of family relations, roles within the family, parenting arrangements, and the

³ It protects from direct and indirect discrimination. Section 4 of the Act lists eight characteristics that are protected: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

impact of assisted reproduction technologies, I would advocate for an understanding of diversity and equality that is more nuanced and broader than the legal one.

In approaching diversity by building upon what families are today, there are several theoretical issues to consider. These include: the social construction of diversity; the relation between the private and public spheres concerning the regulation of family; the impact of culture on how to handle family disputes; and the intersection between individual identities, internal family dynamics, the roles that individuals have within the family and whether those roles are legally protected or not. Attempts are not made here to achieve a deep investigation of the manner in which identity can be shaped, but it is relevant to highlight the fact that the Equality Act, and diversity and inclusion policies, do not seem to consider the whole range of families and family relations that exist and are perceived as such (for instance polyamorous families, or friendship).

The Equality Act, protecting marriage and civil partnership, leaves out all those relations and parenting roles that do not fall into the legal model of adult relations and legal parenthood. There is an evident discrepancy between what happens in society and what is legally acknowledged and protected. However, disputes and conflicts occur in every type of family arrangement and mediation practice should be ready to be effectively inclusive for legally unrepresented families too.

Diversity, family relations, disputes and mediation

A limited understanding of the nature of family disputes and family mediation continues to infuse legal developments concerning mediation. For instance, the definition of family mediation available on the website of the Ministry of Justice reads as follows: “Family mediation is a process where a trained independent mediator helps you work out arrangements with another participant (e.g. an ex-partner) concerning children, finance or property.”⁴ This appears to be a rather partial and limited definition of family disputes, and one that moulds the scope of mediatory intervention upon litigation—the parties are two in number, they are former partners, and the range of disputes is restricted to finance, property and children.

⁴ Available at: [Guidance: Family Mediation Scheme](#).

The reality is different though!⁵

The four vignettes below (drawn mainly from my empirical research, autoethnography and conversations with mediators since 2014) reveal some of the scenarios in which diversity manifests itself during disputes concerning family members and their resolution through mediation.

Vignette 1

Luke, Amanda, and George are in non-monogamous relation. Amanda is from Italy, and Luke and George from the UK, and they live together in London. They started dating four years ago and are now planning to have a child. They have asked their friend Joanna, who is from France, to carry their child. Amanda, George and Luke have been planning to have children for a while and have decided that George and Amanda will donate the sperm and the egg, respectively, and Joanna will carry the baby. This seemed to be a perfect plan until the four of them had a huge argument on the role that each of them would play in the life of the child. Furthermore, Amanda plans to move to Barcelona and wants to take the child with her. They argued for days until they decided to attempt mediation to prevent future conflicts.

Vignette 2

Peter and Jane are half-siblings on their father's side. Their father passed away, and they received a wealthy inheritance. They were not aware that their father had another son, Craig, who has now contacted them reclaiming his portion of the inheritance. Jane has suggested attempting mediation, and her brothers have agreed. The mediator will soon discover that Jane and Craig are deaf.

Vignette 3

Rose is 60, non-married, has dedicated her life to looking after her mother. After the mother passed away, Rose, upon the express request of her late mother, moved in with her sister, Mary, and her family. Rose and Mary have two brothers and another sister. They all live in different cities. Mary has financial troubles, and Rose provides, with her disability pension, for all the main expenses of the family.

⁵ For instance, in the [Code of Practice for Family Mediators](#), the Family Mediation Council suggests a more nuanced definition (para 1.3): "Mediation is a process in which those involved in family relationship breakdown, change, transitions or disputes, whether or not they are a couple or other family members, appoint an impartial third person, a Mediator, to assist them to communicate better with one another and reach their own agreed and informed decisions typically relating to some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation."

Unfortunately, the relation between Mary and Rose deteriorated so badly that Mary decided to invite the other siblings to meet and tell them that Rose should now move in with one of them. The siblings did not take the news well and started to argue with Mary, accusing her of taking advantage of Rose and now dropping her.

Vignette 4

Aran is in his twenties and has started a business with his uncle Mark who is 60 years old and is considered the leader of the family. It was Aran's idea to develop a business together, and he has looked after everything to start it. Aran has also invested more money than his uncle in their project. After a couple of months during which the business flourished, it started to lose money because of a wrong investment that Mark made. Aran was the most affected by Mark's decision. He was furious. However, he was raised to pay respect to the elderly in his family, and, so, he didn't complain.

The vignettes show that during mediation diversity concerns the types of family, the members of the family, the number of parties in mediation, and the types of quarrels. Moreover, the vignettes emphasize the intersecting identities of family members and that, once in dispute, those identities intersect with family members becoming disputants.

Vignette 1, for instance, confirms the long-established existence of a variety of ways individuals employ to create, perform, and perceive kinship and family relations. Broadly speaking, we may say—as Bradway and Freeman put it—that “we understand kinship as a way of *doing relationality* that is always a way of *thinking relationality*—kinship as embodied, aesthetic, and erotic *theory*” (2022: original emphasis). Practices of kinship are various and so are practices of families (Morgan 2011).

Luke, Amanda, Joanna and George (vignette 1) have created a modern family! “Modern Families” come in different forms (Golombok 2015). Families exist beyond marriage, sexual relations, and blood and genetic ties, and parenthood is not universally connected to procreation. Family members include those legally recognized as such, or linked by blood or genetics, but also those who, by choice or circumstances, play roles within the family.

Emotional bonds between children and parents, and between partners, exist independently of biological ties. Some families are chosen (Donovan & Ors 2001); others are made invisible by the law (Danisi & Ferreira 2022); some families share the same household; others are transnational; some

are in motion (Murray & Ors 2019); in others there are elders (Clough & Herring 2018); while in others there is a father who has given birth. Our perception and feelings regarding who is part of our family can change over time. Some families are legally protected while others are not. In some families, more than two adults, who do not live together or who are not in a couple, decide to co-parent the same child (Bremner 2017); in others there are more than two parents living together. In some families, biological parents do not have parental responsibility. In others, only grandparents have parental responsibility. In some families, children decide not to have contact with their parents, in others they are forced to. In some families, children are under the care of local authorities. Some families are displayed, and others are not. According to Finch, “display” is the “process by which individuals, and groups of individuals, convey to each other and to relevant others that certain of their actions do constitute ‘doing family things’ and thereby confirm that these relationships are ‘family relationships’” (2007: 73).

Disputes happen in all types of modern families and their heterogeneity is brought into mediation—for instance, the number of family disputants can be more than two or three; and individuals may speak different languages and be based in different countries, and so time for mediation sessions could be difficult to combine; some of the disputants have legal parental rights while others do not.

Families have several functions, and human reproduction is just one such function. More generally, families are important in the political economy (Bradley 1996); they are a site of power (Foucault 1990); their autonomy is often mediated by policy that the state uses to exercise control (Donzelot 1979) or to perpetuate specific values; families can be the key unit of social welfare; and the target of consumerism. For instance, in vignette 3, for Mary and Rose, family has been the main source of financial and emotional support for both, and this is likely to intrude during the mediation process.

Family relations do not exist in a vacuum—structural inequalities, stratified reproduction, stigma and structural violence impact on the family and can be replicated in mediation, by, for instance, exacerbating power imbalances or deterring disputants from putting forward their claim.

The diversity concerning the relations that create a family, the form of the family unit, the creation of the bonds between family members, the ways in which adults *become and are* parents, interweaves with the specific diverse identities of the parties involved—there is the group, and

there is the person. The social identities of the parties are made up of characteristics that include those protected by the Equality Act 2010 and more. In addition to the eight characteristics protected under the Equality Act, the diversity of the parties encompasses their role within the family unit; whether they have parental responsibility; their past experiences; their knowledge about the dispute; their financial situation; how they deal with emotions; their ability to articulate their ideas; the impact that, for instance, long Covid might have on their cognitive functions; changes in hormone levels; and knowledge of technology during online mediation.

In turn, intersecting various identities and experiences have an impact on family members being in disputes—on their identity to become disputants and to communicate during mediation.

Drawing upon the paradigm of Felstiner, Abel and Sarat, I believe that becoming a disputant happens through a process of naming, blaming, and claiming (1980). First, the person acknowledges the wrong, then places blame upon the other party/parties, then claims redress, and finally acts during the resolution. However, moving from one stage to another is not straightforward, given personal and social circumstances. For example, respect for family ties might refrain a family member from blaming and/or claiming, as shown in vignette 4.

Being a disputant in mediation brings different degrees of embodiment. It involves interaction—verbal and non-verbal communication. Communication, as the exchange of information and learning is of key importance during negotiation and mediation (Gulliver 1979). Such exchange can be hindered or enhanced depending on how diversity is handled. If diversity, in all its manifestations, is respectfully acknowledged and considered as an added value, then communication is enhanced. However, more research should be carried out on how specifically the intersecting identities influence the mediation process.

Another layer of diversity is created by the culture of mediation itself. The handling of disputes—in particular, family disputes—is itself a part of a society's culture. Among other definitions of culture, the one which can help here is “culture is the capacity for creating the categories of our experience” (Rosen 2006: 4). It could be contended that different cultures of family mediation can emerge from the different ways in which family relations are perceived, created, understood, and displayed. The risk is that a pre-defined process of family mediation that looks “overly Westernised” (Menkel-Meadow 2023: 33) or too binary might also deter the recourse to mediation. The power implication of diversity cross-culturally as well the impact of diversity in relation to multiple identities of each

individual—personal, familial, social, professional, cultural—need to be addressed during mediation.

In addition to the diversity of the parties, it is important to also acknowledge that mediators bring their own intersecting diversities during mediation. Although mediation is in effect negotiation with a third party, overall, it is well known that the mere presence of the mediator influences the parties and how they perform during mediation (Palmer & Roberts 2020). Further, mediators bring their own life experience to the mediation processes. For instance, as a mediator who prefers to stay anonymous told me:

My own family trajectory would be one of many aspects that could influence mediatory approaches, e.g., a mediator's own experience of divorce, past experience and attitude to conflict. I know my role as a mediator has been influenced by the stage of my own family trajectory – mediating as a young mother with parties my own age compared to mediating now as a grandmother with parties the age of my eldest grandchild!

However, research has yet to assess the impact that the diverse identities of the mediator have on the parties and the mediation process. Thus, this article calls for further research.

As a consequence of a broader approach to family relations and diversity in mediation, a wider definition of family disputes has to be posited. The vignettes and other research (Moscati 2020; Sims 2020) show that family quarrels are not limited to legal disputes concerning divorce/dissolution, finance, and arrangements regarding children. Matters in dispute can include, for instance: inheritance, as for Peter, Jane and Craig (vignette 2); reproductive choices (including whether and how to have children); contact between grandparents and parents and their children; who has to look after a relative, as for Mary, Rose and their siblings (vignette 3); disagreements about pets; and decisions concerning health issues. Further, a broader, contextualized, approach to mediation intervention is needed, as suggested in the next section.

[C] ADAPTING FAMILY MEDIATION

If, on the one hand, embracing diversity is significant, on the other, Ahmed cautions the adoption of diversity as a term de-coupled from equality and justice. Ahmed points out:

Diversity appeals are often made because diversity seems appealing: it is more consistent with a collaborative style. If the word “diversity” is understood as less confronting, then using the language of diversity can be a way of avoiding confrontation. Diversity is more easily

incorporated by the institution than other words such as “equality”, which seem to evoke some sort of politics of critique or complaint about institutions and those who are already employed by them. Diversity becomes identified as a more inclusive language because it does not have a necessary relation to changing organizational values. The neutrality of diversity and its detachment from power and inequality makes it difficult for diversity to effect change (Ahmed 2012: 65).

Thus, this article, although mindful of the debate on whether equality can ever really be achieved, reflects on how equality could be enhanced within mediation. Here, equality is linked to access to justice—equality in having the opportunity to choose mediation, and for participants to express themselves in mediation. Being aware of the need to address these issues on both theoretical and practical levels, it is argued here that it is important to broaden the intervention of mediation by drawing upon a wider and contemporary concept of family relations, family members and family quarrels. An additional, although simple and somewhat obvious step, is to consider diversity as a value—as suggested in the quote from Pasolini that opens this article! Looking at families naturally leads to the use of intersectionality (Crenshaw 1989) as a general principle but also as a practical tool for mediation practice.

