

# Amicus *Curiae*

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## EDITOR'S INTRODUCTION

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Welcome to the second 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.

In the contribution made by Justice Sir Dennis Adjei of the Court of Appeal, Ghana, entitled "Human Rights for Justice", issues of public institutions and freedom of information are considered, with special reference to Ghana. The paper explores the position of the right to information in international law, considering the International

Covenant on Civil and Political Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights. Additionally, it assesses effectiveness of Ghana's Right to Information Act 2019 (Act 989) in fostering a culture of accountability, transparency, and integrity in the public sphere. It also considers the Act's impact on democracy and examines the justifications for certain exemptions provided by law to safeguard public interest in democratic nations. A fundamental premise in the paper is that public officials, whether

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

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

they belong to governmental bodies established by the Constitution of Ghana or private organizations entrusted with public functions or resources, have a responsibility to be answerable to the citizens they serve. Sir Dennis takes the view that public institutions often lack accountability and transparency, selectively choosing what information to disclose. Thereby limiting the ability of citizens to hold them accountable. To encourage accountability and transparency, many states around the world have enacted Right to Information Acts. Such legislation empowers individuals to seek information from public institutions, enabling them to fulfil their responsibilities as trustees and to be accountable for their actions. The enactments on the right to information aim to provide clear exemptions for information that may not be disclosed. This is done to protect the public interest in democratic societies, in line with the oath of secrecy taken by public officers, preventing them from revealing matters brought to their attention in the discharge of their official duties. The right to freedom of expression encompasses the freedom to seek, receive, and share information and ideas without interference, except for these limitations imposed by the state. The limitations aim

to protect national security, public order, territorial integrity, public safety, health, morals, rights and reputation of others, prevention of crime, disclosure of confidential information, and the authority and impartiality of the courts. The essay also offers a discussion on freedom of information and access to environmental information, a key issue in many parts of the world today.

The Special Section entitled *Children’s Rights: Contemporary Issues in Law and Society (Part 1)* organized, developed and edited by Dr Maria-Federica Moscati (Sussex University) presents socio-legal and interdisciplinary examinations of a range of important questions concerning the rights of children and also seeks to broaden the types of contribution made to scholarly journals. In the first paper in the Section, Jo Bridgeman contributes an essay entitled “Rights of the Child or Parental Authority in Children’s Medical Treatment Cases?” This notes that recent cases in the United Kingdom (UK) have sparked debate about the threshold for intervention in parental decisions regarding a child’s medical treatment. The argument revolves around whether significant harm or best interests should be the basis for such interventions. Although unsuccessful in court,

these arguments have influenced proposed legislation aimed at enhancing parental authority. The author examines the concept of parental authority in the context of treating seriously ill children. She argues against reforming the law to prioritize parental authority, as it would undermine the rights of the child. Instead, the focus should be on the child's needs, interests, and rights within a collaborative approach involving parents and professionals. The contribution concludes with a fictional account of a parliamentary debate on a Bill to reform the law, highlighting the importance of placing the child's interests and voice at the forefront of decisions regarding their medical treatment.

In her essay "Children in Family Mediation: A Rights Approach or the Right Approach?" Marian Roberts analyses the tensions and challenges in protecting ethical and professional principles while giving voice to the child. Three interconnected developments in family mediation concerning children are considered. The contribution discusses the impact of adopting imported terminology, the risks of overemphasizing a rights approach to children's participation, and the failure to recognize the influence of multiple pressures on families.

Lucía Coler and Gabriela Z Salomone's contribution "Criss-crossings of Psychological Practice in Adoption Processes: Preliminary Results of a Field Study in Argentina" examines the significant role that psychologists play in child protection in Argentina, particularly in the adoption system. Their psychological reports and interventions are crucial when making decisions about family separation and the adoptability of a child. The increasing involvement of psychologists highlights the need to analyse the factors influencing their practices. This article presents the findings of field research conducted in Buenos Aires, drawing on both interviews and legal files. It explores the institutional and discursive complexities that impact psychologists working in this area. The study emphasizes the importance of considering both children's rights and the individual's perspective in each case.

The essay authored by Hung-Ju Chen and Po-Han Lee and entitled "Doing Rights, Making Citizens: The Practices of High School Student Governments" explores the relationship between the right to education and citizenship rights, specifically in the context of school education as a site of democratic contestation.

Drawing on a review of documents from international reviews of Taiwan's implementation of the United Nations Convention on the Rights of the Child and interviews with high-school student government members, the article demonstrates how local educational systems navigate international child rights standards. It argues that student government involvement and human rights review processes empower students, giving them a sense of relevance and responsibility in networking and decision-making for the future.

In their contribution, "Adopting a Rights Lens to Children's Training in Football Academies" Nuno Ferreira and Anna Verges Bausili highlight the need for a rights-based approach to children's involvement with football academies, focusing on the impact of commercial pressures on young football players. Drawing on empirical evidence from the English Premier League's self-regulation on youth development, and the problems that arise from the operation of the football academies, the analysis examines stakeholders' awareness of children's rights and their influence on football academies. The article concludes with policy recommendations to address the identified issues.

Simon Flacks' essay "Child Q, School Searches and Children's

Rights" examines the worrying 2020 UK case of "Child Q", which sheds light on the discriminatory treatment of young people by the police. This contribution compares the response of different stakeholders, particularly focusing on a local authority safeguarding review guided by children's rights. It highlights the disparity between scrutiny of police powers to search minors in public and the lack of focus on powers to search students in schools. The commentary emphasizes the need for systematic data collection to address potential disproportionality. It also shifts attention from individual police failures to systemic issues with disciplining students, specifically regarding suspicions of drug use and inequitable outcomes.

Jacob Stokoe's "Queerness as a Gift, LGBTQ+ Parenting and the Benefits to our Children" offers a personal account of trans parenting. The increasing visibility and acceptance of trans people has led to more informed choices in creating diverse families. However, this progress is accompanied by a rise in transphobic rhetoric and threats to trans rights. In this article, Jacob Stokoe, a trans parent, shares reflections on daily parenting, highlighting the unique gifts trans parents bring to their children and families, while

addressing the harm caused by societal norms and transphobia including the problem of pervasive cisheteronormativity.<sup>1</sup>

In Francesca Cavallo's contribution "Open Letter to the Editor", the best-selling and much respected author looks at how children's stories have played a significant role in shaping their world view. These stories offer valuable insights into the ideals cherished by our predecessors. However, it is crucial to recognize that children's literature has often been undervalued due to its moralistic nature and targeted audience. While adults may focus on the intended messages, children experience stories differently, noticing smaller details and exploring their own imaginative interpretations. Understanding this unique perspective is essential if we aim to "decolonize" the stories we present to children—there is a strong need to decolonize this literature, making sure that our stories do not reinforce values that are fundamental to colonialism such as economic exploitation, ethnocentrism, racism, paternalism and so on. By examining the representation of diverse characters and stories, we can challenge and dismantle

colonialist values embedded in children's literature. This endeavour requires us to address what is missing from these narratives and ensure that our stories do not perpetuate harmful ideologies. It is through this process of decolonization that we can create a more inclusive and equitable literary landscape for children.

Amy Kellam's Visual Law contribution entitled "Aesthetic Verdicts: The Intersection of Art, Critique and Law in Whistler v Ruskin" examines the landmark defamation case of Whistler v Ruskin in 1878, which raised issues of the complexities of art criticism within defamation law. John Ruskin's critique of James McNeill Whistler's work led to a libel lawsuit, where Whistler sought validation for his art and artistic philosophy. Despite attracting public fascination, the jury's award of a meagre farthing in damages suggested a perception of the lawsuit as frivolous. This case highlights the challenges faced by legal systems in dealing with subjective art valuation, evolving defamation norms, and freedom of speech. While Whistler technically won, the consequences for both men were significant, impacting

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<sup>1</sup> Cisheteronormativity is a term that normalizes and reinforces heterosexuality and a binary system of assigned sex and gender, emphasizing two rigid and distinct ways of being: assigned-male-at-birth masculine men and assigned-female-at-birth feminine women.

their finances, reputations, and positions in the art world. The trial's legacy continues to shape discussions on art, law, and cultural value.

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.



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Articles: pages 189-236

## HUMAN RIGHTS FOR JUSTICE

JUSTICE SIR DENNIS ADJEI  
Court of Appeal, Ghana

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### **Abstract**

The persons who occupy public office—including those created by the Constitution of Ghana 1992 and any other enactments—and private organizations and institutions that perform public functions or receive public resources are accountable to the citizenry, particularly those whose taxes are used to set up public offices and pay their salaries either in whole or in part, or to provide or support private bodies to perform public functions. The term “public institutions” has a broader meaning within the context of access and the right to information than its ordinary meaning.

The technical meaning of “public institutions” within the context of the right to information covers institutions created by the Constitution, any other enactments and private organizations or institutions that perform public functions or receive public resources. The author uses “public institutions” in its technical sense in this article to avoid repetition of private institutions or organizations that provide public services or receive public resources.

In most cases, public institutions fail to observe the culture of accountability and transparency and decide on the types of information to disclose and those not to be disclosed, to render the citizenry impotent to hold them accountable. The persons who occupy offices in public institutions hold those offices in trust for the citizenry, and, as trustees and fiduciaries they are required to be accountable, transparent, prudent, faithful, honest and not to commingle their personal properties with the properties that they hold in trust for their citizenry.

Discretion was hitherto exercised by public institutions as to the information which may be disclosed to the public or not did not have statutory backing, as a result of which some of them have acted capriciously. In order to make the officers of public institutions accountable and transparent, most states have enacted Right to Information Acts to give statutory backing to persons who may seek information from occupiers of public institutions to ensure that they discharge their mandates as

trustees and are accountable to the nationals of their respective countries.

Furthermore, the enactments on right to information are intended to give a clear exemption to information that cannot be disclosed with the sole aim of protecting the public interest in democratic societies in accordance with the Oath of Secrecy taken by public officers and which prevents them from revealing matters that shall be brought under their consideration or knowledge through the discharge of their official duties.

This article discusses the international law position of the right to information, taking into account the International Covenant on Civil and Political Rights 1965, the European Convention on Human Rights 1950, the American Convention on Human Rights 1969 and the African Charter on Human and Peoples' Rights 1981; and further discusses the Right to Information Act 2019 (Act 989) in Ghana and its effectiveness in promoting the culture of accountability, transparency and faithfulness within the public space; and, furthermore, assesses its impact on democracy and the justification for some of the exemptions provided by law to protect public interest in democratic countries.

The right to freedom of expression includes the freedom to seek, receive, hold opinions and impart information and ideas without public interference, except for restrictions imposed by the state which have been enacted into law and are necessary. The laws that are necessary in a democratic society to restrict freedom of expression must take into account the interests of national security or public order, territorial integrity or public safety, the protection of health or morals, the respect of the rights or reputation of others, the prevention of crime or disorder, and the disclosure of information received in confidence, and for the maintenance of the authority and impartiality of the courts.<sup>1</sup>

There will also be a brief discussion on freedom of information and access to information concerning the environment held by public officers and private institutions and organizations that provide public functions.

**Keywords:** freedom of expression; international law; freedom of information; journalism; Ghana.

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<sup>1</sup> Articles 19 of the ICCPR, 10 of the ECHR, and 9 of the ACHPR.

## [A] INTRODUCTION

Information exists in different forms, including documentary, electronic, digital, scientific, real and demonstrative, and human beings require it for their own good and democratic development. There is some information that those in possession of same would like to disclose for several reasons, while others would not wish it to be disclosed for obvious reasons.

There is information in the custody of public officers who come by it in the course of their official duties and hold it in trust for the people of the country, while private entities who neither perform public functions nor receive support from the state are not accountable to anyone and would not ordinarily disclose information they have in their custody unless there is a law compelling them to disclose. States know that freedom of expression is a fundamental human right but should be regulated for several reasons, including protection of the public interest, security of the state, reputation, other rights of others, prevention of crime and morality, and protection of information affecting international relations.

Governments that are dictatorships and rule by tyranny suppress information in their custody as well as through agents in order not to make themselves unaccountable and not transparent to the people they govern. In order to break the chain of tyranny and ensure the free flow of information from governments to the governed, there are declarations, treaties, agreements and covenants that have made freedom of expression a fundamental human right with legitimate limitations. States are required to enact laws on freedom of expression, place legitimate restrictions on them, and further provide for the procedure through which information that has not been restricted would be freely accessed.

The right to information deals with access to information not restricted by law within the public space. Private persons and private organizations may have information in their custody which may be adverse to the security of the state, public order and any other cause that states cannot obtain without enacting laws that are necessary in democratic societies to empower their security agencies to obtain same against the wishes of those persons.

This article shall take into account all the relevant international instruments and treaties on freedom of expression and the restrictions that are necessary to be placed on them, as well as the parameters of freedom of expression provided by the Right to Information Act 2019 (Act 989).

## [B] HISTORICAL ANTECEDENTS OF FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

The history of right to information could be traced to two basic instruments which came about after the Second World War to ensure free flow of information among states to prevent another war based on absence or lack of information. The two instruments are United Nations (UN) Resolution 59(1) of 1946 by the UN General Assembly and the Universal Declaration of Human Rights of 1948. The first attempt by the UN to promote unlimited access to information came in the form of a resolution.

Resolution 59 of 1946—adopted as “Freedom of Information”—was meant to provide for a right to freedom of expression to individuals to gather, transmit and publish news anywhere and everywhere without fetters. The resolution seemingly provided for access to information without any restrictions or interference from both public and private entities.

The Universal Declaration of Human Rights was the first international human rights instrument made by the UN, and its Article 19 is on the right to freedom of expression and opinion. The Declaration purported, *prima facie*, to make the right to expression and opinion absolute, unlike recent treaties and conventions on the subject, which *ab initio* provide for exceptions on legitimate grounds. The UN General Assembly in 1946 passed Resolution 59(1), which provides:

Freedom to information is a fundamental right, and it is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of information implies the right to gather, transmit, and publish news anywhere without fetters. As such, it is an essential factor in any serious effort to promote the peace and progress of the world.

The UN made the right to information an absolute right. There were no restrictions in any form placed on a person’s rights to obtaining, gathering, transmitting and publishing of opinion and expression through any media. The Resolution envisaged that right to information is a right that could be exercised by a person as an inherent right to obtain any information in the custody of any person with the aim of promoting peace in the world.

The right to information was the only way to expose wrongdoers through information which may affect world peace and progress if such information were not gathered and exposed. The Resolution was passed immediately after the Second World War and considered as an essential

factor to promote peace and progress on the globe by exposing countries which had in mind to benefit from war or foment another war.

However, Resolution 59 existed with the common law right of defamation, which clothed a person whose reputation had been injured without justification to maintain an action for defamation and seek appropriate remedies, including reparation and injunction. The resolution did not also prevent states from punishing a person whose aim was to create another world war by publishing false news, the very thing the resolution was passed to protect.

I submit that, even though Resolution 59 stated in clear terms that it was an absolute right, it did not authorize persons to hide under it to create criminal offences, disturb world peace, or violate public order, national security, or damage the reputation of others without a just cause, and, in fact and in substance, it was not an absolute right; otherwise, it would have defeated the purpose for which it was passed to achieve.

The literal interpretation of the words of the resolution will result in absurdity unless the reasons behind its passage prevail over its letter to create exceptions which would preserve the purpose for which the resolution was passed to achieve.<sup>2</sup> Undoubtedly, the resolution did not take into account information whose disclosure would be prejudicial to the security of the state or affect public interest or disturb democratic principles or regimes, and it cannot be said to have given priority to a private right over public interest. The strict application of the resolution would defeat the principle of proportionality which requires public interest to override private interest whenever they come into conflict. The author is of the candid opinion that even though Resolution 59(1) seems to be absolute and confers the right on individuals to seek, gather and publish any information they have at their disposal, it inherently took into consideration the rights of the states *vis-à-vis* those of the individuals in a democratic regime not to confer an absolute right on an individual, which would impact negatively on the security of the state, public interest, maintenance of law and order, and the reputation of the individual; the very things that the world body sought to protect.

The right to gather, transmit and publish news anywhere without fetters shall be construed to include news which is relevant and would deepen democracy, transparency and accountability in the respective states. A resolution from a body such as the UN would not give an open licence to persons to defame others without just cause or violating the human rights of others, or do an act that would be prejudicial to the security

<sup>2</sup> *Holy Trinity Church v United States* 143 US 457, SCt 511 36 L Ed 226 29 February 1982.

of the state or injurious to the public interest, and should be construed purposively to give effect to the purpose for which it was enacted.

The second instrument, the Universal Declaration of Human Rights of 1948, is a soft law and the first human rights instrument made by the UN to be respected by its member states and their colonies. Article 19 of the Declaration made the right to freedom of opinion and expression an absolute right without any interference or restrictions. Article 19 of the Universal Declaration of Human Rights provides as follows:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

Article 19 of the Declaration makes the right to acquire information and share it through the media an absolute one. The essence was to empower persons to seek and obtain information in the custody of other persons and share same through the media without any limitations placed on it by law. The author is of the considered opinion that Article 30 of the Declaration is to ensure that no one exercises a right under it to destroy the rights and freedoms provided in it, and that alone places fetters on the rights created by it.

Furthermore, the Declaration provides that all persons are born free and equal in dignity and rights and would not confer unfettered rights on persons not to respect the rights or reputation of others.<sup>3</sup> Even though Article 19 did not provide for any exceptions to freedom of opinion and expression, they are subject to the other fundamental human rights provisions, particularly those provided in the Declaration, and cannot be said to be absolute.

A careful reading of Article 19 suggests that, even though it protects both the right to freedom of expression and the right to hold an opinion, it is the latter right that is at large and cannot be lawfully curtailed. Article 19 should be given its proper interpretation to mean that there is a clear distinction between the right to hold an opinion, which is absolute and cannot be interfered with, and the right of expression, which by necessary implication is not an absolute right.

On the face of Article 19(1) of the Declaration, one may be tempted to conclude that there is no limitation on the right to freedom of expression, but a reading of the Declaration as a whole does not make it absolute but subject to the rights of other persons. The Declaration did not envisage a

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<sup>3</sup> Universal Declaration of Human Rights, Article 1.

situation where a person may intentionally defame another person and assert that they have an absolute right under it. Until recently, most jurisdictions criminalized some publications which were considered to be intentional or negligent acts to defame other persons. In Ghana, until the Criminal Code (Repeal of Criminal Libel and Seditious Laws) Amendment Act 2001 (Act 602) was passed, the Criminal Offences Act 1960 (Act 29) had criminalized negligent and intentional libel, and some people who violated it were tried and sanctioned, including journalists.<sup>4</sup> Apart from the law of tort which addresses publications meant to dent the rights or reputation of persons, the same act had also been criminalized.

Section 373 of the Criminal Code of Nigeria deals with criminal defamation, where a publication is made against any person that is likely to injure his or her reputation by exposing them to hatred, contempt, or ridicule, or to damage their profession or trade. The Supreme Court of Appeal of South Africa held that criminal defamation forms part of the laws of South Africa and that the offence is committed where a person unlawfully and intentionally publishes a matter concerning another person with the aim of injuring that person's reputation. The court affirmed the conviction and sentence of three years' imprisonment, suspension for five years, and, in addition, three years' correctional supervision for 22 of the 23 counts of criminal defamation.<sup>5</sup>

On 28 October 2020, the Sierra Leone Parliament repealed criminal libel from its statute book, which had existed for over 55 years. The United Kingdom (UK) kept its common law crimes of criminal libel and seditious libel until they were abolished by the Coroners and Justice Act 2009. Blasphemous libel in the UK was also abolished by the Criminal Justice and Immigration Act 2008. The above paragraphs attest to the fact that states did not interpret the two international instruments in absolute terms and subjected them to restrictions, and it was only recently that criminal libel was undergoing repeals in most countries.

The extent of the right to information contemplated by the two international instruments, when construed literally, would be dangerous for states and their nationals and would be interpreted purposively to make them subject to other human rights provisions and statutes within the specific states.

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<sup>4</sup> Criminal Code 1960 (Act 29), sections 112-119.

<sup>5</sup> *Hoho v S* (493/05) [2008] ZASCA 98; [2009] 1 All SA (SCA); 2009.

## [C] SOME OF THE RECENT INSTRUMENTS ON THE RIGHT TO INFORMATION IN INTERNATIONAL LAW

The four international instruments on the right to information to be discussed under this sub-topic are the International Covenant on Civil and Political Rights 1965 (ICCPR), the European Convention on Human Rights 1950 (ECHR), the American Convention on Human Rights 1969 (ACHR) and the African Charter on Human and Peoples' Rights 1981 (ACHPR). The above instruments confer rights on individuals to express opinion and to seek, receive and publish information to deepen democracy with specific restrictions.

The ICCPR in its Preamble states that the state parties to it considered the principles proclaimed by the Charter of the UN, recognized the rights derived from the inherent dignity of humankind and the Universal Declaration of Human Rights, and rights inherently vested in the human person to enjoy civil and political freedom from fear.

The Covenant was principally made to protect civil and political rights within the confines of state laws made in consonance with it. The Covenant was opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) on 16 December 1966. It came into force on 23 March 1976, in consonance with Article 49, which provided that it should come into force three months after the 35th instrument or accession had been deposited with the Secretary-General of the UN. Article 19 of the Covenant is on the right to hold opinions without interference and the right to freedom of expression. It provides the following:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other medium of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputation of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.



The Covenant expressly makes the right to hold opinions an absolute fundamental human right. However, the right to freedom of expression is guaranteed subject to restrictions provided by law and necessary to respect the rights or reputation of others, protect national security or public order, or public health or morals. A person cannot hide under the right to freedom of expression to injure the reputation of other persons or do any act which may be inimical to public order, the security of the state, public health or morals. States are required to enact laws to cater for the restrictions mentioned in the Covenant.

Most countries have enacted laws to provide limits on freedom of expression, which includes freedom to gather, receive and impart. In some jurisdictions, where the information gathered to be published is obtained contrary to law, it may be used for what it is worth but cannot be used in a court of law. The common law position which was established in the case of *R v Leatham*,<sup>6</sup> that illegally obtained evidence is admissible, does not wholly hold in countries including Ghana, where the Supreme Court has construed Article 18(2) of the Constitution of Ghana 1992 that any evidence obtained contrary to it is inadmissible unless it falls within the exceptions provided by it.<sup>7</sup> This is a case where the plaintiff in the District Court, Sunyani, secretly recorded a pastor in charge of the Presbyterian Church over the ownership to the land which was the subject matter of the suit. The pastor on cassette admitted that the land was owned by the plaintiff, but stated in court that it was owned by the Presbyterian Church. The conclusion to be drawn from the above decision is that not every expression by a person can be recorded and used against that person unless it comes within the exceptions provided by Article 18(2) of the Constitution, including the promotion of the economic wellbeing of the people, and the prevention of crime, morality and disorder.

It is not certain as to whether the common law position established in *R v Leatham* has been compromised. The case of *R v Sang*<sup>8</sup> has held that where illegally obtained evidence would have a prejudicial effect against probation value, the court can exclude its admission under section 78 of the Police and Criminal Evidence Act 1984. The case of *Delaney*,<sup>9</sup> taking a contrary decision to the position in *R v Leatham*, rejected relevant evidence as inadmissible by the fact that it was taken in breach of the rules which requires records of evidence to be kept. However, the House of Lords in

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<sup>6</sup> *R v Leatham* (1861) 8 Cox CC 498.

<sup>7</sup> *Cubage v Asare and Others* [2017]-[2020] 1 SCGLR 305.

<sup>8</sup> *R v Sang* [1980] AC 402 [1979] Crim LR 655.

<sup>9</sup> *Delaney* (1989) 88 Cr App R 338.

the recent case of *Attorney-General's Reference (No 3 of 1999)*<sup>10</sup> admitted the DNA of a rapist which was kept by the police without reference to him and was to be used in another case against him; it was held that even though the police should not have kept the DNA without the consent of the accused, it was relevant and ought to be admitted into evidence.

I now discuss Article 10 of the ECHR which confers the right to freedom of expression on individuals among the member states. It provides thus:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms carries with it certain duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary

Article 10 ECHR is to the effect that freedom of speech is not absolute and states are able to make laws that would impose limitations, restrictions and penalties as are necessary in a democratic society, and in the interest of national security and public safety with the aim of preventing crime and disclosure of information obtained in confidence, protecting health or morals, reputation of persons, and maintaining the impartiality or authority of the courts.

Article 10 of ECHR is more detailed than Article 19 ICCPR but, in substance, both of them are to the effect that freedom of expression goes with duties and responsibilities and states are required to clearly set out restrictions and conditions based on any of the above legitimate grounds to protect freedom of expression. The legitimate grounds for restricting freedom of expression are those provided by Article 10(2) of the ECHR. In the case of *Director of Public Prosecution v Cuciurean*,<sup>11</sup> Lord Burnett CJ discussed the nexus between freedom of expression and freedom of assembly and association under Articles 10 and 11 respectively of ECHR and held that both rights were qualified rights and are subject to the

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<sup>10</sup> *Attorney-General's Reference (No 3 of 1999)* [2001] 2 WLR 56, [2001] AC 91.

<sup>11</sup> *Director of Public Prosecution v Cuciurean* [2022] EWHC 736 (Admin).

limitations to be placed on them by law and necessary in a democratic society; *inter alia*, to protect the reputation of others, in the interests of national security, public order and to maintain the authority of the courts.

Where a particular mode of expressing freedom of rights is curtailed by a state within the meaning of Article 10 of the ECHR, it shall be deemed lawful by the fact that it is a qualified right to freedom of expression or a right to information is not an absolute right. The question is, who determines that a restriction placed on Article 10 is necessary in a democratic society? It is ambiguous, and a person who is of the opinion that the restrictions placed are not within the contemplation of Article 10(2) may challenge its validity (Feldman 2002).

The courts, in determining whether a law enacted to restrict freedom of expression is in conformity with Article 10(2) of the ECHR, must satisfy themselves that the restrictions were made in accordance with the limitations provided by the Convention to respond to the social needs of the state and that they are proportional to the interests of individuals.

The ACHR, also known as the Pact of San Jose, is one of the international human rights instruments made to regulate human rights protection among member states. The Convention, which came into force on 18 July 1978, set up the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to ensure compliance by the member states. Article 13 of the Convention, which is on freedom of thought and expression, provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally or in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputation of others;
  - b. the protection of national security, public order, public health, or public morals.
- ...
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or any other similar action against any person or group of persons on

any grounds, including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

The ACHR provides limitations to freedom of thought and expression and further criminalizes publications intended to promote national, racial, or religious hatred. The member states are to enact laws that would restrict freedom of expression and thought and further criminalize any act likely to create sectional or national hatred. The Convention prescribes for both civil and criminal restrictions, unlike other international instruments that provide for only civil restrictions.

The ACHPR is a human rights instrument for the member states of the African Union. The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have been set up to ensure strict compliance with the provisions of the Charter. The Charter, like the other ones discussed above, does not make freedom of expression an absolute right. The member states are to enact laws to regulate freedom of expression in their respective countries, but the parameters of the restrictions were not provided. The irony is that all the member states of the Charter are members of the ICCPR and would be bound by the restrictions provided by the latter. Article 9 of the Charter, which is on the right to information, provides as follows:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

The right of every individual to receive information is guaranteed by the ACHPR, but the right conferred on an individual to express and disseminate his or her opinions shall be made within the law enacted by the member states. The Charter seemingly suggests that states may restrict freedom of expression but does not provide guidelines or parameters for the restrictions, and it is subject to abuse by states.

The position provided by the ACHPR on the right to express and disseminate information is quite terse as compared to the provisions in the ICCPR, ECHR and ACHR, which provide guidelines for the member states in their national laws. On the other hand, most of the countries in Africa are also members (states) of the ICCPR and cannot use the provision in the ACHPR to arbitrarily restrict freedom of expression in their respective states, which would amount to censorship or deprivation of freedom of expression.

## [D] THE DIFFERENCE BETWEEN THE RIGHT TO FREEDOM OF EXPRESSION AND THE RIGHT TO HOLD AN OPINION

There is a clear distinction between the right to freedom of expression and the right to hold an opinion. The right to freedom of expression relates to the dissemination of information acquired through whatever means, provided the source is credible. There are duties and responsibilities imposed on a person's right to freedom of expression as it must be made within the limitations provided by the national laws of that person. Article 19 of the ICCPR unambiguously provides that states are to provide limitations on freedom of expression by individuals by enacting laws that are necessary to give effect to it.<sup>12</sup>

The right to hold opinions is an absolute right and shall not be subject to interference by states. Article 19, paragraph 1 of the ICCPR provides that everyone has the right to hold opinions without interference or restrictions. The ICCPR makes a clear distinction between the right to freedom of expression, which is not an absolute right, and the right to hold opinions, which is absolute and cannot be interfered with by the member states.

The ECHR considers the right to information and the right to hold opinions under freedom of expression and places limitations on both as are necessary in a democratic society and for the protection of the reputation of others. The ECHR does not draw a distinction between the right to information and the right to hold opinions, and both are subject to restrictions by the member states within the parameters provided in Article 10, paragraph 2. Therefore, the member states within the European Convention are authorized by the Charter not to make freedom to hold opinions an absolute right.

Article 9(1) of the ACHPR distinguishes between the right to receive information and the right to express and disseminate information. The provision does not place restrictions on the right to receive information on persons but places limitations on the right to express and disseminate opinions.<sup>13</sup>

The above discussion may be summed up as follows: an individual seeking a right under the ICCPR to exercise the right to hold an opinion shall not be restricted by the member states, but the right to exercise

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<sup>12</sup> ACHPR, Article 19(2) & (3).

<sup>13</sup> Ibid Article 9(1) & (2).

freedom of expression shall be restricted by the member states through the enactment of law and is necessary in democratic regimes to prevent abuses and excesses on matters affecting the reputation of others and for the protection of national security and the interests of the state. An individual who is of the opinion that restrictions placed on the right to exercise freedom of expression by law are not necessary may challenge its validity in the appropriate forum.<sup>14</sup>

## [E] THE MODE OF EXPRESSING FREEDOM OF EXPRESSION

The ICCPR provides that freedom of expression may take the form of being expressed orally, in writing, in print, in the form of art, or through any other medium.<sup>15</sup> Freedom of expression may be in writing with a pen, pencil, chalk, crayon, or anything else that is capable of being used as a writing material and may be found in a book, on a sheet of paper, a blackboard or a writing board, on television, on social media, or on a wall, vehicle, building or structure among other things. A person in expressing freedom of expression may use charcoal to write it on a kiosk or any other structure, which shall constitute an expression.

A person may express freedom of expression orally through speech, radio, television, social media, the beating of a gong-gong, a toy, or any other verbal communication that is capable of conveying the meanings of the spoken words. Oral language may include signing languages, parents babbling to their babies, gestures and other non-verbal communications, including body language. A person may express freedom of expression in the form of print, including in a newspaper, magazine, journal, book, article or newsletter.

Freedom of expression may also take the form of art, including drawing, painting, photography, sculpture, music, cinema, literature, architecture, printmaking, video art, performance art (dance, drama and theatre), land art, intervention art and installation art.

A person may express freedom of expression either orally, in writing, in print, in the form of art, or through any other medium of their choice.<sup>16</sup> The phrase “other forms of media of his choice” excludes print media but takes into account transmissions, distributions, exhibitions on

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<sup>14</sup> Ibid Article 19.

<sup>15</sup> ICCPR, Article 19(2).

<sup>16</sup> Ibid Article 19, paragraph 2.

telecommunications, the internet, satellites, DVDs, CD-ROMs, cables and media players. The mode of expressing information is broad and encompasses any action or inaction that is intended to have expressive content. While some expressions are protected, others are not.

The ECHR held that sexual intercourse that is used to express an opinion is an unprotected form of expression.<sup>17</sup> The question to pose is: is the context capable of expressing an opinion irrespective of the fact that it was held to be unprotected? It is the substance of the expression and the context within which it is used that is material, not merely its form, which is considered unprotected.

In the case of *Texas v Johnson*,<sup>18</sup> the Federal Supreme Court of the United States of America (USA), by a majority of 5:4, held that the burning of the American flag was protected speech under the First Amendment to the US Constitution and amounted to symbolic speech. The burning of a national symbol, such as a flag, or burning the photograph of the president of a country, and other physical demonstrations to show disapproval of conduct or an event would amount to freedom of speech within the meaning of “in the form of art” as contained in the Covenant. A mode of expressing an opinion shall not be protected where the national laws have prescribed restrictions on it; otherwise, in all other cases, it is the substance and the context within which the expression is made that are materially abusive or offensive.

## [F] DUTIES AND RESPONSIBILITIES OF MEMBER STATES TO COMPLY WITH INTERNATIONAL LAWS, TREATIES, CONVENTIONS AND AGREEMENTS

The countries in the world are regulated by their national laws regarding the effect of treaties, conventions and agreements executed by them. There are two categories of countries when it comes to the execution of treaties, conventions and agreements. These countries are either monists or dualists. The monist countries are automatically bound by international law or treaties, agreements and conventions duly executed on their behalf by the appropriate executive body. The known monist countries in the world include Belgium, France, Germany and the Netherlands. By the Constitution and constitutional history of the USA, it is a monist

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<sup>17</sup> *X v United Kingdom* App No 7215/75 (ECHR 5 November 1981) [1981] ECHR 6.

<sup>18</sup> *Texas v Johnson* 109 S Ct 2533 (1989).

country, but it goes further to draw a distinction between a non-self-executing treaty and self-executing treaties. The self-executing treaties are treaties which become part of the national laws when they are duly executed. The non-self-executing treaties are those that are ratified with the understanding that they would not have effect of their own force.<sup>19</sup> The above discussions demonstrate the fact that the USA practises a hybrid of dualist and monistic law, depending on the nature of the treaty at stake.

The dualist countries, such as all African countries and most of the countries in Europe, Asia and Latin America, maintain their sovereignty and individual self-determination in terms of the law-making process, and, even though bound by treaties, conventions and agreements duly executed by them, such documents do not form part of their domestic laws until they are domesticated.

Article 11 of the Constitution of Ghana 1992 provides the sources of law in Ghana as the Constitution, enactments made by or under the authority of Parliament under the Constitution, subsidiary or delegated legislation made under the Constitution, the existing law and the common law.

International law is conspicuously missing as one of the sources of law in Ghana. On the other hand, customary international law forms part of the common law in Ghana and is one of the sources of law.<sup>20</sup> Article 75 of the Constitution of Ghana, which comes under international relations, provides for how treaties, conventions and agreements duly executed in the name of Ghana shall be ratified by Parliament to give it a legal effect. It provides the thus:

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- (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (2) A treaty, agreement, or convention executed by or under the authority of the President shall be subject to ratification by;
  - (a) An act of Parliament; or
  - (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.

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<sup>19</sup> *Medellin v Texas* 552 US 491 2008.

<sup>20</sup> *Republic v High Court (Commercial Division), Accra, ex parte Attorney-General (NML Capital Limited & Republic of Argentina interested parties)* [2013]-[2014] 2 SCGLR 990.



The ICCPR and the ACHPR do not form part of the sources of law for the dualist countries, including those that have ratified both. By their necessary implications, the ICCPR and ACHPR, which have been duly executed and ratified by Ghana, do not form part of the sources of law in Ghana and only bind Ghana in international law.

A Ghanaian whose rights under any of the two international instruments have been violated may seek redress for a violation at the Economic Community of West African States (ECOWAS) Community Court where exhausting local remedies is not a *sine qua non*—although the individual may have exhausted domestic remedies—and where those rights have not been addressed, that person may seek redress in the ECOWAS Community Court or the African Court on Human and Peoples' Rights against Ghana and the result shall be treated as binding international law in both courts.

There is a lean way in which human rights provisions executed by the President of Ghana without Parliamentary approval under Article 75 of the Constitution may be used in Ghana, even though they do not form part of the laws of Ghana. The Constitution of Ghana 1992 provides that rights, duties, declarations and guarantees on fundamental human rights not specifically mentioned in the Constitution under Chapter 5 (Articles 12-33) have not been excluded and shall be used provided they are considered to be inherent in democracy and intended to secure the dignity and freedom of humankind. Article 33(5) of the Constitution, which permits the Ghanaian courts to apply some human rights provisions from other national and international jurisdictions, provides as follows:

The rights, duties, declarations, and guarantees relating to fundamental human rights specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned, which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

There is no doubt that all the human rights instruments discussed above are inherent in democracy and intended to secure the freedom and dignity of man. The Ghanaian courts are not constrained by the Constitution from invoking human rights instruments and enactments from elsewhere where there is no such provision in the Constitution to supplement the human rights provisions contained in Chapter 5 to ensure that the protection of fundamental human rights and freedoms, which is the cornerstone for unity and stability, does not become a lip service.<sup>21</sup>

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<sup>21</sup> Constitution of Ghana 1992, Preamble & Article 35(4) & (5).

The conclusions to be drawn from the above discussions are that the right to information and freedom of expression found in the ICCPR, ECHR and the ACHPR do not form part of the national laws of the dualist countries who have executed same but bind those states in international law. In some states, such as Ghana, Sierra Leone and Nigeria, some of the human rights provisions in treaties, conventions and agreements may be considered fundamental human rights provisions even though they do not form part of the national laws, provided they are inherent in democracy and intended to promote the dignity of humankind.

The Universal Declaration of Human Rights, the ICCPR, the ECHR, the ACHR and the ACHPR can be used in Ghana under Article 33(5) of the Constitution even though Ghana is not a signatory to the ECHR and the ACHR by the facts that human rights provisions contained in them are inherent in democracy and intended to promote the dignity of humankind. The Ghanaian courts can use all the provisions on human rights in the above international instruments, and the rights to freedom of expression and opinion contained in them shall be invoked to promote and develop human rights jurisprudence in Ghana.

The cases from the Inter-American Courts, the European Court of Human Rights, the African Court on Human and Peoples' Rights and the ECOWAS Community Courts could be used as persuasive authorities in Ghana and shall have binding effects after they have been applied by the Superior Courts in the form of *stare decisis*.

However, a violation of human rights treaties, conventions and agreements by a country may be determined by the regional or continental courts with jurisdiction upon an application brought by the affected person or other appropriate body subject to satisfying the admissibility principles of that court and may be used by the Ghanaian courts to persuade them, after which they may become binding decisions.<sup>22</sup>

## [G] THE RIGHT TO FREEDOM OF INFORMATION ON ENVIRONMENTAL PROTECTION

The international instruments on the right to information discussed above did not take into account freedom of information and the right to environmental protection. The environment has been polluted and depleted to the extent that it must be protected by all, and that cannot

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<sup>22</sup> Article 6 of the Protocol to the ACHPR makes admissibility a condition precedent to assumption of jurisdiction in any case brought before the African Court on Human and Peoples' Rights.

be done unless unfettered access is given to people to freely access information on the environment.

The state of human health is mainly determined by the nature of the environments people live in. A healthy environment provides for healthy human beings. The Rio Declaration on Environment and Development, which was adopted in Brazil in 1992 under the auspices of the UN Environmental Protection Agency, clothed individuals with the right to unfettered access to environmental information from public authorities at the national level, including information on hazardous activities and materials within their communities.

The UN Conference on Environment and Development, also known as the Rio Declaration on Environmental Development or the Earth Summit, which was attended by 117 heads of state and 178 representatives from states and international, continental and regional bodies, agreed to make the right to freedom of information on environmental matters a reality for all persons. Principle 10 of the Resolutions taken at the summit, which is on the right to access to information on environmental matters to safeguard and protect a clean and healthy environment for the living and unborn generations, provides as follows:

Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each Individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and reliefs, shall be provided.

A discussion of the UN Aarhus Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters (Aarhus Convention) is important to guide countries such as Ghana, which does not have enough materials on freedom of information and the right to environmental protection. There is no specific mention of the right to access information concerning the environment under the Right to Information Act 2019 (Act 989), and the courts may take advantage of Article 33(5) of the Constitution, including the provisions of the Act, to set legitimate parameters for disclosure of environmental matters.

The Aarhus Convention, held on 25 June 1998 in Aarhus, Denmark, by the European countries, recalled principle 10 of the Rio Declaration

on Environment and Development, the UN General Assembly Resolutions 37/7 of 28 October 1982 and 45/94 of 19 December 1990 on the World Charter for Nature and the need to ensure a healthy environment for the wellbeing of individuals respectively; and European Charter on Environment and Health (adopted in Frankfurt-am-main, Germany, on 8 December 1989, the World Health Organization's first European conference on Environment and Health). Article 4 of the Aarhus Convention reiterated the need for the states to make information on environmental matters available to the public within the framework of their national legislations, including requests for and production of documents on environmental issues without stating their interest unless the information has been issued to the public or it is reasonable for the public authority to issue it in another form.

The grounds upon which requests for environmental issues may be refused include: where the public authority requesting to disclose same does not hold it; the request is manifestly unreasonable or formulated in too general a manner; where it has been exempted by national law from being disclosed on grounds that the material is in the form of completion or concerns internal communications of public authorities, or where the disclosure of the information would injuriously affect the security of the state; the confidentiality of proceedings of public authorities which have been exempted by national law, international relations, national defence or public security; the course of justice so as not to prejudice a fair trial or not affect the ability to conduct a criminal or disciplinary enquiry; confidentiality to protect commercial or industrial information, and intellectual property rights; confidential personal data or files concerning natural persons and information of a third party who has supplied the information; and the environment the information relates to, including sites where rare species are breeding.

All the above grounds could be used within the context of sections 5-17 of the Right to Information Act 2019 when a question of access to environmental issues comes before the appropriate institutions for disclosure. Section 78 of the Act provides that information classified as exempt information under sections 5-16 shall cease to be exempt information after 30 years from the end of the calendar year in which the information came into being. A person who seeks to access classified exempt information may request for same after 30 years from the date on which the information came into being, but the Act does not operate retrospectively to affect information classified as exempt over 30 years ago.

The Right to Information Act 2019 has prospective effect even though it is applicable to information which was in existence before the coming into force of the Act and information that comes into existence after the Act has come into force, and time shall run in respect of information classified as exempt effective from 21 May 2019 when it was assented to come into force.<sup>23</sup>

The common law exceptions to retrospective legislation—that is an enactment shall have retrospective effect unless expressly stated in cases of declaratory, procedural, evidence, and revised and consolidated laws—do not apply to the Right to Information Act 2019 as it does not belong to any one of those exceptions.<sup>24</sup>

Theoretically, there is no classified information in Ghana that is absolutely exempt from disclosure, but the time to freely access it is postponed to 30 years unless the person in custody of the information establishes that the disclosure of that information will endanger the life or physical safety of an individual, public safety, national security, national economic interest or international relations with any other country. Section 78(2) of the Right to Information Act 2019 takes away the right to access exempt information after 30 years if it can be established that the purpose for which it was exempt is one of the grounds stated above.

In substance, the Right to Information Act 2019 purports to give a right under section 78(1) and takes away almost all the rights under section 78(2), as the reasons upon which the person in possession of that information may refuse to disclose may fall within the grounds under which the exemptions were made under sections 5-17 of the Act.

Article 4 of the Aarhus Convention provides that any refusal to grant access to information shall be in writing if the application was made in writing or, if it was requested orally and the applicant requests for the refusal in writing, it shall be granted. The reasons for the refusal shall be provided. States may allow public authorities to make a charge or payment of fees for the information, but it shall not exceed a reasonable amount.

Article 9 of the Aarhus Convention made provision for access to court or another independent and impartial body established by law to be provided in national legislations to respond to a person who is of the

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<sup>23</sup> Right to Information Act 2019 (Act 989), sections 78(1) and 80; and Constitution of Ghana 1992, Article 107.

<sup>24</sup> *Feneku and Another v John Teye and Another* [2001]-[2002] SGLR 985.

opinion that his or her request has been ignored or wrongfully refused by the public authorities.

The right to information on environmental matters is not an absolute right but is subject to legitimate restrictions to be imposed within the context of the Aarhus Convention but those restrictions may be teased out from the exemptions provided by the Right to Information Act 2019. The environmental degradation and pollution of land and water bodies in the mining areas by the illegal miners known in Ghana as Galamsey has affected water bodies in the affected communities, including farmlands and the cash and food crops on them. Every person has the right to access information from the Minerals Commission about the concessions it has granted and other relevant information the applicant may deem necessary.

The right of information on environmental matters, like all other rights to information, requires applicants to be given access to information such as visual, electronic, written, aural, or any other materials in respect of the elements or state of the environment, including landscape, air, water, land and atmosphere, and factors such as radiation, noise, energy and substances, and the measures adopted to regulate and make them human-friendly to safeguard their existence unless legitimately restricted in accordance with the appropriate Conventions.<sup>25</sup>

The Ghanaian courts can make use of the Aarhus Convention even though Ghana is not a member state because it is a human rights instrument which is inherent in democracy and intended to secure the dignity of humankind, and there is no comparable provision in the Constitution under the human rights chapter.

## [H] LEGITIMATE GROUNDS TO RESTRICT FREEDOM OF EXPRESSION

States are to restrict the right to freedom of expression, which includes the freedom to seek, receive and impart ideas and information through any acceptable means of communication, subject to restrictions to be provided by national legislation. There is a universally agreed-upon principle that is used to restrict access to information, and it is known as the three-part test. In all cases, the three individual tests must be passed; otherwise, it would amount to unjustifiable restrictions to the right of information.

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<sup>25</sup> Aarhus Convention 1998.

The first test is about the legitimacy of the restrictions. Every restriction on freedom of expression shall be legitimate; prescribed by a law that is relevant, clear, accessible and does not confer excessive discretionary powers on the authorities of the state to limit freedom of expression.<sup>26</sup>

The second test is that the restriction must be made to pursue a legitimate aim. Legitimate aims are the restrictions provided as exceptions to the international instruments discussed above, including Articles 4 and 9 of the Aarhus Convention, Article 19 of the ICCPR, Article 10 of the ECHR, Article 13 of the ACHR and Article 9 of the ACHPR.

The third test is whether it is necessary to impose restrictions on the right to information. The state is required to establish that it has become necessary to use restrictions to address the social needs of the state and that this is not intended to violate the rights of individuals. The state is required to use the least available restriction, which is proportionate to the objective it seeks to achieve, which is to restrict access to information. Therefore, any restrictions made contrary to the three-part test shall not be considered to be lawful, as they would be intended to deprive the citizenry of their right of freedom of expression.

The combined effect of all the international instruments discussed above is that the legitimate grounds upon which states may restrict freedom of expression are: to respect the rights and reputation of others; to protect public order, national security, or public health and morals; to prevent crime and disorder; to prevent the disclosure of information received in confidence; and to maintain the impartiality and authority of the courts as is necessary in a democratic society.

After the exemptions on justifiable grounds, all other information is free to be accessed without any further impediments, and this is the thrust of the right to information. The right to information simply means that, where freedom of expression is curtailed by legitimate grounds, the information that is not exempted must be made available through a procedure provided by law enacted by a state to address same.

## [I] THE RIGHT TO INFORMATION IN GHANA: A HISTORICAL PERSPECTIVE

Ghana, on attaining independence on 6 March 1957, went through different political stages, from democratic regimes through military interventions, and finally established constitutional democracy on

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<sup>26</sup> *Sunday Times v United Kingdom* App No 6538/74 (ECHR 26 April 1979).

7 January 1993, after the promulgation of the Constitution of Ghana 1992. Ghana had its first constitution in 1957 (Order in Council), and, in 1957 and 1958, it enacted the Deportation Act of 1957 and the Preventive Detention Act of 1958, respectively.

The Deportation Act of 1957 was passed to deport aliens whose presence in Ghana was not conducive to the public good. The irony was that there was no definition for what amounted to a person whose presence in Ghana was not conducive to the public good and was left to the discretion of the authorities.<sup>27</sup> Several persons were deported under this Act, including those who claimed to be Ghanaians, and their deportations were orchestrated by their political activities and comments made about the then regime in their capacities as leading members of the opposition Muslim Association Party.<sup>28</sup>

The most serious enactment ever made in Ghana to curtail freedom of expression was the Preventive Detention Act of 1958. The Act was passed to give power to the Governor-General, who then represented the Queen of England, to detain a person whose acts were prejudicial to the security of the state for a term of imprisonment of not more than five years without recourse to the courts, and it further forbade the courts from entertaining *habeas corpus* applications within the five years.

A person detained under the Act could seek judicial relief from the courts after the expiration of the five years specified in it. What made the Act a venomous viper was the fact that there was no definition for what amounted to an act prejudicial to the security of the state. The Act was seriously abused, and most political leaders, including those who did not go into self-exile, were arrested and detained for up to five years without recourse to the courts.<sup>29</sup>

There was the need to instil fear in Members of Parliament who might criticize the government, and the Ghana (Constitution) Order in Council, which was the supreme law, was amended by the National Assembly by the Disqualification Act 1959 to disqualify a Member of Parliament who was detained under the Act and, further, to lose their parliamentary seat. The people of Ghana had their first reformed constitution in 1960. Article 13 of the Constitution provided for the solemn declaration to be taken by the President on assumption of office which required the President to preserve public order, morality or health and further ensured that no

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<sup>27</sup> Preventive Detention Act 1958, section 3.

<sup>28</sup> *Lardan v Attorney-General & Others (No 1)* 3 WALR (1957) 55.

<sup>29</sup> *Re Akoto and Seven Others* [1961] GLR 523.



person was deprived of their freedom of speech and right of access to the courts.

In the case of *Re Akoto*,<sup>30</sup> the plaintiffs challenged the constitutionality of the Preventive Detention Act *vis-à-vis* Article 13 of the Constitution, and the Supreme Court held that Article 13 was not a bill of rights to have a legal effect to invalidate an Act arising from a conflict but was analogous to the Coronation Oath of the Queen of England, and the powers given to the Governor General or his representative to detain persons whose acts are prejudicial to the security of the state could not be impugned.

The 1964 Referendum, which brought into force the Habeas Corpus Act 1964 (Act 244), amended parts of the 1960 Constitution, including Article 45(3), to make the judiciary, which is supposed to protect the fundamental human rights of the people, an appendage to the Executive by conferring power on the President to remove judges of the Superior Court at any time for reasons which appeared to the President to be a sufficient cause. There was no definition for any reason appearing to the President to be a sufficient cause to remove a judge, and therefore it became susceptible to abuse.

The National Liberation Council overthrew the democratically elected Government elected to office in 1960 through a *coup d'état*. The National Liberation Council on assumption of office passed into law the Criminal Procedure Code 1960 (Act 30) to clothe the Attorney-General with the power to detain persons for an initial 28 days and for a further period as the Attorney-General may deem fit without having access to bail. The amendment further threatened freedom of expression.

The first time Ghana had in its constitution a chapter on fundamental human rights, particularly freedom of expression and the right to information, was in the Constitution of 1969. The Parliament of Ghana did not pass an Act to give effect to a right to information provided in simple terms in the 1969 Constitution. The three successive *coups d'état* that brought into power the National Redemption Council (which subsequently metamorphosed into the Supreme Military Council), the Supreme Military Council II, and the Armed Forces Revolutionary Council did not improve upon the right to information as people lived in fear and were not given the opportunity to seek relevant information from public institutions and governments.

The 1979 Constitution further had a chapter on fundamental rights, which included freedom of expression and the right to information, but the

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<sup>30</sup> Ibid.

Constitution was suspended and abrogated by the Provisional National Defence Council on 31 December 1981 and could not be enacted to regulate the right to information provided therein. The Provisional National Defence Council governed the state for over a decade and subsequently gave birth to the 1992 Constitution of Ghana, which has been in force for 30 years.

## [J] THE RIGHT TO INFORMATION IN GHANA

The right to information is provided by Article 21(1)(f) of the Constitution of Ghana 1992, which makes the right to information a fundamental human right in Ghana and provides thus:

- (1) A person shall have the right to ...
  - (f) information, subject to such qualifications and laws as are necessary in a democratic society.

The Constitution does not define the parameters of the qualifications to information and laws which are necessary in a democratic society, and the Right to Information Act 2019 (Act 989) was enacted to provide the rights to individuals to access information in public institutions and private institutions or organizations that provide public functions or receive public resources and further exempted areas considered to be necessary and consistent with the protection of public interest.

The Right to Information Act 2019 (Act 989) which was enacted and came into force on 21 May 2019, is the first Act of Parliament in Ghana to provide for the right to information and exemptions made on legitimate grounds. The Right to Information Act 2019 (Act 989) does not apply to information held by the national archives, libraries and museums, to which the public has access to seek information.<sup>31</sup>

The right to information was provided as a fundamental human right to give the people of Ghana an inherent right to hold the President of the Republic, who was elected in accordance with the principle of universal adult suffrage, accountable. The Government becomes a trustee for the people of Ghana, including those who voted for the President and those who did not, and, as beneficiaries, the people must know everything within the public sector as a right unless matters are lawfully exempted from disclosure on legitimate grounds. The right to information is an effective tool to hold persons in accountable positions to be transparent and accountable. The exemption must be legitimate to conform with the restrictions provided by the international instruments discussed above.

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<sup>31</sup> Right to Information Act 2019 (Act 989), section 79.

The Right to Information Act 2019 (Act 989) has made public institutions accountable and, to avoid any ambiguity, provided a definition for it to include private institutions or private organizations that receive public resources or provide a public function. The private bodies contemplated by the Act include hospitals and schools established by religious bodies whose staff are paid by the state. A mission hospital whose compensation is paid by the state to perform public health services would be deemed to be a public body regulated by the Act to give free access to information held by it.<sup>32</sup>

The word “information” has also been defined broadly to include recorded matter or material of whatever form or medium that is under the control, possession, or custody of a public institution, irrespective of how it was made or produced by a public institution, and in the case of a private body it must relate to the performance of a public function.<sup>33</sup>

The long title to the Right to Information Act 2019 (Act 989) forms part of the Act in addition to providing objectives of the Act. Section 13 of the Interpretation Act 2009 (Act 792) provides that the preamble and long title form part of an Act. The long title to the Right to Information Act 2019 (Act 989) provides as follows:

AN ACT to provide for the implementation of the constitutional right to information held by a public institution, subject to the exemptions that are necessary and consistent with the protection of the public interest. In a democratic society, to foster a culture of transparency and accountability in public affairs and to provide for related matters.

The long title to the Act seems to be quite misleading on the legal effect of the right to information by describing it as a constitutional right even though it is first and foremost a fundamental human right which is an inalienable right before the Constitution further made it a constitutional right.

The Act mandates public institutions to come out with manuals containing up-to-date, accurate and authentic information held by them, including departments or agencies under them, and shall be reviewed every 12 months. The information in the manual shall be accessed or inspected free of charge or may be subject to the payment of a fee in accordance with section 75 of the Act.<sup>34</sup>

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<sup>32</sup> Ibid section 84.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid section 3.

An applicant who is seeking access to information from an appropriate body shall pay appropriate fees under the Fees and Charges (Miscellaneous Provisions) Act 2009 (Act 793) unless otherwise exempted under section 75(2) of the Right to Information Act 2019 (Act 989). The circumstances under which fees and charges shall not be paid by an applicant include: where it is about a personal reproduction of the applicant or on whose behalf the application was made; information of public interest; information that should have been provided by the public body within the time stipulated under the Act; where the information is to an applicant who is indigent or a person with a disability; the time spent by the information officer or the information reviewing officer to review the information requested or the time spent by the information officer or an information reviewing officer to examine if the information requested for has been exempted; and preparing the information for which access is to be provided.<sup>35</sup>

The charges payable by the applicant shall be retained by the public institution concerned to defray the expenses incurred by it in the performance of its functions.<sup>36</sup> An item of information required from a public institution or an appropriate private institution shall be obtained through an application upon payment of a prescribed fee to that body through its information officer, unless exempted by the Act. An information officer who is served with such an application is required to respond within 14 days.

Where the information required is in the custody of another institution, it shall be directed to that body to provide same to the applicant. Where the information officer refuses to grant the request, the applicant may apply for an internal review to be determined by the head of the institution, who shall deliver a decision within 15 days from the date of receipt of the request. Where the head of the institution fails to grant the application, the applicant may apply to the High Court for judicial review within 21 days or to the Right to Information Commission.

The Right to information Commission was set up by the Act to promote, monitor, protect and enforce the right to information provided under Article 21(1)(f) of the Constitution and shall be independent in the discharge of its functions subject to the Constitution. The Right to Information Commission may entertain and review a decision rendered by an information review officer of an institution upon an application made orally or in writing to it.<sup>37</sup>

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<sup>35</sup> Ibid section 75(2).

<sup>36</sup> Ibid section 76.

<sup>37</sup> Ibid section 41.

The jurisdiction of the Right to Information Commission shall only be dealt with after the applicant has exhausted the internal review process; if the information officer had decided on the matter and was dissatisfied with its decision, he or she applies to the review information officer, who is the head of the body concerned, to review the decision.

A person dissatisfied with the review decision by the information review officer may either apply to the High Court for judicial review or invoke the jurisdiction of the Right to Information Commission, subject to section 67 of the Act, which permits direct access to the Commission on stated grounds.<sup>38</sup>

The instances where direct access is permitted include: where the information has previously been in the public domain; the request for the information is time-bound; the head of the body is the information officer there; and the information requested is the personal information of the applicant and the initial request made to that body has been refused.<sup>39</sup>

An applicant who makes an application under the Act must satisfy themselves that the information being sought has not been exempted by the Act and that the information officer is competent to respond to same.

Furthermore, the state should act legitimately by imposing restrictions which conform with international law and satisfy the three-part test. An application to request information that has been exempted by the Act shall be dismissed by reason of the exemption.

## [K] THE AREAS EXEMPTED BY LAW AND JUSTIFICATION

Information prepared for submission to the President or Vice President for consideration or containing information concerning any advice, deliberation, minutes, opinion, consultation, or recommendation that is likely to prejudice national security or undermine the deliberative process has been exempted.<sup>40</sup>

This includes information relating to Cabinet, a subcommittee of Cabinet, or a committee of Cabinet regarding matters submitted before it for consideration; information before Cabinet that has not been published or released to the public, which, if disclosed, may disclose information relating to advice, deliberation, opinion, recommendation, minutes, or

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<sup>38</sup> Ibid sections 65 & 66.

<sup>39</sup> Ibid section 67.

<sup>40</sup> Ibid section 5.

consultations likely to prejudice national security, frustrate the success of the policy, if it is disclosed prematurely, undermine the deliberative process in Cabinet, including its committees and sub-committees; or prejudice the formulation or development of government policy. The Cabinet is given the authority to grant access to information exempted by section 6 of the Right to Information Act 2019 (Act 989). The exemptions under section 6 of the Act do not cover information which contains statistical or factual data.<sup>41</sup>

Information concerning law enforcement and public safety has been exempted on several grounds, *inter alia*, to prevent the commission of crime, disorder and threats to public safety. The exemptions are not absolute and do not cover access to information consisting of the outcome of a programme adopted by a public institution to deal with possible contravention or contravention of an enactment, contains a general outline of a programme adopted by a public institution to deal with possible contravention or contravention of an enactment, or consists of a report emanating from an investigation that has been disclosed to the person who was investigated are not exempted from disclosure.<sup>42</sup>

Also exempt is information affecting international relations whose disclosure will damage or prejudice the relations between the Government of Ghana and government of any other country; information communicated in confidence to a public institution by another government or on its behalf; or by an international organization or a body of that organization; or to another public institution in another country or another government; or an international organization or a body of that organization. Despite the exemptions, the President of Ghana may give prior approval for its disclosure.<sup>43</sup>

The other exempted areas include: information that affects the security of the state, economic and other interests; economic information of third parties unless it has been already disclosed or made available to the public; information concerning tax unless the person to whom the information concerns agrees to its disclosure; information concerning the internal working of public institutions which is on opinion, advice given or recommendation or deliberative process in that institution but may be disclosed where it contains statistical or factual data, contains information used as the basis of public policy or to formulate public policy; parliamentary privilege, fair trial, and contempt of court or of

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<sup>41</sup> Ibid section 6.

<sup>42</sup> Ibid section 7.

<sup>43</sup> Ibid section 8.

a quasi-judicial body; and privileged information under the Evidence Act 1975 (NRCD 323), the lawyer and client professional relationship, communication between a doctor and patient or any other medical expert in respect of a medical diagnosis or treatment of the patient, or a communication between spouses married under any law, unless that privilege is waived by the person who is entitled to it.<sup>44</sup>

The other areas exempted by the Act are where the disclosure of personal affairs on the living or dead person is unreasonable, and where information is exempt from disclosure but its disclosure would fail to protect the public interest.<sup>45</sup>

Article 135 of the 1992 Constitution is on the production of official documents in court where disclosure of its contents will be prejudicial to the security of the state or will be injurious to public interest. The Supreme Court has exclusive jurisdiction to determine whether or not an official document shall not be produced in court and if its disclosure or production of its content will be prejudicial to the security of the state or will be injurious to the public interest.<sup>46</sup>

All the legitimate grounds provided by the Act are in accordance with the legitimate grounds provided by the recognized international instruments discussed above and satisfy the three-part test which is used to determine the justification for restrictions placed on freedom of expression and the right to hold opinions.

## [L] SOME OF THE ENACTMENTS THAT PROVIDE FOR EXEMPTIONS AND SANCTIONS FOR VIOLATIONS

The State Secrets Act 1962 (Act 101) provides that a person who obtains information, records or publishes any state secrets intended to be useful to a foreign power either directly or indirectly or makes any sketch or model intended to be used by a foreign power commits an offence.<sup>47</sup>

The Right to Information Act 2019 (Act 989) which has criminalized a wilful disclosure of exempt information provided by it and a person convicted of any such disclosure shall be liable to a fine of not less than 250 penalty units and not more than 500 penalty units or to a term of

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<sup>44</sup> Ibid sections 9-15.

<sup>45</sup> Ibid sections 16 & 17.

<sup>46</sup> Constitution of Ghana 1992, Article 135.

<sup>47</sup> State Secrets Act 1962 (Act 101), section 1.

imprisonment of not less than six months and not more than three years or to both.<sup>48</sup>

The Cybersecurity Act 2020 (Act 1038) has criminalized publication of photographic images of a child or any other person. A person who takes or permits to be taken an indecent image of a child for the purposes of publication or storing it on a computer shall upon conviction be liable to a fine of not less than 2500 penalty units and not more than 5000 penalty units or term of imprisonment of less than five years or both.<sup>49</sup>

Furthermore, a person who uses a computer online service, an internet service, a local bulletin board service, or any other device capable of storing electronic data or transmission to publish or store information relating to a child for sex abuse shall upon conviction be liable to a term of imprisonment of not less than five years and not more than 15 years without an option of a fine.<sup>50</sup>

A person who is convicted of the offence of aiding and abetting a child for the purposes of child abuse or sexual extortion shall, upon conviction, be liable to a term of imprisonment of not less than five years and not more than 15 years without the option of a fine.<sup>51</sup> A person who is convicted of the offence of cyberstalking a child shall be liable to a term of imprisonment of not less than five years and not more than 15 years.<sup>52</sup>

A person who commits sexual extortion; a person who threatens to distribute by post, email, text, or transmission by any electronic means or otherwise to harass, intimidate, or coerce a person with intent to extort money or engage in unwanted sexual activity; or actually extorts money or forces the victim to engage in unwanted sexual activity shall, upon conviction, be liable to a term of imprisonment of not less than five years and not more than 25 years without the option of a fine.<sup>53</sup> There are other offences relating to the distribution or dissemination of information relating to online sexual offences.

There are civil remedies to regulate the use of information without disclosing their source and claiming it as their own, which amounts to plagiarism and is also considered as academic dishonesty which attracts

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<sup>48</sup> Right to Information Act 2019 (Act 989), section 81.

<sup>49</sup> Cybersecurity Act 2020 (Act 1038), section 62.

<sup>50</sup> *Ibid* section 63.

<sup>51</sup> *Ibid* section 64.

<sup>52</sup> *Ibid* section 65.

<sup>53</sup> *Ibid* section 66.



serious sanctions. Furthermore, there are laws on copyright to protect the intellectual property of its owners.

## [M] THE STATE'S POWER TO ACCESS INFORMATION FROM THE PEOPLE

The Government also requires information from individuals to promote the welfare of its citizens, in whom the sovereignty of power resides, and therefore enact laws to clothe it with authority to either legally or illegally obtain information which will help in fighting crime, prevent disorder, protect public safety and the economic wellbeing of the people or for the protection of rights and freedoms of other persons.

As a result of the above, the Government has enacted several laws including the Constitution of Ghana 1992; the Criminal Offences and Other (Procedure) Act 1960 (Act 30); the Electronic Communication Act 2008 (Act 775); the Economic and Organised Crime Office Act 2010 (Act 804); the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930); the Office of the Special Prosecutor Act 2017 (Act 959); the Right to Information Act 2019 (Act 989); the Narcotics Control Commission Act 2020 (Act 1019); and the Cybersecurity Act 2020 (Act 1038) to empower the Government to obtain information from individuals and other entities to promote the welfare of Ghana through any means permitted by law.

The Cybersecurity Act 2020 (Act 1038) gives authority to an investigative officer investigating an offence under the Act to make an application *ex parte* to the High Court in camera for the production order to obtain the subscriber information, which is the subject matter of the investigation, from the suspect.<sup>54</sup> An application *ex parte* to intercept the content data may be made, and the court, if satisfied, may grant and issue a warrant for that purpose.<sup>55</sup>

Despite the fact that communication by persons provided by the service providers including Vodafone, Scancom and Airtel-Tigo is supposed to be confidential, the Government of Ghana operating under the exceptions provided under Article 18(2) of the 1992 Constitution has permitted the National Communication Authority to request the service providers to install interception capabilities to record all communications that pass through them, including the decrypting of telecommunications message used through their facilities, to enable

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<sup>54</sup> Ibid sections 69 & 70.

<sup>55</sup> Ibid sections 73 & 74.

them to comply with interception warrants issued by the High Court under the Cybersecurity Act 2020 (Act 1038).<sup>56</sup>

The service providers are further mandated to store and retain subscriber information for at least six years, traffic data for a period of 12 months, and relevant content data for a period of 12 months, and the High Court, upon an application made *ex parte*, can order the service provider concerned to provide the required information.<sup>57</sup> Everyone is at risk and must know the type of information they pass on to others or discussions they have through telecommunications.

The Government also requires information from the people to ensure the maximum welfare of the people in accordance with the 1992 Constitution.<sup>58</sup> The Constitution provides for the protection of privacy of home and other property, but there are exceptions which permit the state to use its coercive power in accordance with law and as may be necessary in a free democratic society for public safety, economic wellbeing of the people, the prevention of crime or disorder and the protection of rights and freedoms of others.

The state may therefore empower a body by an Act of Parliament to record and intercept communications between persons and search a person, or his or her property, to seize any information that comes under the justification provided by the Constitution. The Government may require information from the people through whatever means to prevent disorder or crime, or the rights and freedom of others, or provide safety or economic wellbeing of the country, and may secretly record a person or intercept his or her communications.

Section 71 of the Narcotic Control Commission Act 2020 (Act 1019) empowers the Director-General of the Commission, subject to Article 18 of the 1992 Constitution, to intercept communications and parcels likely to contain information or substances that may assist in a narcotics offence.