For instance, the College of Mediators—in its Diversity and Inclusive Practice in Mediation Policy and Guidelines—has included the following:

Diversity is intersectional; multiple dimensions of diversity will overlap and influence, to different extents, the life of the parties involved in mediation. The intersection of multiple characteristics will influence how parties communicate, behave and contribute to the mediation process. To the extent possible, mediators should pay attention and consider the different and overlapping aspects of diversity.⁶

Translated into daily practice, using intersectionality as a principle and as a working tool that can enhance inclusion and equality requires preparation and the creation of a space where disputants have the opportunity to express themselves according to their diversity. This also requires mediators to deal with their own biases; be cognizant of the several ways diversity presents itself; learn to use appropriate language; dedicate more time to these issues during the pre-mediation meeting; and allow more time for joint sessions if needed to make parties at ease.

However, one might add that although—as argued in this article—intersectionality is extremely important and somewhat apparent within family relations, the wide variety of family relations suggests that

⁶ Diversity and Inclusive Practice in Mediation: Policy and Guidelines (2022: 4.2).

further steps are required. To start with, further research is needed on intersectionality in mediation. Here, I mean participatory research and inclusive knowledge-exchange initiatives that involve researchers and mediators.

Then, drawing upon the concept of merographic connections, that Strathern explains as “a phrase that formalises what is commonplace in English usage: the fact that nothing is simply part of a whole insofar as another view or perspective may redescribe it as part of something else” (2018), assumptions about family, its members and their autonomy and power should be avoided. Further, as suggested by Prilleltensky with reference to psychology, “values, assumptions and practice are closely connected. The assumptions we make about people are influenced by our values ... these ideas in turn influence practice” (1997: 519). This is true for mediation practice too. I would add that assumptions are shaped by culture and traditions too. When reflected in mediation practice, those assumptions shaped by culture, risk to limit inclusion and equality during the resolution. For instance, the debate and practice concerning child-inclusive mediation, at least at the moment, neglect different cultural approaches to childhood. Notwithstanding the 1989 United Nations Convention on the Rights of the Child, in some cultures children are still considered unable to act without their parents’ guidance, independently of their individual maturity or circumstances. Without falling into the trap of cultural relativism, child-inclusive mediation practice should develop in a way that addresses such cultural differences and the variety of family forms children are raised in.

Furthermore, because of the complexity of family relations and quarrels, some changes to the way in which people can become mediators are needed. I suggest here the development of an academic degree in mediation for family relations that is grounded in dispute resolution discourse and provides an interdisciplinary preparation on kinship/family in legal, procedural, sociological and psychological terms. Such a degree should also provide modules on race, gender, disability and class. Following successful completion of a degree, future mediators should attend further professional training, pass an exam, and then be regulated by professional rules.

In addition, to champion inclusive informality of mediation process, reflections are needed among family mediators on how to structure mediation sessions/process in a way that accommodates diversity while respecting the principles of voluntariness, impartiality, party control and confidentiality, but without modelling it upon family litigation. At the

same time, to ensure full engagement, policies on diversity, inclusion and equality should be developed with the participation of the public—namely, the family disputants themselves.

Finally, legislative developments should avoid compulsory mediation and draw upon the key principle of access to justice—the right to choose among a variety of fully accessible dispute resolution mechanisms—and the idea that quarrels, disputes, and conflicts, including those among family members, do not necessarily represent something negative—they have the power to unveil injustices and show how kinship and families are changing.

[D] CONCLUSION

In this article, I have tried to analyse the ways in which diversity is manifested in mediation used to resolve disputes between family members, and how mediation can become more inclusive so as to accommodate diversity and enhance inclusion and equality. I have discussed the challenges that diversity poses to mediation practice and some changes that are important to address those challenges. The argument developed here suggests expanding the mediatory and institutional interventions according to various family relations. A more nuanced understanding of diversity of family relations, family disputants and family disputes is needed. Studies on kinship, inclusion, race, gender, disability and class should begin to feed back into mediation (and more generally into dispute resolution), encouraging a revision of family mediation intervention, because diversity relates not only to family structures, but also to the intersecting social identities of the parties involved in a dispute.

The diversity of family structures, individual roles and displaying expand the notion of family disputes beyond divorce/dissolution, finance and child arrangements. This article has outlined some of the various forms of disagreements that should be included under the umbrella term of family dispute.

To address diversity in a meaningful way that enhances inclusive agency of the parties involved in family disputes and make mediation accessible, these reflections have suggested that a broader understanding of family relations requires a broader approach to mediation.

Family mediation cannot be *divorced* from the family/families! Litigation tends to extract the dispute from its social dimension and attempts to reduce its resolution to the application of legal rules, whereas mediation is heavily involved in social norms and that means that strategies to

resolve disputes through litigation and mediation should be inherently different.

Mediation offers the parties involved greater leeway to manoeuvre in the search for an appropriate outcome of their dispute. But this flexibility exists within a normative framework and with a mediator present who transforms in various ways the dispute by that very presence. An important question is to what extent and in what ways such transformation occurs and takes into account the greater structural diversity that families present without the risk of attempting to reconnect such families to the (hetero)normative, binary, mono-cultural model that limits the agency of those parties in dispute who do not fit into that model. I have pointed out that, drawing upon access to justice, equality can be achieved if disputants have the opportunity to access mediation if and whenever they wish. If, on the one hand, fairness and impartiality of mediators can assist in ensuring equality between the parties, on the other, excessive formalization in the process, compulsory mediation and a lack of in-depth knowledge might reduce the opportunities for the parties to express themselves. Looking at families—queer, transnational, polyamorous, reconstituted, adoptive, of choice—it is apparent that the Equality Act 2010 is outdated, and diversity policies and mediation practices shaped on that Act run the risk of being unhelpful. The diversity of family forms and relations functions as a proactive engine to modify mediation practice—the method should be fashioned around the families and not the other way around.

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Legislation, Regulations and Rules

Equality Act 2010

United Nations Convention on the Rights of the Child 1989

AN AMERICAN LEGAL SCHOLAR RETURNS TO CHINA

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*Neysun Mahboubi has studied Chinese law for three decades, visiting China countless times and forging strong ties with fellow scholars during those trips. These are his reflections, first published in August 2023, on returning after nearly four years away.**

[A] INTRODUCTION

Last month, I returned home from a three-week academic trip to China. At almost any other point in the past 40 years, this would be a thoroughly unremarkable statement for me or any other American scholar to make. No longer.

Until the Covid-19 pandemic, robust scholarly exchange was a hallmark and sometime ballast of United States (US)–China relations. That had been the case since the earliest days of normalization of relations in the late 1970s, even through the crisis of 1989 (Southern 1989). Since my own first visit to China for language study in the summer of 1995, I have made academic research of Chinese law the centrepiece of my professional life, returning to China over the ensuing decades more times than I can count, for all manner of visits, sometimes as many as three or four times a year. Until quite recently, it never would have occurred to me that my return from a trip to China might prompt any wider notice or special grounds for reflection.

For scholars like myself, who have prioritized on-the-ground research and exchange in our



*Neysun Mahboubi visiting
with renowned legal scholar
Jiang Ping 江平.*

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study of China, the past few years since the onset of the pandemic (and associated travel restrictions) have been very difficult to bear, akin to being deprived of oxygen. As recently as just this past December, the resumption of our travel to China—for the express purpose of research and exchange—seemed distressingly far off to many of us, who were not willing to accept the strictures and vagaries of China’s “Zero-Covid” policies.

The sudden dismantling of those policies following the “white paper” protests (Zhu & Ors 2023) opened a vista as welcome as it was unexpected, and I proceeded to make travel plans for as soon as it was practicable.

Returning to China in June 2023 did not put me at the very front of the line of returning US scholars. Others were making their return visits around the same time as me, while still more were slated to go in the following weeks and months. Still, we remain in the early days of resumption of academic travel to China—and renewal of people-to-people exchange more generally—with understandable concerns about not only cost but also safety clearly paramount for many (Jakes & Ors 2021). (And of course there are well-founded reciprocal concerns among our Chinese colleagues too, as they contemplate their own return travel to the US.) The overall picture of US—China scholarly exchange remains just a pale shadow of its former self, the scope and scale of exchange as late as 2019 incredible to contemplate today.

[B] THE EFFECT OF THE COVID-19 PANDEMIC

By 2019, mounting tensions between the US and China already were in sharp relief, of course, as was the spillover into the realm of scholarly exchange. But as tumultuous as the relationship between the two countries had grown by then, various dynamics unleashed by the Covid-19 pandemic have made things markedly worse. This dismal landscape is what sets the scene for any considerations of resuming academic travel and exchange now, propelling the safety concerns that weigh heavily on US and Chinese scholars alike. Even a few cases of scholars being subjected to intrusive questioning or otherwise harassed on arrival at the border—the accounts well disseminated by word-of-mouth among the relevant communities—have had a significant and persistent chilling effect.

Early in the Covid-19 pandemic, when barriers to travel to China had become clear but their full duration not yet apparent, I grappled with the threat to academic work on China that was already visible, laying out my position with as much force as I could then muster:

Precisely because China remains so much a closed and opaque target for academic inquiry, there simply exists no plausible alternative to the on-the-ground research US scholars have been able to conduct, and hone with ever-greater sophistication, in recent decades. ... So, once COVID-19 travel restrictions are lifted, and as long as visas remain available, US-based scholars of China will have no choice but to return there and continue all the research projects that have fallen into abeyance since the onset of the pandemic, however fraught the circumstances and whatever the risks (Mahboubi 2020).

At more or less the same level of rhetorical intensity, this has been my consistent stated view in all the years since, and really the sole point in the general arena of US–China relations on which I have staked out a sharply maximalist position. So when the opportunity to return finally arose, I felt a special responsibility to do so—not just for the benefit of my own academic research, but also to follow through on my rhetoric of the past few years, and to model resumption of in-person exchange for still hesitant colleagues in both the US and China.

To be sure, as my actual departure neared, possible risks crept to mind. Even as Covid controls have dissipated and foreigners encouraged to return, the various ways in which Chinese security officials—much empowered over the course of the pandemic—made their heightened scrutiny felt in recent months (Wei 2023) have escaped no Western scholar’s attention. I am not immune to the fears that drive many colleagues’ ongoing reluctance to travel to China and am certainly respectful of their difficult cost/benefit analysis. Having resolved to make the trip, notwithstanding, I was relieved to find that none of my concerns were met. From start to finish, my visit was entirely free of hassle, and exchanges with longtime friends and interlocutors—who seemed genuinely delighted to welcome me back to China—proved as open and frank as ever. This is not to suggest that all returning scholars will necessarily encounter the same, but just to enter my own experience into the cumulative record.

[C] OBSERVATIONS FROM THE GROUND LEVEL IN CHINA

So, against this backdrop, what did I learn from my trip? I’m grateful to have had the chance to share some reflections already on the *Sinica Podcast* (2023), but let me here elaborate on, and add to, some of the points I discussed with Kaiser Kuo in that episode.

First and foremost, as happily noted above, I found Chinese colleagues eager to re-engage, after almost four years of effective separation. Not



Neysun Mahboubi together with (recently retired) Peking University Law Professor He Weifang 贺卫方.

of spirit with which I was greeted, at every turn, served as a welcome reminder of the enduring strength of ties forged during the past 40 years of US–China engagement (Campbell & Ratner 2018), despite the common trope that such engagement had “failed”.

That said, the general theme of fraught US–China relations was indeed omnipresent throughout all my interactions, prominent even in contexts where the bilateral relationship would rarely (if at all) have come up in the past. For most of my professional life relating to China, the focus of my work generally and my China travel in particular has been the narrow academic field of Chinese administrative law. My discussions in China, over the decades, have tended to focus on relatively technical questions like the scope of judicial review under China’s Administrative Litigation Law, or the operational meaning of public participation requirements for Chinese agency rulemaking.