Sections 10, 11 and 12 of the Criminal Offences and Other (Procedure) Act 1960 empower the police to arrest and search for information by search warrant executed in accordance with the law. Other bodies, including the Office of the Special Prosecutor and the Economic and Organized Crime Unit, have been clothed with the powers of the police to arrest, search and obtain information in accordance with the law to perform similar functions given to the police by law, and each of them

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<sup>56</sup> Ibid section 76.

<sup>57</sup> Ibid section 77.

<sup>58</sup> Constitution of Ghana 1992, Articles 1 & 18.

may tap communications between persons to obtain evidence against them to be used in the courts.

Section 96 of the Banks and Specialised Deposit-Taking Act 2016 (Act 930) empowers a person authorized by the Bank of Ghana to examine the books, records, minute books, files and personnel of any financial institution under the Act as part of the supervisory powers of the Bank of Ghana over all other banks in the country.

## [N] ACCESS TO COURT AND THE POWER OF CONTEMPT

The courts are public institutions set up by law to resolve disputes and legalities, and it is in the public's interest that people have confidence in them. The parties to actions before the courts are restricted by court rules and laws of evidence as to the information that could be pleaded and the evidence that could be adduced as relevant and admissible.

The power of the courts to commit for contempt for themselves in Ghana is exclusively given to the superior courts of judicature, consisting of the Supreme Court, the Court of Appeal, the High Court and Regional Tribunals.<sup>59</sup> The contempt committed in respect of the lower courts is punished by the High Court on their behalf, as they do not have jurisdiction to commit contempt against themselves. The importance of contempt is to maintain the authority and impartiality of the judiciary.

The parameters of contempt of court are quite dicey, as what amounts to contempt is quite ambiguous. In Ghana, the courts are classified into superior courts and lower courts. The lower courts consist of the Circuit Courts, District Courts, Juvenile Courts and the Chieftaincy Tribunals, which are made up of the judicial committees of the National House of Chiefs, the Regional Houses of Chiefs and the Traditional Councils.<sup>60</sup>

At times, it is not certain whether to include bodies that exercise quasi-judicial authority, including commissions of inquiry established under the 1992 Constitution and other Acts of Parliament. The bodies established by law to exercise administrative and investigative functions include the Commission on Human Rights and Administrative Justice and the Labour Commission.

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<sup>59</sup> Ibid Article 126.

<sup>60</sup> Courts Act 1993 (Act 459), section 39.

Admittedly, those bodies cannot commit contempt against themselves, as the 1992 Constitution has given that jurisdiction exclusively to the superior courts, and they cannot claim to have jurisdiction. The question is about when they are scandalized in the discharge of their functions: can one file contempt proceedings in the High Court to safeguard the administration of justice?

The main issue is whether the High Court has jurisdiction to entertain contempt applications emanating from the proceedings of bodies that exercise investigative and administrative functions of the state. There are several cases before the English courts for resolution on the issue of the High Court to entertain contempt applications from bodies which are not part of the inferior courts but exercise judicial responsibilities. In the case of *Attorney-General v British Broadcasting Corporation* (1981),<sup>61</sup> the Attorney-General sought an interlocutory injunction to restrain the British Broadcasting Corporation from broadcasting proceedings before the local valuation court as it was likely to prejudice the matter pending before it for determination.

The House of Lords held that the local valuation court is not one of the inferior courts created by law and does not attract the protection of the law of contempt. By parity of reason, only the courts have the protection of the law of contempt, and the other bodies are not protected.

Another group of bodies that may require the protection of the law of contempt are those that exercise quasi-judicial powers. Traditionally, the quasi-judicial bodies were not given the protection of the law of contempt, but section 14(c) of the Right to Information Act 2019 (Act 989) states that information is exempt where its disclosure would “constitute contempt of court or of a quasi-judicial body”. These are bodies that are essentially judicial in character but not created to exercise judicial power within the contemplation of the law. There is no legislation in Ghana that has created a quasi-judicial body, and the Act cannot create such jurisdiction and exempt its information from disclosure.

There are tribunals established by some Acts of Parliament to resolve legal matters, and a person dissatisfied with them may appeal to the courts. They include the tribunal known as the Adjudicative Panel, established by the Chief Justice under section 28 of the Payment Systems and Services Act 2019 (Act 987) to review a decision of the Bank of Ghana arising from the refusal of a licence or authorization of an electronic

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<sup>61</sup> *Attorney-General v British Broadcasting Corporation* [1981] AC 303.

money issuer, and the Court Martial established under the Armed Forces Act 1962 (Act 105).

These quasi-judicial bodies are composed of a High Court judge and other persons, but they are not considered as part of the lower courts and ordinarily do not have the protection of the law of contempt. However, the Right to Information Act 2019 (Act 989) seeks to exempt some of their information from disclosure, which, when disclosed, would constitute contempt of a quasi-judicial body, which is unknown to the jurisprudence on contempt in Ghana.

For the purposes of this topic, emphasis shall be placed on criminal contempt, which is often used to maintain public confidence in the court. Civil contempt primarily consists of wilful disobedience to a speaking order or judgment of a court which directs a person to do an act or to refrain from doing an act otherwise than payment of money to a person.

Criminal contempt consists of contempt *in facie curiae* (on the face of the court) and *ex facie curiae* (outside the face of the court), and it must relate to one or more of the following acts: any act that scandalizes the court or tends to scandalize it; an act that prejudices or impedes pending proceedings; insulting the court or a judge in respect of a pending proceeding; an act that tends to lower the authority of the court; an act that prejudices or tends to prejudice or interferes or tends to interfere with pending proceedings; or an act that interferes or tends to interfere with or obstructs the administration of justice in whatever manner.

In the case of *Republic v Mensa-Bonsu and Others*,<sup>62</sup> where the respondent published a scurrilous publication about one of the Supreme Court cases after judgment, the Supreme Court held that there are instances where the exercise of freedom of speech in the courts would constitute contempt of court, and that includes all the grounds mentioned in the above paragraph. In the case in point, one of the Supreme Court judges was alleged to have attributed a comment to the former Prime Minister of Ghana, Dr Kofi Abrefa Busiah, which was not true and, in the article, captioned: “Justice Abban is a liar”.

Another article was headed “Justice Abban scandal takes dramatic turn”, and a final article was headed “Abban puts integrity of the Bench on the line”. The journalist was convicted of contempt of court for publishing scandalous, abusive and contumacious material calculated to bring the administration of justice into disrepute.

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<sup>62</sup> *Republic v Mensa-Bonsu and Others* [1994]-[1995] GBR 130.

Freedom of expression is restricted when it comes to contempt matters, as the law has settled that the truth or otherwise of the publication is not a defence, and the court would not take it into account when it is established that the publication concerns any of the restrictions imposed by law whose violation amounts to contempt of court. Any act that scandalizes the courts has the propensity to erode public confidence in the courts which would undermine the authority of the courts whether it was made in respect of a pending proceedings or after judgment.

The restrictions imposed on freedom of expression in court derive their roots from common law and are further fortified by Article 10, paragraph 2, of the ECHR, which restricts freedom of expression as prescribed by law and is necessary in a democratic society to “maintain the authority and impartiality of the judiciary”. Section 14 of the Right to Information Act 2019 (Act 989) exempts any information whose disclosure would constitute contempt of court or of a quasi-judicial body. It provides the following:

- 14 Information is exempt from disclosure if the disclosure can reasonably be expected to ...
- (c) constitute contempt of court or of a quasi-judicial body.

Any information whose disclosure would constitute contempt of court or a quasi-judicial body is exempt by law. The restrictions imposed on freedom of expression whose disclosure would constitute contempt do not suggest that the courts are above criticism, but any criticism of the court shall be *bona fide*, temperate and fair; otherwise, it may delve into the area restricted by law.<sup>63</sup>

The European Court on Human Rights (ECtHR) held that freedom of expression is not an absolute right and a person who uses abusive words in the court or to its judge shall overstep his or her bounds and may be guilty of contempt. The ECtHR drew a distinction between criticism and insults when an appellant who was dissatisfied with the decision of the Municipal Court in Zagreb, Croatia, filed a notice of appeal against it to the Zagreb County Court in which he insulted the court and the judge. He was convicted of contempt in the nature of abuse of rights in the proceedings by the Municipal Court and argued that it was within his freedom of expression under Article 10 of the ECHR.

The court held that the appellant was guilty of contempt by the fact that he used abusive words in the court in Croatia and towards its judge, that such conduct falls within the restricted part of Covenant and that

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<sup>63</sup> *Saday v Turkey* App No 32458/96 (30 March 2006).

the restraint on freedom of expression was necessary and proportionate to maintain the authority and impartiality of the judiciary. By a majority of 4:3, the ECtHR held that the restrictions imposed by law did not violate the appellant's right to freedom of expression on the ground that they were imposed by law to pursue a legitimate aim that was necessary in a democratic society.<sup>64</sup>

The aim of restricting freedom of expression is to maintain the sanctity of the courts and their judges and promote public order. Contempt of court under Article 19 of the 1992 Constitution is an entrenched provision whose amendments or repeals would have to go through a national referendum.

## [O] FREEDOM OF EXPRESSION AND JOURNALISM

Journalists are persons who seek, obtain, publish or disseminate information for public use through text, pictures, or video. The person may belong to a professional body or not but may be considered a journalist provided the person provides the public with the information he or she seeks, gathers and disseminates. Journalists expose public wrongs to promote transparency and accountability, while others also expose wrongs by naming and shaming those involved and require protection from the courts.

The restrictions imposed by the ICCPR, ECHR, ACHR and ACHPR do not exempt journalists from the restrictions imposed on freedom of expression, and the restrictions apply to all, and a journalist who violates any of them ought to be dealt with in accordance with the law. The Right to Information Act 2019 (Act 989) also does not exempt journalists from the restrictions imposed on freedom of expression. The UN Educational, Scientific and Cultural Organization (UNESCO) promotes the safety of journalists as some of them are killed for the information they release to the public, while others are imprisoned by the courts for contempt of court.

The killings of journalists have been condemned by all, and a UNESCO report disclosed that 55 journalists were killed in 2021, and the number of killings in 2022 rose to 86.<sup>65</sup> The laws on contempt do not spare journalists, and occasionally some of them are convicted and punished for contempt of court by the courts, which has become a worry to journalists.

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<sup>64</sup> *Zugic v Croatia* App No 3699/08; 3408/2011 (ECHR, 31 May 2011).

<sup>65</sup> See UNESCO, 'Journalist killings decline in 2021 but alarming threats remain' (6 January 2022).

In Ghana, the first open court system was allowed during the 2012 presidential election dispute, when the public had the opportunity to observe the Supreme Court proceedings. The second open court was during the 2022 presidential election dispute.

In Ghana, the hearing of cases is supposed to be made in public, subject to restrictions to be placed by the adjudicating authority in the interest of public morality, public safety, or public order to hear them in public.<sup>66</sup> There are laws that have placed restrictions on public hearings in the interest of public morality, public safety, or public order, and they include proceedings before family tribunals and juvenile courts.

The ICCPR, to which Ghana is a signatory and which requires court hearings to be in public, forbids the press and the public from attending cases on stated grounds. It provides the following:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society or when the interest in the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice but any judgment rendered in a criminal case or in a suit at law shall be made public, except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.<sup>67</sup>

The above provision introduces the topic of open or closed courts. Where a public hearing of a case is not forbidden by law, journalists shall be afforded the opportunity to attend and broadcast same live to the public under freedom of access to information. In most instances, there are allegations made by some of the courts in Ghana that court reportage by some journalists is not accurate and fair, and the only solution is to advocate for open justice in proceedings not restricted by law. In most cases, judges and magistrates permit journalists to take notes and make stories out of them instead of promoting audiovisual recordings.

Audiovisual journalists and television journalists are also journalists who capture the entire proceedings live in both visual and audio form for the consumption of the public. The audiovisual represents the accurate

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<sup>66</sup> Constitution of Ghana 1992, Article 19(14).

<sup>67</sup> ICCPR, Article 14(1), which is almost the same as ECHR, Article 6(1).



and fair representation of the court proceedings, and it is preferable to print journalism, which feeds the public with the information journalists perceive to have heard from the court.

In some cases, including presidential election disputes, a sizable number of the public would be willing to attend, but the court space may not allow more than 500 people to be present. This is where television journalists come in, as they would be able to broadcast everything live to the millions of people who would have liked to attend if not for the inadequate space.

The Supreme Court of Appeal in South Africa affirmed the decision of the High Court granting access to court proceedings to the public and stated that audiovisual broadcasting of judicial proceedings forms part of freedom of expression.

The court further held that the use of pencils and pads by print journalists to take notes from the courts for public consumption has become outmoded and fails to give accurate reportage, and makes the judges accountable to the public. The court also stated that to avoid interference with the work of the courts, the journalists shall be in court at least 15 minutes before the court sitting to use stationary, erected video-cameras to be operated without human movement with the consent of the officials of the court.<sup>68</sup>

The South African Supreme Court of Appeal had, as far back as 2009, issued a practice direction allowing full audiovisual broadcasting of its proceedings, and the restrictions were on the means of gathering the information and the place where it should be gathered, not on filming outside the court. The UK has also endorsed open court, including the use of audiovisual broadcasting of court proceedings, as a right to freedom of information.<sup>69</sup>

Lord Diplock defined open justice as a fundamental right inherent in common law; it is subject to narrow exceptions, and in criminal cases all evidence communicated to the court is made public.<sup>70</sup> The ECtHR has held that Article 6 ECHR, which requires public hearings, is subject to certain restrictions. Judges, magistrates and jurors who preside over cases in areas where there are no restrictions become accountable to the public as their temperaments are witnessed live by all.

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<sup>68</sup> *NDPP v Media 24 Limited and Others and HC Van Breda and Media 24 Limited and Others* (425/2017) [2017] ZASCA 97 (21 June 2017).

<sup>69</sup> *Attorney-General v Leveller Magazine* [1979] AC 440.

<sup>70</sup> ECHR, see Article 6(1) and *B v United Kingdom; Pev United Kingdom* [2001] 2FLR 261.

There are instances where judges deny the comments attributed to them during court proceedings by journalists, and open court is the solution to it.<sup>71</sup> There are restrictions imposed on the reporting of cases involving a child before a family tribunal, and a person who acts contrary to them commits an offence. Section 39 of the Children's Act 1993 (Act 560) provides as follows:

- (1) A person shall not publish information that may lead to the identification of a child in a matter before a family tribunal except with the permission of the family tribunal.
- (2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding two hundred and fifty penalty units or to a term of imprisonment not exceeding one year or to both the fine and the imprisonment.

The above provision does not exempt journalists from criminal prosecution on the publication of matters affecting children before the family tribunal, which may lead to the identification of the child involved.

It is not every matter before an adjudicating authority that may be heard in public, and in some cases only the parties to the proceedings and their lawyers may be permitted to attend due to several reasons. The justifiable grounds for a closed hearing in Ghana include where the adjudicating body considers it necessary or expedient that an open hearing of the proceedings may prejudice the interests of justice or where a law provides for an in-camera hearing in the interest of defence, public safety, public morality, public order, or the welfare of children (persons under 18 years), or the protection of private lives of the parties to the proceedings.<sup>72</sup>

An open hearing or publicity should be forbidden to journalists in cases where their admission to the proceedings would violate the 1992 Constitution or ICCPR provisions on in-camera proceedings. There is a controversial issue as to whether cases heard in camera may be published in the law reports for public consumption. Some of the matrimonial proceedings which are heard in camera are published in some of the law reports for public consumption, which therefore defeats the objective of in-camera hearings. At best, only the legal issues emanating from the case may be published, excluding the facts and evidence that would expose the private lives of the couple or parties. When matters heard in camera under law go on appeal, the appellate courts should ensure that they comply with the requirements imposed on them by the 1992 Constitution

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<sup>71</sup> *Republic v Mensa- Bonsu* (n 62 above).

<sup>72</sup> Constitution of Ghana 1992, Article 19(14)(a) & (b).

and ICCPR to prevent publicity unless it is a legal issue, which would not defeat the purpose of an in-camera hearing.

It is recommended strongly that proceedings from cases heard in camera for some obvious reasons under the 1992 Constitution and ICCPR should not be made public in law reports to publish the facts and evidence for public consumption.

## [P] POSITIVE EFFECT

Public institutions are to publish all relevant information which may be accessed in a brochure and shall be revised every 12 months to give up-to-date, accurate and authentic information on the institutions. The right to information requires public officers to be transparent and accountable to the people they serve. A person who wilfully discloses any information exempt from disclosure commits an offence, and this is meant to ensure that legitimate restrictions placed on freedom of expression to promote democratic principles are not abused.

Furthermore, to ensure transparency and accountability on the part of public officers, the Right to Information Act 2019 (Act 989) has criminalized an act of public officers which constitutes gross misconduct.<sup>73</sup> The state, through its agencies, may interfere with or intercept any information or communication that may help the state to prevent the commission of crime, the prevention of disorder, the protection of the rights or freedoms of others, the protection of public safety, or the economic wellbeing of the people. The international instruments help the member states restrict freedom of expression in accordance with the law, as is necessary in a democratic society.

## [Q] NEGATIVE EFFECT

The governmental power to intercept communication is subject to abuse, particularly against political opponents. The interception of communication by the telecommunication companies is not safe and may pose problems for subscribers, including suits for defamation and arrests for matters that they did not attach any seriousness to. Private organizations are exempted unless funded by the state or performing public functions. The fees payable for the information sought may be disincentives to applicants, in particular where the applicant decides to use judicial review to address a decision by a review information officer, which is filed upon payment of appropriate filing fees.

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<sup>73</sup> Right to Information Act 2019 (Act 989), sections 81 & 82.

The Right to Information Act 2019 (Act 989) satisfies the legitimate restrictions provided by the international human rights treaties, some of which Ghana is a signatory to, including the ICCPR and the ACHPR. Section 14(c) of the Act, which partly deals with information that is exempt from disclosure and is likely to constitute contempt of a quasi-judicial body, is likely to create confusion and deter exempt bodies which are not courts from disclosing information under the guise of contempt when contempt of a quasi-judicial body is unknown to the jurisprudence on contempt in Ghana. The laws provide for contempt of court, contempt of Parliament, and contempt of a district assembly, and not any other type of contempt in Ghana.<sup>74</sup>

Where a private body performs a public function and has not been included in the legislative instrument made by the minister responsible for information, it may refuse to disclose information under the Act. The Act has defined “relevant private body” as “a private body that the Minister may, by legislative instrument, add to the list of private bodies performing a public function”. The power given to the minister is subject to abuse as public institutions have been defined to include private bodies or organizations that perform public functions or receive public resources, and there is no ambiguity about their identification to give such discretion to the minister.

## [R] CONCLUSION

Freedom of expression is a vital tool used to deepen democracy, but it is not absolute, and the restrictions imposed on it by laws should be observed to avoid prosecution and further imprisonment, whether the person involved is a journalist or not. There is an undeniable fact that the roles of the judiciary and journalists complement each other to develop democracy and further expose wrongdoing. Journalists must appreciate the fact that they are forbidden from disclosing exempt information, otherwise the laws would deal with them as they would with any other person. Where there is a right to freedom of information, journalists may through whatever means seek, obtain and disseminate for public use.

Where there is a right to information, the law on illegally obtained information is immaterial, as the role of journalists is to get information for the public. The issue as to whether illegally obtained evidence would be admissible in court or not does not form part of the role of journalists; but a question of admissibility is to be determined by the courts. Everybody is

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<sup>74</sup> Constitution of Ghana 1992, Articles 19, 122, 123 & 126 and Local Governance Act 2016 (Act 936), section 223.

at risk about the discourse they have on telecommunications and should be circumspect in their discussions. There is a clear distinction between freedom of expression and the right to information, as the former has exempt information which cannot be disclosed, while the latter is free, and the procedure used to obtain it is immaterial.

Section 85 of the Right to Information Act 2019 (Act 989) makes the Act applicable to all the enactments in force before the coming into force of the Act that deal with disclosure, and, where the existing law provided otherwise, it shall be modified to conform with it.

### ***About the author***

**Sir Dennis Dominic Adjei** is a Justice of the Court of Appeal, Ghana. He was elected as Judge of the African Court in July 2022 for a term of six years. He is one of the Nine-Member Advisory Committee of the International Criminal Court. Justice Dennis Dominic Adjei was elected as the Inns of Court and Institute of Advanced Legal Studies, University of London, Senior Judges Fellow for Common Law jurisdictions for the 2022-2023 academic year. He is a Fellow of the Ghana Academy of Arts and Sciences.

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Special Section:  
Children's Rights: Contemporary Issues in Law and  
Society (Part 1), edited by Maria Federica Moscati,  
pages 237-367<sup>1</sup>

**INTRODUCTION TO THE SPECIAL SECTION**

MARIA FEDERICA MOSCATI  
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*Il mondo si può guardare a altezza d'uomo, ma anche dall'alto di una nuvola (con gli aeroplani è più facile). Nella realtà si può entrare dalla porta principale o infilarvisi—è più divertente—da un finestrino.*

*You can look at the world at eye level, but also from the top of a cloud (it's easier with airplanes). In reality, you can enter through the front door or slip in—it's more fun—through a window (Rodari 1973: 28).*

The Special Section was prompted by several conversations that I had in recent times with some primary school children and their teachers in Italy about children's rights and their application in daily life. Children were interested in reading about research on children's rights and to write about those rights, but in a "cool" way. Like the quotation above, the children to whom I talked, wanted to look at children's rights from the ethereal vantage point of the clouds. They wanted to be able to choose their own perspective.

Thus, Part 1 and Part 2 bring together researchers, activists, writers, and practitioners from different disciplines, backgrounds, and geographical areas. Trying to speak to all types of readers (not their age but to their intelligence and sensibility) submissions include essays, artistic means, personal account, audio visual samples, poems, and letters. More importantly, to use publications to empower children, and although to be published later this year, Part 2 of the Special Section includes submissions written by young adults.<sup>2</sup> In an attempt to contribute to the discourse on decolonizing academic research (and resulting publications)

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<sup>1</sup> Part 2 will be published in *Amicus Curiae* 2.5.3 (2024) (forthcoming 2024).

<sup>2</sup> See *ibid.*

concerning children, authors have been free to write in languages other than English too.<sup>3</sup>

The general aim of the Special Section (Part I and Part II) is to provide socio-legal and interdisciplinary analyses of emerging issues, methods and topics concerning children's rights, and contributors have been free to choose the themes to address. These themes can be succinctly stated as including awareness of and education about children's rights, professional interventions in decision-making processes concerning children, families and their dynamics, child abuse, child identity, representation of children, and writing about children.

The two-part Special Section published here in *Amicus Curiae* on "Children's Rights: Contemporary Issues in Law and Society" is dedicated to all children affected by wars.

### **About the author**

**Maria Federica Moscati** (*Marica*) teaches law at the University of Sussex. She holds a PhD from SOAS, is an Italian advocate, trained mediator and former professional dancer. She has previously convened and lectured at SOAS, Queen Mary and UCL (University of London), and at the University of Shantou in the People's Republic of China. Before undertaking her doctorate she practised as a family lawyer, and worked for Save the Children Italy where she specialized in children's rights. Her main research interests concern issues relating to dispute resolution, access to justice, comparative family law, children's rights, sexual orientation and gender identity, reproductive and health cultures, and their intersection.

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<sup>3</sup> See Keikelame & Swartz 2019. See also *Amicus Curiae* 2.5.3 (forthcoming 2024) for contributions that include languages other than English.

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## RIGHTS OF THE CHILD OR PARENTAL AUTHORITY IN CHILDREN'S MEDICAL TREATMENT CASES?

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### **Abstract**

Recent cases concerned with the future medical treatment of a child with a life-limiting condition have presented, on appeal, the argument that the threshold for intervention in a parental decision about the child's medical treatment should be significant harm rather than best interests. The basis of the claim is that parents know their child best and, consequently, should have the right or authority to make decisions about their child's future. Although unsuccessful before the courts, these legal arguments have inspired the inclusion of provisions in Bills before Parliament aimed at enhancing parental authority in such cases. This article examines this modern reincarnation of the claim to parental authority, in the context of the medical treatment of a seriously ill child. It argues that reform of the law to re-assert parental authority would be a seriously retrograde development—a contemporary conservative reformulation of the child as object—which would significantly erode the rights of the child. Rather, it is argued that the child should be at the centre of the shared care of parents and professionals focused upon the individual child's needs, interests and rights. This article concludes with a fictional account of an attempt to reform the law to place the interests, rights and voice of the child at the centre of determination of their future medical treatment.

**Keywords:** children's interests, rights and voice; parental authority; children's medical treatment; best interests or significant harm threshold.

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## [A] INTRODUCTION

The recent court cases concerned with the future medical treatment of Charlie Gard in April-July 2017 and Alfie Evans in February-April 2018 became lengthy, high-profile, and highly charged disputes as their parents sought in vain to persuade the courts that they, and not the professionals providing treatment, knew what was best for their child.<sup>1</sup> Required to present a legal argument to the appeal courts following the determination of the judges in the Family Division, Francis J and Hayden J respectively, that continued ventilation was not in the best interests of either child, the argument on behalf of the parents, that the threshold for intervention of the court should be significant harm rather than best interests, was premised on the view that parents should have authority to decide on their child's future medical treatment. Whilst unsuccessful in the courts, the parents of Charlie Gard have continued to press for this change to established law through their campaign for "Charlie's Law". Influenced by these cases and with sympathy for the plight of the parents in such cases, amendments to the law have been included in a number of Bills before Parliament. This article argues that these attempts to change the law amount to a modern reincarnation of the claim to parental authority. Enactment would be a seriously regressive development that would significantly erode the rights of gravely ill children whose medical treatment is under dispute. It is argued that the best interests of the children are better secured through shared care between parents and professionals focused upon the needs, interests, and rights of the child.

This article first explains the emergence of claims to parental authority through arguments for a threshold of significant harm in children's medical treatment cases. The legislative proposals, inspired by the arguments in these cases, to reform the law by bringing in a significant harm threshold are then explained. Sympathy amongst the public for enhanced parental authority and academic arguments in support are then considered. This article concludes with a fictional account of an attempt to reform the law to highlight the distinction between enhanced parental authority through concerned care for their child and the placing of the interests, rights and voice of the child as central to determination of a child's future medical treatment.

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<sup>1</sup> Case citations and details of both cases and all other reported cases concerning the medical treatment of a child can be found here: [Our Research Projects: Social and Legal Issues in Science and Health, Law Department, University of Sussex](#).

## [B] RE-EMERGENCE OF CLAIMS TO PARENTAL AUTHORITY

In the cases concerned with the future medical treatment of Charlie Gard and Alfie Evans, Francis J and Hayden J respectively, in the exercise of the court's inherent jurisdiction applied established law, the welfare or best interests principle, to reach the conclusion that continued ventilation was not in the best interests of the child (*GOSH v Yates & Gard* 2017; *Alder Hey Children's NHS Foundation Trust v Evans* 2018). Arguments presented on appeal on behalf of the parents for a threshold of significant harm, rather than application of best interests, sought to challenge this conclusion through a point of law (*In the Matter of Charles Gard* 2017; *In the Matter of E (A Child)* 2018).<sup>2</sup> The best interests analysis, it was argued, permits the courts to override any decision made in the exercise of parental responsibility simply on the basis of a different assessment of what is best for the child. Further, that state intervention is only legitimate when what the parents proposed risked causing their child significant harm.<sup>3</sup> The parents of Charlie Gard, Connie Yates and Chris Gard, have expressed the view that a significant harm threshold would have prevented the judge from deciding his case and enabled them to have taken Charlie to the United States for a trial of innovative therapy (Charlie Gard Foundation). The position statement of the Trust, Great Ormond Street Hospital (GOSH) for Sick Children, submitted for the hearing on 13 July 2017 expressed the view that Charlie's parents "fundamentally believe that they alone have the right to decide what treatment Charlie has and does not have" (GOSH's Position Statement 2017: paragraph 7). In contrast, his parents explained that they had fought for Charlie's "right to receive appropriate medical treatment" believing that they "ought to have been entrusted with the decision (as supported by scientific rationale and their international and world-renowned experts in mitochondrial disease) as to what was in their own child's best interests" (Position Statement on Behalf of the Parents 2017: paragraph 29). Given that best interests is firmly established as the "sole principle" (*In the Matter of Charles Gard* 2017: paragraph 112), applicable in domestic and international law concerning the upbringing of the child, invocation of a significant harm threshold was inevitably unsuccessful in the attempt to prevent ventilation from being withdrawn from both of these children.

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<sup>2</sup> A detailed analysis of the submissions is provided in Bridgeman (2020: chapter 8).

<sup>3</sup> The legal arguments renewed ethical debate in the United Kingdom. The bioethics literature is examined by Birchley (2019) and Wilkinson (2019).

Unsuccessful before the courts, the parents of Charlie Gard have continued to argue for change to the law in children's medical treatment cases within the wider context of seeking to secure a legacy for Charlie through Charlie's Law.<sup>4</sup> They have worked with NHS professionals, ethicists, and lawyers to develop Charlie's Law, in light of their experiences, seeking to change processes to prevent cases reaching court,<sup>5</sup> to improve the advice and support provided to families<sup>6</sup> and to better protect parental rights. Reflecting their argument on appeal, through reform to the law they seek to restrict the involvement of courts to cases where the child is at risk of significant harm. Sympathy for this argument in both Houses of Parliament has resulted in legislative reform proposals aimed at the introduction of a significant harm threshold in cases concerning children's future medical treatment. The provisions have been variously expressed but are clearly influenced by these recent cases and a concern to enhance parental authority and power in children's medical treatment cases.

First, in October 2019, Baroness Finlay introduced to the House of Lords the Access to Palliative Care and Treatment of Children Bill 2019 with specific reference to the cases of *Charlie Gard* and *Alfie Evans*. This would have applied in cases where there is a difference of opinion between parents and doctors responsible for a child with a life-limiting illness on the nature or extent of specialist palliative care or the extent to which palliative care should be accompanied by "disease-modifying treatment" (paragraph 2). In such cases, it provided that reasonable steps should be taken to ensure that the views of the parent are taken into account. When the difference of opinion was before a court, the Bill would have prevented court orders being made to prevent parents seeking disease-modifying treatment when that treatment was not harmful and when another reputable hospital was willing to provide it. In seeking to enhance parental authority to pursue the treatment they want for their child, these provisions would have shifted focus away from the child to the wishes of the parents.

Baroness Finlay introduced a further Private Members' Bill to the House of Lords in January 2020, the Access to Palliative Care and Treatment of Children Bill 2019-21. Clause 2 would have applied when the question of a child's future medical treatment was before the court.

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<sup>4</sup> The [Charlie Gard Foundation](#) invests in research into the treatment of mitochondrial diseases and supports families by providing services to enhance quality of life and with memory-making and campaigning for "Charlie's Law".

<sup>5</sup> Proposing access to clinical ethics committees, medical mediation and medical reports.

<sup>6</sup> On ethics and rights to independent second opinions and legal aid.

In such cases the Bill would have required a court to “assume, unless the contrary is clearly established” that medical treatment proposals put forward by any person holding parental responsibility for the child are in the child’s best interests. The explanation, given in the notes, was that this provision aimed at “reinforc[ing] the socio-medical norm” that those holding parental responsibility are seeking to act in the best interests of the child (Explanatory Notes: paragraph 19[1]-[3]) and sought to give “appropriate weight to parental views” in the courts’ assessment of the benefits and disbenefits of a proposed course of action (Baroness Finlay, HL Hansard, 2020, volume 801, column 2028). In these cases the child’s parents are seeking to secure what they genuinely feel to be in their child’s best interests, but that is different from an assumption that the treatment they want for their child, invariably with complex medical needs, is in the child’s best interests. The Bill further provided that this assumption required clearly established evidence to the contrary in order to be rebutted. So, rather than the evidence of parents and professionals being considered to determine the course that is in the best interests of the child, it would have required evidence to be presented that what the parents wanted was not in the best interests of the child. It is not clear whether this proposed change to the burden of proof would have made any difference in practice given that by the time the issue is before the court the child’s treating team have secured second opinions and independent experts who have confirmed their professional judgement. However, it is at least symbolic of parental authority over their child, a retrograde move away from respect for children’s rights, and a failure to recognize the respective expertise which professionals and parents bring to the decision. The best interests of the child are served and the rights of the child protected by parents and professionals working together, each bringing their own expertise, in a determination which is focused on the interests of the individual child.

A further amendment suggested by Baroness Jolly to be added at the committee stage would have required the court to “consider” any treatment proposal presented by any person holding parental responsibility “unless contrary evidence is established that the proposed treatment poses a disproportionate risk of significant harm” (HL Hansard, 2020, volume 801, column 2034). Judges already “consider” the treatment proposal presented by the holder of parental responsibility given that is the issue under dispute. However, the amendment would have required that the treatment proposed by the parents be provided unless “established” by “contrary evidence” that there are reasonable grounds for the doctor to

refuse to provide it, but no guidance was provided as to when a refusal may be considered reasonable.

In response to these proposals and the only example in the debates on these provisions of engagement with the rights of the child, Baroness Brinton referenced the United Nations Convention of the Rights of the Child (UNCRC), Article 3, to emphasize that the views of loving parents should not come before the interests of the child. Further, she pointed to the role of the children's guardian as the voice of the child and questioned how the clause would sit with recognition of the views and wishes of the Gillick-competent child. Having made these points Baroness Brinton expressed the hope that the Bill could be improved to support both the wishes of parents and the rights of the child (HL Hansard, 2020, volume 801, columns 2054-2055). Development of the law in this area should not be informed by parental rights or authority but focused upon the rights, voice, views and wishes of the child.

Finally, for now, Baroness Finlay moved an amendment to the Health and Social Care Bill 2021 which aimed to improve communication between parents and doctors of a child with a life-limiting illness when there was a disagreement about the nature or extent of specialist palliative care or to which the child should be provided with "disease-modifying treatments". It also placed the burden on the hospital to demonstrate that the proposed treatment would be likely to cause the child significant harm (HL Hansard, 2022, volume 820, column 371). As with all recent proposals this was intended to enhance parental authority and increase parental power in treatment discussions, rather than to ensure that the child is at the centre of decision-making or to protect the rights of the child. None of these Bills met with success, failing due to the prorogation of Parliament, parliamentary closures due to the Covid-19 pandemic, and lack of government support.

## [C] PUBLIC SYMPATHY FOR CLAIMS TO PARENTAL AUTHORITY

The court proceedings concerning the future medical treatment to be administered to Charlie Gard and Alfie Evans were conducted amidst intense, worldwide media scrutiny and considerable comment on social media platforms. There was understandably much sympathy for the parents who had recently been confronted with their child's diagnosis of a progressive and fatal medical condition, had to navigate his care in a paediatric intensive care ward in a specialist children's hospital and then had been thrust into the alien environment of the courts and legal



process. There was also much endorsement of their view that as parents, as the ones who knew their child best, they should have the right to decide about medical treatment and that the Trust and the courts were wrong to prevent them from doing so.

Ranjana Das has demonstrated how the social media campaign in support of “Charlie’s Army” presented “the Establishment”—the healthcare system, doctors and judiciary—as evil, wrong and harmful and the “ordinary people” as a vulnerable group whose voices needed to be heard (Das 2018: 79). In the campaign, professional judgement and expertise about Charlie’s condition, prognosis and future care were rejected in favour of personal anecdote (Das 2018: 81). The campaign, Ranjana Das argued, was symptomatic of, and fed into, critical judgement of public services including the National Health Service (NHS), drawing upon and contributing to the “rhetoric of suspicion and disdain for public services”, fuelling parental anxiety and mistrust in both the experts and the service (Das, 2018: 83). Rather than considering the issues raised by a disagreement between the parents and doctors caring for a child with a life-limiting condition in terms of partnership, shared care, professional duties and parental responsibilities, or the rights, interests and voice of the child, the debate became dominated by parental rights and authority.

## [D] ACADEMIC RESPONSES TO THE ARGUMENTS FOR A SIGNIFICANT HARM THRESHOLD

Support within popular opinion for greater parental authority over their child rather than a focus upon the rights of the child may have been understandable as an emotional response to parents seeking to do what they considered to be best for their child in unimaginably difficult circumstances. However, there has also been support for a move to a threshold of significant harm within the academic literature, as a critique of the best interests principle, from the perspective of parental authority, and in support of the imposition of greater limits upon state intervention in family life.

Cressida Auckland and Imogen Goold’s analysis reflected upon the extensive worldwide media attention in the *Charlie Gard* case which they considered highlighted the “substantial disjunction between what the legal position is and what many people believe it ought to be: that parents should have the final say in decisions about their child’s care” (Auckland & Goold 2019: 291). Elsewhere, Imogen Goold has interpreted the law to be that courts have the authority to intervene in parental decision-making

whenever an application is made to court on an issue of child welfare and expressed the view that this is “an exceptionally large intrusion by the state into the private decisions of parents” (Goold 2019: 39). This would indeed be so were any of the multitude of minor decisions parents make daily concerning their child’s upbringing referred to court. Many day-to-day decisions made by parents do not require special skills, are neither “complex or difficult”, nor do they have a significant impact upon the child, so there is no reason why anyone else is better placed to make them than the child’s parents, who can also take into consideration other relevant factors such as the needs of other children or family members or resources (Auckland & Goold 2019: 298). However, Cressida Auckland and Imogen Goold argued that in the case of a child’s medical treatment, which may have very serious consequences for the child’s future, parents ought to have authority as those who know the child best and are most personally concerned for the child’s welfare (Auckland & Goold 2019: 298). They understood the *Charlie Gard* case to have solely involved a value judgement about the possible harms and benefits of the proposed nucleoside therapy, that is “a decision about which chances are worth taking and at what cost, about which there cannot be a ‘right’ or ‘wrong’ answer” but rather to which there is a variety of reasonable decisions, which parents are as able to make as others. Leaving the decision to parents, they argued, respects their value judgements and “supports their authority” (Auckland & Goold 2019: 300-301).

That may be so, if these cases are merely about different value judgements. However if, as I have argued elsewhere (Bridgeman 2019), by the time the cases are before the courts, the treating doctors have reached the conclusion, supported by second opinions, that what the parents consider to be best for their child is, in the professional judgement of the treating doctors, contrary to “professional conscience” (*Re Wyatt* 2005: paragraph 30) or “unethical” (*An NHS Trust v AB* 2016: paragraph 23), these are not merely different value judgements about harms, risks and benefits. Parents do not and should not have the authority to require a doctor to administer treatment to a child that, in their professional judgement, the doctor considers to be unethical.

Cressida Auckland and Imogen Goold argued that the cases of *Charlie Gard* and *Alfie Evans* raised the issue of the authority of parents to make private decisions affecting their families without state intervention. They considered that a significant harm threshold would protect parental authority whereas best interests left “all parental decisions ... vulnerable to court interference” (Auckland & Goold 2018: 41). In their view, a significant harm threshold, “better reflects the boundaries between our

private lives and those areas into which the state can rightly intervene, is the most ethically justified and strikes the most appropriate balance between parental *authority* and protecting the vulnerable” (Auckland & Goold 2019: 288-289, emphasis added). The view that a significant harm test is “most ethically justified” is premised on giving “priority and protection to the autonomy of parents” (Archard 2019: 105) over the rights, interests, or protection of the child. That would be a retrograde step, a return to prioritization of parental authority over their child away from recognition of the rights of the child and the responsibilities of parents and of the state emphasized in the Children Act 1989 and the UNCRC.

Dave Archard has explained that the claim that a parent should choose what is in the best interests of their child is a claim of “a position of privileged knowledge” and not of “moral entitlement to choose” and is based in the interests of the child not in the status of the parent. In other words, it is a claim that the best should be done for the child and that whoever is best placed to decide what this is should do so (Archard 2019: 105). Furthermore, as Dave Archard argued, just because parents are motivated to do the best for their child does not mean that they alone are best placed to decide (Archard 2019: 105), perhaps especially so in cases of the complex medical treatment of a seriously ill child which also involve issues of clinical expertise.

To raise the threshold to significant harm would be a retrograde step because it would revert to the position prior to the challenge to parental authority made in the initial cases concerning a child’s medical treatment first brought before the courts in the 1980s. In 1981, consultant paediatrician Dr Arthur went on trial for the attempted murder of John Pearson, a baby with Down’s Syndrome, who had died after Dr Arthur prescribed nursing care only and the administration of a sedative following his parents’ rejection of him (*R v Arthur* 1981). Dr Arthur, who was acquitted by the jury, maintained that his professional conscience was clear as he had acted as a responsible paediatrician respecting the authority of the parents (Osman 1981). In the next case, despite the court giving consent to surgery to remove an intestinal blockage from Baby Alexandra, who also had Down’s Syndrome, the surgeon declined to operate, respecting the wishes of her parents that it was in her best interests to be allowed to die, sedated to ensure she did not suffer any pain (*Re B* 1981). The surgeon explained that he considered that the “great majority of surgeons faced with a similar situation” would have reached the same decision despite unanimous medical evidence that the procedure was clinically indicated (*Re B* 1981: 1423). The matter was settled by the Court of Appeal, which authorized the procedure,

establishing the duty of the judge to reach an independent assessment of the best interests of the child and not to accede to professional respect for parental authority.

In its review of child law, the Law Commission expressed the view that the concept of parental rights was misleading as the paramountcy of the welfare of the child imposed a duty upon parents and justified interference by the state to promote child welfare (Law Commission 1985: paragraph 1.11). The resultant Children Act 1989 introduced the concept of parental responsibility, defined in section 3(1). Inevitably, understandings of a concept such as parental responsibility evolve over time. Parental responsibilities are specific in response to the particular needs of the child. How responsibilities are understood by a parent of a six-month-old child with a degenerative condition being cared for in the paediatric intensive care unit will be very different from those of a parent of a child of the same age without such a condition. The responsibilities of parent to child are also general, determined by current social norms, as illustrated by a comparison of the responses of the parents of John Pearson and Baby Alexandra in the 1980s to the responses of the parents of Charlie Gard and Alfie Evans over 30 years later, and the contemporary commentary on them.<sup>7</sup> Jonathan Herring has reflected upon the cases of *Charlie Gard* and *Alfie Evans* in the context of parenting literature which places increasing pressure on parents for the safety of their children and for ensuring that they “succeed in life” (Herring 2019: 197). This pressure is “reinforced”, he argued, by the message from public institutions and the Government that decisions made by parents have a significant impact upon the welfare of children and that parents are to blame for anything that goes wrong for or with their children. Professionals, public services, the Government and the state cannot be relied upon to protect the child. This, Jonathan Herring argued, sends the message that the responsibility for, and to protect, children rests solely with their parents. He argued that, consistent with hyper-parenting, involving “excessive lengths to make the child the best possible child” (Herring 2019: 199), the parents in these cases did everything in their power to fulfil their sense of responsibility to fight for their child, doing everything they possibly could in the attempt to save their child’s life.

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<sup>7</sup> Support at the time for the parents of John Pearson and Baby Alexandra is considered by Freeman (1983) and Kennedy (1983).

## [E] RIGHTS, INTERESTS AND VOICE OF THE CHILD AT THE CENTRE OF SHARED CARE

Parents do have authority to make decisions about their child's medical treatment, to decide when to seek a professional opinion, to choose between treatment options offered by doctors in the exercise of their professional judgement, working together with professionals ensuring that their knowledge of their child and their values, preferences and beliefs affecting their child's wellbeing are factored into decision-making alongside professional judgement. The Children Act placed primary responsibility for the welfare of children with their parents, including the responsibility to make decisions about the medical treatment their child will receive from the options available (*Re A* 2001: 179), according to their judgement of the best interests of the child. Doctors cannot treat a child, who is too young to give consent on their own behalf, without the consent of the child's parents or the court.

The Government has not supported these recent reform proposals, taking the view that it is necessary to look at the "whole process" and develop "systemwide solutions" to avoiding, recognizing, and managing disputes (Earl Howe, HL Hansard 2022, volume 820, column 379). Section 177 of the Health and Social Care Act 2022 required the Secretary of State to arrange for a review into the causes of disputes between persons with parental responsibility for a critically ill child and those responsible for their medical treatment. The Nuffield Council on Bioethics was commissioned to undertake an independent review focused upon the causes of disagreements about a child's future medical treatment, factors influencing what happens to those disagreements and mechanisms for resolving them. The report made 18 recommendations focused on education, continuing professional development, resources, guidance, further research and the provision of information (Nuffield Council on Bioethics 2023: 51). The report briefly considered the criticism of the best interests test and debate about significant harm that had been identified in the literature review and raised in the evidence and concluded that there was insufficient evidence to support a change to the law (Nuffield Council on Bioethics 2023: 6). Any change to the law should not be a reversion to parental authority over children. If there is to be a change to the law it should be to ensure that seriously ill children are provided with shared care focused upon the needs, interests, voice and rights of the individual child. To conclude, I finish with a fictional example of a parliamentary debate on a Bill to reform the law informed by claims of parental authority challenged by recognition of the voice of the child.

## Placing the Child at the Centre of Medical Treatment Decisions

*Baroness Hart:* It is with the greatest respect to the experience and expertise of Lord Smythe, who has had a long and distinguished career in private law and campaigning for public funding of palliative care services, that I have to speak against the proposed Parental Authority over Children's Medical Treatment Bill. I know that my Lord has worked closely with the parents of Ava, a baby with a rare genetic condition that left her dependent on ventilation and artificial feeding in the paediatric intensive care unit at London Children's Hospital. Their dispute with the doctors treating her was determined in the High Court amid worldwide press attention and comment on social media platforms as they sought to raise money to take her to the United States for experimental therapy offered by a doctor in Chicago. Parents, for whom we would all wish to express our sympathy, who were highly critical of the legal process that determined the future of their child and their family.

My views are similarly based on the experiences of family members but family members who are usually not heard in discussions about the future medical treatment of a child. A child, we should remind ourselves, who unable to articulate their own interests depends upon others to speak for them. I was contacted by, and had the privilege of spending time in the company of, a 15-year-old I shall call Nova whose parents have also in recent years been in dispute with doctors about taking her younger sibling to Europe for experimental treatment for a rare cancer. This family did not waive anonymity in the legal proceedings so I shall refer to Nova's sister as Aurora.

Nova, a bright, articulate young woman, contacted me knowing this Bill was coming before this House, wanting to share the experience of what Aurora and her family went through. Nova told me about the days she spent with Aurora in hospital as treatment options were tried and failed to work and then as legal proceedings were conducted. Days in which she saw in her sister's face the pain her condition was causing her—not quite managed by medication—discomfort, and the indignity of the procedures necessary to keep her alive.

Nova saw her parents frantic with the hope of possibility from the offer of therapy in another European country. At the time, Nova thought that her lack of understanding as to why the doctors who had cared for Aurora with such close attention to her needs and wellbeing did not think she should have the therapy was due to her childlike lack of comprehension. But, in the years since, she has read more and reflected and now is

saddened that the offer of a therapy, not scientifically or clinically proven, by a clinic with far less experience than the expertise in the specialist children's hospital caring for Aurora, may in reality have been a false hope. She wishes the legal process had helped everyone to understand whether that was so.

Nova saw her parents consumed by the abject anxiety of how they were going to raise the money for private treatment abroad in a very limited time. She worries that Aurora, whilst not knowing the detail of the plans to sell the family home, picked up on this additional anxiety. Yet, she is glad that her parents did not feel they had no option but to use social media to help them to raise the funds—as other families have done—so that images of her sister as she drained away in the last weeks of her life were not shared across the world.

Nova spent time with Aurora watching her favourite films, reading aloud to her, lying alongside her in her bed listening to music or just talking sharing her memories of precious times together as a family, of beach holidays, walking their family dog in the woods as the autumn leaves fell, baking together pretending they were contestants on “Bake Off”, dressing up as princesses, teachers, and yes, inspired by the “Barbie” film, as Supreme Court Justices!

A few years older than her sister, Nova was old enough to remember Aurora as a content, smiley baby who had grown into a child who saw the joy in life and helped everyone else to see it too, in rain on a summer's day, splashing in a muddy puddle, studying intensely the first flower of spring. So, naturally, Aurora did not complain. Nova saw the concerned look in her eyes as her parents exchanged terse whispers in the corner of the hospital room in response to yet another email from the clinic abroad or returned from meetings with the clinical teams, with mediators, with solicitors. She understood, and knows that Aurora had understood, that her parents considered it their responsibility to leave no stone unturned in the hope that they could save the life of the child they so loved, that their responsibility was to never give up fighting for their daughter. In a very sad way, their all-consuming focus on doing all they could for their child took from them all time to share those little moments of family life that could still be shared in the clinical environment and were so precious to them all, cuddles, a funny story of Aurora's antics as a baby, a family joke. She knows her parents were determined in pursuit of the hope they wanted to be in Aurora's best interests, driven by their family's past and their hopes for its future. But she wondered whether Aurora's interests, as the child she was, somehow became lost in the dispute

between her parents and the doctors and the legal proceedings which were meant to, objectively, identify her best interests. Whilst Aurora should not have been asked directly or been expected to decide, Nova felt that opportunities to hear her little voice were missed. Nova stressed to me that I should appreciate that she was in no way criticizing her parents who were amazing in a truly horrible situation but that it must surely be the job of the professionals to ensure that the voice of the child is clearly heard.

So, My Lords, I don't think the present Bill which would require the treatment parents want for their child to be administered unless it causes significant harm is the right solution to the problems these cases present. This Bill seems to me to focus upon the rights of the parents, inadvertently returning to ideas of parental authority which risks positioning the child, for whom everyone is seeking to do what is best, as an object of the entirely understandable concern. Together with experts in children's rights, I have been in discussion with the Secretary of State for Children and Families, to take forward the principles set out in the 1989 Children Act and the UNCRC in a Children's Act which will impose a duty on public bodies, including the courts, to place the interests and rights of the child at the centre of all decisions affecting their upbringing, including those concerning future medical treatment. Respect for the voice, participation and agency of the child will ensure that the welfare of the child is the primary or paramount consideration in important decisions affecting their future.

### ***About the author***

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## CHILDREN IN FAMILY MEDIATION: A RIGHTS APPROACH OR THE RIGHT APPROACH?

MARIAN ROBERTS  
Family Mediator

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### Abstract

This article explores the impact of three interlinked developments on both theoretical understanding of the specific role of children in family mediation and on its professional practice implications. First, the adoption of an imported terminology deviates from the clarity and precision of existing policy in respect of the nature and purpose of professional intervention in relation to children in mediation; second, current high standards of practice risk being compromised by an overemphasis of a rights approach to determining a child's direct participation in mediation; and third, how a failure to sufficiently recognize the impact on families of multiple harsh pressures, including poverty and deprivation, at a time of conflict and stress, risks both overstating the scope of mediation for meeting a child's needs as well as underplaying the complexities involved in relation to the direct participation of children in mediation. The article explores the tensions arising from these developments and the challenges, theoretical and professional, involved in protecting the ethical and professional principles of mediation while ensuring that the voice of the child can be heard in the process.

**Keywords:** ADR; mediation; family mediation; children in mediation; children's rights.

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*Childhood is entitled to special care and assistance* (United Nations Convention on the Rights of the Child 1989, Preamble).

### [A] INTRODUCTION

The subject of children, in whatever professional context, always provokes important, delicate and complex questions—about their rights and about their welfare: about their role in decision-making and what is meant by their “participation”; about the kinds of decisions that have to be made in circumstances that have often profound and long-lasting effects; about ethnic, cultural, economic and gender factors and other differences; about what children themselves think and want; and

about the need to balance respective and possibly competing interests in families. The focus on children in family mediation also brings to the fore more general themes that emerge in all fields of mediation practice. First, there is the role of third persons in mediation, themselves not parties or decision-makers yet who may be directly affected by the process and its outcome (Roberts 2003). Children, for example, are neither parties nor decision-makers in mediation yet are directly affected by the decisions of their parents, the disputants, who have decision-making authority. Second, there are distinctive features that distinguish mediation from other interventions, including other dispute resolution processes—of particular relevance is the way in which the mediation-specific role of children differs conceptually, ethically and professionally from their involvement in other forms of intervention, whether welfare investigation, judicial proceedings, child counselling, therapy, advice-giving, guidance or advocacy. Third, a tension can arise between the pursuit of individual rights and the ethics of collaboration and consensual, joint decision-making that distinguishes mediation.

Notwithstanding collegiate consensus on the specific role of children in family mediation, the nature of professional intervention and high-quality professional standard-setting and training by the family mediation representative and regulatory bodies in the UK,<sup>1</sup> terminological misconceptions, process misunderstandings and a paucity of relevant research are problematic. Furthermore, there can be a serious failure to sufficiently appreciate the impact, on disputes relating to children in particular, of the pandemic and of the harsh reality of the economic, financial, social, psychological and health struggles associated with family breakdown.<sup>2</sup>

This article explores, from the perspective of an experienced family mediator,<sup>3</sup> how misunderstandings about the role of children in family mediation can arise as a result both of the imposition of unrealistic theoretical, policy and practice expectations on an essentially modest dispute resolution intervention, as well as from an underestimate of the complexities and difficulties of fulfilling appropriate professional expectations in practice. The article will focus in particular on the following

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<sup>1</sup> The FMC; the College of Mediators; the NFM; and the Family Mediators Association (FMA).

<sup>2</sup> Dr Sheena Webb, a clinical psychologist, draws attention to the prevalence of trauma experienced by many families involved in public and private family law proceedings, how these systems themselves contribute to that trauma and the failure of professionals to understand or recognize the impact of trauma on behaviour (Webb 2023).

<sup>3</sup> The author has over 40 years continuous family mediation practice experience and has been involved over decades in the development of the national professional regulatory framework for family mediation.

questions: first, does the adoption of an appropriated terminology, namely “child inclusive mediation” (CIM), imported from abroad but without its substantive content, create inaccurate public and professional expectations? Second, does a reliance on Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) 1989 constitute a sufficient theoretical justification for promoting the increased direct participation of children in the mediation process? Third, does Article 12 privilege the role of professionals in respect of hearing the voice of the child?

## [B] A BRIEF FAMILY MEDIATION HISTORY

Family mediation has always been associated with a greater concentration on the needs of children whose parents are separating or divorcing (see Davis & Roberts 1988; Kelly 2004; Ministry of Justice 2011).<sup>4</sup> The first family mediation services in this country, set up in Bristol in 1978, and in Bromley, south east London, in 1979, were established with their primary focus on the wellbeing of children. These pioneering services provided mediation (then termed “conciliation”) with the express purpose of mitigating the harmful impact on children of parental conflict arising from family breakdown. The historical legal and policy context of this then pioneering form of family dispute resolution can be seen in the extensive body of reports and research studies that informed their establishment, initiated by the Finer Report of 1974. This report, in response to concerns about the social impact of divorce and separation, officially espoused a new spirit in which family breakdown should be viewed, affirming the need “to civilize” the consequences of breakdown. It recommended that the “winding-up” of marriage failure should be accomplished by “the *couple*” making the most rational and efficient arrangements for their own and their children’s future (emphasis added). The Finer Report gave first public recognition to the idea of *conciliation* in family disputes with its emphasis on reducing conflict and on the reaching of consensual agreement between the parties themselves (Finer Report 1974: paragraph 4.313).

A unique feature of family disputes is the continuing and interdependent relationship of the adult disputants, bound together forever as parents of their children (Fuller 1971). Children provide the common interest and mutual inducement for collaborative effort. Children may be seen, simultaneously, to be the cause of dispute, the weapons of dispute, the main casualties of dispute and, therefore, the best reason for ending the

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<sup>4</sup> For a recent comprehensive overview of the social, legal and research developments relating to children in family mediation in the UK, see Allport (2020: chapter 10).

dispute (Davis & Roberts 1988). Disputes over children frequently reflect this complex and paradoxical predicament.

The common view that family mediation can offer the “best setting” for the voice of the child to be heard has been linked to the presumption, embodied in the UNCRC 1989, the Children Act 1989 and the Family Law Act 1996, that the greater awareness of and greater attention paid to the views and feelings of children both acknowledges their worth and significance as well as alleviating distress at a time of separation and divorce. The research literature consistently indicates that children’s voices are an important component of the separation and divorce process, that in many cases children and parents have better relations and that there can be less parental conflict when children are incorporated in the process (McIntosh & Ors 2008; Birnbaum 2009). Notwithstanding, there has also been controversy particularly over the nature and purpose of the role of children in the mediation process. The issue has been not whether or not children should be consulted in the decisions that affect them—that, it is agreed in principle, would be good commonsense and be fair and just (Emery 2003). The vexed question that polarized positions focused on whether or not children should be involved *directly* in the mediation process and on the role of professionals in that process.<sup>5</sup> By the 1990s, however, conceptual clarification of the nature of the mediation process, the greater practice experience of family mediators plus research findings (Garwood 1989; O’Quigley 1999; Wade & Smart 2002; Birnbaum 2009) combined with a fresh climate of thinking about the “voice” of the child in decision-making (see Article 12 UNCRC 1989; the Children Act 1989). This resulted in a convergence of views that resolved the debate for and against the direct involvement of children in family mediation. There was now consensus on the principles, policy and language use that could frame the approach to and the professional practice of family mediation involving children. The policy question to be addressed was this: “How can children’s perspectives best inform a process in which the parents are the ultimate decision-makers?” (Roberts 2014). The answer lay in the concept of *consultation* which clarified not only language use<sup>6</sup> but also resolved the substantive question, namely, that children can be *consulted* as part of their parents’ decision-making in mediation. Consultation

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<sup>5</sup> Some North American researchers argue that mediation is not the appropriate forum for children to express their views; that, on the contrary, mediation can be a protective factor for children in providing a forum where parents can express their conflict without involving the children (see, for example, Kelly & Emery 2003).

<sup>6</sup> This was necessary because the language used to describe the role of children in mediation was vague and varied, reflecting the prevailing imprecision about the professional nature of the intervention. Usages included the following—“working with” children; “involving” children; “seeing” children; “including” children; children “participating” etc.

could take place in either or both of two ways: indirect consultation by means of parents themselves consulting their children and bringing their views into the process—an approach that was seen to encourage parents to consider and take into account their children’s perspectives; direct consultation with children by the mediator within the process—of particular value when the perspective of the child was missing. Whether children should be consulted directly, and how and at what stage were matters to be agreed jointly between mediators and parents, requiring also the child’s consent (National Family Mediation (NFM) 1994).

These principles form the basis of the policy approach and practice guidelines in relation to children now in place and endorsed by all five member bodies making up the Family Mediation Council (FMC), the overarching self-regulatory body for family mediators in England and Wales.<sup>7</sup> This approach positively promotes, as its core principle, the importance of incorporating the perspectives of children in parental decision-making with guidance as to how this can best be achieved.<sup>8</sup> With the consent of the child, the parents and the mediator, children can be consulted directly by a specially trained mediator in a separate single confidential session (usually up to a maximum of one-hour) scheduled between two mediation sessions so that there can be both the careful preparation of parents in advance (including addressing the possibility of negative responses) and their receiving subsequent feedback from the mediator. The content and manner of that feedback (whether to parents jointly or separately) requires the child’s explicit consent. Children are not themselves involved directly in parental discussions, although occasionally children can participate in a final family meeting once agreement has been reached.

Family mediation is thus the only dispute resolution process in the country that has had in place, for decades, not only policy and practice guidelines but also rigorous quality assurance requirements in relation to the role of children and young people. It is the only dispute resolution process with the primary objective of enabling disputing parents to foreground their children’s needs, feelings and views and to reach consensual joint decisions informed by these perspectives (Roberts 2015).<sup>9</sup>

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<sup>7</sup> The five member bodies making up the FMC consist of the College of Mediators, the FMA, the Law Society, NFM and Resolution.

<sup>8</sup> FMC Code of Practice and Guidance (2018: sections 5.23 & 6.6, “Welfare of Children”) states: “The Mediator must encourage the Participants to consider the children’s wishes and feelings. All children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during the Mediation, if they wish” (section 6.6.1).

<sup>9</sup> This is not to say that current policies and practice could and should not be updated and enhanced through collegiate endeavour.



It is significant that the recommendations in the Ministry of Justice Report on the voice of the child in dispute resolution (2015), while embracing all dispute resolution processes, made no mention of how what it termed “child inclusive” practice could be practicable in respect of lawyer negotiation, collaborative lawyering, arbitration or any other dispute resolution process. Sir James Munby (lately President of the Family Division) has lamented the lack of progress in relation to the greater participation particularly of older children in the family justice system, with the aim not only to improve the quality of judicial decision-making but also to value and respect the views of children themselves in respect of those decisions:

What has been achieved? *Nothing, absolutely nothing*, effective, despite continuing and unrelenting pressure for change since 2014 ... The deplorable reality is that what children want and need, what their welfare demands, is, according to the Ministry of Justice, too expensive” (Munby 2021:747, 748, emphasis in original).<sup>10</sup>

## [C] WHAT IS “CHILD INCLUSIVE MEDIATION”?

The term, “child inclusive mediation” has been a relatively new import from Australia where there it refers to a wide-ranging and sophisticated child-related model and practice approach in comparison with what is termed “child focused” practice. CIM, piloted in two sites in Australia (in Darwin and Melbourne), aimed to embrace children’s concerns and interests in all aspects of overall practice, whether counselling or mediation (McIntosh 2000). Concerns that “child inclusive” practice (recommended as a “good practice” approach rather than “best practice”) might be understood to mean that all children should be seen in all cases was an assumption that was explicitly refuted by the consultants to the pilot (Commonwealth Department of Family and Community Services 2002). What was envisaged by “child inclusive” practice was that, throughout the process of mediating with parents, both the parenting role and the needs of children would be supported in a variety of ways, direct child consultation being one critical option, as well as other indirect ways, such as working with parents in group programmes or with families in

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<sup>10</sup> The meeting of children with judges is covered by Guidelines for Judges Meeting Children who are Subject to Family Proceedings 2010. The purpose of such meetings is to benefit the child, not to gather evidence. *Re C (A Child) (Ability to Instruct Solicitor)* (2023) also addressed a child meeting with a judge. In this case there was difference of view between an expert psychiatrist and the judge at first instance as to whether a 14-year-old boy was deemed competent to instruct solicitors. Notwithstanding helpful guidance, children’s meetings with judges persist in having “knotty and ambiguous features” in practice (Seagrim & Lewis 2023, 1455).

family therapy. Findings highlighted the vital resource, expertise, training and infrastructure implications entailed in implementing CIM. An extra six to eight hours of worker time per case were needed to be funded, and staff trained for direct consultation already had graduate training in psychology and social work and prior therapeutic work experience with children. Supervision was conducted by a clinical child psychologist.

While the term “child inclusive mediation” was adopted in this country, its wide-ranging practice approach was not replicated. Rather what the new terminology did introduce was an increased emphasis on the importance of offering the child/young person (from the age of 10) the opportunity to be directly consulted during the mediation process. In fact, it added nothing fundamentally new or different to prevailing practice, already incorporated into policy and practice directions as the “direct consultation of children” (DCC). As described above (see also footnote 5), the original professional clarification of the mediation-specific role of children also involved clarification of language use.

Policies and practice guidelines acknowledge that mediation, while potentially powerful in its impact, is a modest intervention.<sup>11</sup> Also recognized expressly are the range of services that may be more appropriate for meeting the needs and interests of children affected by separation and divorce—such as counselling and therapy, advice, guidance, social work and advocacy. Therefore the appropriation only of the Australian CIM terminology is problematic: first, because however well-intentioned and apparently benign, CIM reverts to a previous vagueness of language use that gives no indication (unlike DCC) of the precise nature of the professional intervention involved. Second, a new terminological hierarchy of practice approaches is created to incorporate the voice of the child in family mediation, privileging one approach, the direct consultation of children, over other consultation approaches. Third, CIM implies a false innovation, namely that prior mediation practice in relation to children was not inclusive of their wishes, views and feelings. Fourth, given the vagueness and breadth of what is conveyed by “child inclusive” practice, misunderstandings can arise and consequently misplaced and unrealistic expectations (public, professional and official) can be imposed on family mediation to meet the wider range of children’s needs associated with family breakdown.

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<sup>11</sup> In a synthesis of findings from 17 studies (from Australia, Canada and the United States) on mediation in public law child protection cases, effective, properly trained and independent mediators were found to be “powerful enablers”, recognized to be key to successful practice where children’s interests were central (Wallace & Ors 2020).

Family mediation should not be expected to meet a lack of provision of more appropriate services for children, nor should mediation be criticized for failing to fulfil objectives that are not its business to fulfil.

## [D] CHILDREN'S RIGHTS

The primary focus of family mediation services in seeking to mitigate the harmful impact of family breakdown has always been child-centred (see above). There has always been professional consensus on the objective of engendering more co-operative, post-separation parenting arrangements and of the need to respect the voice of the child in all dispute resolution processes.

Article 12 UNCRC 1989<sup>12</sup> provides the main foundational principle of the rights approach that now underpins research and policy recommendations for prioritizing the child's right to have a voice in family mediation (see, for example, Barlow & Ewing 2020; Family Solutions Group 2020; Ewing 2021). In drawing attention to international obligations, Article 12 needs also to be understood not only as a fundamental right but also as a general principle to be implemented "holistically" in relation to the realization of concomitant rights under the UNCRC, in particular Articles 3, 5, and 9 (respectively, the best interests of the child as the primary consideration and their right to care and protection; responsibilities, rights and duties of parents and appropriate direction and guidance in a manner consistent with a child's evolving capacities; and the right not to be separated from parents) (Lansdown 1995; Thomas 2007). Article 29(c) highlights too the aim of the education of the child to be directed, *inter alia*, towards respect for their parents. In addition, there is no one construction of the meaning of participation of children and young people in decision-making under Article 12. Participation can take many forms, be constructed in different ways and at different levels—consultative (indirect and direct), collaborative and child-led (Lansdown 1995). The requirements for participation of children within the public arena of civil and political decision-making (a process involving procedural requirements for information, advice, follow-up and evaluation, complaints, remedies and redress) must not be equated with requirements in respect of the

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<sup>12</sup> Article 12 UNCRC 1989 states the child's right to express an opinion freely where capable and to have that opinion taken into account in any matter or procedure affecting the child. The views of the child are to be given due weight in accordance with the age and maturity of the child. Article 12, though ratified by the UK, has not been incorporated into domestic law.

participation of children in the context of the private ordering process of family mediation.<sup>13</sup> If children have the right to express a view on matters of concern to them and to have those views taken seriously, then parents have a corresponding obligation to consult their children. This right of the child to participate in decision-making does not remove the ultimate authority of the parents to make decisions in relation to the child. It does, however, significantly affect the process by means of which those decisions are made (Lansdown 1995).