In recent years, amidst downward-spiralling US–China relations, I have felt compelled to tackle this subject more directly (see [The Penn Project on the Future of US–China Relations](#)), so I did anticipate for US–China relations to be a key feature of some discussions on this visit. Even so, I was taken aback by the degree to which concern over (the poor state of) the relationship came up in just about every conversation. No corner of China studies, I fear, will be unaffected by these shadows.

Deeper anxieties were often mentioned too. China’s strict response to the Covid-19 pandemic, and then sudden relaxation of controls, have left emotional scars that remain close to the surface for many. Worries over the tightening economic outlook are clearly pervasive. Most of all,

only private discussions but also public dialogues (around lectures I delivered in Beijing and Shanghai) were about as robust and wide-ranging as I could have hoped. Given the precipitous decline in US–China relations over the past few years, I would not have been shocked to find personal dynamics negatively impacted as well. That they were not—and in fact much the opposite!—helped to confirm the significance I had attached to this particular trip, lending a real emotional weight to my visit. More broadly, the generosity

among the scholarly and professional communities I know best, there was palpable dismay over the ongoing contraction of political space under Xi Jinping 习近平, coupled with uncertainty as to where the “red lines” are today (and where they will be in the future). I was heartened to find some examples of ongoing willingness to test the boundaries—to use whatever space remains to somehow advance legal and policy arguments critical of (or at least not fully aligned with) dominant political trends. But many Chinese colleagues who have displayed similar instincts in the past have grown more circumspect of late, turning their attention to matters well within the zone of perceived safety, or simply just focusing instead on their own personal lives and interests. This is to say nothing, of course, about those who have more affirmatively taken up the mantle of Xi Jinping’s regime.

[D] THE CASE FOR RESUMING ACADEMIC EXCHANGE

Realistically, we can expect US–China tensions and (in some ways corresponding) Chinese political restrictions to persist and even deepen for the foreseeable future.

Against this backdrop, I well understand why there is so much pessimism about the immediate future of scholarly exchange between our two countries. Still, I remain undaunted—and, in fact, am newly energized—in calling on scholars on both sides of the Pacific to bolster our efforts to restart the engines of on-the-ground research and exchange that have been idling these past four years. What left the deepest impression, from all my experiences on this trip, was the powerful reminder of the intrinsic and vital benefits which this mode of inquiry brings to our academic work. (I have no doubt many other American scholars who returned to China this summer feel the same way.) Just from a knowledge standpoint, the immense costs of what we lost over the course of the pandemic never have been so obvious, the need to prevent further losses never more urgent.

A more fulsome resumption of scholarly exchange, across the board, can yield additional benefits as well. Like other channels of dialogue—all much impaired over the past few years—it could offer at least a moderate stabilizing influence (Kennedy & Wang 2023) over the freefall in US–China relations, if only by restoring some degree of cognitive empathy (Wang 2023) to now hardened perspectives.

More ambitiously, it also could play a role in pushing back against closing political boundaries in China. The hydraulics of scholarly

exchange have long served as a tool for reformist Chinese intellectuals to press for greater liberalization. More conservative, security-minded Party authorities likely anticipate this, hence China's own mixed messaging on the resumption of exchange (which includes revising the Anti-Espionage Law to dramatically expand its coverage) (Agence France-Presse in Beijing 2023). But at a moment of growing concern over the scarcity of foreigners visiting China—and the not-unrelated state of the Chinese economy more generally—there is a distinct opening for American scholars to return and re-engage with our Chinese colleagues. We should seize this opportunity.

[E] A CALL TO ACTION

For us to do so effectively, more will be required than from individual scholars alone. Of course, we will need the full support and encouragement of our respective academic institutions—many of which have begun, in their natural caution, to reconsider longstanding frameworks and pathways of exchange. It would help as well for our own government, which now tends to focus almost exclusively on high-level communications (Davis 2023), to better demonstrate that it takes seriously its recent statements endorsing the revitalization of academic exchange (Miller 2023), alongside other forms of people-to-people exchange generally.

This must include greater attention to the treatment of visiting Chinese students and scholars in the US. It is hardly “whataboutism” to note that both countries have dampened enthusiasm for academic exchange by confronting a non-trivial number of students and scholars with visa delays, visa denials, and border harassment. If anything, the problem has been more acute from our side of late (Feng 2023). Restoring the hard logistics of exchange (fellowships, funding, flights) is an important precondition too, of course, but probably insufficient to drive up interest so long as the US and China remain locked in this contest of mutual intimidation.

Ideally, it also would be possible to carve out some more room in US popular discourse about China (and vice versa) for affirming the value of scholarly exchange. This may be a tall order, for multiple reasons. In



Neysun Mahboubi speaking at Shanghai Jiaotong University Law School, at the invitation of Professor Ji Weidong 季卫东.

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the US, it remains good politics, from either side of the aisle, to press an unrelentingly tough line on China (Philbrick 2023). Occasional carve-outs for shared challenges on issues like health and climate are mostly pro-forma, and in any case often dismissed.¹ Proponents of any form of engagement carry a heavy burden of persuasion, including on whether such engagement succeeded in the past, but especially on whether it can make any significant difference now or in the future. In China, anti-Western rhetoric from the very top (Palmer 2023), however sometimes calibrated, does enjoy a sizeable receptive audience not only among the general public, but also (it must be said) across a range of intellectuals.

American and Chinese scholars who wish to push back against these wider currents have to think very carefully about how to make the best case(s) for academic exchange within their respective environments—and how to ensure that the contours of whatever exchanges we are able to resuscitate can be the most productive given these new complexities on every side.

This will take a lot of work, somewhat beyond our core skill set, conditioning, and incentives as academics. But I suspect there is little to no alternative if we want to preserve, much less strengthen, fields of inquiry and learning about China built up over the past 40 years. In many respects, the present moment recalls the early days of constructing US–China scholarly exchange in the aftermath of the Cultural Revolution (Shambaugh 2023). It’s hard to imagine any less broad-mindedness and ingenuity than was applied then, by American and Chinese scholars of that generation, will be necessary today.

[F] THE ROAD AHEAD ...

My last night in Beijing, at dinner with some of my closest friends from the Chinese legal community, whom I’ve known for almost 30 years, we debated whether the current landscape for scholarly exchange—informed by all the reciprocal visits this summer, including my own—reflects the beginning of the end of a dark period, or just the end of the beginning. I may be cautiously optimistic of the former, but I am realistic enough to acknowledge the latter as a real possibility too. We shall find out soon enough.

¹ When this essay was originally published in *The China Project* in August 2023, there looked to be a distinct possibility that the Science and Technology Cooperation Agreement first signed between the two countries in 1979, and renewed every five years since, could be allowed to lapse (Hao & Hua 2023). Ultimately, the Agreement was renewed for another six months, but as of this republication, the long-term future of the Agreement remains in some doubt (Razdan 2023)

In the meantime, I am planning to return to China again in the fall, holding out hope that my trip's significance will be muted by then, against the backdrop of the ordinary and routine.

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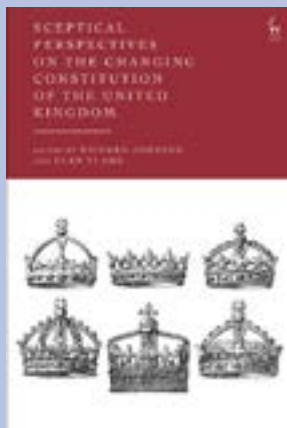
Legislation, Regulations and Rules

Administrative Litigation Law

Anti-Espionage Law

**SCEPTICAL PERSPECTIVES ON THE CHANGING
CONSTITUTION OF THE UNITED KINGDOM, EDITED
BY RICHARD JOHNSON AND YUAN YI ZHU**

PATRICK BIRKINSHAW
University of Hull



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This is an oddly entitled book of edited essays. The back cover states that it focuses on the Human Rights Act 1998 (HRA) and the United Kingdom (UK) Supreme Court—it does no such thing. One is led to believe that it will focus on the attempt to shift the “political constitution” to a “legal one” brought about by judicial decisions “from the 1960s” and the Blair Government’s constitutional reforms. The editors set up their straw men and women who decry our unwritten constitution, and its often-cited tendency to encourage populism, manipulation and even tyranny. They share a “suspicion of legalistic remedies for problems that are inherently political”. For them the “old constitution” maximizes “usable political power” (p 3). Parliamentary legislation as the supreme voice of law is deemed *ipso facto* “constitutional” for there is no hierarchy of laws (p 3)—nothing to strike down legislation as unconstitutional. *Thoburn v Sunderland City Council* (2002) ruled that there is such a thing as legislation with constitutional status, and this had important legal consequences which were not confined to European Union (EU) law. The courts have not gone the further step of ruling legislation unconstitutional or refusing to enforce such legislation although there are *obiter* that the latter may

be possible.¹ Such action would be met with apoplexy by several of the contributors to this edited work.

The British constitution is, continue the editors, a “political constitution”, and it is a “profoundly democratic system” (p 4). But be reassured, this is not a “partisan book” (p 5). All participants take the political constitution seriously and view a movement to a “legal constitution” with “healthy scepticism” (p 5). As if to prove the point, Labour Governments with scarcely a majority in the Commons have benefited from the political reality of the political constitution, the editors argue—the people are in charge. What of the Tory-dominated fourth estate? What of financial markets? Now, they argue, the left (Blairites) are prepared to move to a more legally determined constitution to prevent the Tories getting their way.

Is there not “something to be said for the old constitution” they ask? (p 8) At the height of Johnsonian and Trussian irresponsibility, the editors may have hit a *leitmotif*. These messages are now beginning to sound distinctly discordant.

The tenor of the editors’ opening chapter is taken up in Part One “The Political Constitution and the Law” on which I will concentrate. Part Two on “Westminster and Whitehall” contains some contributions seeking to defend the *status quo*—on the bifurcated position of the Attorney General for instance (Conor Casey) and a celebration of the repeal of the Fixed-term Parliaments Act 2011 by the Dissolution etc Act 2022 (Robert Craig) which restored prime ministerial prerogative via the King to dissolve Parliament—but it also offers serious and useful discussions on reform of the Commons (Tony McNulty) and Lords (Philip Norton), desperately needed I argue in the latter case, electoral reform (Jasper Miles), and very good chapters on delegated legislation (Hayley Hooper), the public appointments system (John Bowers) and standards in the British constitution (Gillian Peele).

Part Three on “Beyond Westminster and Whitehall” has interesting analyses of devolution by Vernon Bogdanor, in which he cites the Bingham Centre’s call in 2015 for a Charter (in the absence of a written constitution) to lay down the basic principles of devolution and division of powers to replace the “ad hoc and unplanned” devolution process to date; on Scottish secession by Peter Reid and Asanga Welikala in which “secessionist diplomacy” has ceded devolution by Whitehall and Westminster “while

¹ See Birkinshaw & Varney 2016: ch 1; *Moohan v Lord Advocate* (2014): para 35, Lord Hodge; *R (Public Law Project) v Lord Chancellor* (2016): para 20, Lord Neuberger; Hodge 2021; see contra *Privacy International* (2019): paras 207-211, Lord Sumption.

still giving away the least amount of power possible” (pp 307-308); and what can only be described as Northern Ireland Unionist drum beating by Baroness Kate Hoey. I will say a little more on this chapter later. Wales does not have a separate chapter. Gisela Stuart writes on the EU and the British constitution though she states that David Cameron vetoed the 2012 Fiscal Compact Treaty—he didn’t sign up so they proceeded without him outside the EU framework. Not much of a veto. Richard Tuck argues for a rejection of proportional representation and citizens’ assemblies and “sortition” (random selection of such assemblies), and while referenda may be here for the medium future (?), his heart is really with a first-past-the-post form of election.