There is also no reason to presume that the implementation of Article 12 in respect of divorce and separation requires there to be a professional involved rather than a parent, grandparent, or other trusted adult. Is there something of a paradox in advocates of children's rights presuming the competence of children (that they will behave reasonably and sensibly in relation to the making of decisions affecting them) yet at the same time denying such a presumption of competence in respect of the parents' decision-making in respect of those children? There is no evidence to suggest that, in most cases, parents, however angry and distressed, are less committed to their children's wellbeing than a professional. On the contrary, decades of research findings highlight parents' own concerns about the impact of separation on their children and their primary concern to prioritize and protect their children, however angry and distressed they may be (see, for example, Saposnek 1983; Davis & Roberts 1988; Utting 1995; O'Quigley 1999; Birnbaum 2009; Nuffield Family Justice Observatory 2023). Many parents expressed this in the language of wanting "to put the children first", wanting to do what is "best for the children" or putting the children's interests "over your own", however difficult this task was acknowledged to be owing to tensions, emotional pain and conflict (Symonds & Ors 2022: 20).

There has long been a danger that the preoccupation of professionals regarding the issue of "children's interests" could give rise to a conflict, not between parents and their children, but between parents and those professionals who claim to know and be able to better protect the best interests of children (see Berger & Berger 1983). Yet greater significance is attached to the value of the direct consultation of children by a professional in family mediation than to the various other means of hearing the voice of the child.

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<sup>13</sup> A more recent theoretical perspective on the meaning of children's "participation" (in the political and social context) expands the notion of the "voice" of the child to encapsulate more elaborate understandings of a dynamic process of participation incorporating learning and change. In this context "consultation" can be seen as a limited understanding of participation in response to an adult agenda rather than as a collaborative process with children actively involved themselves in developing creative responses to the issues (Percy-Smith 2014).

The focus on Article 12 in providing the most compelling theoretical justification for endorsing the direct involvement of children and young persons in mediation requires consideration in the context of the more complex and difficult theoretical questions about children's rights that complicate the issue, such as those posed, for example, by Emery (2003), Guggenheim (2007), King (2007) and Ferguson (2013).<sup>14</sup> These questions include, first, why disagreement between parents should act as a trigger for asserting children's rights and why children's views are accorded greater significance in relation to decisions taken at the time of separation than in relation to equally difficult decisions taken by parents in intact families? These decisions, often profoundly affecting their lives, such as moving to another part of the country, are imposed on children, not least the decision to separate and divorce itself, one which "society sanctions through its non-intervention" (Maidment 1984: 273; King 2007). Second, whether there is any evidence to assert that a theory of children's rights necessarily improves or increases the likelihood of improved outcomes for children, rather than through a "best interests" assessment, the welfare principle or an approach of duties owed to children (Ferguson 2013)? Third, whether there is any empirical evidence to suggest that giving children legal rights actually improves their lives (in terms of their protection, welfare or their autonomy)? Guggenheim (2007) argues that it is neither possible nor desirable to isolate children from the interests of their parents, or society as a whole, and that children's rights can serve as a screen for serving the interests of adults because these rights are relational, with the parents having the ultimate duty and legal rights in respect of minors.<sup>15</sup>

## [E] CAPACITY AND CONSENT

Recent policy recommendations in respect of family mediation propose that there should be a statutory presumption (in order to ensure compliance) that "all children and young people aged 10 and above be offered the opportunity to have their voices heard directly in all processes

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<sup>14</sup> Emery highlights the view that as rights and responsibilities go hand-in-hand, to increase children's rights burdens them too with adult responsibilities, such as being put "in a position ... in direct opposition to their best interests: smack in the middle between their warring parents" (2003: 623).

<sup>15</sup> Theoretical and empirical findings on the participation of children in a range of contexts highlight that having a voice does not necessarily lead either to inclusion or to any tangible outcome. What children say may not be the whole story of what they want and what they need. There may be a tension between having responsibility for decision-making and having a childhood (Percy-Smith 2005).

for resolving issues between parents including mediation and solicitor led processes” (Family Solutions Group 2020: 87).

This recommendation goes even further than the already controversial Recommendation 1 of the Voice of the Child Dispute Resolution Advisory Group (Ministry of Justice 2015) that this should be a non-legal presumption. This presumption privileges the right of the child to participate directly in a dispute resolution process (except where it would be unsafe) above all other considerations—whether the appropriateness of the circumstances or the process, the suitability of the dispute, or the parties, the views of the parents, or the professional discretion of the mediator. This recommendation takes no account of the multiparty consent requirements—of the mediator, each parent and the child—in place to ensure ethical and appropriate professional practice and currently embodied in all family mediation codes of practice and policies on children (see, for example, NFM 1994; College of Mediators 2002; FMC 2018). All these policies protect in principle and in practice that parental consent is essential for the involvement of their children in mediation.<sup>16</sup>

Several research studies agree that children would not benefit from being directly involved in mediation in certain circumstances, for example, where parents are so overwhelmed or are psychologically incapable of making use of the information given to them; where the conflict between them is high; where there are mental health problems that impede positive working relationships; where there are cognitive difficulties in children (of particular significance given the increasing numbers of children being diagnosed with neurodevelopmental disorders); where children may be manipulated by one parent; where mediators feel insufficiently equipped or skilled; and where parents are agreed on the needs of their children and are co-operating together (Kelly 2004; Birnbaum 2009; Kearney 2014; Rodríguez-Domínguez & Roustan 2015).

While a clear theme has emerged from research that children want to be involved in decision-making when their parents separate, whether or not parents go to court, it is also acknowledged that being involved in decision-making can put children in a difficult position (Emery 2003; Kelly & Emery 2003; Kearney 2014).<sup>17</sup> Experience highlights the difficulties that can arise for children (and for mediators) when one or more parent

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<sup>16</sup> The FMC did not support Recommendations 19 and 20 of the Voice of the Child Dispute Resolution Advisory Group which proposed the dispensing of consent of both parents in relation to a *Gillick* competent child and of one parent in relation to a non-*Gillick* competent child (Ministry of Justice 2015).

<sup>17</sup> Kearney quotes research that found a marked reluctance for DCC in Ireland other than in “suitable circumstances” (2014: 154).

fails to take on board their child's perspectives and the distress and damage that can be caused when the consultation of the child backfires and parental punitive action is taken against a child for having their say (despite advance preparation to prevent this).

A distinction can be drawn between children's desire to be included in certain aspects of the decision-making process and to feel their voices heard and taken into account—and the burden of children feeling that they had had the “final say” in decisions affecting them (Roe & Eyre 2021). A significant minority of children did not want to be involved in decision-making at all (ibid). As to the weight to be attached to the views of children, it is well recognized that views can change, especially on reaching adolescence. Research has shown that the most passionate of a child's convictions at the time of break-up can come to be later regretted (Wallerstein & Kelly 1980).

The phenomenon of the worryingly large numbers of children nowadays diagnosed with autism spectrum disorder (ASD) is a common experience in family mediation. Anecdotally, in the author's current mediation practice experience, in two out of every three families one or more child is described as having a neurodevelopmental disorder. This can create new areas of dispute between parents, for example, over the validity of the diagnosis itself and over the kinds of special arrangements that may be necessary to meet a child's particular needs. When it comes to consideration of the option of direct consultation of such a child, mediators, needing both expertise and a greater reliance on parental knowledge, exercise a heavy professional and ethical responsibility to assist parents in determining the appropriateness and capacity of their children to engage in and benefit from their direct participation in the process.

It is not surprising that the rate of divorce is higher (23.5% compared to 13.8%) for parents of children with ASD (Hartley & Ors 2010). Research identifies the several factors that account for the poorer wellbeing of parents (with their own mental health or other vulnerabilities) facing the uncertainty of (and disagreements over) the diagnosis of ASD, its long term prognosis, the stressful nature of ASD symptoms and behaviours plus the lack of public understanding and tolerance of such behaviours (ibid). These families experience extraordinary levels of stress, often exacerbated by social and economic deprivation and limited support.

Parents have been referred to as “gatekeepers” to children's access to a mediator (Barlow & Ewing 2020; Ewing 2021). This negative designation, implying undue parental control over and denial of a child's rightful opportunity to participate in the mediation process, may disrespect

the fact that parents, knowing their children better than anyone else, may well be acting in their child's best interest in deciding against their direct participation in mediation. Where there is disagreement between parents over consent, a new category of dispute is added to matters already in dispute. Furthermore, unlike counselling services, which are set up to give direct access to children, children cannot engage directly in mediation themselves without prior parental involvement. Parents are no more "gatekeepers" to their children's access to mediation than, inevitably, they are to almost every other major area of responsibility in their children's lives, whether health, education and so on.

## [F] CONCLUSION

There are no simplistic prescriptions for better outcomes for children whose parents engage in family mediation. A professionally appropriate decision for the direct consultation of a child in the mediation process does require the careful consideration of all the circumstances of each family, the approval of the mediator, the consent of each parent, and the willingness of the child or young person to engage. Some disputing parents may be all too ready to absolve themselves from the difficulties of joint decision-making; the wishes of children, however strongly felt, cannot be conclusive; nor can children be reliably regarded as the best judges of their own long-term interests. Striking a proper balance between the rights and obligations under the UNCRC constitutes one of the many challenges for decision-making involving separating and divorcing families. Equally challenging is striking the "tricky balance" of affirming parental authority for decision-making with acknowledgment of the rights of the children to have their interests and perspectives heard and valued (Emery 2003: 626). If striking the right balance within families is not without difficulty, then what of the difficulties of striking the right balance between families and professional interveners?

While the question is not "if" but "how" and "when" children should have a voice in the decisions that affect them (directly or indirectly), there are still many unanswered questions that need to be addressed. These include, for example, what weight should be given to the voice of the child and who decides? Should there be an age when the views of children are determinative? What does the participation of the child really mean? Are children's views considered seriously or through the adult lens of what is in their best interest? How is the outcome to be evaluated—the settlement of the dispute or future family relationships? (Birnbaum 2009).



The answers to these questions lie in more robust theoretical and conceptual frameworks; co-ordinated research linking best practice approaches with an empirically based focus including the actual experiences of children;<sup>18</sup> greater dialogue amongst practitioners, researchers, policy-makers and families and their children; and enhanced regulatory oversight of family mediation practice to include specialist training and practice protocols for mediators on such topics as special needs (neurodiversity in particular) and intercultural and gender awareness.<sup>19</sup>

Children need to be heard by parents throughout their lives, not only when they are in dispute. The needs of all children in situations of family breakdown deserve to be recognized and met, not only when their parents engage in dispute resolution processes. The onus for meeting those needs placed on mediation, now the officially endorsed and publicly funded primary family dispute resolution process, imposes inappropriate expectations. Moreover, mediation is based on certain ethical values that justify its use for disputants as well as for those who choose to become mediators. These values exemplify the standard of respect that lies at the heart of mediation as a dispute resolution intervention.<sup>20</sup> This foundational ethic of respect is essential for the mediator to have proper regard for the right of the parties, whatever the difficulties, to be the architects of their own agreements and for party competence and control, as distinguishing features of mediation, to have meaning.<sup>21</sup> Where children are concerned, the fundamental issue at stake is whether separating/divorcing parents, like parents in intact families, can be trusted to make decisions about their own children.

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<sup>18</sup> With a growing private market of unregulated practitioners, research on family mediation based on the practice only of those who are fully accredited by the professional family mediation regulatory body, the FMC, should be considered authoritative.

<sup>19</sup> Moscatti highlights the importance of recognizing the various forms of family life, the diversity of gender and sexual relationships, and the range of those with parental responsibility (Moscatti 2020; 2023).

<sup>20</sup> Albie M Davis is one of North America's most visible and articulate exponents of the importance of respect, as much as competence, in the practice of mediation (1984). It was through her efforts that the work of the early 20th-century scholar Mary Parker Follett became recognized as the "mother" of the ADR movement.

<sup>21</sup> The Code of Ethics and Practice of the Mediators' Institute of Ireland (1 May 2021), under Fundamental Principles, S 97, 'Respect', states: "An underlying and fundamental principle of the Mediation Process is respect between the Mediator and the Parties and of the process. If this respect is missing in the process and the Mediator believes that the lack of the respect is or is likely to affect the process, the Mediator may terminate the mediation."

### About the author

**Marian Roberts**, qualified as a social worker and barrister, has been in continuous practice as a family mediator since 1982, focusing on high-conflict disputes over children. She has been involved in the development of the national regulatory professional framework for family mediators and has taught on the LSE Alternative Dispute Resolution (ADR) Law Masters and on the SOAS ADR Law Masters. Her publications include *Access to Agreement: A Consumer Study of Mediation in Family Disputes with Gwynn Davis*; *Developing the Craft of Mediation: Reflections on Theory and Practice*; *A-Z of Mediation*; *Mediation in Family Disputes: Principles of Practice (4th edn)*; *Family Mediation: Contemporary Issues co-edited with Maria Federica Moscati*; and *Comparative Dispute Resolution co-edited with Maria Federica Moscati and Michael Palmer*.

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# CRISS-CROSSINGS OF PSYCHOLOGICAL PRACTICE IN ADOPTION PROCESSES: PRELIMINARY RESULTS OF A FIELD STUDY IN ARGENTINA

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## **Abstract**

Psychologists have acquired an increasingly significant role in the field of child protection in Argentina. Particularly in regard to their participation in the adoption system, psychological reports and interventions have taken great prominence when an exceptional protection measure of family separation is decided or when the adoptability status of a child is under consideration, among other instances. The increasing incidence of intervention by psychologists makes it necessary to analyse the factors that infuse the practices conditioning professional criteria. From a mental health perspective, it is necessary for professionals in the area to be able to provide a reading of the subjective aspects at stake. Based on this, we reflect on the importance of articulating both the children's rights field and the field of the individual subject involved in each case.

This article presents some results of PhD field research conducted in Buenos Aires, Argentina, by analysing qualitative interviews and the retrieval of information from legal files collected from a Civil Court and from several institutions related to the adoption system. It examines various institutional and discursive criss-crossings that affect the work and the viewpoint of psychologists in this area of their activity.

**Keywords:** adoption; ethics; institutions; psychology; subjectivity.

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## [A] INTRODUCTION

This article addresses a question about the roles of psychologists in adoption processes. As a legal institution that establishes filiation, adoption links two different discursive fields: the field of children's rights and the subjective field. At this intersection, the role of psychologists is relevant in the different stages of the adoption process which, in Argentina, go from family separation decisions until the moment a new filiation bond is established through a legal act. Considering the specific reading of subjectivity that psychologists can provide in each case, the central research question is aimed at elucidating the factors that may affect their particular criteria, as well as the general criteria based on the children's rights perspective.

The new Argentine Civil and Commercial Code 2015, Article 594, defines the concept of adoption as:

A legal instrument whose purpose is to protect children and adolescents' right to live and develop in a family that provides care in order to meet his/her affective and material needs, when these cannot be provided by the biological family. The adoption is granted only by means of legal judgment and confers the adoptee the status of son/daughter, in accordance with the provisions of this Civil and Commercial Code.

Currently, in Argentina, the legal declaration of adoptability of children and adolescents is preceded, in most cases,<sup>2</sup> by a legal procedure to separate the child from his/her parents. It is understood that this intervention constitutes an *exceptional protection measure*, according to sections 39, 40 and 41 of the National Law for the Protection of Children and Adolescents' Rights (Law 26,061, Argentina 2005). This law focuses on the rights of children and adolescents, the administrative bodies for their protection, and the protective interventions that must be implemented if the rights of children are violated or in jeopardy. In this context, the exceptional protection measure is the most radical option, since it assumes that other interventions have been carried out beforehand and did not result in the protection of rights. The National Law defines the *exceptional measures*, as follows:

Exceptional measures. These are the measures adopted when children or adolescents are temporarily or permanently deprived of their family environment, or it is in their best interests not to remain in that environment. The goal is that the subject preserves or recovers the exercise and enjoyment of his/her infringed rights, and that those

<sup>2</sup> Other situations in which the adoptability of a child would be declared occur when he/she has been abandoned and his/her filiation cannot be determined, or when the child's parents have died and his/her birth or extended family is unknown or are unable to take care of him/her.



violated rights are satisfactorily repaired. These measures are limited in time and can only be extended while the causes that gave rise to them persist (Law 26,061, section 39).

In cases in which the cause that triggered this intervention cannot be reversed—and therefore the child cannot return to his or her biological family, and there are no extended family members capable of caring for the child—adoptability shall be declared.

In this regard, a survey conducted by UNICEF (United Nations Children's Fund, originally known as the United Nations International Children's Emergency Fund) in Argentina established that the procedure of family separation generally is initiated by the violation of children and adolescents' rights, including family violence, abuse, neglect, child labour and so on (Ministerio de Salud y Desarrollo Social de la Nación & UNICEF 2018, 2022). This information is relevant, since family separation, as an exceptional protection measure, takes place, as a necessary antecedent, in the adoption process of children and adolescents.

Once the court has come to a decision to pronounce the adoptability status of a child or adolescent, the search in the Unique Registry of Aspiring Guardians for Adoptive Purposes begins, first in the registry from the place where the child lives and, if there is no matching result, the search will be extended to the other provincial records (Article 613 of the new Civil and Commercial Code 2015).<sup>3</sup>

As an institution, adoption consists of a long string of professional and institutional interventions towards children and their families of origin. It is during this process, in a variety of roles, that mental health professionals intervene at different stages. On this occasion, we will analyse some aspects that feature in the practice of psychologists who work in this very particular field that can affect, not only psychologists' point of view about a particular situation (Salomone 2017), but also the circumstances surrounding the legal procedure to separate a child from his or her parents and the criteria that support its enforcement, sometimes impinging on the framework of children's rights present in the spirit of current legislation. In addition, some factors that are not usually included in such studies, but are nevertheless valuable for a comprehensive understanding of the problem, have also been identified.

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<sup>3</sup> Election of the guardian and intervention of the administrative body. The judge who declares the adoptability status of a child selects the intended adopters from the list sent by the Registry of Aspiring Guardians for Adoptive Purposes.

## [B] PSYCHOLOGICAL PRACTICE IN ADOPTION PROCEDURES—THE READING OF SINGULARITIES

Psychologists work in a variety of institutional spaces that comprise the child protection system. In Argentina, particularly with regard to adoption processes, psychologists can intervene through different pathways, for example as members of the technical teams from various government offices,<sup>4</sup> as well as mental health crew in hospitals or other organizations for the protection of children's rights (in the form of non-government organizations). Their interventions often consist of assessments, recommendations and reports about the violation of rights that a child or adolescent could be suffering and requesting the enforcement of protection measures.

Not only in relation to protection measures, but also in the subsequent stages related to the adoption process itself, psychologists play significant roles. For instance, once the adoptability of a child or adolescent has been declared, they are involved in performing assessments of prospective adopters and choosing the most appropriate families to adopt the children in question.

But what about the child's feelings during this process? Based on actual cases analysed in the fieldwork, it is worth noting that, on occasions, the child involved can face conflicting feelings—contradictions between the desire for a new family and the fear of losing the link with the family of origin, or the anguish of being separated from siblings, among other possible emotions. It is not always possible for mental health professionals to carry out an evaluation that encompasses the child's subjectivity (Salomone 2017). Different factors can prevent this subjectivity reading from becoming effective, some of them are explicit while others are not so obvious. They are generally related to social representations about ideals of childhood and family archetypes and can influence professional practice, although professionals usually remain oblivious to this.

To address this issue, it is useful to differentiate two aspects of psychological practice: *role* and *function* (Salomone 2011, 2020). On the one hand, a variety of professional *roles* that psychologists play in different institutional contexts can be identified, for example, in the adoption system. In undertaking these roles, psychologists offer technical knowledge from the disciplinary field of mental health, articulated with requirements,

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<sup>4</sup> For instance, the regional Office of Public Defence, the Permanent Legal Guard and the Children Rights local and regional services in the different provinces of Argentina.

proceedings, objectives and even theoretical frameworks from the different institutions where their role is performed. At the same time, a *function* inherent to mental health professionals can be described, which is based on their specific knowledge and expertise about the psychological aspects of the subject and the dimension of mental suffering. Salomone argues that this knowledge implies a responsibility for the protection of those complex subjective aspects that the legal–administrative discourse fails to consider. Hence, the *function* should involve interventions that perceive a subjective dimension that goes beyond the institutionally assigned role: in ethical terms, the performance of the role is expected to include a clinical interpretation that conveys a singular assessment of the situation, which constitutes our professional function (Salomone 2020: 442).

The distinction between *role* and *function* allows us to recognize how essential their articulation is. By articulating the role—institutionally defined—with this particular reading from the mental health field, it is possible to protect the subjective sphere, even in contexts and practices where the rights of the subject are at the heart of the case. Especially, in the legal field, but also in others, where the rights discourse is central, it can be difficult to obtain an assessment of the subjective, psychological and affective aspects of the situation since a reading of the individual in terms of rights is preponderant. In addition to this, as we propose to show here, there are various historical, institutional and discursive factors that may affect the intervention criteria and the ethical position of psychologists (Ellett 2009; Ciordia & Villalta 2012; Benbenishty & Ors 2015; Domínguez 2015; Fluke & Ors 2016; Graziano 2017; Larrea 2021; Villalta 2021).

## [C] METHODOLOGY

### Data Collection

This article is based on an exploratory–descriptive qualitative doctoral research project, the purpose of which is to achieve a global understanding (Gallagher 2008) of the involvement and performance of psychologists in adoption cases, as well as to delve into some other relevant aspects (Bryman 2004), such as the discourses around the rights protection system, in general, and on adoption, in particular, that may influence psychological practice. To this end, our field study included data collection through interviews and document analysis.

## Interviews with Professionals

Eleven psychologists, whose work is related to family separation processes and subsequent adoptions, were interviewed through semi-structured interviews. They belong to different institutional contexts, which comprise the adoption system, such as the National Directorate of the Registry of Guardian Candidates for Adoption Procedures (part of the Ministry of Justice of the Nation), civil courts of the City and the Province of Buenos Aires, the Children without Parental Care team of the Council for the Protection of Children and Adolescents' Rights, the Permanent Legal Guard (which is part of the aforementioned council) and children's residential care institutions. The purpose was to obtain relevant information regarding the practices and discourses that comprise and influence the adoption process, based on the experiences of the interviewees. In this respect, there were some questions common to all interviews, while others arose from what the interviewee expressed. A pre-determined set of open-ended questions was asked, such as: "What is your job like?", "What are your duties and responsibilities?", "What do you think is your contribution, as a psychologist, to the interventions?" and "Have you perceived changes since the implementation of the New Civil Code in your daily practice?" Likewise, more specific aspects were examined through particular questions such as: "Do you think there has been an increase in exceptional measures recently, as a result of the economic and social situation in the country?", "In addressing a case in which a child needs protection in his or her family environment, multiple institutions and a variety of interventions are involved and many strategies are deployed over time. In your opinion, why so often do none of them end up working?", "Within your interventions, have you come across dilemmatic situations that involve the intersection between the subjective and the legal field?"

In turn, these qualitative and comprehensive interviews granted access to the perceptions and discourses of the professionals in detail (Mason 2018), as well as to the understanding of the context of the adoption system and their workspaces (Bryman 2004). In short, discourse analysis allowed us to understand the perceptions that these professionals have regarding the adoption system and facilitated a deeper approach to their experiences in those situations.

Each interview was transcribed, named and numbered as Protocol No 1, 2, 3, and so on, in order to organize the content and facilitate the reading of results. With the purpose of maintaining the anonymity of the participants and the confidentiality of sensitive data, regarding

the interviewee, other professionals, institutional matters, children, adolescents and their families involved in the cases mentioned, we have removed any identifying information from the transcripts and reports, such as names, locations, characteristics of the institutions and so on.

## [D] FINDINGS

### Institutional Criss-crossings

The analysis of the field study has shown that the difficulties in sustaining a reading of subjective aspects, based on the singularities of each case, are not due exclusively to the blind spots of psychologists. The diversity of variables and discursive intersections that intervene, conditioning the practice, must also be considered.

For example, the current Civil Code establishes, among the main changes introduced in the matter of adoption, a maximum of 180 days to resolve the situation of a child who is under an exceptional protection measure, separated from his/her family of origin (Article 607, 2015). In this respect, this modification aims at shortening institutionalization times, as a way of caring for children, thus speeding up adoption processes. However, with this legislation, the possibilities for intervention by the protectional team are limited, reflecting a difference between the timescales of the individual subjects and the judicial timescale, whose logics tend to differ profoundly (Salomone 2011).

Throughout the interviews, the professionals from children's rights organizations reported an acceleration in the timings of the adoption processes, as well as an increase in the number of adoptions in recent years as a consequence of the latest legislative adjustments. Although these legislative changes in relation to resolution times were conceived with the objective of protecting children and adolescents, especially from so-called institutional care, which constitutes an advance in the area of children's rights, at the same time, they interfere in possible earlier interventions performed by psychologists to avoid the separation of children from their birth family and to improve the general situation. Naturally, this kind of intervention requires development time to achieve results. Therefore, the pressure to respond in certain predefined periods bypasses the responsibility of the state towards prevention and to generating strategies aimed at avoiding family separation; on the contrary, it ends up producing "children available for adoption" (Yngvesson 2012), obstructing the professional capacity to intervene in such cases.

Furthermore, the interviews have shown that the option of adoption is indicated, in many cases, as the only possible response to serious family problems. A lack of resources to reverse the said problems and an institutional structure limited in its capacities to intervene and respond have also been highlighted. In this way, the ambiguity of social policy is evident, in that children are removed from their homes instead of assistance being offered to their families (Pena 2014).

The lack of resources and the difficulties in establishing intervention strategies affect the course of a family situation when it comes to court. From the documentary analysis it emerges that several psychological and environmental reports on the determination of the adoption status of a child assert that a proper intervention to improve the family situation would take time and resources that exceed the state's capacity. These statements show that, in order to avoid an overly extensive institutionalization, as required by law, a decision is taken to decree the state of adoptability (in our view, perhaps too hastily). Moreover, one interviewee said that: "There are cases that you already know will end up in adoption" (Protocol No 6), indicating the insufficiency of resources available and, at the same time, showing the preconceptions that influence the outcome of the cases. Another interviewee points out that: "There are families that need to be adopted in their entirety, with adults included" (Protocol No 1), referring to the magnitude of vulnerabilities to be solved and the few resources available.

## Inter-institutional Aspects of Professional Practice

Based on our analysis of the individual interviews, we noted the tensions and difficulties faced in order to come to an agreement and establish common intervention strategies among the different teams of the multiple organizations that constitute the children's rights protection system.

In that context, psychologists are expected to conduct notably different tasks, such as performing assessments, issuing reports and designing strategies to support legal decisions, which are also affected by different institutional variables.

In this regard, a situation highlighted by almost the majority of interviewees is that professionals who are assigned the same tasks and even share the same workspace may have different work environments and terms of employment, and that these have an impact on the interaction between the professionals from the different institutions. This is a consequence of the different types of labour contracts, plus the framework where they are performed (national, municipal or city body),

and if they depend on the Ministry of Social Development, the Ministry of Justice and Human Rights, the Head of Government or the judiciary.

In addition to this, all professionals are influenced by political decisions that affect government institutions, which generates a sense of instability. Changes in government management have a great impact on daily practice, as well as on public spending for child protection policies and programmes. This tends to upset professionals and make them feel insecure because they have to deal with adjustments implemented following the appointment of new leaders of government agencies. This situation of sudden and unpredictable change makes it difficult to improve the performance of institutional teams and inter-institutional relationships because it prevents the establishment of solid labour ties and consensual strategies based on the construction of common criteria. Management changes affect daily work, the team organization and supervision dynamics, among other things, and generate an unstable environment that also affects the progress of cases.

An interviewee remarked:

The network of institutions is characterized by rejection and, somehow, this sets the tone of the network. Most of the teams assume other teams “are not working properly, this is not okay, they don’t know anything”. Once you have worked in several spaces, it can be noticed that the relationship between institutions is very negative (Protocol No 3).

This context elicits certain institutional rivalries, arising from differences in the working conditions and the confusion generated by not knowing who or what institution is the one making the decisions.<sup>5</sup> There are clear disagreements among professionals, which could be detrimental to the relevant shared case, as pre-existing institutional tensions invariably come first. Each institution starts isolating and functioning autonomously, evidencing a lack of collaboration between organizations. The historian Ignacio Lewkowicz stated that “this isolation has a twofold effect. On the one hand, an anarchy in the relationship of the institution with the external setting. On the other hand, a despotic tyranny within the institutions” (2004: 47).

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<sup>5</sup> A legal case can be referred from a hospital to the Council for Children and Adolescents’ Rights, which then requests the judiciary to intervene. Afterwards, the situation is referred to a regional Office of Public Defence, which will request reports from the care facility (in case there are no members of the extended family that could assume the responsibility of caring for that child), the school and other entities that should be considered for the case, in order to inform the judge on its development.

In this sense, the professionals explicitly expressed the frequent difficulties that arise when trying to unify criteria with other intervening institutions. They even implied that the evolution and outcome of a case may depend on circumstantial factors such as the assigned team, the professionals involved, or who the judge is (Salomone & Ors 2021).

A psychologist who works with children during the bonding process between a child and his/her new adoptive family expressed her view as follows:

Each institution and each court have their particular characteristics. They are very diverse and heterogeneous. Some courts are interested in our opinion, intend to develop a deep understanding of the case and want to exchange ideas professionally. However, there are courts with professionals that we do not even know, we don't have access to them, they don't want to share too much information and, as a result, all the exchanges are through official notices and intimations (Protocol No 5).

As mentioned above, establishing a common approach and intervention criteria beforehand is rarely achieved in addressing a specific case. The most common outcome is that each situation is resolved according to the available resources at any given time and according to the points of view of professionals and magistrates that intervene, instead of via a consensual professional criteria. We have already mentioned the great institutional merry-go-round that each case goes through, as well as the professionals themselves, and which has an impact on unstable intervention teams. However, it must also be noted that the children's rights framework of the United Nations Convention on the Rights of the Child 1989 (UNCRC) is the basis of current laws and institutional contexts of the child protection system in Argentina. That is to say, not only the legal system but also professionals acknowledge the guiding principles of the UNCRC that support the implementation of all the rights set forth, such as the notion of *best interests of the child*. The conceptions of the paradigm of rights protection should function as a common ground for decision-making processes. However, the field study shows that there are notable discrepancies regarding the meaning or interpretation of these conceptions. In this respect, one interviewee expressed this view:

There are some intervening organizations where the exchange of information is easier, and others that do not function this way and are more complicated. In my opinion, this has to do with the fact that there are institutions—considering the interventions they do and the strategies they propose—that know more about the child's situation and regard for his/her subjectivity, and there are others that do not work that way. Often, there is no continuity in the outlined strategy, so one thing is proposed, then another, and different strategies are



implemented without thinking much about the reason behind them. For example, from the Office of Public Defence we are told that “the father of X child is here now, so let’s reconnect them”, we ask about the reason: “what for? So that he is placed with him?”, “No, we don’t know”, they tell us. Then ... why? Many of these things happen and make our job very difficult, because children establish uncertain relationships and it takes more time to make a decision (Protocol No 4).

This statement highlights an important and recurring aspect throughout the fieldwork. There is evidence of a certain tension in the decision-making process. There is a perceived stress associated with assuming a central role in the decisions that will certainly affect the family life of both children and adults.

In summary, in observing the working circumstances of psychologists from the adoption system, we have identified difficulties related to the unification of criteria among the different experts, as well as inter-institutional tensions and those related to working conditions. In addition, this role implicitly carries a burden of fearing to assume the responsibility of assessing, analysing, informing and suggesting crucial decisions about the family life of children. We wonder if this fear, which often leads to confusing strategies, is particularly related to these specific professional roles or if it is a consequence of a weak and insecure labour and institutional framework.

In this regard, some studies (Ruscio 1998; Benbenishty & Ors 2015) suggest that proper training and the use of more structured and previously established tools for interventions would help reduce certain inconsistencies originating from institutional, historical and moral influences, which affect the evaluation of children’s rights and interventions to protect those rights. This would avoid prioritizing interventions based on the individual opinions and beliefs of each professional.

However, from this perspective, there could be a risk that assessments and interventions become rigid—eliminating the singular contribution of each professional based on a singular interpretation of the case—and then the possibility arises that the exchange that occurs in interdisciplinary and inter-institutional work loses value, leading to negative results (Munro 2011).

As a result, we need to find a middle ground: how might a consensus among the different teams involved be achieved without automating the professional practice while also preserving the particularity of the case?

## General Logic and Singular Approach

The inclusion of professionals from the field of psychology does not guarantee in itself a reading of singularity (Salomone 2008) during the adoption process. The possibility of a singular, unified approach will depend on the position taken by each professional in the face of the situation and on the professional criteria applied. Reflecting on the position that is assumed and on the decisions that are made configures an ethical position that implies a reading of the singularity at stake and not only a linear interpretation of the norms and action protocols automatically applied to the case (Coler & Salomone 2017).

An aspect of central importance for the analysis of and approach to this issue is the articulation of the subject of rights and the subject of mental suffering (Salomone 2006) in our interventions in the general, logic-based adoption system world, in order to give rise to the subjective particularities, supported by a singular logic.

In this context of multiple variables and discursive intersections, we propose to question our position as the foundation of our praxis, in order to articulate the protection of children and adolescents in the normative field, together with the support of an interpretation that contemplates the singularity of subjectivity.

It has been noted in the review of case files during the fieldwork that the psychological report at the moment of declaring the adoptability of a child or adolescent is extremely valuable, which may also represent a challenging dimension. Frequently, such reports play a leading role since they explicitly recommend either interrupting or not interrupting the biological relationship. Based on the analysis of this information, we have identified a practice gap between the spirit and intentions of the new legislation that affects family situations and the actions taken at the institutional level. In the field of real interventions, there are tensions and contradictions between the regulations and what can be achieved in everyday reality (Villalta 2021). We have described certain circumstances related to the working conditions of the professionals, which have an impact on the difference between what is proposed and what really happens, in addition to the complexity of the particular situation of each case.