My review will concentrate on the essays in Part One as these take up the themes celebrating the “old constitution”. What however, is meant by “old constitution”? I taught constitutional law for over forty years and spent a good deal of time explaining its historical foundations. For better or worse it is a developmental constitution. Like many others I have written of the juridified constitution where judicial decision has played an increasingly important, some would say forthright, role in tempering governmental powers (Birkinshaw & Ors 2019). *Miller No 1* (2017) on the unlawful attempt to use the prerogative to sign Article 50 of the Treaty on European Union 2009 to notify the European Council of the UK’s intent to leave the EU, along with *Miller No 2* (2019) where Boris Johnson was ruled to have acted unlawfully in advising the Queen to prorogue Parliament for five weeks at a crucial stage of the withdrawal negotiations, are the most dramatic moments in this denouement. What precisely would the advocates for the old constitution (AOC) have us return to?

The AOC are not at all forthcoming on what is meant by “old constitution”. It certainly embraces more than pre European Communities Act 1972 through which the UK legal system was transformed by our accession to the European Economic Community. Does it mean pre 1922 when all of Ireland, and not just Northern Ireland, was a part of the UK? Pre 1911, when the House of Lords possessed greater legislative powers than those curtailed by the Parliament Act of that year? Pre 1832 and the Great Reform Act which introduced changes to our parliamentary constituencies enfranchizing 217,000 male adult voters in England and Wales (Woodward 1962: 88). Pre 1688 and the Bill of Rights setting out relationships between the Crown and Parliament? Pre 1649 and governance by the divine right of kings, or pre 1215 before Magna Carta and the jungle? And so on. There will be no return to an old constitution. The phrase has no meaning. There will be developments to the present constitution in which judges will continue to play a central role.

In the first chapter in Part One, Brian Christopher Jones argues against a written constitution. Although the UK has no “We the people” incantation, parliamentary sovereignty, he claims, preserves elected representative’s status “as the most important voice of citizens and the most direct connection to the people” (p 24). A “we the people” moment would lessen the status of Members of Parliament (MPs) and legislation and lead to judicial supremacy and judicial paternalism, he believes. The losers would be, he argues, citizens and democracy. A written constitution does not entail a better-informed citizenry. One need look no further than the frequent ignorance of ministers and MPs in the UK to our own constitutional truths so that they frequently confuse the executive with Parliament (House of Lords Constitution Committee 2022; q 5, Lord Reed) before one goes on to ask about the knowledge of UK citizens of their unwritten constitution and its labyrinths. In times of crisis, he continues, the UK has managed successfully to overcome disasters with flexibility and pluck. Brexit and coronavirus are cited. Let’s leave alone the chicanery and lies that manufactured Brexit and the lack of control over purchasing PPE (personal protective equipment), the closeted making of crucial appointments and the pervasive resort to executive law-making in the epidemic; these do not portray a picture of order and integrity. The failures to prevent Johnson’s abuses would not have been prevented had we possessed a written constitution, he continues, and even in the United States (US) their constitution did not prevent Trump’s excesses. The jury is still out on that and the US constitution may yet face the strongest of challenges. It might have been useful to have explained how a written constitution would be produced in the UK given parliamentary sovereignty and our historical background.

Carol Harlow’s is the most elegant essay in Part One and the most balanced. One would expect no less from this doyenne of administrative law and seasoned observer of the constitution. She writes on judicial encroachment on the political constitution, harking back to the essay by her former colleague at the London School of Economics, John Griffith, and more latterly the debate between Griffith and Stephen Sedley. Griffith bitterly denounced the English judiciary for affecting political neutrality in their judgments, whereas their judgments, and world vision, showed them to be highly politicized. Griffith wrote in a different era redolent of memories of judges as a threat to executives committed to social change and then to groups or “outsiders” seeking to modernize social mores, radicalize universities or advance collective employee power. She cites Griffith’s belief that the judges withdrew in the Conservative years, but

there were remarkable judgments in that era too.² In his more recent writing, though that was over twenty years ago, and several years before his death, Griffith railed against the “celestial jurisprudence” which saw law as morally based on principles, like those at the heart of the common law, and which promoted judges to interpreters of the constitution and not simply the law.

Harlow was a member of the independent commission set up by the Ministry of Justice to examine judicial review. Her appointment was greeted in some quarters as evidence of the Government setting out to “get” the judges after *Miller* because of her association with Griffith. This was unfair and inaccurate, and the report of the commission was far from the hatchet job the Government clearly hoped for. Despite raising questions about “What is the political constitution?” and “What is the judicial role?”, one doesn’t get the clearest idea of these phenomena. Her chapter contains a lucid account of the post 1960s advance of judicial review, but I’m left with the impression that her message is that everything is political, just as Griffith said everything that happens is constitutional in his 1979 article. And if nothing happens, he added, that is constitutional too. Political claims should not be confused with inherent rights, he claimed. Political decisions, he believed, should be taken by politicians.

Does this simply amount to: rights are only what actually exist in law? If it doesn’t exist, it is merely a contestable claim. Perhaps legal positivism is coming back into vogue. Surely a life free from slavery and a non-toxic environment are correctly couched in the language of rights, even where society denies these things. Morality lies at the heart of contestable claims. But that doesn’t mean a moral claim must always be satisfied. Or that because it’s called “moral” it must be right.

Harlow ends by claiming that, following the Brexit maelstrom, the Reed court operates in a very different manner to its predecessor and cites case law that has rolled back the court’s inclination to rule social and economic measures unlawful despite the effect they purportedly had on increasing child poverty, and to rein in the tests for reviewing government guidance as unlawful in case it encouraged campaigning groups driven, one supposes, by moral impulses. The AAA decision of the court of appeal (*R (AAA Syria) v Secretary of State for the Home Department* 2023), which ruled the Rwanda policy of the Government unlawful because the treatment

² *Raymond v Honey* 1982; *CCSU v Minister for the Civil Service (GCHQ)* 1984; *Factortame v Secretary of State for Transport* 1991, the latter deriving from our presence in the European Community; *M v Home Office* 1993, etc.

of asylum claims by Rwandan judiciary risked breaching article 3 of the European Convention on Human Rights, will be an interesting gauge on the bearing of the Reed court.

What is crucial in the rule of law is the independence of the process of judicial appointment. So far so good. And that depends on lawyers who form the recruitment pool for appointment, and that significantly depends upon social class and elite institutions, many of which are coddled in privilege and wealth. There has been progress but there is still levelling-up (to use a Johnson phrase) to do.

Richard Ekins argues that parliamentary sovereignty is still unqualified in the political constitution. A declamatory style means that much of his chapter comes across as opinionated and headstrong. His claim that it is not open to Parliament to change constitutional convention by legislating but it can displace (override) convention with a legal rule or replace (supplement) a convention with a legal rule seems to me to be a change by legislation. The Parliament Act 1911 which reduced the veto power of the House of Lords is an example of such. Omnipotence must entitle Parliament to legislate that “Henceforth ministerial responsibility shall not mean but shall mean ...”. Parliament’s ability to change the law is self-tempering (p 57) he asserts—then followed by the claim on page 61 that the relevant provisions of the devolution legislation on self-determination for the devolved peoples are “contingent” and can be repealed at Parliament’s will. So, in that sense, could the 1783 Treaty of Paris ending the American war of independence, and the 1931 Statute of Westminster!

Parliamentary sovereignty was an English doctrine, and its presence means Westminster can govern through legislation without consent though “with much respect for devolved institutions”. The decision to hold an EU referendum was an exercise of sovereignty and democracy not its abdication, he writes, so presumably was Parliament’s and the Government’s decision to treat the outcome as binding even though only legally advisory. Likewise, he continues, the threats to breach the Northern Ireland Protocol (NIP) were legitimate exercises of legislative freedom. It’s only “foreign law” after all, as Lord Frost used to say! The HRA interferes with legislative freedom because it discourages “parliament’s responsibility to legislate for the common good” (p 69). The Act protecting human rights has made MPs mice, seems to be the message. The Act “distorts” the political constitution. Never mind that egregious abuses in the past showed how lawless UK governments could be and how emasculated Parliament was to prevent this. It descends into chest-

beating bravado, and the author really would be at home advising the more extreme elements in the Tory party including the Home Secretary! As a parting shot he opines that withdrawal from the ECHR could be achieved by prerogative—the armoury of real titans! As I suppose, come to think of it, could the Treaty of Paris!

Let's just pause from all this gush for reflection.

Donald and Grogan (2022) make the following points. The NIP and the UK–EU Withdrawal Agreement require a continuing commitment to the ECHR and the earlier Good Friday/Belfast Agreement requires the ECHR to be part of law in Northern Ireland. Devolution legislation requires compliance with the ECHR. The HRA requires compliance with the ECHR and so would have to be repealed—by legislation. The UK–EU Trade and Cooperation Agreement (TCA) “requires a shared commitment by EU & UK with ECHR as an essential element”, and a “serious and substantial” failure to fulfil this obligation which “threatens peace and security or that has international repercussions” could lead to the suspension or termination of the agreement by the other party. Part 3 TCA makes it an essential component in enforcement and judicial cooperation in police matters—ie exchange of intelligence, evidence, data, extradition, enforcement of arrest warrants etc. The EU has stated that it “would terminate cooperation on criminal matters” if the UK were to leave the ECHR.³

The European Court of Human Rights is a “politicised court” said Braverman in a characteristic outburst (*BBC News* 2023). Ekins wants to uphold “public action” in defiance of “political litigation” (p 71). On judicial review, the development has been questioned both vis-à-vis merits and its extent. The expansion is “decades long” (p 72)—I would have thought Coke CJ in the early 17th century would have a comment on that! This is all opinionated drivell! Carnwath’s judgment in *Privacy International* is “unconstitutional”, and judges should return to a “more disciplined understanding of their constitutional role” (p 74). Constitutional law is “contingent”, and legislative freedom guarantees the primacy of the political constitution (p 75). I have to say I find this all rather depressing. Perhaps with Johnson’s demise these sentiments will increasingly appear outlandish.

Michael Foran’s chapter is over-long and sets within its sights several targets: the most important is the false perception of the “inadequacy of common law rights” compared with Convention rights (p 77). But the

³ [“Joint Statement of the Council and the Commission”](#) from Steve Peers.

frailty of common law rights should not be overlooked, I add. *Entick v Carrington* (1765) could be, indeed was, removed by legislation. Prisoners' rights did not exist until the later part of the 20th century; the *Sunday Times* thalidomide case brought home the pusillanimity of our freedom of speech; the common law could not protect us from phone taps and so on.

The Convention is an international treaty which, he argues, gives little guidance to domestic judges on filling in the values—unlike the common law technique. But that technique is precisely what domestic judges have been using to fill in gaps since 2000. In failing to give judges this guidance, Parliament abdicated its legislative responsibility in the HRA (p 100). This is reminiscent of Ekins. The community dimension of rights has been lost, he believes (pp 104-105). Does this mean that if a majority in the community don't want a human right to be protected, it can be overridden? The greatest happiness to the greatest number etc.

Sir Robert Buckland's chapter is on law and politics. As Lord Chancellor/Secretary of State for Justice, he set in motion the reviews on judicial review and on the HRA, part of the 2019 Conservative manifesto pledge to "update" administrative law and the HRA and to end "abuse of judicial review to engage in politics by another means", a component of the promise to look at "the broader aspects of the constitution" that Johnson delivered on. It was widely reported in the media, how reliably I don't know, that Buckland was replaced by Johnson because he had not produced sufficiently curtailing proposals. As I write, the reforms to judicial review are relatively modest, though not unproblematical, and the Bill to repeal the HRA was withdrawn when its ministerial sponsor Dominic Raab faced numerous allegations of bullying. The courts are accused of sleight of hand in their approach to judicial interpretation so that in no case has an ouster clause been clear enough in its language to successfully remove the jurisdiction of the courts (p 114). But one should note that attempts to limit judicial review have been successful (*R v Secretary of State ex p Ostler* 1976; *R v Cornwall CC ex p Huntington* 1994).

The rule of law, he asserts, has been subject to "conceptual creep" (p 116) leaving it open to high-jack by politically motivated interests—ie lefty lawyers and judges in Braverman's terminology. There is confusion about what the "rule of law" means, although he doesn't attempt to offer his own meaning of this "extremely powerful concept". It is quite clear his version is a rather narrow formalistic variety—non-retrospectivity is a core feature, although he does seem to go with the principle of legality as proffered by Lord Hoffmann in *R v Secretary of State for the Home*

Department ex p Simms (1999). But opponents of a broad conception of the rule of law would argue against Hoffmann that if Parliament has given the Government broad powers, which I add the Government gave to Parliament in the wording of its Bill, why should they not be taken literally to confer maximum discretion? Because, one adds, the judges would not put up with this where human rights are undermined. His narrow version comes home on page 117 when he states that the rule of law “is not a legal concept; it is a concept of ‘political morality’ about the way in which we are and should be governed”.

My view is that the rule of law is about legal morality. Even Parliament uses the epithet “Constitutional principle” to describe the rule of law in section 1 of the Constitutional Reform Act 2005. Previous iterations of the rule of law such as “law and order” or “the rule of law is the law of rules” (Scalia 1989), meaning any old rules will do so long as they are followed, seem to me to be closer to political morality. But in its modern significance the rule of law has substantive features—protection of human rights is not openly denied even by dictators, although they invariably breach them, only the means through which they are protected is contestable. The more successful the protection, the more powerful the toes that will be trodden upon and the more politicians of a conservative motivation will cry “Offside”. You are using law and legal processes for political objectives. This is not the game! Isn’t that what the slave traders would have argued? We thought slavery was justified and legal before these 18th-century lefty lawyers started invoking *habeas corpus*. One doesn’t need to get metaphysical to argue that dignity and respect have been driving forces impelling human development, as have oppression and exploitation, and lawyers’ craft is to shape the beneficent qualities around legal doctrine to a right to be treated as a full member of the human race. Pah! Humbug! “Political positions are not the preoccupation of the rule of law” (p 118). Having stated the rule of law is a political concept, he then states that it is “quite rightly above politics” (p 120).

Craig’s chapter is a paean to the revival of prerogative in the Dissolution and Calling of Parliament Act 2022 which repealed the Fixed-term Parliaments Act 2011. The latter was a compromise to assuage the Liberal Democrats in the Coalition Government of 2010-2015 that Cameron would not seek to dissolve Parliament and call an early election, basically ditching them. My own feeling is that there is something of a short-change when the Prime Minister (PM) calls for dissolution because of expedience, divination or poll readings, but Craig argues the case for such dissolution pretty convincingly. Craig is vehemently opposed to the arguments that the ouster clause in the statute preventing a dissolution

being called is judicially reviewable. On one thing I am pretty confident: we are far too far down the road of legality to say that prerogative powers are beyond review. If a power is seriously abused whatever its provenance it is potentially reviewable. Should such be the case, past case law suggests there is no way to protect it from judicial scrutiny. Dissolution stands at the apex of prerogative powers along with national security. Here I would say, “Review, most unlikely”. But never?

Miller No 2, an “alarming decision” opines Craig (p 150), which others believe to be a great judgment fully consistent with the flow of our legal history and doctrine (Birkinshaw 2020), was about prorogation by prerogative, thereby preventing Parliament sitting and performing its constitutional responsibilities. *Miller No 2* was a dramatic development, but it was justified by compelling and highly persuasive judicial reasoning to protect the constitutional position of Parliament, and ultimately to protect us all. The case is a high-water mark, but it was constitutionally and legally warranted as a reaction to extraordinarily autocratic executive action. When the Fixed Term Parliaments Act was repealed in 2022, dissolution of Parliament was rendered unchallengeable in the courts, as the courts had long suggested was the case (see Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* 1985), but prorogation was not mentioned. It suggests the lesson had been learned. Dissolution is followed by a general election and a new Parliament. Prorogation means Parliament is in abeyance. An argument has been made that *Miller No 2* was unjustified because the Commons had it within its power to reverse the prorogation (Endicott 2020). Reed has recalled that no arguments on this were made to the court, although an argument based on a “no confidence” vote was made (House of Lords Constitution Committee 2022: q 6). The argument on Parliament remedying the situation seems highly unrealistic as the Commons was in disarray and seemed incapable of organizing the proverbial piss-up in the brewery let alone defiance of prorogation.

One more essay seems to fit into the AOC mould and that is by Casey on his defence of the dual legal-political nature of the Attorney General (AG) for England and Wales. The chapter is informative and well researched. Being a politician and sitting at the Cabinet the AG always runs the risk of appearing a political *parti pris* susceptible to PM pressure to colour their legal advice to government. This was true in Blair’s office (advice on legality of Iraq war, dropping of a criminal inquiry into BAE re Saudi Arabia arms contracts for corruption because of political sensitivity) and more recently the presence of individuals who had more of the music hall performance about them, and in Braverman’s case urging the Government

to breach international law for party political purposes. It is too invidious to expect such a party-political beast to be an impartial legal advisor and guardian of the public interest and rule of law. The record raises worrying illustrations of contamination of the rule of law (again), not assisted by the Commons ruling the government in contempt for failing to produce the AG's advice to the house on the EU-UK Withdrawal Agreement following an earlier Commons vote in favour of production. They are subject to something rarely heard these days—ministerial responsibility to Parliament—Casey argues in order to impose accountability. A neutral legal office under a non-partisan AG might, he argues, be too diffident and hesitant and fail to add drive and impetus to policies aimed at social and economic regeneration—reminiscent of Griffith.

Like so much in the old constitution it displays the virtues of a government of men (and women) not laws, where so much depends upon the character, integrity and capability of the individual. Take that away, as we saw with Johnson, and we are in trouble, although Johnson eventually met his nemesis.

The one further chapter I wish to return to is Hoey's on Northern Ireland's constitutional position. She is a passionate Northern Irish unionist who believes the NIP has sold the union with the UK down the river now that Northern Ireland is still subject to EU laws and the jurisdiction of the Court of Justice of the EU following Johnson's rejection of the back-stop negotiated by Mrs May and his acceptance of the NIP. This was forced upon him, Johnson claimed, by his weak parliamentary position pre the 2019 election, and whether he signed up to the protocol with his fingers crossed, as Ian Paisley junior claimed, he acted as if the international treaty had no consequences and could be ignored. Sunak's agreement in the Windsor Framework with the EU in February 2023 seems to have turned the corner on that episode, at least for the time being.

As I wrote earlier, one can hear the unionist drums beating in Hoey's chapter, and while hyperbole and chest beating are present in other chapters this seems to be the prologue to a bar room punch-up or worse: "Unionists feel betrayed by their own UK government, while the Irish government constantly backs up nationalists" (p 336). The Republic wants to achieve a "united Ireland"—pausing for just a second to note it was a united Ireland prior to events in 1920-1921 when Ireland was partitioned by the British Government following Unionist pleas to ensure a protestant hegemony in the six counties of the new country of Northern Ireland and excluding three Catholic-dominated counties from nine in

the province of Ulster. This led to shameful discrimination, favouritism and gerrymandering. That in turn led to internecine violence from the 1960s until the Good Friday Agreement in 1998, violence that still has not ceased. The agreement, she claimed, did not guarantee an open border in Ireland as its defenders claim. Does that mean a border controlled by police with military support can or should be re-established?

The AOC, and by no means are all contributors to this book members of that brigade, would no doubt give full vent to Braverman's Illegal Migration Act 2023, section 55 of which allows the home secretary to ignore interim injunctions from the ECHR. The ECHR only binds us to final judgments, writes Jonathan Sumption. Braverman has reiterated her call for the UK to leave the ECHR—along with Russia which was thrown out—if it prevents the UK breaching international law and international obligations. If you are incorrigible, don't make promises to be good.

The 2023 Act has been severely criticized. Donald and Grogan (2022) write that the United Nations (UN) High Commissioner for Human Rights and High Commissioner for Refugees issued a joint statement saying that the Act "is at variance with the [UK's] obligations under international human rights and refugee law and will have profound consequences for people in need of international protection". The Bill "extinguishes access to asylum in the UK for anyone who arrives irregularly", barring them from presenting claims for protection "no matter how compelling their circumstances" they report.

The UN High Commissioner for Refugees adds that the Act "sets a worrying precedent for dismantling asylum-related obligations that other countries, including in Europe, may be tempted to follow, with a potentially adverse effect on the international refugee and human rights protection system as a whole" (Donald & Grogan 2022).

Qui ferit gladio, perit gladio. I am fretful that this country's governmental behaviour since 2016 will confirm this country's position as a tiny and uninfluential land off the coast of Europe. Those essays in this book that long for a glorious past of sovereignty, prerogative and virtually unbridled executive power exemplify that arrogance and bombast that stands in sad contrast to this country's, and many of its inhabitants', more humane contributions to world order, including the ECHR. This criticism only affects a minority of the book's contributors. The majority have made readable and weighty contributions which one feels are better described as "critical" rather than "sceptical".

About the author

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Dissolution and Calling of Parliament Act 2022

European Communities Act 1972

European Convention on Human Rights 1953

Fixed-term Parliaments Act 2011

Good Friday/Belfast Agreement 1998

Great Reform Act 1832

Illegal Migration Act 2023

Human Rights Act 1998

Parliament Act 1911

Northern Ireland Protocol

Statute of Westminster 1931

Treaty of Paris 1783

Treaty on European Union 2009

UK–EU Trade and Cooperation Agreement 2020

UK–EU Withdrawal Agreement 2019

Windsor Framework 2023

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33

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Raymond v Honey [1982] 1 All ER 765 (HL)

Thoburn v Sunderland City Council [2002] 4 All ER 156

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

News from the IALS Library

IALS Library Satisfaction Survey 2023

The Library's annual survey once again demonstrated that our members are highly satisfied with their experiences of IALS Library. The highest rating was awarded for "overall satisfaction with IALS Library", with a satisfaction rating of 98.2%. This result underscores our commitment to providing an excellent library service for the postgraduate legal research community. The survey also highlighted other areas of success, including the helpfulness of library staff (97% satisfaction), legal research training sessions (96.1% satisfaction), study facilities (92.4% satisfaction) and range of books (92.3% satisfaction).

Elgar 2022 e-book Collection

The Library has purchased the Elgar Law 2022 e-book Collection, which consists of 155 titles on the ElgarOnline platform. This brings the total number of titles available to IALS library members via the ElgarOnline platform to 1082!

IALS Archives Guides

To make the archives more accessible, IALS Archivist, Clare Cowling, has been working on a collection of [guides](#) highlighting the material held for various subjects and countries. More guides are under construction and will be added soon. For more information on the archives and a complete list of collections, see the [archives pages of the website](#).

New ScanTent

It's time to say goodbye to blurry book images taken on your phone! The Library's new ScanTent is designed to help take high-quality images of books using a smartphone. Install the app, place the book inside the tent, and the LED lights will enable readers to take crisp and clear images. Readers can find the ScanTent and full instructions for using it at the photocopying area on the 2nd floor of IALS Library.

Quiet contemplation room

IALS has opened a room for quiet contemplation. Located on the ground floor of the IALS building, this room is open to all our users,

for quiet contemplation, reflection, meditation, or prayer.

Term-time opening hours

- ◇ Monday-Friday:
9:00am-11:00pm
- ◇ Saturday: 10:00am
to 8:30pm
- ◇ Sunday: 12:30pm to 8:30pm

Selected Upcoming Events

Sir William Dale Centre, Sixth Law Reform Project Workshop—Reforming the Law: Addressing the Challenges and Opportunities in Small Jurisdictions

Venue: Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

Date and time: 3 November 2023, 2:00pm-5:30pm

Lead Speakers: Dr Enrico Albanesi, Associate Professor of Constitutional Law, University of Genova, and IALS Associate Research Fellow, University of London; Jonathan Teasdale, IALS Associate Research Fellow, University of London, and former Lawyer with the Law Commission for England & Wales.

See [website](#) for details.

ILPC Seminar—Fighting Algorithms: Challenging Automated Government Decision-Making in Comparative Context

Venue: online via Zoom

Date and time: 8 November 2023, 1:00pm-2:00pm

Speaker: Dr Yee-Fui Ng, IALS Visiting Research Fellow

Chair: Dr Nóra Ní Loideáin, Senior Lecturer in Law and Director, Information Law & Policy Centre, IALS

Significant technological advances in artificial intelligence, machine learning and big data analytics over the last two decades have enabled the widespread automation of decision-making in government in Western liberal democracies. However, automated government decision-making can have adverse effects upon vulnerable populations who are the intended recipients of government social programmes, yet at the same time the least able to address errors in government decision-making. This talk presents preliminary findings from a comparative book project analysing legal challenges automated government decision-making in the United States, United Kingdom (UK) and Australia.