Sometimes these circumstances in the exercise of institutionally defined roles for psychologists are naturalized. But, fortunately, in many cases these obstacles and difficulties do not prevent a reflection on their practices. Below, there is an extract from an interview that encompasses

the concerns of many psychologists regarding their work and how it is affected:

Is it possible to meet legal deadlines? I ask myself that question and I always tell myself “it depends”. It depends on the complexity of the situation and its progress. We need to consider if we have six months to intervene in a critical situation or if there has been an early detection of risk or vulnerability. Likewise, we have to evaluate if it was possible to implement the activities during those months and a lot of other factors, such as that if the institution did not have a vehicle or did not have fuel to take the children to the hospital, if there were no vacancies at institutional care, if the family had to start some kind of psychological treatment and did not do it because there were no appointments available, etc. That is why there are other determining factors that go beyond the law. Although the law is well intended and contemplates interdisciplinary efforts and institutional work, in practice it is a whole different story and, generally, the problems that emerge are not the result of the professionals’ intentions, but of the resources they have. As a result, when the deadline approaches, an ethical dilemma arises: “Did we do our job?” We all ask ourselves this question because we know that our decisions are fundamental for people’s lives (Protocol No 2).

Indeed, these are crucial decisions for children, adolescents and their families, both the biological and eventual adoptive families. Family separation, filiation, identity, the right to know one’s origins, to participate in legal processes, to establish new filial relationships, among other issues, are at stake. However, it can be noted that, sometimes, institutional pressure subverts the conceptions that the institutional discourses themselves want to preserve. One interviewee clearly described the conclusions we were able to reach in the field study:

The system collapses, and the teams cannot cope with all the cases. The truth is that, in this context and with a lack of resources, the team cannot offer the family what they need, so they resort to exceptional measures. This happens because professionals cannot or could not work with that family and, if the situation becomes very risky, unfortunately, exceptional measures are the next step to be followed (Protocol No 6).

## [E] FINAL THOUGHTS AND DISCUSSION

In recent years, the Government of Argentina has made enormous progress in relation to the design and creation of national and provincial regulations that promote a greater protection of rights. A wave of new legislative provisions has occurred, which includes the Same-Sex Marriage Law (Law 26,618, 2010), the Gender Identity Law (Law 26,743, 2012), the Women’s Comprehensive Protection Law (Law 26,485, 2009), the Comprehensive

Access to Medical-Assistance Procedures and Techniques for Medically Assisted Reproduction Law (Law 26,862, 2013), the Law on Dignified Death (Law 26,742, 2012), the Comprehensive Protection of the Rights of Girls, Boys and Adolescents Law (Law 26,061, 2005), to name but a few, which have expanded the range of rights currently contemplated.

These new regulations have been accompanied by changes introduced in the so-called ‘new’ Civil Code 2015, which—regarding the particular subject we are addressing here—defines the new guidelines for adoption as a legal institution. These adjustments focus on providing children without parental care with a family and making the child the centre of the legal procedure, considering his or her best interests, according to the children’s rights paradigm. On this basis, the rights and interests of potential adopters are subordinated to those of the child or adolescent in a situation of adoptability. Such legal modifications clearly introduce the notion of the child as a subject of law, and this is the reason why both the issues of children without parental care and adoption processes are addressed in terms of protected rights. Correspondingly, there are multiple existing programmes that seek to protect children’s rights<sup>6</sup> throughout the country.

In this context, our research sought to identify some factors that prevent—within the framework of adoption processes—achieving a comprehensive protection of children: in terms of rights, despite the extensive regulatory and institutional framework that supports them, and in terms of subjective suffering, depending on the difficulties of psychologists’ work.

Based on the results of the field study, we wonder about the possibility of guaranteeing that children and adolescents’ rights are respected and protected, taking into account the factors described above, despite the good dispositions and valuable conceptions of the professionals. During the fieldwork, we mostly interacted with professionals who are highly dedicated to their work and actively participate in the protection of children’s rights. Beyond the circumstances of their jobs, those who have worked for years in the same role demonstrated commitment and attention to their very particular task, dealing with unstable working and institutional environments that lack the necessary resources, which affects interpretations and interventions.

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<sup>6</sup> Such as the Programme for Children and Adolescents without Parental Care, the Zonal Ombudsman Offices, the Permanent Legal Guard, the Registry of Publication and Search for Missing Children, the Department of International Restitution, the Department Against All Forms of Exploitation, the Technical Unit Specialized in Child and Youth Abuse, the National Early Childhood Plan and the Universal Allowance per Child.

On this point, we also noted that the potential for perceiving subjective aspects in the analysis and development of a case is not the sole responsibility of psychologists. In other words, the contribution we can make from our discipline also needs to be accompanied by public policies and the availability of resources to enable this particular intervention. The multiplicity of actors, professionals, programmes, laws and policies with no consolidation or overall structure discourages professionals and hinders strategies for the protection of rights and the subjective field.

In other words, contemplating the subjective aspects in a case intervention is an important part of protecting children's rights. Even though there are highly committed professionals that intend to strive for it, this task becomes extremely difficult when the intersections between the institutional, labour, political and discursive elements affect the possibility of unifying criteria in pursuit of the child's best interests. There is still a need to undertake more work in terms of prevention policies and the designation and reorganization of the state budget for children's rights protection policies and programmes (UNICEF Argentina 2023). In this sense, we suggest that designing early strategies for wellbeing in family life and the implementation of children's rights, with a gender perspective, would promote greater care in childhood and detect possible risk situations in advance, which would in turn reduce the activation of exceptional protection measures of family separation.

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United Nations Convention on the Rights of the Child 1989 (UNCRC)

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# DOING RIGHTS, MAKING CITIZENS: THE PRACTICES OF HIGH SCHOOL STUDENT GOVERNMENTS

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## Abstract

How does the right to education inform respect for citizenship rights, where school education becomes a site of contestation over democracy? Drawing on a review of all documents produced during international reviews of Taiwan's implementation of the United Nations Convention on the Rights of the Child and interviews with members of high-school student governments, in this article, we demonstrate how local educational systems negotiate to meet international child rights standards. We further argue that experiences of being involved in student governments and human rights review processes empower the students, informing them of a future where they feel relevant and responsible in networking and decision-making.

**Keywords:** civil and political rights; Convention on the Rights of the Child; education reform; right to education; school government; Taiwan.

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## [A] INTRODUCTION

School education is essential in helping children socialize to become citizens in a democratic society. At school, students learn communication, teamwork, public speaking, interaction with authority figures, and other vital skills to prepare themselves for engaging in public and private affairs. Ideally, civic education and critical thinking, if offered through formal courses and extracurricular activities within and beyond

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the campus context, should help equip young children with the necessary adeptness to participate in social and political life in the future, such as voting, petitioning, joining a union and political party, and paying attention to public policy debates (Chomsky 2012). Governments also utilize school education as a medium to convey the country's political traditions and culture to students (Meyer & Ors 1992), thereby reflecting on the design of courses and activities, the selection of textbook content, and the "hidden curriculum" between teachers and students (Bennett & Hansel 2008).

Therefore, it is crucial to understand the formulation and reform of a country's education policy, as it determines the children's perception as well as the kind of citizens they are expected to become in the future. The education policy reflects the goals set by the government to be achieved through education. These goals usually depend on the kind of citizens the government wishes to foster (Borman & Ors 2012). Furthermore, it is imperative to understand the implementation of education policy, since many factors could influence the interaction between teachers and students and between students themselves, resulting in the insufficient and unequal distribution of educational resources.

In the language of human rights, the formulation and implementation of education policy includes children's right to education, as stipulated in Articles 28 and 29 of the United Nations Convention on the Rights of the Child 1989 (UNCRC). Article 28 of the UNCRC requires the state parties to achieve various levels of education, from primary through secondary to higher education. Therefore, children should have the right to access all educational and vocational information and guidance. Article 29 of the UNCRC addresses the more fundamental aspects of education policy, depicting five educational goals to be achieved: (a) the development of children's personality, talents and mental and physical abilities; (b) the development of respect for human rights and fundamental freedoms; (c) the development of respect for the children's parents, their cultural identity, language and values; (d) the preparation of children for responsible life in a free society; and (e) the development of respect for the natural environment.

Although the UNCRC expects states to develop their educational policies based on these goals, the states have expressed their preferences regarding the priority of education goals, which must be considered in the context of the local educational system. Hence, the aims of education introduced *from* abroad may conflict with the culture and values built

*from* within (Shee 2019). Being aware of the potential inconsistency, this study explores the practice of the right to education in Taiwan.

More information on how Taiwan adopted the UNCRC is needed here. Taiwan is not a member of the UN but included the UNCRC into domestic law in 2014 through an Implementation Act of the Convention on the Rights of the Child 2014 (last amended 19 June 2019). To monitor the implementation of international human rights treaties, Taiwan has created a system of internal periodic reviewing that mirrors the international reviewing before the International Review Committee (IRC) (Chang 2019). Taiwan has also established a National Human Rights Commission (NHRC) under the Control Yuan in 2020 to monitor the human rights situation in Taiwan (Caldwell 2019).

In each review cycle (every four to five years), the Government submits a state report to the IRC, whereas the NHRC and non-governmental organizations (NGOs) offer alternative and parallel/shadow reports. Following the review of all reports and discussions with different actors, the IRC adopts concluding observations and recommendations for the Government regarding the implementation of the relevant human rights treaty.

When analysing Taiwan's education policy, we consider the role of multiple actors. The Government, the NHRC, NGOs and the IRC have negotiated and collectively determined the aims of education and the direction of Taiwan's education policy. Yet, in practice, students and teachers are considered the primary actors on the ground who achieve these goals. This study identifies the influence of human rights treaties on Taiwan's education reform and the goals behind these policies. Then, it explores how multiple actors in Taiwan interpret and implement the right to education that reflects the kind of agentic citizens the system seeks to produce.

## [B] RESEARCH METHODS

Multiple methods to collect qualitative data were used to understand the formulation and practice of Taiwan's education policy. First, we analysed the documents collected from the two review cycles for the implementation of the UNCRC in Taiwan, including the reports produced by the Government, NHRC, NGOs, child delegates and the IRC's concluding observations. Drawing on the documentary analysis, we considered how various actors' interpretations of the aims of education inform education policy reform.

<b>Respondent</b>	<b>Gender</b>	<b>Year of class</b>
A	boy	sophomore year
B	boy	sophomore year
C	boy	sophomore year
D	girl	sophomore year
E	girl	sophomore year
F	boy	sophomore year
G	boy	sophomore year
H	girl	sophomore year
I	girl	sophomore year
J	boy	sophomore year
K	girl	sophomore year
L	girl	sophomore year
M	boy	junior year
N	boy	sophomore year
O	girl	sophomore year
P	boy	sophomore year
Q	girl	sophomore year
R	boy	sophomore year
S	girl	sophomore year
T	boy	sophomore year

*Table 1: Basic information of interviewees*

Subsequently, to understand the practice of education policy at school, we considered high school student governments in Taiwan as an example to illustrate the complex situations in which students exercise their rights in negotiation with teachers' authority. The National Taiwan University Research Ethics Office (NTU-REC No 202209HS004) approved

a qualitative research protocol, including careful ethical accounts, especially considering potential participants could be teenagers. Semi-structured interviews were conducted with 20 student delegates from 13 high schools (11 boys and 9 girls ranging from 16 to 18 years old, most of whom had been elected as leaders of student government).

Taiwan's senior high school is a three-year education system, in which students are "freshmen" in their first year, "sophomores" in their second year and "juniors" in their third year; basic information about our interviewees can be found in Table 1. These students had first-hand experiences with the school authorities, teachers and other peer students. All the respondents belonged to Taipei City, the capital of Taiwan, to avoid differences in educational policies across counties and cities. Most interviews lasted 1–1.5 hours, while some respondents chose to do group interviews, which lasted between 1.5 and 2 hours.

The interview was composed of two parts: the model of school governance and student delegates' strategies to participate in school affairs. For the first part, we asked the respondents about the attitudes and behaviours of school administration towards student government, such as the principal, directors of different departments and parent delegates. Our interest lay in understanding whether the schools respected student delegates' opinions, considered their views and provided information and assistance for the student government. Furthermore, we also asked about the relationships between the student government and other teachers and students.

For the second part, we asked our respondents about the structure of their organization, its division of power and institution, the challenges they faced while participating in school affairs, and their strategies to respond to school discipline. To avoid the recall bias of our respondents and for narrative triangulation, we also collected posts and meeting minutes from each school's social media pages.

## [C] MULTIPLE INTERPRETATIONS OF THE "AIMS OF EDUCATION"

The UN Committee on the Rights of the Child (the UN Committee) adopted its General Comment No 1 in 2001, identifying various issues with respect to the aims of education, including human rights education, prevention of overemphasis on the competition for further education, student participation in school affairs and prohibition of corporal punishment and the student grievance mechanism. General Comment No 1 also

mentions children's right to non-discrimination (Article 2) and the right to be heard (Article 12), considering that the right to education does not exist independently but is interrelated and interdependent with other children's rights. However, this documentary study found that the IRC's recommendations influenced Taiwan's Government's selective emphasis on educational policies, while the NGOs were found to have identified a broader range of issues related to the aims of education.

According to UN Committee General Comment No 1, the state shall pay equal attention to all issues concerned; however, the Taiwanese Government has been selective regarding the problems it addresses in the state reports. On the contrary, the NGOs have taken a more inclusive approach to education reforms that sometimes went beyond the concerns of the IRC and were thus overlooked by the Government and the NHRC. In the following sections, we focus on two issues mentioned in NGO shadow reports—human rights education and non-discrimination education.

## Selective Gaze at Human Rights Education

As the means to cultivate children's respect for human rights, human rights education is one of the essential components mentioned in the UN Committee General Comment No.1. The states must provide human rights education, teaching children about international human rights treaties and informing them of how human rights standards are practised in everyday life. In the first state report concerning the UNCRC in 2016, Taiwan's Government mentioned establishing a "Human Rights and Civic Education Mid-Range Plan" under the Ministry of Education (MOE), integrating human rights education into primary and secondary school curricula (Child and Youth Welfare and Rights Promotion Group 2016). In 2019, the MOE announced the implementation of the "Curriculum Guidelines of 12-Year Basic Education", thereby standardizing the curriculum for high school and below. It included human rights education, and teachers were encouraged to incorporate this concept into different subjects. Training on human rights education for teachers and the development of relevant teaching materials were also included in the second state report.

Surprisingly, no NGOs mentioned human rights education in their shadow reports. The only report that touched upon this issue was the alternative report submitted by the NHRC, which was concerned with the practicality and effectiveness of the Government's proposal (NHRC 2021). The NHRC urged the Government to revise current curriculum guidelines rather than simply adding human rights education as a



critical topic to radically rebuild human rights-based curricula. In its concluding observations, the IRC (2022) also emphasized human rights education, acknowledging Taiwan's effort to promote awareness of human rights among schoolchildren. However, the IRC also recommended that students should have the opportunity to exercise their rights in school.

Nevertheless, with little mention of human rights education, NGOs provided abundant case studies and observations concerning the rights of students from marginalized and vulnerable groups, such as sexual and gender minority students, Indigenous students, and students with disabilities. Although Taiwan has often been considered the leading country in Asia in terms of gender equality (Lee 2011; Brysk 2021), NGOs reported profound hostility in school contexts against gender minority students. For instance, high-school teachers included anti-LGBT content in homework and exams (Taiwan Association for Human Rights, Covenants Watch & Taiwan Alliance to Promote Civil and Partnership Rights 2017); influential parent delegates pressured textbook publishers to delete content about gender equality (Taiwan CRC Watch 2022); and students were reported being bullied due to their gender expression and sexual orientation (Taiwan CRC Watch 2017). These issues remain common despite the requirements of the Gender Equity Education Act 2004 (last amended 16 August 2023).

Indigenous students and students with disabilities have also experienced similar situations. Under the Education Act for Indigenous Peoples 1998 (last amended 20 January 2021), the Government should subsidize schools to provide multilingual and multicultural teaching to promote students' cultural identity and respect for cultural diversity. However, according to NGOs' shadow reports, the efficacy of implementing these policies has not been as positive as claimed by the Government (Lima Taiwan Indigenous Youth Working Group 2017). A significant challenge lay in the shortage of teachers for Indigenous languages, and the MOE and the Council of Indigenous Peoples were not active in addressing the issue until recently. Meanwhile, students with disabilities have also faced several issues, such as being rejected by schools or treated inappropriately at school. The NGOs have reported low attendance rates of disabled students, and, for those who do attend school, reasonable accommodation and inclusive education remain gravely lacking among schools at all levels despite the rules provided by the Special Education Act 1984 (last amended 21 June 2023) (League for Persons with Disabilities 2022).

Generally, it was found that the Government has been passive and selective regarding education policy for human rights and non-discrimination, although it is essential for realizing both Articles 2 and 29 of the UNCRC. The insufficient attention from the state reports is primarily due to the IRC's attitude. In its first concluding observation, the IRC mentioned the integration of human rights education, encouraging the Government and the NHRC to elaborate further on the issue. Therefore, the education reform for human rights awareness was emphasized in the second review cycle. Yet, the IRC mentioned little about non-discrimination, and the Government and the NHRC have paid limited attention to the issue. Therefore, on the construction of the right to education, the IRC has a strong authority in agenda-setting, which, both directly and indirectly, has influenced the Government's attention to specific policies.

## Half-Done Work for the Right to Education

In addition to selective attention to human rights and non-discrimination education, it is also vital to examine whether Taiwan's educational policies have realized the goals outlined in Article 29 of the UNCRC. A systematic review of all relevant reports found that, despite the state's emphasis on several legal amendments, the NHRC, NGOs and IRC have commented on the insufficiency of changes in law without substantial transformation in practice. In this regard, we focus on student's participation in school affairs and regulations on teachers concerning school discipline.

Students' participation in school affairs should be viewed as the conjunction of the right to participation (Article 12) and the aims of education (Article 29) under the UNCRC. Article 12 requires states to protect children capable of forming their own opinions to express their views and give them due weight within the decision-making process. At schools, Article 12 recognizes students' right to establish a student government, elect student delegates to participate in school councils and express their views about school affairs such as curriculum review, dress code and so on.

In its first state report, the Government mentioned student delegates' right to participate in school meetings according to the Senior High School Education Act 2013 (last amended 26 May 2021). However, NGO parallel reports argued that the participation quota of student delegates is not equivalent to the state fulfilling the obligation to protect the right to participation (The Guardian–National Association for Children and Family 2022). This is because in most high schools, the

student governments did not have a complete organizational structure and rules of procedure, and most students did not receive any training and experience to operate such an organization. Without the school's assistance and support, students could only rely on the experiences passed on from previous delegates. Another problem experienced by student governments concerns the power inequality between teachers and students. Although many teachers in Taiwan have learnt to treat students as human rights-holding subjects and respect their opinions, many students, who are regarded as not mature enough by many teachers, are still excluded from participating in school affairs. Student government members often fear expressing their opinions at school council meetings or are not provided adequate information to form their opinions. The NGOs are concerned that student delegates might become "tokens" of student participation (Hart 1992) yet lack substantial opportunities to participate. The IRC (2017) was also concerned with the operation of student governments, recommending that the Government supervise the independence and efficiency of student governments.

Following the initial review of the implementation of the UNCRC, the Government has adopted measures to foster the effectiveness of student government. In 2018, the MOE formulated the "Guidelines for Senior High Schools to Give Counsel on the Operation of Student Councils and Other Related Self-Governing Organizations", which required senior high schools to provide necessary assistance to student governments. In 2021, the Government amended the Senior High School Education Act 2013, requiring the proportion of student delegates to be no lower than 8% and giving student delegates the right to propose, discuss and vote. For students below junior high school, their right to participate in school councils is now also respected and ensured by the Protection of Children and Youths' Welfare and Rights Act 2003 (last amended 20 January 2021). In concluding observations regarding the second review, the IRC (2022) further discussed students' participation in reviewing curricula while appreciating the Government's efforts in promoting student governments' operations.

Article 28(2) of the UNCRC, in conjunction with Article 29, set up strict limitations for the states to regulate school discipline. Taiwan's Government only mentioned a few regulations prohibiting corporal punishment in its first report, whereas the NGOs and the IRC questioned their implementation. The NGOs criticized the Government for requiring students to learn non-violent behaviours while still subjecting them to a violent environment (Taiwan CRC Watch 2017). Students from vulnerable

groups had a higher tendency to be bullied by classmates who imitated teachers' ridicule and discriminatory attitudes and behaviours. The IRC (2017) stressed the importance of student grievance institutions, urging the Government to build an independent, confidential and safe mechanism for students to complain and appeal. Students should have a voice in the grievance mechanism and should be able to elect third-party representatives for monitoring.

The Government provided further details regarding school discipline in its second report (Child and Youth Welfare and Rights Promotion Group 2021). It mentioned the amendment to the "Directions Governing the Regulations on Teacher's Counselling and Discipline of Students" in 2020, prohibiting teachers' use of corporal punishment. The Government also required schools to establish a Student Grievance Review Committee to handle students' appeals and launch a survey among students regarding corporal punishment at school. The NHRC (2022) reminded the Government of the complainer's rights to know during the grievance procedure, including the right to acquire investigation reports and learn the outcomes.

By utilizing the examples of students' participation in school affairs and discipline, we demonstrate the gap between the Government and civil society's comprehension of the achievement of the goals of education. For the Government, ensuring the quota of student delegates in the school council was sufficient to fulfil its obligation concerning students' right to participate. However, for NGOs and child delegates, the student government in most schools lack a complete organizational structure, training and resources to function adequately. The power inequality between teachers and students creates another barrier for student delegates to express their views in front of teachers and the administration. Similarly, the Government paid meagre attention to school discipline in the first review, only mentioning the prohibition of corporal punishment. On the other hand, the NGOs and the IRC alerted the Government that corporal punishment is still prevalent, and that the Government should take responsibility to improve student grievance mechanisms.

Despite the Government's initial passive attitude to student rights, we have observed the influence of NGOs and the IRC on shaping the Government's agenda and actions. Following the reviews, the Government has come to recognize student delegates' right to actively participate in school councils and requested school authorities to provide necessary assistance. It has further established stricter regulations on school

discipline, along with a series of commitments to implement student grievance mechanisms. Therefore, since the internalization of the UNCRC in Taiwan, we have witnessed the increasing impact of NGOs and child delegates on fostering an environment wherein the right to education is reconceived and realized as per international standards.

## [D] LEARNING HOW TO GOVERN AND BE GOVERNED AT SCHOOL

In the forums of international reviews of the implementation of the UNCRC in Taiwan, the construction and interpretation of the right to education inform all relevant actors of contested imaginations of the pursuit of democracy. However, the manner in which students in Taiwan experience and exercise such a right at school also deserves attention. Are students' experiences at school correspondent with the reports? Are there inconsistencies between Taiwan's educational policies and their implementation?

Informed by Lundy's (2007) conceptualization of Article 12 of the UNCRC regarding children's right to be heard and drawing on interviews with members of high-school student governments, we present how students perceive their learning about rights and governing and how they negotiate the reality of being governed. Emerging from the coding process of our qualitative data, we identify two models of school governance based on the students' narratives: "democratic school governance", where school authorities respect students' participation and empower students to become active participants in school affairs; and "non-democratic school governance", where the authorities oppose or exclude students from participating and dissuade them from challenging teachers' authority. Schools' governance styles impact the extent to which the right to education is related to students' understanding of citizenship rights.

### Learning to Get Things Done Democratically

A school environment is democratic when teachers and students establish an equal and reciprocal relationship in the school context. The administration of democratic governance, providing necessary information and resources for student delegates to form their views, respects students' participation in school affairs and pays attention to their opinions. Moreover, the executive leaders actively consult with student delegates to promote the reform of school policies. As illustrated by one of the respondents, the director of the Student Affairs Office in

her school took the initiative to discuss with student delegates about mandating a later school start time:

He might have heard from the news that some people proposed to the public policy platform, calling for the MOE to cancel the self-study time in the morning. Instead of waiting for the MOE to amend the regulations, he thought it would be better for us to discuss them first. It will cause less trouble if we change our rule first (Respondent I).

Another respondent mentioned working with the Director of Student Affairs to cancel the school's morning assembly since the director considered that "it's meaningless to redo such an event after a year of cancellation during the pandemic" (Respondent J). The director allowed J to put this policy reform into his political agenda to ensure that other students could recognize the student government's effort to promote students' benefits. J recalled that the teachers respected his opinions without pressuring him from a superior position.

Respecting students' opinions does not necessarily mean full acceptance of their thoughts; however, it does require teachers to provide students with reasonable responses when rejecting their proposals. One of our respondents mentioned being rejected by teachers when proposing an amendment to the school lunch ordering policy. Most students in Taiwan have their lunch prepared by the school; however, in recent years, more and more schools have allowed students to make their orders by themselves. Nonetheless, in Respondent H's scenario, teachers rejected the student delegates' proposal because there could be a risk of food poisoning, which the school would be held accountable for, and, thus, the administration needed to be more careful. In addition, the school was afraid that self-ordering would increase the disparity between students from families of various income levels. H considered these arguments reasonable and further discussed with the teachers how to improve their policy proposal. While teachers are willing to respect students' participation, they expect students to take responsibility for their actions as well as the actual and potential consequences.

Although most teachers and students (outside the student government) in a more democratic school environment may not be familiar with the operations of the student government, they have designated channels to put forward their opinions to student delegates. Through friend groups and personal networks, as well as leaving anonymous messages on the social media pages of the student government, the ways of expressing an idea are diverse. At some schools, students strictly supervise the student government and provide anonymous criticism on social media. One of

our respondents mentioned another student organization in their school that often criticized the student government for its lack of effectiveness.

They criticized us for too much emphasis on hosting activities and networking events with other schools rather than fighting for students' rights and interests. We discussed whether to respond to them, but our director said they have the right to express, and we should consider taking some of their suggestions (Respondent L).

Under democratic school governance, student delegates are empowered to form and express opinions, supervise school policies, and pressure the authority through various means. Respondents P and Q belong to the same school, being the president and vice president of the student government, respectively. They mentioned their experience in revising the constitution of their student government to expand its size and promote its status to be equal to that of other school departments. Due to their involvement in student governments, these student delegates better understand school regulations, Taiwan's education system, and how to interact with the authorities. They have also learnt how to use student grievance mechanisms to resist school discipline, such as filing a complaint to the municipal or county education bureau or revealing their concerns on mainstream or social media or through NGOs to seek public attention and generate social pressure. They have also become actors with a higher human rights consciousness. As previous studies have found, they are now more capable of identifying potential violations of student rights due to unreasonable school policy (Jerome & Ors 2015).

## No "Rights" Talk at Non-Democratic Schools

Contrary to the democratic environment, non-democratic school governance indicates an almost unchallengeable, ostensibly hierarchical, top-down power relationship that exists between and is actively maintained by teachers and students in the school. Teachers may even exclude students from participating in school affairs; their intervention could start as early as the election of student delegates. One of our respondents, the student government president at his school, was asked by the Office of Student Affairs regarding his potential policy proposals during his campaign: "The teachers wanted to know if my proposals would contradict school policies and tried to convince me to give up those that would" (Respondent A). In A's scenario, he defended his proposals by referring to the student government's regulations, arguing for the legitimacy of his policies that should not be changed.

The teachers in a non-democratic school environment might not directly reject students' participation in public affairs, but they employ various methods to hinder their substantial participation. These methods include refusing to provide information, delaying responses to students' requests, and scolding students for disrespect. Respondents B and C once argued with teachers about their school's newly launched student clubs' evaluation policy. The evaluation outcomes would have affected a club's budget and the number of new members it could recruit in the new year. Our respondents recalled that the responsible officers continuously delayed providing information regarding the policy. When the policy was announced, the administration even planned to implement it without consultation. Respondent B commented:

The evaluation measure was obviously problematic and potentially violated students' rights. For example, the standards for evaluation were not transparent. What punishment would the president receive if a student club rated at the bottom of the review? After we raised our concerns, the director of the students' association office finally decided to postpone the implementation of the evaluation, but we're still arguing with the teachers about amending it (Respondent B).

Another method teachers utilize to interfere with the student government's operation is by controlling its budget. Student governments often require large sums of money to organize student activities, such as the prom or holiday party. While some student governments can raise funds by selling tickets and self-designed souvenirs, others were prohibited from engaging in profit-making activities and could only rely on school funding and space. In the democratic context, teachers tend to provide assistance and resources for the student government with reasonable conditions, such as budget supervision and monitoring and maintenance of the space and facilities. In the non-democratic context, however, teachers review the student government's fees and limit its budget items and funding sources in advance to control what the student government can or cannot do.

One teacher strategy that the students generally found hard to negotiate is the discourse regarding the more significant impact of academic performance than "temporary" school life—particularly often seen at private high schools, which are well-known for their stricter regulations and disciplining system for strong academic reputation (Chou & Ching 2012). Respondents M, N and O, all coming from a famous private high school in Taipei, reported that the director of the Student Affairs Office forbade student delegates from participating in school council meetings. The director was "worried" that letting



student delegates participate would “provoke” the principal and parent delegates, thus hoping that they only express their opinions through indirect communications. Protested by the student government, the director argued that students should focus on studying instead of paying too much attention to school affairs. “You’re going to be here for only three years,” said the director, “the good or bad of this school has little impact on you. What has the greatest impact on you is the university you attend and the future direction of your life.”

Students in non-democratic schools, rather than resisting teachers’ counterarguments and fighting for their right to participation, tend to accept, even though at times ambivalently, the legitimacy of teachers’ discipline and limited involvement. Most private school students tend to agree that the strict regulation was exactly what attracted them to enrol in the first place. These students and their parents are willing to pursue stable and anticipated better academic performance at the cost of limited free time and freedom. Student delegates in this context were forced to employ various discourses in their struggles. Instead of talking about student “rights” (thus implying obligations) and risking irritating the authority, they often reframe the issue based on student “benefits” (up to the authority’s understanding and kindness) to negotiate with the teachers.

I view student rights as a privilege, not a fundamental right. Our teachers don’t support student rights. If we talk to them about “rights” every time, our communication will turn into a fight, and they will reject us. Therefore, I tried to explain to them non-offensively—it’s not about what the law says but about what the school can do to benefit both teachers and students. I learned from this school that it’s easier to promote rights if we don’t talk about rights (Respondent M).

## [E] CONCLUSION

In this study, we have identified that the internalization (incorporating international law domestically) of the UNCRC has influenced relevant actors’ (such as the Government, NHRC, NGOs and child delegates) contested ideas of the aims of education. While the Government dominates the formulation and reform of educational policy, it has considered the observations and recommendations from other actors, particularly the IRC, composed of international child rights experts. By reframing and discussing school issues in the human rights language, we have argued that school students have gradually become recognized as human rights-holders under the UNCRC and other international human rights treaties.

We have further witnessed the impact of human rights discourse on teachers and students, as well as the relationships between them. Teachers in democratic schools have realized the significance of respecting and promoting students' participation in school affairs and empowering them to actively participate in striving for students' rights. However, a few students from non-democratic schools are still deprived of their right to participate and be heard. Teachers have employed various strategies to reassert their authority and control, and students, especially those not involved in student governments, are "convinced" to accept limited participation. This phenomenon represents a tension between the international child rights standards and local educational institutions in Taiwan. However, student delegates have voiced concerns about this issue, and the Government should consider addressing it.

This study has demonstrated how students' involvement in school and public affairs equips them to express opinions and inform them of a future where they can feel relevant and responsible in decision-making. Factors such as school governance may influence education as a means of making agentic citizens, resulting in a gap between aims and practice. Despite legal requirements regarding necessary assistance from schools, non-democratic school governance persists, suggesting inequalities in exercising the right to participation among schools and, hence, between students. Some students are more prepared to become active citizens, whereas others lack the opportunity to engage in politics. Considering the nexus between education and citizenship-in-the-making (Pashby 2011), the right to education should be weighed alongside other civil and political rights (eg the right to equality and the right to be heard). With multiple actors involved in "realizing" children's rights in Taiwan, strategies that can close the gaps between norms and reality and between institutions require close attention.

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## ADOPTING A RIGHTS LENS TO CHILDREN'S TRAINING IN FOOTBALL ACADEMIES\*

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### Abstract

Sporting issues are increasingly the subject of legal intervention in the United Kingdom and elsewhere, but the effect of commercial pressures on young football players remains largely unaddressed. Underpinned by an empirical assessment of the English Premier League's self-regulation on youth development matters, this article argues in favour of the need to adopt a rights-based approach to children's involvement with professional football academies. Based on data gathered through almost 80 semi-structured interviews across England, the analysis concentrates on stakeholders' awareness of children's rights and how they influence football academies. The article concludes with policy recommendations to ameliorate the issues identified.

**Keywords:** children; football; children's rights; sports; Premier League.

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### [A] CHILDREN IN PROFESSIONAL FOOTBALL ACADEMIES

Children all over the world are extremely enthusiastic followers and players of football. Football—similarly to other sports—has great positive potential and contributes to development, tolerance, respect, empowerment of individuals and groups, and promotion of health, education, social inclusion and employability (Council of Europe 2001; 2018; 2020: 16; Expert Group on Good Governance 2016: 3, 6).

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Nonetheless, football is also plagued with serious issues that have been the object of extensive research, such as corruption, discrimination and violence (Cashmore & Cleland 2014; Cleland 2015). And while some unethical practices in professional football make the headlines, other equally or more disturbing malpractices go unnoticed.