See [website](#) for details.

ILPC Annual Lecture and Conference 2023—Human in the Machine: Digital Rights and AI

Venues: 23 November in-person at Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR; 24 November online via Zoom

Dates and times: 23 November 2023-24 November 2023, 9:30pm-5:00pm

Annual lecturer: Robert Spano, former President of the European Court of Human Rights

Keynote speakers: Professor Kingsley Abbott, Institute of Commonwealth Studies; Professor Jeremias Adams-Prassl, University of Oxford; Natalie Byrom, Director of Justice Lab; Fanny Coudert, European Data Protection Supervisor; Kashmir Hill, Technology Reporter, *New York Times*; Professor Christopher Millard, Queen Mary University of London; Graham Smith, Bird & Bird; Steve Woods, Former Deputy Information Commissioner, Information Commissioner's Office

Topics to be covered: artificial intelligence (AI) technologies and innovation; biometric identification and surveillance; end-to-end encryption and data security; UK Data Protection and Digital Information Bill; European Union AI Act; algorithmic bias and human oversight; AI and predictive policing.

See [website](#) for details.

Inns of Court Fellow's Seminar—Can Judges Make Better Decisions?

Venue: IALS Council Chamber, Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

Date: 30 November 2023, 5:00pm-6:15pm

Speaker: Hon Justice James O'Reilly, Federal Court of Canada

Chair: Professor Carl Stychin, Director, Institute of Advanced Legal Studies

Scholarly writing in the area of behavioural economics and psychology has pointed out flaws in the way people make decisions, including unconscious biases and cognitive illusions. Judges are not immune from these kinds of errors. Can they avoid them?

See [website](#) for details.

IALS Fellow's Seminar—Foreign Relations in Pre-Colonial Africa: A Case Study of Portuguese–Benin Kingdom Diplomatic Interactions

Venues: online via Zoom

Date and time: 6 December 2023, 1:00pm-2:00pm

Speaker: Dr Eghosa O Ekhaton, Senior Lecturer in Law, University of Derby/IALS Visiting Research Fellow

Chair: Professor Susan Breau, IALS Senior Associate Research Fellow

This seminar focuses on the diplomatic interactions of “pre-colonial” Benin which is in now in present day Nigeria. Benin Kingdom was one of the most important states in the forest region of West Africa in the pre-colonial era. Benin was a recurring topic in contemporary Western or European writing and had ambassadors posted to Portugal in the precolonial era. Due to the trade with its neighbours and foreign (distant) states/empires, precolonial Benin became a very rich and powerful Empire in the 15th-17th centuries. Portugal had a massive influence on the culture, economy and trade, religion, and language of pre-colonial Benin amongst other influences, some of which are still in existence to date in present-day Benin City. Benin Kingdom had an effective legal system in the pre-colonial era, and this was also exemplified by the diplomatic interactions between precolonial Benin and Portugal in the 15th and 16th centuries.

See [website](#) for details.

The Director’s Seminar Series—The Hidden Histories of the Pinochet Case

Venue: Council Chamber, Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

Date and time: 6 February 2024, 5:00pm-6:30pm

Speaker: David Sugarman, Professor of Law Emeritus, Lancaster University Law School; Senior Associate Research Fellow, Institute of Advanced Legal Studies

Chair: Professor Carl Stychin, Director, Institute of Advanced Legal Studies.

Autumn 2023 marked the 25th anniversary of Augusto Pinochet’s arrest in London and the subsequent decisions of Britain’s top court denying Pinochet’s claim as a former head of state to immunity. It was the first time that a former head of state had, while travelling abroad, been arrested on charges of genocide and crimes against humanity, and where that former leader’s claims to immunity were rejected by a domestic court. Hugely controversial, Pinochet’s arrest and the “Pinochet precedent” changed the meaning of international justice, giving a massive fillip to human-rights movements, galvanizing victims and their loved ones, activists and lawyers. This lecture brings into the open the hidden histories of the Pinochet case. It reveals what went on behind the scenes, in law and in politics. Drawing on a unique set of 250 interviews with victims, non-governmental organisations, activists, judges, lawyers, politicians, government officials and journalists during or shortly after the case, and exhaustive archival research.

See [website](#) for details.

Podcasts

Selected law lectures, seminars, workshops and conferences hosted by the Institute of Advanced Legal Studies in the School of Advanced Study are recorded and accessible for viewing and downloading.

See [website](#) for details.

SAS IALS YouTube Channel

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See [website](#) for details.

JUDGING A BOOK BY ITS COVER: WOMEN, LEGAL LANDMARKS AND OTHER FRONTIERS

ROSEMARY AUCHMUTY
University of Reading

ERIKA RACKLEY
University of Kent

The right cover is like a beautiful coat, elegant and warm, wrapping my words as they travel through the world, on their way to keep an appointment with my readers. The wrong cover is cumbersome, suffocating. Or it is like a too-light sweater: inadequate (Lahiri 2017: 16).

[A] INTRODUCTION

As Mr Tulliver learned to his cost when buying his Sunday reading from Partridge's sale, one should never judge a book by its cover (Eliot 1860: ch 3).¹ And yet, most of us do. And why not? After all, in the words of 19th-century novelist and poet, Thomas Love Peacock, "[t]here is nothing more fit to be looked at than the outside of a book" (1831). Or as Italian author, Lalla Romano, stated more bluntly: "it is very hard to love an ugly book" (Lahiri 2017: 28).

More than simply a practical solution to enclose its pages, a book's cover acts as its herald

or champion striding forward to catch the eye of passers-by. It is at once a harbinger, inserting its content into a particular style or genre, and braggart, recounting celebrity endorsements and the previous successes of its author as one might list "ingredients" on a packet of soup (Lahiri 2017: 30; see also Jones 2006). It is rarely static. Book covers are updated to reflect current trends or jurisdictions, to celebrate anniversaries or to place a book within a particular series.² Their purpose is both aesthetic and commercial. Where once when books were rare and precious objects covered with similarly rare

¹ Indeed, prior to the 1820s, most books were sold unbound so that purchasers might commission their own bindings—usually to match their library.

² The seven Harry Potter books by J K Rowling, eg, have had over 200 different covers since *Harry Potter and the Philosopher's Stone* was published in 1997. See also Lamont 2010; Touma 2022.

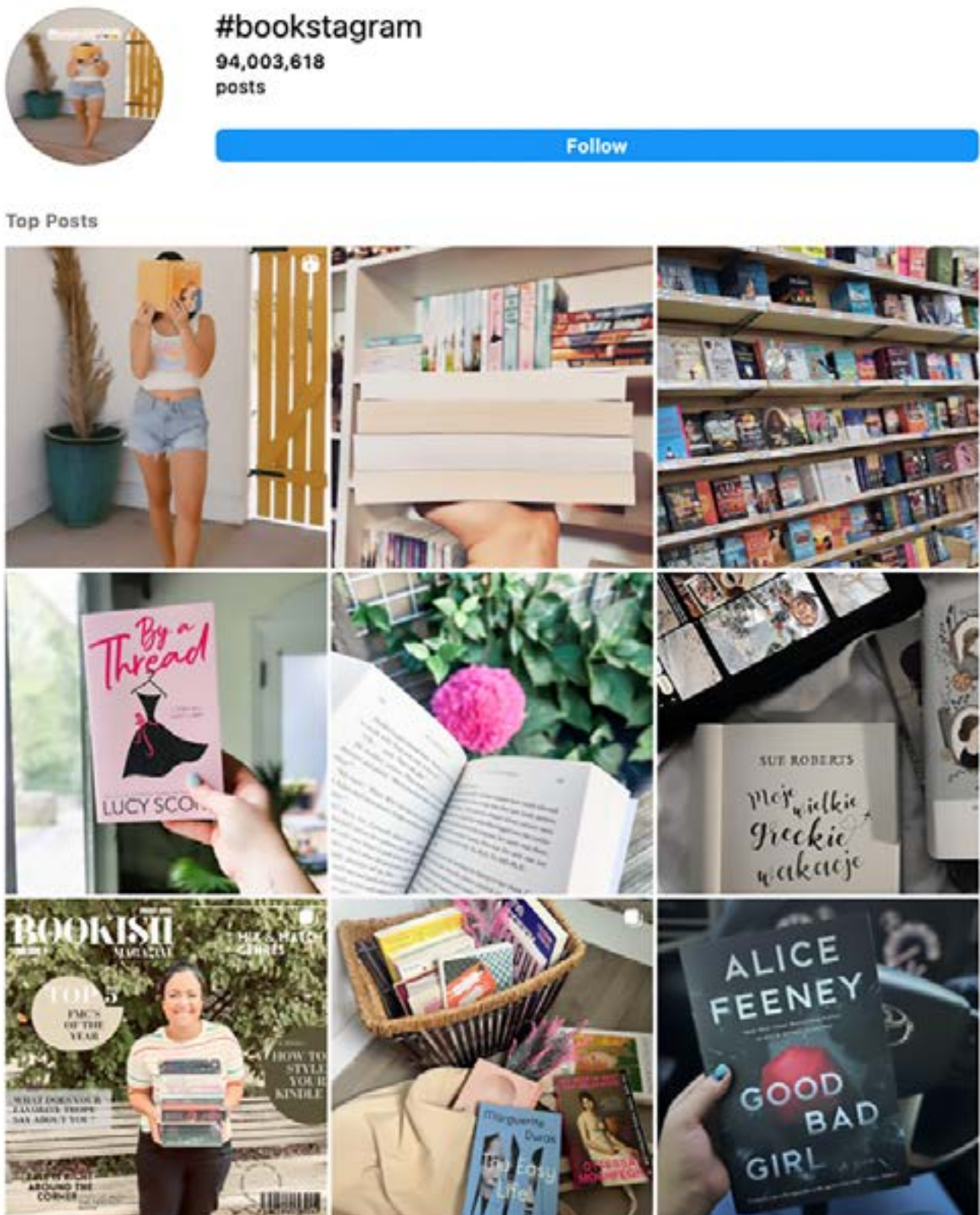


Figure 1: Screenshot of #bookstagram Instagram feed (taken 23 August 2023)

and precious materials,³ today it is their covers that attract attention. As Peter Campbell notes, “the product and the advertisement are bound up together” (2009). What a book *looks* like often drives the market—with the very best covers adorning coffee mugs and other household items and featuring #bookcover and #bookstagram social media feeds and the like (Connolly 2018; Bramley 2021).

However, as feminist legal scholars have long argued, book covers represent far more than this (see eg Bottomley 1996; Beresford 2009; Monk 2022). Far from simply “packaging” the text (Bottomley 1996: 116), a “visual garb” allowing for the transformation of “the text into an object, something concrete to publish, distribute and, in the end, sell” (Lahiri 2017: 19, 14) or “jacket” shrugged on simply to protect the text beneath, the cover of a book, to use Anne Bottomley’s words, is “a frontier between two territories: a window into the text and a window from the text on to the world” (Bottomley 1996: 116). A book’s cover provides both the first impression *and interpretation* of the text. It represents—and represents—the text. It is the means through which the authors (albeit within the limitations set by the publisher) and/or publishing team convey what *they* think the

book is about, which in turn sets the rules of engagement with the text beneath.

Little wonder that authors often have strong ideas of what they want—or don’t want—on the covers of their books. J D Salinger, for example, is said to have forbidden pictorial covers for his fiction (Mullan 2003). Jhumpa Lahiri, a Bengali American author, in her powerful reflection on *The Clothing of Books* has written of the disassociation and conflict she feels when faced with publishers’ interpretations of her work:

All my life I have been in conflict between two different identities, both imposed. No matter how I try to free myself from this conflict, I find myself, as a writer, caught in the same trap. For some publishing houses, my name and photograph are enough to quickly commission a cover that teems with stereotyped references to India: elephants, exotic flowers, henna-painted hands, the Ganges, religious and spiritual symbols. No one considers that the greater part of my stories are set in the United States, and therefore pretty far from the river Ganges. Once I complained that the cover of a book in which the protagonist was born and raised in the United States seemed too “exotic”, that a

³ See, eg, the Ulm Münster Book-Cover of the book of the Epistles from c 1506: [British Museum collection](#).

less “oriental” approach was better suited, the publisher removed the image of an enchanting Indian building and replaced it with an America flag. From one stereotype, that is, to another (Lahiri 2017: 50).

Academic authors are no different—though it may be that we have a little more input into the clothing of our books than Lahiri describes.⁴ Joseph Raz, for example, took the photo on the cover of the Oxford University Press edition of *Practical Reason and Norms* published in 1999. Similarly, Daniel Monk has written about Brenda Hale (then Hoggett) and David Pearl’s involvement in the selection of covers for the various editions of their family law textbook, *The Family, Law and Society: Cases and Materials*:

In conversations with Brenda and David it was clear that the covers of their books always mattered to them. They ensured that the choice was theirs ...

The image on the cover of the sixth edition [of a 2008 bronze sculpture entitled “Family” by the British pop artist Peter Blake] ... was very much Brenda’s

choice. And visiting the artist in his studio one morning to receive his signed permission, in a rush to meet the deadline, was one of the unexpected pleasures of co-authoring that edition.⁵ (Monk 2022: 65, 71)

So, what about our books?

[B] REPRESENTING WOMEN’S LEGAL LANDMARKS

Celebrating the History of Women and Law

The first women’s legal landmarks collection—*Women’s Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland*—was published by Hart Publishing in 2019 (Rackley & Auchmuty 2019), the centenary of women’s formal entry into the legal profession. It is a large volume (around 300,000 words) featuring 91 landmarks each representing a significant achievement or turning point in women’s engagement with law or law reform. Beginning in *circa* 940, the landmarks cover a diverse array of topics including matrimonial property, reproductive freedom, domestic

⁴ Certainly this has been our experience working with Hart Publishing on the covers to our women’s legal landmarks collections. The Hart Publishing ‘Information for Authors’ states: “We work with both in-house and external designers to make sure Hart covers are among the best in the market. We are happy to discuss specific requirements that you may have for a final product and, where possible, accommodate them” (nd: 5).

⁵ Daniel Monk joined as co-editor of Hoggett & Pearl for the 6th edition published in 2009 (Monk 2022: 71).

violence and abuse, the right to vote and the ordination of women bishops alongside short “pen portraits” of some of the first women lawyers.

We knew early on that we didn’t want the cover to feature the usual representations of “law”—courtrooms, gavels, wigs and gowns or “law reform”—Parliament, Elizabeth Tower and so on. Nor did we want it to feature signposts or way-markers pointing to some unknown destination in the distance, as an inaccurate nod to the “landmarks” of the title, or abstract images of “women”. This was a book about real women making a difference to the lives of countless other women, children and men. And they needed to be visible from the outset. Images of individual women (as suggested by the publisher in an early very beautiful mock-up of the cover in which a photograph of Emmeline Pankhurst was placed in a suffrage medal) or of particular landmarks (votes for women, equal pay and so on) were out—as they suggested the collection was only about those women or landmarks. So too were images of women lawyers, despite the coinciding centenary, as these were a small and relatively recent addition to those using the law to effect positive change for women.

Our original idea of creating a collage for the cover using an

image for each landmark was rejected by the publisher. It was too expensive, too cluttered.⁶ And they were right—not least because we were squeezing in new landmarks right up against our publication deadline. Instead, we compromised on a maximum of three images—but which ones?

The process took over three months and nine rejected covers. Where we ended up was with a group of photographs taken in the 20th century—featuring three groups of women: outside the 1919 Paris Peace Conference; on a march for equal pay in Trafalgar Square, London; and holding hands around the perimeter fence of RAF Greenham Common in Berkshire (known as “embracing the base”). The top two photos together with white dividing lines echoed the WSPU (Women’s Social and Political Union) colours: green, white and purple.

What we liked about these images were that they involve law and law reform in different ways: both within and outside the legal and political institutions, legislative and common law reform, as well as protest (law-breaking). All the images involve women collaborating—working together to achieve their legal and political aims. They represent a mixture of familiar and less familiar legal landmarks. Few people are aware

⁶ Though see the fabulous cover for *Women, Their Lives and the Law* (Barnes & Ors 2023).

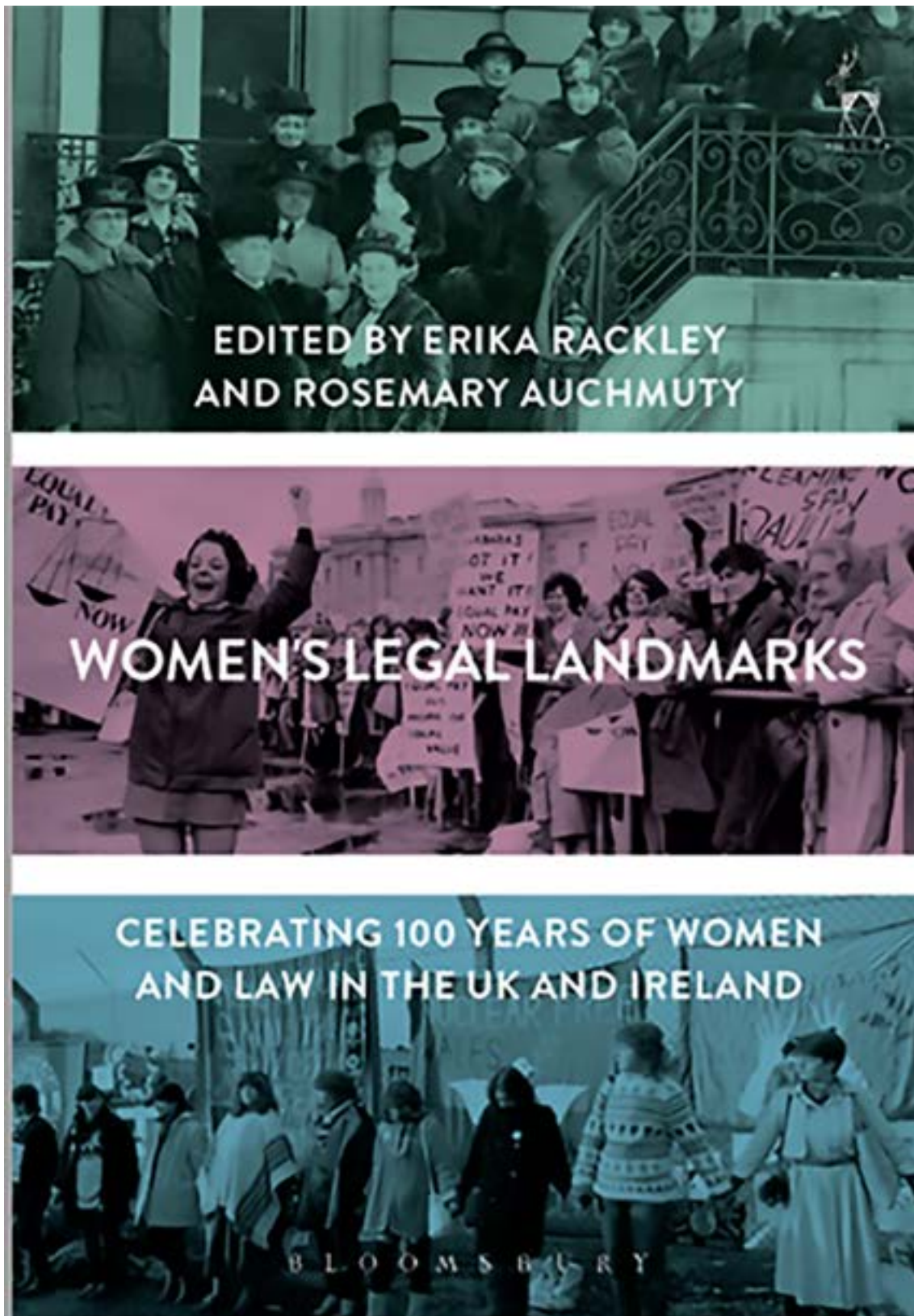


Figure 2: Cover of Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland. Photo credits: Pictorial Press Ltd/Homer Sykes Archive/Trinity Mirror/Alamy Stock Photo.

of the role of women-led non-governmental organizations in the creation of the League of Nations and fewer still of their success in ensuring through Article 7 that its Secretariat (an international civil service) should be open to men and women (O'Donoghue 2019: 125). Similarly, while the images of women at Greenham Common are well known, their imaginative and innovative use of legal hearing as part of their campaign as well as their impact on national election laws was (and is) less so (Woodcraft 2019: 363). We were keen to include pictures that echoed links with other campaigns—the banners pinned to the fence behind the Greenham women invoking the early 20th-century suffrage banners, the demand for equal pay on the banners in Trafalgar Square mirroring that carried by Patricia Ford alongside Irene Ward, Edith Summerskill and Barbara Castle on 9 March 1954 when they united across political parties to present an 80,000 signature to Parliament demanding equal pay.

We were also keen to depict that women were actively “doing something”. The images are

of protest in action: of women travelling across the world to Paris,⁷ of the Equal Pay demonstration organized by the National Joint Action Campaign Committee for Women's Equal Rights and attended by 1,000 protestors which led directly to the Equal Pay Act 1970 (Watkins 2019: 291) and the Greenham Common Women's Peace Camp, which prevented cruise missiles being brought to the United Kingdom.

In hindsight, however, we wish we had been able to use our cover to demonstrate the full historical and jurisdictional breadth of our book—most obviously by including an image from the final landmark in our collection, the “Repeal the 8th” campaign which took place in Ireland during 2018 (de Londras 2019: 651)—as well as reflecting the greater diversity of the women involved.

Women's Legal Landmarks in the Interwar Years

Our second collection—*Women's Legal Landmarks in the Interwar Years: Not for the Want of Trying—*

⁷ The women in the top photo had travelled from around the world to the Paris conference. They are: front row from left to right—Mrs J Borden Harriman (United States); Mme DeWitt Schlumberger (France); Mme Pichon-Laudry (France); second row—Mrs Juliette Barrett Rublee (United States); Dr Katherine Bennett Davis (United States), Mme Brunsching; third row—Mrs Millicent Garrett Fawcett (Great Britain); Mrs Oliver (Ray) Strachey (Great Britain); Miss Rosamond Smith (Great Britain); fourth row—Mme Brigode (Belgium); Marie Paunt (Belgium); Miss Nevila Boyle (South Africa); Mlle Van den Plas (Belgium); sixth row—Mme Sonnine Capi (Italy); Mlle Eva Mitzhouma (Poland).

focuses on the often forgotten legal “landmarks” that benefited, or aimed to benefit, women in England and Wales between 1918 and 1939 (Auchmuty, Rackley & Takayanagi 2024). We wanted to ensure that our cover reflected the breadth of the landmarks included in the collection. While the time period is much shorter—just 21 years—the 34 landmarks once again cover a wide range of topics: access to property, family relationships, health care, criminal law, employment opportunities, pay, pensions and political representation as well as pen portraits of early women lawyers and parliamentarians and key women’s organizations, including the Six-Point group and the Married Women’s Association.

Its cover echoes that of our earlier collection. Publishers like the recognizability of a “brand”—their view is that people who liked the first volume will want others in the series—and with this second volume *Women’s Legal Landmarks* was on the way to becoming a brand. This time the design process felt much quicker.⁸ In large part because—five years on—we knew much more about what we wanted. We wanted to include photos of real women “on the move”. We wanted groups of women, rather than women on their own, to highlight the importance of collaboration and

women’s organizations, and also to move away from the tendency in women’s history, in defiance of reality, to isolate individual “heroines” to admire or discredit. And we also wanted to ensure that we represented working-class women as well as those from the more commonly seen middle and upper classes. Once again, we did not want “famous faces” or events. And most definitely we did not want images of women standing in a line looking miserable.