Children can be particularly hit by the allure of professional football. Media popularity and expected high earnings make children enthusiastic players and followers of the “beautiful game”. Those hoping to become professional footballers may join football academies owned by, sponsored by, or somehow affiliated to football clubs. These academies exist across Europe and beyond, and—despite subsisting differences between them—are increasingly homogeneous in their aims to develop players for first teams, promote players’ personal development and obtain financial profits (Relvas & Ors 2010). In the English context, children are sometimes recruited and start training at a very young age—as young as three through “pre-academy” schemes, “junior academies” and “satellite academies”—sometimes supported in some way by a professional club, and have the expectation of becoming professional footballers in the future. One organization’s staff member we interviewed estimated that there are up to 10,000 children across the football academy and centre of excellence system at any single moment. It is thus essential to analyse current conceptions of youth development and player welfare and the links between welfare and performance in the English football academy system.

Football academies in English football find their historical origins in the 1950s youth departments of football clubs and have suffered radical changes since then owing to the increased marketization of football and the creation and positioning of the Premier League in the governance of English football (Guy 2020: 531–532). All aspects of football academies are now regulated in great detail. Children and parents alike appreciate the attention, feeling special, and enjoying a sense of identity and pride, the standard of play, the quality of professional coaching, the level of organization and structure, playing with like-minded children of a similar ability, the discipline, social activities, and the high-quality training facilities that they can access by being connected with a football academy. To use the words of a child we interviewed, football is “massively important” to many children in England and around the world. Another child also told us that playing with an academy “was the best thing that ever happened to me”. Yet, concerns arise when deliberate practice of football becomes *the* or one of the main (professional) activities of a child. Indeed, participants in our research expressed concerns about the



physical, psychological and social pressures of high-performance sport on individuals who have not reached maturity, like this organization's staff member:

RESPONDENT. Whichever sport you are in, the higher up you go in the ladder, you are more at risk of all forms of harm. So, professional sport is an area of risk generally. The scale of football and the amount of money in professional football adds a huge other dimension in terms of pressures on young people. ... The tension is between producing excellent footballers and getting the best and doing that in a way that is child-centred and values the child as a whole person.

Furthermore, the commercial exploitation of children's and their families' interest in the football sector has become such that there are virtually no limits to what may be offered and promised: "you then get private companies, you know, of 'toddler football', and these private companies saying: 'give me your two-year old and I will teach them good football skills'. You know, it is just bonkers!"

Both children and families often have experiences with football academies that leave them "bitter"—to use the words of a parent with whom we spoke. An academic thus concluded that:

RESPONDENT. Football, because of the size of the contracts, is taking people from their normal peer group, their normal activities, and putting them into a quite different world. So, that is happening during a part of your formative years, so it's bound to have an impact on your development, on your education, on your relationships with your peers, with your family, and whoever else.

In England, talented male children are initially pulled into the football industry through an extensive network of scouts operating across the country, and subsequently recruited into the world of professional football through sports academies, through the use of government-financed traineeships. English football academies draw high levels of interest from male children, even though football academies have been characterized as failing young players on a number of fronts: allowing high levels of attrition (in other words, the proportion of players who leave the academy system) coupled with poor promotion of professional alternatives (Stewart & Sutherland 1996; Monk 2000; Monk & Olsson 2006); promoting lack of critical attitudes in relation to football as a life choice; and cultivating dismissive attitudes towards the value of schooling in comparison to playing football and disruptive over-masculine "lad culture" (McGillivray & Ors 2005; Parker 2000). Educational and occupational issues in the professional football academy system have also been on the radar of the National Society for the Prevention of Cruelty to Children and the Footballers' Further Education and Vocational Training Society, which

have been proactive in seeking positive change. Results achieved have only been partially successful, though.

There is still insufficient research into the impact of children's involvement with football academies on children's welfare and rights, with most literature in this field focusing on sexual abuse, thus leaving largely unexplored a range of other important issues (Expert Group on Good Governance 2016: 7). This article addresses questions on the impact of children's involvement with football academies on children's welfare and rights. More specifically, it offers a methodologically and theoretically original contribution to childhood and sports studies by putting forward a strong argument in favour of regulating children's sports activities through a children's rights lens, and assessing the awareness of children's rights by stakeholders in the world of football academies in England on the basis of new empirical data.<sup>1</sup> This research usefully complements other studies carried out in relation to other sports, jurisdictions and age groups.

We wish to contribute towards a more robust system of child protection in elite competitive sports, which will consequently secure better psychological and physical development of children involved with sports academies and professional football traineeships in the future. With this purpose, we employed both theoretical analysis and empirical methods to offer a qualitative, socio-legal discussion of our subject-matter. We adopted a mixed-methods approach entailing a thorough documentary analysis of relevant instruments and regulations, as well as interviews concerning the welfare experiences of children in high-performance football environments. This included 77 in-depth semi-structured interviews over a period of 26 months,<sup>2</sup> with a very broad range of participants: 14 child footballers (ranging 8-14 years old), 1 current adult footballer (18 years old), 3 adult ex-footballers, 26 parents of footballers ranging 8-18 years old, 1 house parent,<sup>3</sup> 15 staff members of football academies, 13 staff members of other (regulatory, third sector and civil society) organizations, 4 academics, and 1 journalist. This range of participants was linked to 12 academies that were sponsored by clubs in the English Premier League

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<sup>1</sup> The fieldwork unearthed a range of other themes that will be discussed in a longer piece of work, including children's participation, discrimination, physical and psychological wellbeing, private and family life, play, leisure, rest, education, transfers between academies/clubs, and risk of economic exploitation.

<sup>2</sup> Fieldwork took place between October 2013 and December 2015. The fieldwork started after obtaining ethics approval: Ethics approval No RETH000632 by the University of Liverpool.

<sup>3</sup> House parents are individuals who host child footballers, generally older teenagers, when they are away from their own families, owing to the distance between their homes and the football academies where they train.

at the time the interviews took place, thus corresponding to 60% of the Premier League-sponsored football academies.

All interviews were transcribed and analysed qualitatively with the assistance of the software NVivo. An inductive and thematic content analysis approach was adopted. To minimize inter-rater variability, interview segments were openly coded according to emerging themes by the two researchers, discrepancies resolved and segments grouped into broader thematic priorities. All quotes and other interview material used have been anonymized to the extent necessary to avoid any participant from being identified. Participants are only referred to on the basis of the capacity in which they were interviewed.

In section [B] below, we argue that children's experiences in sports activities, in particular their involvement with football academies, should be regulated by a children's rights framework. In section [C], we assess the awareness of children's rights by stakeholders in the world of football academies. Finally, in section [D], we put forward some recommendations to improve the current state-of-affairs in relation to rights awareness.

## [B] ADOPTING A CHILDREN'S RIGHTS LENS

The Council of Europe, in its 2012-2015 Strategy for the Rights of the Child, highlighted the need to ensure that children's involvement with sports occurs on ethical bases and that children's human dignity, integrity and safety be at all times safeguarded, including by promoting adequate sport pedagogy and coaching that respect children's development. Whilst only being one of several elements to be considered, legal frameworks play an essential role in achieving these aims.

We therefore favour the adoption of a strong legal perspective, more specifically, a rights perspective of children's involvement in the football academy system. The alleged "autonomy of sport" has often placed the sport sector in tension with fundamental rights. Although interventions by public authorities should "primarily complement" the actions of the sports movement (Council of Europe 2001: Article 3), "questions can be asked" to sports organizations, especially when athletes' fundamental rights may be in jeopardy (Council of Europe 2021). Indeed, stronger public intervention may well be warranted in the context of commercial enterprises such as Premier League clubs and sports people under the age of 18.

Our starting point is that children's involvement with football academies is a matter of rights (as well). As Brackenridge points out, the failure of sport

“to engage in rights debates has left it vulnerable, at best, to accusations of naivety and frivolousness and, at worst, to charges of negligence and discrimination” (Brackenridge 2007: 31). This has prompted various initiatives to raise rights-awareness in sports people and organizations, such as the International Olympic Committee promoting a rights culture at the 2018 Youth Olympic Games (Special Rapporteur on the Sale and Sexual Exploitation of Children 2018: paragraph 112). As it has been acknowledged, we need to ensure that “fundamental rights of children are promoted, protected, respected and fulfilled within professional sport” (UNI Europa, World Players Association & EASE 2017: Preamble III). It is thus important to understand to what extent the current English football system takes into consideration the rights of the children it aims to develop into the next generation of professional footballers, and what scope for improvement there is in the current football policy framework to ensure those rights are respected.

The cornerstone of our analytical framework is the United Nations Convention on the Rights of the Child (UNCRC),<sup>4</sup> which the United Kingdom (UK) signed in 1990 and ratified in 1991. This rights perspective will enable us to unearth dimensions of children’s involvement with football academies so far largely unexplored or not systematically dealt with. The UNCRC includes a range of civil, political, economic, social and cultural rights. These can be grouped under four categories, also known as the four Ps: participation, protection, prevention and provision. The UNCRC can also be said to have four transversal or guiding principles: the right to non-discrimination; the principle of best interests; the right to survival and development; and the right to participation (Committee on the Rights of the Child 2003). All four transversal/guiding principles inform the interpretation and implementation of all other UNCRC rights, as well as each other (for example, the right to development should be implemented in light of the right to non-discrimination (Peleg 2019: 97-98)).

The principle of best interests can be found in Article 3(1) UNCRC, which states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. This wording entails the application of this norm not only to the actions and omissions of state agencies, but also to the activity of private entities with responsibilities in the field of children’s rights (van Bueren 1995: 46). This is thus something that should also

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<sup>4</sup> Adopted and opened for signature, ratification and accession by the General Assembly, Resolution 44/25, A/RES/44/25, 20 November 1989.

occur in all aspects of the regulatory framework applicable to football academies. Crucially, the Committee on the Rights of the Child is very clear about the fact that there is an:

obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the *private sector*, including those *providing services*, or *any other private entity or institution* making decisions that concern or impact on a child (Committee on the Rights of the Child 2013a, paragraph 14(c), emphasis added).

This interpretation places all stakeholders in the world of football, including all those in football academies, squarely within the personal scope of these obligations. Although children's "best interests" may be a flexible notion that needs to be applied in light of specific circumstances, there is no doubt that they need to be given "high priority" and are not "just one of several considerations" (Committee on the Rights of the Child 2013a: paragraph 39). The importance of the principle of best interests for young footballers is clear from the assertion of the European social partners of the sport sector that "the best interests of the child shall be the guiding principle for the involvement of children in sport" (UNI Europa, World Players Association & EASE 2017: VII.C), something reiterated by the Special Rapporteur on the sale and sexual exploitation of children (2018: paragraph 121).

Additionally, the right to development, enshrined in Article 6 UNCRC, has gained increasing prominence in the work of the Committee on the Rights of the Child, but states parties to the UNCRC still have considerable leeway as to how to interpret it, thus escaping strict requirements and obligations (Peleg 2019: 94). Article 6(2) UNCRC states that: "States Parties shall ensure to the maximum extent possible the survival and development of the child." The right to survival can be more easily understood, but the right to development is more dynamic and it can be defined as the:

right of individuals, groups, and arguably peoples to participate, contribute to and enjoy continuous economic, social, political and cultural development in an environment in which all human rights can be realised ... [including] concepts of equality of opportunity and distributive justice for all including children (van Bueren 1995: 293).

The right of the child to development thus includes the right to an adequate standard of living, as well as the right to develop to a level that will enable children to benefit from the exercise of all other rights to which they are entitled (Himes 1995; van Bueren 1995: 293). Closely connected to children's right to health and welfare, a child's right to development

indeed also brings to the fore several other rights, such as the right to social security, the right to an adequate standard of living, the right to education and the right to play and leisure (Peleg 2019: 119)—the latter two being of particular importance to children involved with football academies.

UNCRC Articles 6 (on the right to survival and development), 12 (on the right to participation), 27 (on the right to an adequate standard of living) and 32 (on the right to protection from economic exploitation) have been read in a combined fashion to promote the concept of “maximal development”, which requires from states the obligation to provide children with the best services and conditions possible in light of the resources available (Marks & Clapham 2005: 25). Accordingly, the UN General Assembly has called on all members of society to “promote the physical, spiritual, social, emotional, cognitive and cultural development of children as a matter of national and global priority” (General Assembly of the United Nations 2002: 4). While the exact scope of the right to development is dependent on the level of the socio-economic development of each country, it is clear that the (relatively) high standards of living and economic development in the UK justify a duty to provide all children in the UK with a very high standard of socio-economic conditions and legal protection.

To the four guiding/transversal principles, we should add the principle of evolving capacities, reflected mainly in Article 5 UNCRC. A combined reading of this Article with Article 12 (on the right to participation) and 14(2) (on freedom of thought, conscience and religion) recognizes children’s progressive autonomy on account of their developing capacities, age and maturity. Although the application of this principle presents some challenges owing to cultural, social and economic variations, it constitutes a crucial transversal principle, thus illuminating the application of all other children’s rights.

Both UNCRC rights and their transversal principles should apply to the field of sports, including football, as recognized by UN bodies (Special Rapporteur on the sale and sexual exploitation of children 2018: paragraph 126). Even if the UNCRC only directly binds states, it informs the regulation of private–private relationships (such as child–football academy) and can be drawn upon to adjudicate conflicts in those contexts (Ferreira 2011: chapter 1). Moreover, private entities, such as businesses, can negatively impact children’s rights and are therefore under the obligation to also respect the UNCRC, which may require state regulation of businesses to ensure compliance with the Convention (Committee on the Rights of the Child 2013b: paragraph 9). Furthermore, UN bodies clearly advocate

in favour of adopting the UNCRC, along with its Optional Protocols, as core standards in the world of sports (Special Rapporteur on the sale and sexual exploitation of children 2018: paragraph 133).

Several international documents in the field of sports governance are underpinned by rights language, such as the UNESCO International Charter of Physical Education, Physical Activity and Sport, whose Article 9.1 requires sport activities to take place in an environment that protects “the dignity, rights and health of all participants” (UNESCO 2015). Importantly, Article 9.2 of this Charter specifies that harmful practices to be avoided include “discrimination, racism, homophobia, bullying, doping and manipulation, deprivation of education, excessive training of children, sexual exploitation, trafficking and violence”, which are all themes that have emerged to various extents throughout the fieldwork that informs this article. The Council of Europe International Declaration on Human Rights and Sport, known as the Tbilisi Declaration (Council of Europe 2018), also calls on public authorities and organizations to respect, promote and protect human rights in the field of sports, and the Guidelines on Sport Integrity refer to the fight against discrimination and respect for internationally recognized human rights (Council of Europe 2020: 13). FIFA (Fédération internationale de football association) has also acknowledged its obligation to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights, including in relation to children (FIFA 2017: 5; Ruggie 2016). The Football Association shows awareness of the principle of best interests and children's rights—including as set out by the UNCRC—by making reference to these in its safeguarding children policy and pledging its commitment to them (Football Association 2020a: 6).

It is therefore beyond doubt that a rights perspective is essential in relation to the involvement of children with the world of football. Nonetheless, it remains to be seen how much such a rights perspective is familiar to the stakeholders involved in this field.

## [C] (LACK OF) AWARENESS OF CHILDREN'S RIGHTS

Despite the importance of children's rights for the world of sports, English football authorities' familiarity with child players' rights seems to be very limited. Although the Football Association has issued a guidance note about the players' rights in football, it only relates to 16 to 17-year-olds (Football Association 2020b). This seems to either overlook the large number of younger players (from under 9s up until scholars' age) who

are effectively under professional academies' management, or makes one wonder whether young players are seen as not having rights, not valuing or having an interest in rights, or not having the capacity to understand rights. Even the rights that 16 to 17-year-olds are made aware of are quite limited and reframed in simplistic terms, as they only refer to feeling safe, having healthy relationships, not being bullied, not feeling uncomfortable, and not being discriminated against. Important as these are, they do not really reflect the range of legal norms in force.

More generally, there seems to be a lack of awareness of children's rights amongst stakeholders in the world of football. A staff member of a football organization candidly acknowledged that although their organization was familiar with the UNCRC and regulations were child-focused, particularly giving children a voice, UNCRC rights besides the right to participation did not particularly come up in discussions and meetings. An academic confirmed this state-of-affairs by asserting the focus on policy rather than rights:

RESPONDENT. No, I don't think children's rights come up a lot. In academic circle discussions, yes, they certainly do. From the clubs, no, I cannot say I can ever recall anybody in the football industry in 10 years talking, for example, about the rights of the child or the UN Convention. It just doesn't happen. It's all very much "right, what do the regulations not allow you to do?" So, no, rights of the children and human rights generally, this is stuff that in the football industry, probably only FIFA ... and supporter groups will talk about. Something that is very rarely mentioned by governing bodies and never mentioned by clubs.

Another academic went further by stating that, although there is talk about individual players' expectations and the need to respect them, when it comes to "rights talk", "I'm not aware of that terminology, but that doesn't mean it doesn't happen." This tallies with what the staff member of an organization told us about "rights talk" in the football industry: "I don't know anyone who has ever mentioned [children's rights] to me ever." A coach recognized this lack of awareness of "rights talk" in the world of football academies in forceful terms:

RESPONDENT. I have been in numerous coaching courses over the years ... and nobody really talks about the UN Convention of the Rights of the Child, for example. I think people in football don't even know it exists. And I think one of the clauses, I think it is 3(1), talks about governments—because it is an international agreement of governments—that the welfare of the child ... that people's got to do what it is in the best interest of the child and these things are the most important thing. And yet sometimes I wonder whether it actually happens.



Even when interested in a rights perspective in the world of football academies, participants sometimes required further training to be able to articulate that perspective in a more effective way. A staff member of an organization, for example, said that: "I talk about it [rights]. I've got two or three colleagues I network with all the time who are working in academies in the London area, we talk about it a lot." Yet, when asked which rights did they have in mind in this context, they replied "I don't know enough about rights, I'm just talking about as a, you know ...".

There also seems to be a good dose of hostility against the language of rights amongst some stakeholders. As a journalist told us: "Never about rights. In fact, if you as a parent, if you mention what are our rights here? The one thing they will show you is the door usually." This hostility is compounded by the fear that, according to the staff member of an organization, is instilled in parents:

RESPONDENT. So, to me their basic rights which a kid should have but nobody is allowing them to voice those rights, because their mom and dad are not going to shout. What about if a mom and dad shouted and objected, what do you think would happen? The kid would get ditched. The kid would be going: "what did you do that for, I've now lost my opportunity!"

A parent seemed to cede to this environment hostile to rights by suggesting that by entering into an agreement with a football academy, a child is to a certain extent renouncing their rights. Asked about the way the academy system dealt with children's rights, they replied: "I think the choice is still there, the choice is always there to do it or not to do it, it is just once you have signed that paper."

Even when sympathetic towards rights, some participants found that emphasis should be on overall policy and rules, with rights remaining in the background. As the staff member of an organization told us:

RESPONDENT. When you ask about children's rights, I think they have to be entrenched within ... rules and regulations surrounding welfare, rules and regulations surrounding safeguarding, implicitly their rights. There isn't a charter of children's rights, although a lot of clubs, a number of clubs will have their academy charter which will tell each player, and parent, what their, what the club, you know, I suppose what their commitment is in terms of what they will provide, but there is also, they will tell you what, you know, your responsibilities are ... Children's rights you know, we are looking for that in the wider society not just in football, aren't we really...

So, while there may be clear statements on what football academies will take responsibility for offering, that is generally not framed in terms of the rights of the children affected but rather as a commitment in exchange

for certain obligations placed on the children. This clearly risks diluting the importance of children's rights in the world of football academies. An academic expressed this concern by stating that:

RESPONDENT. In many aspects it [football system] does infringe [children's rights]. ... now, I do not know the human rights law well enough, but there is ample evidence to say that what they are doing is not good and wholesome sport, as is supposed to be done in the United Nations Charter [Convention of the Rights of the Child].

There is thus a need to move from a charitable approach to policy and practices to a rights-based approach that recognizes the fact that children are rights-holders and not simply recipients of the optional kindness of adults. An organization's staff member expressed this in the following terms:

RESPONDENT. The things that would be possibly missing or needs a bit more emphasising in academies is that children have a right to be treated in a certain way. It's not just that it's a nice thing to do and it's good for people and we want to be good people—that is their human right that they are not bullied, that they are safe, that they have a voice, that people listen to them, that they are housed in a place that's safe with people who have been checked. That's actually what they have a right to ... and I think that ... that's a slightly different attitude than just saying we should do these things because they are good things to do or because the government has told us to. I think it's about their basic kind of human right as a child.

A coach thus rightly argued that training offered should include material on children's rights:

RESPONDENT. Do they know about the UN Convention on the Rights of the Child? Well, for me, it should be on every coaching course. There should be a course, there should be a module, you know, children have rights, you know? They have a right to education, they have a right to enjoy their lives, they have the right not to be abused if the system abuses them in any way. And if it is, can/do you recognise it? You know, where you stand on it? Do you think about these things?

A greater awareness about legally enshrined rights could, indeed, help reduce the seriousness of some of the issues that we have identified during our fieldwork, including in relation to child players' rights to physical and psychological integrity, private and family life, play, leisure, rest, education, freedom of association, and freedom from economic exploitation.

## [D] MUCH SCOPE FOR IMPROVEMENT

Most people working at football academies undoubtedly invest considerable time and effort in offering young players a positive experience, with an academy staff member telling us that “[e]ven when they walk away from here, I want them to walk away enjoying the time they had here”. Yet, children’s involvement with football academies is plagued with a range of serious shortcomings, and these are largely underpinned by a poor awareness of children’s rights and a sense of normality that dates back to the Wilkinson reform in 1997, when the “practice” of removing talented young players from representative schools and youth football clubs and into academies run by professional clubs started in earnest (Wilkinson 1997). It is thus essential to take measures to increase stakeholders’ awareness of children’s rights in the world of football and ensure that children’s rights are respected throughout their involvement with football academies.

To achieve these aims, first, once children get involved with the academy system, it is crucial that they be embedded in a child-centred talent development scheme framed around children’s rights and needs, rather than one that focuses excessively on finding the next great footballer at the expense of their—and their families’—wellbeing. For this to happen, more emphasis needs to be placed on the children’s and their families’ rights to information, participation and being consulted throughout their time at academies. For example, children’s participation can be enhanced by carrying out regular wellbeing surveys and asking young footballers to use logbooks to record their experiences, concerns, learning reflections and suggestions, thus ensuring coaches and academies receive useful feedback and the players’ voices are heard (Ecorys & Vertommen 2019: 83).

Second, at a more fundamental level, the overall culture of football talent development in England needs to be revisited so as to operate a shift from hyper-masculine, managerial styles to child-centred and participatory values. Such a cultural shift needs to be underpinned by strong rights awareness-raising, alongside education and training efforts to promote sport integrity, child-centred policies and non-exploitative practices (Council of Europe & European Union 2021b; Ecorys & Vertommen 2019: 4). Rights awareness-raising, in particular, can take the form of means that are more engaging and appealing for young people, such as phone apps supporting young people’s familiarity with rights and safeguarding issues (Council of Europe and European Union 2021a). It is also fundamental that—as the Sporting Chance Principles point out—

lessons on how to enhance human rights respect in sport activities be “captured, disclosed and shared in transparent ways to raise standards and improve practices” (Advisory Council of the Centre for Sport and Human Rights 2018: principle 7).

Third, to supervise a reform to the football talent development system in England, as well as adequately oversee and punish football clubs’ violations of children’s rights (Special Rapporteur on the sale and sexual exploitation of children 2018: paragraph 125), greater regulatory authority and resources need to be put in place, especially to ensure that children’s rights are always considered and enforced in this context. Football governing bodies need to overcome their resistance to external scrutiny and reforms, and the Government should have greater willingness to intervene and combat unethical and illegal behaviours (Council of Europe 2020: 77). Additionally, policy reforms and regulatory enforcement need to be informed by the views of young players and their families, in consonance with the right to participation of these key actors (Council of Europe 2020: 44). This is in line with the Tbilisi Declaration’s commitment to use governmental/non-governmental partnerships and multi-stakeholder platforms to develop measures that address human rights violations in sports (Council of Europe 2018), as well as the emphasis of the Sporting Chance Principles on collective solutions and coordinated action to address human rights challenges and align the world of sports with international human rights standards (Advisory Council of the Centre for Sport and Human Rights 2018: principle 9). This is also consistent with the need to ensure child-sensitive information, advice, advocacy, remediation, shared responsibility, effective remedies and grievance mechanisms in the context of business-related human rights violations (Special Rapporteur on the sale and sexual exploitation of children 2018: paragraph 30; Committee on the Rights of the Child 2013b: 71). Such an increase in regulatory oversight is aligned with the recommendation of the Committee on the Rights of the Child that regulatory agencies should be strengthened and endowed with the powers and resources they need to ensure respect for children’s rights, as well as investigate complaints and enforce remedies for possible violations (Committee on the Rights of the Child 2013b: 61(a)).

European social partners in the sport sector seem committed to ensuring child safeguarding and rights through the use of ethical guidelines, codes of conduct, protection policies and monitoring tools (UNI Europa, World Players Association & EASE 2017: Article 3c), d), e)). That high-level commitment needs to translate into more effective regulatory frameworks, enforcement mechanisms and overall ethos

in the world of football talent development. Only thus can children in the world of football truly fulfil their potential and enjoy their sport journeys while seeing their rights respected and themselves not being treated as commodities. As the Committee on the Rights of the Child reminds us, implementing children's rights is not a "charitable process, bestowing favours on children" (Committee on the Rights of the Child 2003: paragraph 11). Although the brief recommendations put forward above go against the grain of what English football talent development is currently about, all stakeholders should be determined to collaboratively foster a more children's rights-centred approach to football academies. Such recommendations and children's rights-centred approach can only benefit the practice of football in the long run and, more broadly, contribute to effective and ethical sports governance and law by upholding all participants' rights and welfare to the greatest extent.

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United Nations Convention on the Rights of the Child 1989 (UNCRC)



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## CHILD Q, SCHOOL SEARCHES AND CHILDREN'S RIGHTS

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### **Abstract**

The troubling case of “Child Q”, regarding a black girl who was strip-searched at her school while on her period in 2020, highlighted the discriminatory and often brutal treatment experienced by young people at the hands of the police. This commentary considers the response to the incident, focusing on the local authority’s use of a children’s rights framework to assess the actions of both police and schoolteachers. It compares the scrutiny of police powers to stop and search minors in public with the lack of focus on powers to search pupils in schools, noting the potential for disproportionality and the need for systematic data collection. It draws attention away from the focus on individual police failures and towards systematic problems with disciplining school pupils, focusing on suspicions about drug use—and the smell of cannabis specifically—as a potential source of inequitable outcomes.

**Keywords:** drugs; racism; education; policing; exclusions.

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### [A] INTRODUCTION

The case of child Q concerned a 15-year-old black girl who, in late 2020, experienced a humiliating and distressing strip search at the hands of police officers at her school in London. The search involved the exposure of her intimate body parts, with the knowledge that she was menstruating, and took place without an appropriate adult present as required by statutory guidance (Home Office 2020). Teachers thought that Child Q smelled of cannabis, although she denied possessing any drugs. They searched her bag, blazer, scarf, and shoes but found nothing illicit. They then sought advice from the police who visited the school and conducted the strip search. Child Q was so distressed after the incident that she was referred for psychological help. In September 2023, it was announced that three Metropolitan Police officers would face gross misconduct hearings over the incident (Rawlinson 2023), whereas the Independent Office for Police Conduct (IOPC) called for a review of policing powers relating to the strip-searching of children (IOPC 2023). In this

article, I ask whether the responses from different stakeholders to the incident, and particularly a local safeguarding review that was guided by a children’s rights framework, were sufficiently attuned to the potential for discriminatory and unjust treatment at all stages of the disciplinary process.

The case prompted concern and anger among the local community, as well as wider debate and research about the incidence of strip-searching. According to a subsequent report by the Children’s Commissioner for England (2023), 2,847 children aged 8-17 were strip-searched by police forces in England and Wales between 2018 and 2022. A quarter involved a child aged between 10 and 15 years old, over half (52%) took place without an appropriate adult present, and 38% were carried out on black children. In response to an urgent question in Parliament in 2022, Kit Malthouse, the Minister for Crime and Policing, said the case was “both troubling and deeply concerning” and that “this experience will have been traumatic for the child involved; the impact on her welfare should not be underestimated”.<sup>1</sup> Other Members of Parliament, including Bell Ribeiro-Addy, considered the incident as an example of racist degradation in line with the over-policing of minority populations by London’s Metropolitan Police. Research has drawn attention to the particularly damaging consequences of stop and search on black teenagers (Flacks 2018; 2020). In 2021/2022, almost 18% of all stop and searches in England and Wales were conducted on those aged 10 to 17. Seventy were carried out on children under 10. Just 9% of these stop and searches (and only 7% of drugs searches) resulted in an arrest (Home Office 2022).

The local safeguarding review into the incident had a mandate to consider it in light of the United Nations (UN) Convention on the Rights of the Child 1989 (CRC) and concluded that a number of provisions had been breached (Gamble & McCallum 2022). In the discussion below, I pay particular attention to this review, noting that it endorsed the initial teachers’ decision to search Child Q—despite finding flaws in subsequent events—and found it to be compliant with the CRC. I suggest that the lack of focus on the school search was significant and reflects a general lack of attention directed towards the potential racialization of school disciplinary measures. It also points to the centrality of illicit drugs within mechanisms of governance and surveillance, both at school and in public, and their role in authorizing incursions into young people’s privacy and even bodily autonomy. I conclude that these deeper and broader questions need to be further interrogated in order to uncover the

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<sup>1</sup> HC Deb, 21 March 2022, volume 711, column 138.

factors that contributed to the humiliation of Child Q, turning attention to the deficits in disciplinary oversights that exist in schools rather than simply the failure of two police officers to comply with guidelines on the presence of appropriate adults during strip searches.

## [B] POLICE STOP AND SEARCH

Although there has been much less scrutiny of searching practices within schools and other educational establishments (Parpworth 2017), police powers in relation to “street” stop and search have long been subject to criticism in the field of criminology because of the ways in which members of black and ethnic minority communities are disproportionately targeted (Bowling & Phillips 2007; Equality and Human Rights Commission 2010; Human Rights Watch 2010; Stopwatch 2013). Studies have found that stop and search can damage relations between police and citizens and lead to criminality due to processes of labelling and deviancy amplification (Bradford 2015; 2017). Using data from a survey of Londoners aged 14 to 16, Bradford & Ors (2022) suggest that the consequences of procedurally unjust stop and search experiences may run deep. They found them to be associated with lower levels of trust in the police, higher levels of involvement in and exposure to gang-related activities, and the belief that it is acceptable to harass females in public space and control intimate partners. In addition to criminological critique, the stop and search of under-18s in the United Kingdom (UK) has been subject to criticism from human rights bodies. The UN Committee on the Rights of the Child, responsible for implementing the CRC, has repeatedly asked the UK to ensure stop and search checks are proportionate, taking into account the age and maturity of the child and principles of non-discrimination, and to more systematically collect data (Committee on the Rights of the Child 2016, 2023).

Nevertheless, a succession of Home Secretaries and police chiefs have defended use of the powers, arguing that they fulfil a “necessary” function in preventing crime, despite a lack of evidence to support this contention (Flacks 2020). For Bradford and Loader, such fictions persist because they “form part of a legitimization strategy which maintains that stop and search is in principle controllable, measurable and that the will exists to control it and assess its effects” (2016: 32). Minority victimization by the police is therefore framed as an accidental or necessary consequence of police tactics, or perhaps a failure of governance or the result of individual “bad apples”, rather than as a central characteristic of the racial state (Martinot & Sexton 2003). It has been argued that the maintenance of disproportionate stop and searching can be understood as an investment

in imprisonment, social exclusion and segregation as solutions to the insecurities of the advanced liberal order (Flacks 2020).

Recall that Child Q was initially stopped in a school corridor because it was thought that she smelled of cannabis. The College of Policing's Authorised Professional Practice (APP) advises against apprehending individuals on the basis of the smell of cannabis alone (College of Policing 2022). This corresponds with guidance issued by both the IOPC (2022) and His Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS), which has stated:

on its own the smell of cannabis on a person provides only weak grounds. This is because there could be legitimate reasons why a person might smell of cannabis—close recent contact with a person using cannabis for instance (HMICFRS 2021: 37).

Distinctions are not made between adults and under-18s. In spite of this guidance, recent research by Grace & Ors (2022), on factors influencing police decision-making in cannabis possession offences, found that three-quarters of public searches in their sample were conducted due to the sight or smell of cannabis. The individuals most likely to be policed for cannabis possession were young and ethnically minoritized. Interviews with police officers as part of the study suggested that the smell of cannabis could, in the words of one participant, serve as “a gateway to try and discover other offences that you cannot readily search for” (ibid: unpagged). A third of the officers interviewed thought that smell alone was sufficient to conduct a search, in spite of the APP guidance.

This is not to suggest that stopping and searching school pupils does, or should, mirror practice on the streets, or that the powers available to teachers are/should be analogous to those of police officers. However, as discussed in the next section, teachers have been given more power in recent years to conduct searches, including where drugs or alcohol are concerned, despite objections from children's rights advocates. There remains a lack of data and guidance on such practices, and research on police stop and search suggests a potential for disproportionality and the need for greater scrutiny.

## [C] POWERS TO SEARCH CHILDREN IN SCHOOL

There has been considerable interest in recent years on the disproportionate exclusion of children from some social groups, including minority backgrounds and those with mental health problems

and other additional needs (DfE 2019). However, behaviour has long been a dominant discourse within education, reflecting broader societal fears about crime and social disorder, as typified by drug use and knife crime (Ball & Ors 2012: 100). Behaviour policies are also one of the ways in which schools, within an increasingly marketized and competitive education system, can present themselves as attractive choices for parents (Kulz 2014). According to Ball & Ors (2012: 106): “Discipline is big-money business and the rhetoric of ‘crisis’ helps produce a market opportunity for the private sector to support the—in this discursive construction, ‘failing’—public sector.” Neville Harris (2014: 4) argues that the result is that “reforms of recent years have ... promoted the interests of schools ... over pupils who misbehave”. Such reforms have included increased powers to search pupils for prohibited items, despite objections from children’s rights advocates.