After considering images of women packing coronation biscuits in Huntley & Palmer’s factory in Reading, of early women MPs outside Parliament and (one of our favourites) of a group of equal suffrage campaigners protesting in the rain, we settled on two images. The top image features women at a woodwork class at the South East Essex Technical College in Barking, East London, in 1936. The bottom image is of four women undergraduates holding bicycles at Oxford University in 1920. Again, the photos are colour washed, this time invoking the gold of the Women’s Freedom League.

Unlike the cover of our first collection, however, the images we chose do not relate to specific landmarks. Rather they reflect the changing attitude and opportunities available to

⁸ Though it still took about three months and nine rejected designs.

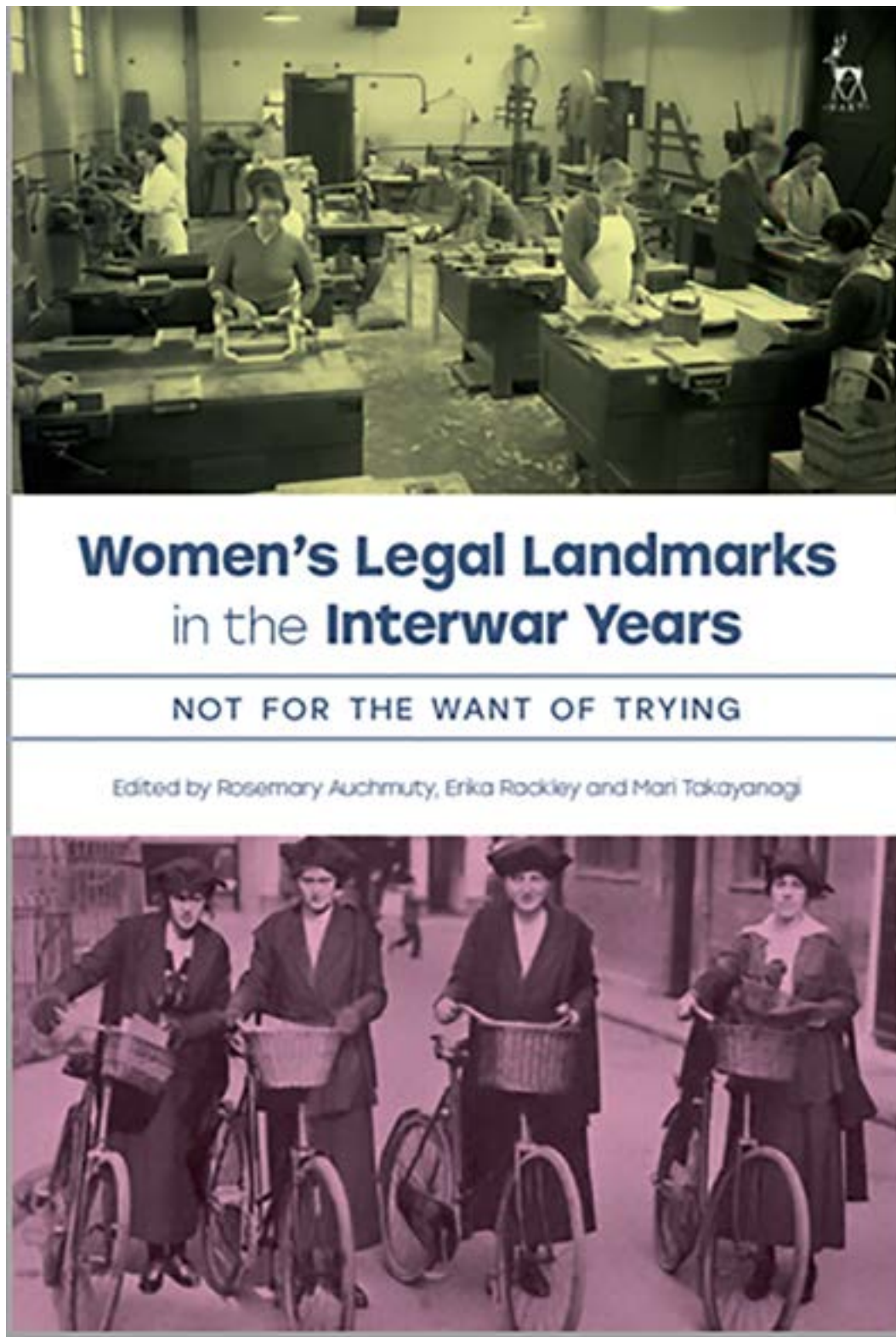


Figure 3: Women's Legal Landmarks in the Interwar Years: Not for the Want of Trying. Photo credits: Allan Cash Picture Library/Alamy Stock Photo/Look and Learn/Bridgeman Images.

women. Of a world opening up, a world of greater—but not yet equal—freedom. They are images of a world in which women are occupying territory that had previously belonged to men and doing things from which they had formerly been excluded.

Take the upper picture. It shows women learning a practical skill in a recently opened educational facility. They are most likely women who have not had the advantage of attending a high school, much less a university. And they are not learning domestic skills, though domestic science was certainly offered at the college,⁹ but *woodwork*—traditionally a masculine activity.¹⁰ In later decades, these women might have been bored housewives pursuing a hobby. In 1936, however, they seem rather to have been learning skills that would enable them to get jobs in workshops and factories.

The South-East Essex Technical College had only opened in 1936, so perhaps the picture on our cover was taken as part of early

publicity for the college. It was one of four regional technical colleges in Essex situated on the Becontree estate, then the largest public housing project in the world. It was built to provide educational facilities for those who had moved to the Becontree estate from London's East End. The College occupied nearly six acres and originally comprised six departments: Industrial and Fine Arts, Commerce, Domestic Science, Engineering, Building and Allied Subjects, and Science. Most of the teaching was provided though part-time evening classes for adults.¹¹ Adult education at the time, as Pushpa Kumbhat has argued,

was a community sphere in which women could exercise their agency irrespective of their traditionally assigned roles as wives, mothers, and workers ... offer[ing] women spaces in which to explore their individuality, and form networks outside the home ... empowering them within their comfort zones, building their confidence and affirming their status as active

⁹ That domestic science had its own department in the College was also in its way a feminist move, representing an effort to raise the status of undervalued domestic work by showing that it required knowledge and skills commensurate with other trades.

¹⁰ Though see Ellison 2016.

¹¹ The College was built to house 5,000 evening students, 1,000 full-time day scholars (aged 11-16) and 750 senior students (B 1937: 556). No mention is made of female students, though a similar report following the opening of the South-West Technical College a few miles down the road refers to a nursery “[o]n the ground floor nearly opposite the board-room ... where mothers may leave their children in the care of a trained nurse while they attend classes!” (B 1939: 568).

citizens (Kumbhat 2023: 544, 548–549).

The photograph tells a tale of new opportunities for working-class women; of a recognition that industry needed and wanted their contribution, and that women in the interwar years were not simply funnelled into the domestic sphere as they might have been before the First World War. Rather women, at least before they married, could earn good money in skilled occupations. It shows indirectly why middle-class women found it increasingly difficult to get domestic “help” in their homes as more and more working-class women shunned domestic service in favour of the better conditions and money they could get in industry. It shows that women’s work was beginning to get proper public attention (as our landmarks demonstrate) and that women’s aspirations were supported by educational establishments such as this.

What it doesn’t show, of course, is how working men often resented and resisted women “taking” jobs from men and how men’s trade unions fought for a “family wage” so that husbands could keep their wives in dependence at home (A Morris 2024). It doesn’t show how working women faced discrimination and harassment in the workplace and how the law was mustered through such means as the marriage bar to keep women

out of competition with men (see eg Samuels 2024).

The lower picture combines two more familiar images, that of young women at Oxford University (evident from their caps and gowns) and of young women on bicycles. Both, again, represent new freedoms. Oxford University had been open to women since 1879 when the first women’s colleges were founded but, although they could study the same subjects and take the same examinations as men, women were not awarded degrees until 1920, the date of this photograph (Auchmuty 2008). In that year, as a direct result of the Sex Disqualification (Removal) Act 1919, Oxford admitted women as full members of the university and the first graduations of women took place. Ivy Williams, England’s first woman barrister, was among those who received her degree in that year (C Morris 2024). So the cheerful young women in the cover picture could look forward not only to the rewards of intellectual endeavour in congenial surroundings but also to receiving degrees at the end of their studies and perhaps using them to embark on remunerative professional careers.

Bicycles are symbolic of a different kind of freedom, actual physical independence for women. The modern “safety” bicycle—that is, the one with wheels the same size (as opposed to the “penny

farthing”) and driven by a chain attached to the back wheel—was invented in 1885. The dropped crossbar made it possible for women to ride safely in their obligatory long skirts, still worn in this picture.¹² The bicycle meant that, no longer confined to the home and its surrounds or dependent on male-provided transport, women could now get about town and out to the countryside and explore the world uncontrolled and unchaperoned.

But still there was opposition. For all the medical experts who extolled the benefits of fresh air and exercise for young women, there were others who warned of the dire effects on their reproductive and other internal organs, their energy levels, their appearance (a phenomenon called “bicycle face” that would put off potential suitors) (Stromberg 2015) and even their sexual morality (an association with masturbation) (Hallenbeck 2015). The same arguments had, of course, been used against higher education for women. Any excuse would serve to attack developments like the

bicycle and the university that took women out of their proper place—the home—and into the world controlled by men.

Though the pictures depict women of very different social backgrounds and from different decades, they have much in common. Both acknowledge the importance of education in opening doors to a better life for women. Both celebrate learning as an end in itself, giving interest and purpose to constricted lives, but also the potential for financial reward in skilled or professional work and, with that, less desperation to find a husband for support. Both reflect the camaraderie of studying and working alongside other women. Both are concerned with physical freedom and moving into men’s territory. And both represent *progress* for women in a period when, for the first time in English history, equality with men seemed attainable. Women could vote and stand for Parliament and they looked forward to pushing through further reforms now that their sex and their interests were

¹² Though sadly this was not always the case: “I allude to the death of Miss Carr, near Colwith Force [in Cumbria, UK]. The evidence of her friend who rode just behind her, says that ‘Miss Carr began the descent with her feet in the rests, but finding the hill become much steeper, she strove to regain her pedals and failed’. I think she failed because she could not see the pedals, as the flapping skirt hid them from her view, and she had to fumble for them. Could she have taken but a momentary glance at their position, she would have had a good chance to save her life. The poor girl lingered a week” (*Daily Press*, 20 September 1896): cited on the [Bikes & Bloomers](#) website: a project which “tells the story of how some women creatively challenged conventional ideas of how a woman should look and move in public space through their clothing”.

represented. As our collection shows, however, the path was not easy and there were many setbacks and considerable backlash against women's greater freedom in the interwar period. It also shows, however, that the optimism displayed by our cover pictures was not entirely misplaced.

[C] CONCLUSION

There is, perhaps, Monk suggests, a “perception ... in the burgeoning field of law and art, [that] legal textbook covers are just a bit ‘too domestic’ to take seriously, not ‘public’ enough” (2022: 65). If so, this is unfortunate. A (good) book is, of course, much more than its cover. So too a cover. A (good) book cover can, and should, convey more than what is inside the book. Clothed well, a book cover provides an opportunity to (re)imagine frontiers and explore territories beyond the narrative of the text. We hope (it is, of course, for others to judge) that this is the case with the covers of the two *Women's Legal Landmarks* collections.

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If you ask someone to design a cover image for a book about English law they will often produce a version of Justice and her scales from the Old Bailey roof. Ask someone to design a cover image for a book about *women* and English law and they will often offer the same thing, intended (no doubt) to point up the irony of Justice being a woman and women being subject to so much *injustice* in English law. The images we have chosen as representing over 12 centuries of women's legal landmarks do not immediately proclaim that the content of our collections is legal. But they are clear that the subject-matter is *women*. In representing women who are beneficiaries of legal reform, who may have become campaigners for further reform, our cover images stand for the slow and unsteady progress of justice for women and freedom from men's control.

* See [the Women's Legal Landmarks website](#) for more information about the projects.

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