As indicated above, the Child Q incident occurred after teachers at her school expressed concern that she smelled strongly of cannabis. Under the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA) (section 242), the powers of school staff to search students (or their possessions) without consent were extended to include drugs, as well as weapons. At the time, a report by the Joint Committee on Human Rights (JCHR) concluded that the Government had not provided sufficient evidence to explain why these measures were necessary (JCHR 2009: 40-42). During a reading of the Bill, the Secretary of State responsible for schools, Ed Balls, explained that the measures were required “to ensure that teachers have the powers that they need so that they can get on and teach in the classroom”.<sup>2</sup> In a subsequent debate, it was acknowledged, apparently with approval, by the Conservative opposition that the Bill would make police involvement in schools more likely.<sup>3</sup> It was only in the House of Lords that the Bill faced significant opposition. Baroness Walmsley said that: “Teachers should not be seen as an extra arm of the Ministry of Justice”;<sup>4</sup> whereas Baroness Sharp said: “It is an important issue, and it is important that we recognize children’s dignity and privacy. It would be lovely if we could see the UN Convention on the Rights of the Child incorporated into British law.”<sup>5</sup> The Child Rights Alliance for England (CRAE) noted that the enlargement of powers under the ASCLA went ahead in the absence of any evaluation of the use of existing search powers within schools, as recommended by the Practitioners’ Group on School

<sup>2</sup> HC Deb, 23 February 2009, volume 488, column 28.

<sup>3</sup> HC Deb, 5 May 2009, volume 233, column 127.

<sup>4</sup> HL Deb, 2 Jun 2009, volume 711, column 116.

<sup>5</sup> Ibid column 197.

Behaviour and Discipline (CRAE 2009). Provisions under the Convention on the Rights of the Child require that “school discipline is administered in a manner consistent with the child’s human dignity” (Article 28). The Committee on the Rights of the Child has also asked the UK Government to: “Systematically and regularly collect and publish disaggregated data on the use of restraint and other restrictive interventions on children in order to monitor the appropriateness of discipline and behaviour management for children in all settings, including in education” (Committee on the Rights of the Child 2016, paragraph 40).

Despite the relatively muted opposition to the introduction of stronger powers to search, further plans—under the Education Act 2011—were soon tabled to extend powers even further to include any item that was prohibited by the school. The CRAE argued that this constituted a “significant intrusion into children’s privacy ... which must be shown to be necessary and proportionate in order to be lawful” (2009). The CRAE called for a review of the use of existing powers and disaggregated data on students who had been searched. In a further debate on that Bill, Baroness Walmsley said:

I think that searching affects the fundamental relationship between teachers and pupils, which changes from one of trust, about preparing the child for its future life at work and in the family, to one of policing ...<sup>6</sup>

A report by the Children’s Commissioner for England into strip-searching, released in 2023, found that both searching and strip-searching had deleterious consequences for school pupils. According to one former pupil:

I was being searched every single day at school [by teachers]. ... I then felt isolated from everyone that I was the odd one out. I was the one that was being made to feel like a criminal. Although when I was first being searched, I wasn’t actually a criminal and it was the fact of the pressure that the school was putting on me and because of the people I hanged about with that then actually led me to take drugs (Children’s Commissioner for England 2023: 24-25).

Neil Parpworth (2017) has pointed out that guidance on police stop and search is relatively detailed in comparison to guidance for teachers, particularly in terms of what constitutes “reasonable suspicion” and when the use of force might be appropriate. The DfE reviewed and updated its guidance on searching, screening and confiscation following Child Q, placing more emphasis on safeguarding and the rights of the pupil during and after a search (DfE 2022). However, there is no further guidance on

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<sup>6</sup> HL Deb, 14 June 2011, volume 728, column 670.

what might constitute reasonable grounds for a search, or the potential for some pupils to experience searches disproportionately and for there to be unconscious bias on the part of teachers. It is now a requirement that data is collected on police stop and searches (College of Policing 2020), but schools are only “encouraged” to record searches, including information about which pupil was searched and the reasons for doing so. Moreover:

Schools who conduct a high number of searches should consider whether the searches fall disproportionately on any particular groups of pupils by analysing the recorded data. In such cases where searching is falling disproportionately on any group or groups, they should consider whether any actions should be taken to prevent this (DfE 2022: paragraph 46).

The guidance is unclear on how exactly schools should monitor potential disproportionality. There is also no expectation that this data be made public so that schools can be accountable in the same way as other public sector bodies such as police forces.

## [D] THE SEARCHING OF CHILD Q

An important, yet largely overlooked, factor in the Child Q case was the grounds for her initial searching. The discovery of drug use, possession or supply in school—and sometimes off school grounds—is likely to lead to temporary or permanent exclusion (Flacks 2021). As indicated above, pupils from minority backgrounds are disproportionately likely to be punished in this way. Black and mixed Caribbean and Gypsy and Roma pupils are particularly vulnerable to permanent exclusion compared with white British pupils (DfE 2023). However, there is considerable variation in how schools discipline students for matters involving drugs. According to a study of school drugs policies (Flacks 2021), the question of “drugs” is itself contentious, with some schools including asthma inhalers and herbal remedies within the definition. It also found that descriptions of the nature of the threat from drug use/possession tended to be ambiguous and related to the reputation of the particular institution (and perhaps its position in the league tables within a marketized education system) as much as the precise risks posed to pupils. The result is that penalties for drugs infractions are likely to vary widely from school to school, with some pupils subject to permanent exclusion as a consequence of “zero tolerance” policies, whereas others may benefit from a less punitive approach.

The Local Child Safeguarding Practice Review into Child Q by the City of London & Hackney Safeguarding Children Partnership (Gamble

& McCallum 2022) found that Child Q's rights had been violated in a number of respects, but not in relation to her initial search. The Review lays out its terms of reference at the outset:

- Was the rationale and practice to strip search Child Q sufficiently attuned to the rights of children as set out in the relevant articles of the United Nations Convention on the Rights of the Child?
- Was practice involving Child Q sufficiently focused on her potential safeguarding needs?
- Is the law and policy, which informs local practice, properly defined in the context of identifying potential risk and furthermore, does law and policy create the conditions whereby practice itself can criminalise and cause significant harm to children? (paragraph 1.12)

In Finding 1, the Review praised the actions of the school, concluding that it was:

fully compliant with expected practice standards when responding to its concerns about Child Q smelling of cannabis and its subsequent search of Child Q's coat, bag, scarf and shoes. This demonstrated good curiosity by involved staff and an alertness to potential indicators of risk (*ibid* paragraph 1.16).

The Review went on to find that other factors, in addition to the smell of cannabis, justified the stop and search of the student. They were that it was a "repeated incident" (teachers had suspected that she smelled of cannabis one month previously); there was "additional context about someone known to Child Q"; and there was a potential risk posed to other pupils in the school by the possession of drugs (*ibid* paragraph 5.11). It found that decision-making thus far complied with Article 3 (best interests) and Article 33 of the CRC. Article 33 states that:

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

The Review emphasizes that school staff can search a pupil, even without consent, where they have reasonable grounds for suspecting that the pupil may have a prohibited item, and that the actions adhered to Article 8 of the European Convention on Human Rights 1950 which permits interferences with the right to privacy on certain grounds (Gamble & McCallum 2022: paragraph 5.14). The review did state that the government's guidance, "Searching, screening and confiscation—Advice for headteachers, school staff and governing bodies, DfE, January 2018" should be improved with



“stronger reference to the primary need to safeguard children” (paragraph 5.16), rather than focusing primarily on discipline and only mentioning the police in respect of external agencies to contact (ibid paragraph 5.51).

The lack of critical scrutiny of the initial decision to apprehend and search Child Q, and the use of children's rights provisions to justify the search, was significant. To take first the question of the initial search, it is reasonable to be concerned about pupils smelling of cannabis and—as the Review makes clear—in line with established safeguarding practice. In addition to concluding that a search was appropriate and consistent with children's rights provisions, the Review found that the concerns about Child Q smelling of cannabis should have resulted in contact with “external agencies” (Gamble & McCallum 2022: paragraph 5.41). Instead, the focus was on the breach of rules rather than “what the alleged substance misuse might mean for her safety and welfare” (ibid paragraph 5.42). A month earlier, when Child Q also reportedly smelled of cannabis, the school contacted her mother and warned that further instances may result in exclusion (paragraph 2.13).

However, a focus on Child Q's welfare could have prompted more reflection on whether the search was necessary and reasonable in the circumstances. As the Review makes clear (Gamble & McCallum 2022: paragraph 5.48), the smell of cannabis alone should not constitute “reasonable grounds” for a strip search. If it is enough to warrant the searching of a school pupil's outer clothes, there needs to be more guidance on the basis for such a search. For example, smell should not constitute grounds for further intelligence-gathering by teachers in relation to other potential behaviour issues, nor be used for the primary purpose of disciplining rather than safeguarding. The Review did not consider what safeguarding in relation to suspected cannabis use might mean or involve in order for the action to have been proportionate and justified. However, given the potential for disproportionality and unconscious bias, as well as right to privacy considerations, teachers might be advised in future to consider factors such as the age of the pupil concerned, their ability to accurately identify the odour, and whether certain pupils are more likely to be searched than others. They also might consider whether a conversation with the pupil would be more beneficial, and respecting of their dignity, than an interference with their privacy rights.

It was notable that the justification for the initial search was premised on the potential risk posed to other school pupils who required protecting from drugs (paragraph 5.11). However, the Review did not go on to explain these risks, and nor does Article 33 say anything further about

the needs for measures to be, for example, proportionate—as discussed further below. Although not explained, it appears that teachers may have been concerned that Child Q might have been supplying cannabis to fellow pupils, rather than, for example, a victim of exploitation, since no call was made to social services either in this incident or when teachers previously suspected she smelled of cannabis. Again, questions might have been asked about whether the smell alone, along with undefined information about an individual’s peer group and the fact that it was a repeated incident, constituted sufficient grounds for this suspicion. If this does not fully explain how other pupils might be at risk, then there is a need for more explicit policy and safeguarding guidance in order to balance a pupil’s individual rights with concerns for protecting the school body. Again, given the dearth of data on school searches, we do not know whether disproportionality exists, but minority students are more vulnerable to temporary and permanent exclusion from school. The disproportionality in both police stop and search practices and school exclusions suggest a need for such school searches to be more systematically monitored, including stronger expectations on schools to collect and publish data, in case of any unfair targeting of specific social groups.

### Article 33 and the Use of Children’s Rights

The use of the CRC as a guiding framework for the Review was innovative. However, a child rights-based approach should involve a complete review of relevant provisions, rather than “cherry picking” those thought to be most relevant, according to the human rights principles of indivisibility and interdependence (Byrne & Lundy 2019).<sup>7</sup> In particular, the invocation of Article 33 in an otherwise critical safeguarding Review did not result in adequate consideration of Child Q’s welfare, nor illuminate the ways in which she may have been subject to racialized disciplinary measures because it was considered in isolation from other relevant Convention rights. The principles of indivisibility and interdependence are especially important in respect of Article 33 because it is a short provision, without qualification, that potentially affords generous powers to authorities to curtail children’s rights to privacy and bodily autonomy in the interests of protecting children from drugs. The CRC is the only international human rights convention to contain a clause relating specifically to drugs. Since the Article was drafted in the late 1980s, there is more understanding of the ways in which the “war on drugs” causes harm to those it is ostensibly

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<sup>7</sup> [Vienna Declaration and Programme of Action](#) (Article 5), adopted by the World Conference on Human Rights, Vienna, 25 June 1993.

aimed at protecting, particularly young racial and ethnic minorities (Eastwood & Ors 2016; Koram 2019). Article 33 has been used in this “war” to justify punitive and coercive responses to drug use by both adults and children. For example, a 2010 report to the JCHR by the Department for Children, Schools and Families (DCSF) on the implementation of the CRC (DCSF 2010) used the extension of searching in schools to drugs, criticized by children's rights organizations, as explained above, as an example of CRC compliance. International campaign organizations such as the World Federation Against Drugs and Drug Free World, the latter sponsored by the Church of Scientology, have used Article 33 to justify a prohibition-based approach to drug laws (World Federation Against Drugs 2009; Drug Free World 2023). It is well documented that such laws have resulted in rampant human rights violations all over the world (Lines 2017). Countries including Singapore have used the CRC and Article 33 to justify long prison sentences, and even capital punishment, for relatively minor offences relating to possession and supply (see Committee on the Rights of the Child 2017). This potential for misuse makes it even more important that Article 33 is considered with reference to other Convention rights such as Article 2, which requires state parties to protect children from discrimination. The Review only considered the provision in isolation, however, and did not explain how Child Q's initial apprehension protected her from drugs, nor how the provision might be balanced against her best interests, and rights to privacy and non-discrimination. The Committee on the Rights of the Child should consider issuing further guidance on Article 33 in the form of a General Comment, including the need for any protection measures to be proportional and balanced against the other rights of children.

## The Role of the Police

The Review found it acceptable that police were called to investigate the incident, but that school staff “should have been more challenging to the police, seeking clarity about the actions they intended to take” (Gamble & McCallum 2022: paragraph 1.16). However, the question might have been whether it was necessary to bring in the police at all. According to the Runnymede Trust (2023), almost 1,000 police officers are operating within UK schools, largely within “Safer Schools Partnerships” (SSPs) in which an officer is placed permanently within a designated school. The partnerships were introduced under the New Labour Government in 2002, and subsequently promoted with the aim of “Taking early action to ensure pupil safety and to prevent young people from being drawn into crime or antisocial behaviour” (DSCF 2009: 4). Despite having broad political

support, SSPs have been resisted in some communities. For example, the “No Police in Schools” campaign group was set up to “decriminalise the classroom” in the Greater Manchester area and beyond.<sup>8</sup>

SSPs are more likely to be based in areas with higher numbers of pupils eligible for free school meals, correlating with higher numbers of black and minority ethnic students (see Henshall 2018). Joseph-Salisbury (2021) argues that increasing police presence in school has a detrimental impact on learning environments, helps to create a culture of low expectations, criminalizes young people, and cultivates a school-to-prison pipeline. He found that many teachers themselves had reservations about allowing police into the classroom. Evidence to support the involvement of police in schools is at the very least limited (Bradford & Yesberg 2020; Gaffney & Ors 2021).

Staff at Child Q’s school may have considered it their duty to call the police since they suspected a crime could have been committed. This decision was not criticized in the Review, although it suggested that welfare services might have been contacted at an earlier point. However, given that their initial search of clothing produced no evidence of cannabis possession, it is questionable whether it was then necessary to contact police rather than further discuss the issue with Child Q and her carers. If those discussions uncovered further suggestions of criminal activity, or welfare concerns, it may then have been necessary to contact either the police and/or social services, or another appropriate welfare organization. The decision instead to contact police, who are principally employed for the purposes of crime detection, perhaps points to a more fundamental issue with the ways in which concerns about drugs are addressed within school—primarily as questions of criminality and/or punishment—as well as the role and function of SSPs. A lack of criticism in the Review lent support to the value of police involvement in school, while shifting the focus towards the problematic conduct of individual officers rather than any deficiencies in school disciplinary or safeguarding processes.

## [E] CONCLUSION

The primary concern about Child Q from the outset seemed to be that she posed a risk to the school and may have engaged in criminal activity. As such, the sights of all the adults involved seemed to be trained on the appropriate disciplinary processes, rather than safeguarding requirements. This was likely not the result of any deliberate decisions

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<sup>7</sup> See “No Police in Schools”.

by those in positions of power, or failures of office, but rather systemic shortcomings. Although it has been argued that Child Q was failed both by her teachers and the police officers involved, and that the incident may have been the result of racial bias, the links between the disciplining of drug use and racialized school exclusion policies have not been interrogated. I have argued that suspicions of drug activity in school require an approach that carefully weighs up the possible risks posed to the wider school body with respect for a child's right to privacy and best interests. This means balancing Article 33 of the CRC with other Convention rights and carefully considering the principles of indivisibility and interdependence while ensuring that measures taken are proportional. It has also been suggested that there should also be a requirement that schools collect data on rates of searching in school, disaggregated by age, ethnicity or race, gender and other identifying characteristics, and for this data to be published annually so that we can better understand how these powers are deployed. Finally, Child Q's treatment was shocking and troubling, but the focus on the intimacy of the body search, and the lack of an appropriate adult or the behaviour of the police officers, should not draw attention away from systemic failings. Locating the blame for the incident within the poor decision-making practices of individual police officers avoids scrutiny of the broader context in which the incident took place.

### **About the author**

**Simon Flacks** joined Sussex Law School in 2022 as a Senior Lecturer in Criminal Justice. He has previously held positions at the Universities of Westminster and Reading, and graduated with a PhD from the University of Vienna, Austria, in 2013. His research interests revolve around drug law and policy and the implications for children/families, and he has undertaken work into youth justice, criminology, drug use/policy, family law and discrimination. Simon is currently undertaking research on parental substance use and family justice, and school exclusions. He is Deputy Director of the Centre for Innovation and Research in Childhood and Youth.

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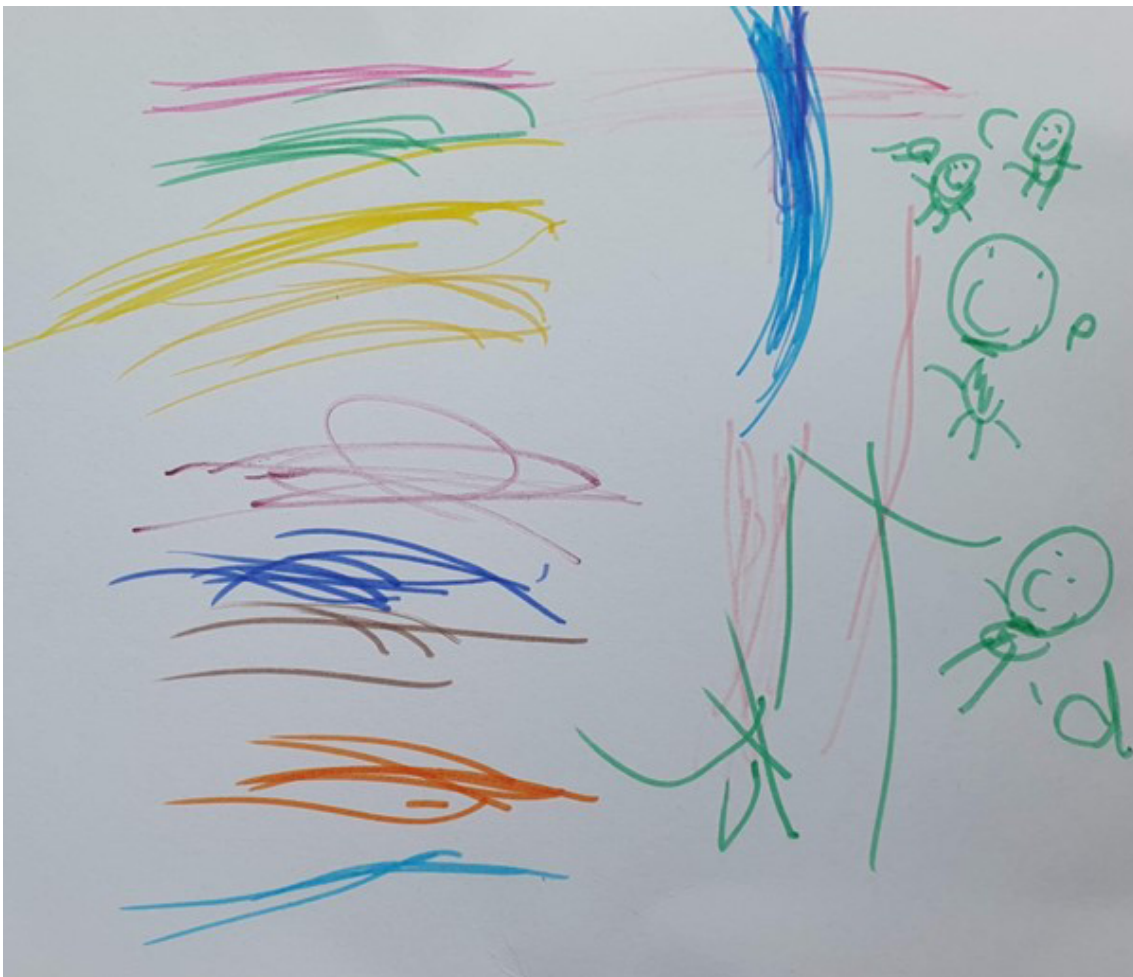
United Nations Convention on the Rights of the Child 1989 (CRC)

## QUEERNESS AS A GIFT, LGBTQ+ PARENTING AND THE BENEFITS TO OUR CHILDREN

JACOB STOKOE  
Transparent Change

With increased visibility, language and community, more trans people are coming out and making informed choices in regard to how to create their family. These factors mean more children will be raised in openly gender-diverse homes.

But the increased visibility of trans people has a darker side, and we live in turbulent times. We are seeing a large increase in transphobic rhetoric with a moral panic being framed around trans people which leaves trans rights under threat, and these changes both directly and indirectly impact the rights of our children.



As a trans parent, I want to give voice to my family and the children who are being raised in my community. In this article I share a personal reflection on my daily parenting. I will also reflect on how the effects of pervasive cisheteronormativity and active transphobia bring harm to us as individuals and families, but will also give visibility to the many unique gifts that trans parents bring to their children and their families.

## I Grew in your Uterus, Papa

My five-year-old, R, holds Pink Teddy to her chest and looks down lovingly. “This is my baby,” she says, “I grew her in my uterus.” She bustles about with the importance of play, and I’m handed the little teddy, more grey than pink after years of love. I hold the bear gently, like a baby, and watch as my daughter continues playing at being a parent. It takes me back to myself at that age, lovingly pretending at looking after a baby, never questioning the certainty that one day I would be a parent myself. Putting a blanket over the teddy in my arms, my daughter picks her up again and says, “I grew in your uterus, Papa, and I have a uterus too.”

R talks as easily about having a trans dad as she talks about what she had for lunch at school. For her, it is mundane and normal that I, her Papa, gave birth to her.

She may remind me of myself, but so much of her experience is different. Not so much that she has a Papa who gave birth to her (in so many ways that is a very small thing in our household), but that she has the language to talk about her body, her experiences and her emotions in a way that I was never gifted. I have gone into parenting incredibly mindfully, and I truly feel that being a queer person in a cisheteronormative world has given me strengths and gifts that I bring to my parenting and, in turn, pass those gifts on to my children.

I’m trans and was assigned female at birth, which means I have a uterus and all the other physical attributes needed to do the everyday miracle of growing a human in my body. But to look at me, you would not assume that that’s the body parts I have. When I realized that not all girls wanted beards and maybe I might be something other than cisgender, I started the process of socially and then later medically transitioning. For me, that included taking testosterone, which has masculinized my features to the extent that I am often assumed to be a cis (not-trans) man.

When I started testosterone, I was told by multiple health professionals that it would make me infertile. In the run-up to starting hormone replacement therapy I sought out options for egg retrieval, but there was nothing available. I was incredibly poor at the time, living on benefits and I had been homeless only a year before after my family rejected me for being trans. This was 2009 and I was in my early 20s, at one of the most vulnerable times in my life and facing the choice between my fertility and a life-saving medication.

There was no choice, of course. I had to choose life and living authentically, but I grieved deeply for my perceived infertility. I had always known I wanted to be a parent, and I felt the loss of that like a wound.

I feel in many ways that my route to parenting is similar to couples who have successfully conceived after an infertility journey. I understand how it feels to grieve deeply for a child you think you'll never have, and how utterly miraculous it feels to finally have your baby in your arms.

And, of course, this is true for so many queer couples. Rarely do we have a simple route to parenting. Whether it's searching for donors, accessing fertility clinics, the mountainous climb that is the fostering and adoption process or, in my case, pausing my hormone therapy to get pregnant, we are often facing challenges before we even get to the complexities of raising children as queer parents in a cisheteronormative world.

I think the mainstream (read: cis and straight) narrative is that having an LGBTQ+ identity is something relevant only to your bedroom and that because of this it's inherently sordid. However, the reality of having a queer identity and being part of our community is expansive and beautiful and a lot of the ethos at the core of our community translates easily to parenting. The queer community celebrates love, yes. But beyond the "love is love" slogans on a pride march, in my experience we also celebrate authenticity, diversity, honesty, consent and autonomy.

As well as our community values, queerness comes as an experience of stepping outside of the mainstream, and this comes with personal growth. For me, this otherness brought resilience, perspective and compassion, and these are also values that positively impact my parenting.

In this article I'm going to focus on consent, acceptance of others and acceptance of self as examples of benefits that I bring to my parenting from being queer.

## Thank You for Letting Me Know

One of the most important lessons I've learned in my life (and therefore key lessons I want to impart to my children) is consent. (With that in mind, I'm going to talk about sexual violence and if that feels like something you don't consent to reading about, skip ahead a paragraph.)

Like too many of us, I have experienced sexual violence. And honestly, my odds weren't great. As someone assigned female my odds of experiencing sexual abuse were around 1 in 4 and as a trans person they rocketed to almost 1 in 2. Without giving too much detail, I experienced sexual abuse both as a child and also as an adult. The majority was at the hands of cis men, however, the most recent of which was within a romantic relationship and my abuser was a cis woman.

After that experience, I stopped being able to have physical contact, even platonic. I shut down totally and couldn't tolerate even a hug from close friends or family members. It was coincidental, but life-changing, that around this time I accessed a retreat for trans people called Trans Bare All. I went looking for community, but I found so much more. At this retreat, consent was built into the very core, from the ground rules in the space to the discussions and workshops. For the first time in my life I learned what consent truly meant. I learned how to say no, and, from this, I was finally able to say yes again.

The lessons I learned from this, and from other queer spaces, I have taken directly to my parenting. We have consent central to everything we do. From the minute they were born I listened to my children's cues about what they did and didn't want. When we tickle it is in small amounts, and I often pause and say "more or stop?". And just like I learned from my queer peers, stop means stop. No means no. Maybe means no. Anything other than an enthusiastic "yes" or "more" means no. I'm teaching both of my children, but especially my daughter, so they don't join me in the statistics. I'm teaching this to them both, but especially my son, so they don't cause statistics to happen.

Both of my children are incredibly affectionate and often want to snuggle on the knee of their beloved adults (which includes my husband and I as well as family, both chosen and biological). As they sit on me I'll often stroke their hair or arm. Sometimes they'll lean into this and really want more, other times they'll ask me to stop and whenever they say no or ask me to stop, I thank them. "Thank you for letting me know."

I use this phrase a lot, and it feels important. Saying "no" was a mountain for me to climb. It felt impossible to let someone else down,

even as I felt intense discomfort. But my children are thanked when they say no. I want them to say no. I want them to feel so safe with me that they never question saying no to touch they don't want.

In fact, I want to be that person for everyone in my life. You want to cancel plans because you don't feel up to it? I'm glad you told me, I'm glad you're looking after yourself.

In a world that tells us we should put up and shut up, I'm working hard to support those in my life to speak up and say no. I'm also trying to support my children to know that "no" is a good thing to hear, it means someone trusts you enough to let you know what they need.

Last week we had a family gathering with aunts and cousins and when it was time to leave I asked, "Would anyone like to give hugs goodbye?". My five-year-old was then offering hugs to her cousins and the youngest, age four, said he didn't want one. R said "ok" and moved on to offer a hug to someone else. It wasn't a big event, there were no hard feelings, no uncomfortable pause. It is so mundane for me that I didn't even think about it until my sister reflected to me how impressive it was that R took hearing "No" so well. We have built consent into the fabric of our lives to the extent that it feels strange to consider anything else to be the norm. I am so incredibly grateful for the trans and queer folk who helped me unlearn the lessons that the cisheteronormative world had taught me.

There is a delicate line when it comes to consent and parenting, and this has been something I've had to work hard at finding the nuance of. Children cannot consent to some things because they aren't developed enough to understand the consequences. When it comes to health, wellness, education, etc, it's our job as parents to make informed decisions for them. We create and hold boundaries so our children can feel safe to explore and to be fully themselves within them.

## Most of the Time

"Most of the time people start as a boy or a girl and they stay the same all their life, but some of the time people realize that even though the world is telling them they're a boy or a girl that they're actually the other one." R is sitting on my knee as I tell her this. She's not quite four at this point and I know I need to keep things as simple as possible. She probably won't take it all in, and I'll repeat it again later if I need to. But it's important, because her aunty has just come out as trans and we need to let her know that her aunty is a girl, even though we might not have realized it before.

We started using her aunt's name regularly and deliberately talked about her a lot when she wasn't around to normalize her name change. It worked exactly the same as introducing R's new sibling to her. She accepted her aunt's new name in the same way that she accepted her new sibling's name. Because what are names other than what we call each other?

I feel that acceptance of difference and acceptance of change is another strength that I've honed through being part of the LGBTQ+ community. I am able to model acceptance for my children because I have practised it repeatedly with my peers and was given the gift of it from them when I went through my transition.

I'd even go so far as to say that it isn't even just acceptance but celebration that we experience. I celebrated that my sister could tell me about her transition and finally live authentically. I celebrate when my friends tell me of finally getting diagnoses for their neurodivergency. My daughter celebrates enthusiastically when we come across other families with structures outside of the norm.

When we're looking at the incredible depths of human variation and experience, it can feel a little daunting to try and explain things to a child, especially when you don't have the benefit of society doing the heavy lifting for you. With this in mind, I find myself using the phrase "most of the time" a lot. It's a simple phrase that gives context within the societal norms and can turn complex conversations into age-appropriate one-liners ... most of the time.

We use it a lot, and I have heaps of examples that I use it in, but one that often comes up is when we're talking about our family structure. "Most of the time children have a mummy and a daddy, but we have a family with a daddy and a Papa." We often talk about other families we know at this point, especially families that also don't have a "mummy and daddy" as parents. This can be families with a single parent or other relationship dynamics.

We also use it when talking about the fact that I was pregnant with both R and her sibling. R was three when C was born, so she knew I was growing a baby in my uterus. I often found myself saying "Most of the time it's a mummy who is pregnant, but because I'm trans I'm a Papa who can be pregnant", not only to explain how and why I was pregnant, but also that not all dads can grow a baby!

It feels so important to me that my children grow up knowing from the get-go that not everyone fits into neat boxes. We can truly celebrate

others when we start with who they are and not who we expect them to be. I grew up in a world that told me that people must always be a certain way and anything that deviated from that was an abomination. But the leap to outside-of-the-box was a beautiful one, and I want to raise my children to know that the boxes are there but they don't limit us and that where people are in relation to them doesn't determine their worth.

## The Reality of Who We Are

As a queer and trans person who has had to go through rejection, loss and grief to live authentically, I want to do everything in my power so that my children can be wholly and entirely themselves without having to go through heartache to get there. This comes in two parts, I want to embody accepting and loving myself so they see what that looks like and I want to make it so clear and obvious that I love all of who they are without them having to prove anything or live up to any expectations.

In its purest form this is unconditional love, and perhaps many people in cisheteronormative society get to experience this, but for so many LGBTQ+ people the act of coming out is a step too far and our families can no longer love the reality of who we are, and they reveal that they only loved a version of us that they created and that fitted their narrative.

I want to show unconditional love for my children but also show them that I have unconditional love for myself. The latter is a therapeutic form of reparenting, but is also an example. This is me showing my children what it looks like to love yourself and to know you're lovable even when you are the most honest version of yourself.

I hope that with this comes freedom, for my children to voice and express the truth of who they are without fearing loss. We will love them just as much when they conform as when they don't. The freedom to change, to evolve and to experiment is built into this. With this in mind we don't gender clothing, words or toys. We let our children play with what feels good and fun, and we follow their lead when it comes to self-expression.

My experiences as a queer child have framed this part of my parenting. What I needed back then was to be told that I was lovable no matter what, that I didn't need to fight against my truth to be accepted. I was just as queer when I was eight as I am at 38 and that childhood part of myself is still there and hurting from the trauma of relentless shame. As a child I was terrified of not projecting the correct version of myself. It is a human experience to fear rejection, and I remember the gut-wrenching shame and



guilt of knowing I wasn't what people, and especially the people raising me, wanted and needed me to be. That shame and guilt was foundational to my experiences, and I don't want my children, or anyone, to ever have to experience that.

## Pride and Grief

I sit with my daughter while she pretends to give her teddy a bottle. She leans in to me and when I go to stroke her hair she shakes her head "no". I smile at her and she snuggles in with her teddy. It's a wordless exchange, but I feel a well of emotion from it. Pride and grief battle in me, and I have to allow them both their space. I feel pride for the hard won gifts that I'm giving to my children, for the tools I'm giving them to face the world and be versions of themselves that they feel loved and confident in. And with that I hold grief for the child version of myself that didn't have access to those tools.

I feel like I'm a dam holding back generational trauma, and so much of that trauma has nothing to do with being LGBTQ+, but the coping strategies and the perspectives I have that protect my children have come from the queer community and my experiences as a queer person in a cisheteronormative society.

I can't know who my children are going to grow up to be or what they're going to do. I can't predict how they're going to feel about my queerness or about growing up in a family with two dads, but what I can know is that I'm giving them the tools to tell me and the knowledge that I'll listen when they do.

### ***About the author***

**Jacob Stokoe** is the Founder of *Transparent Change*, a not-for-profit which provides LGBTQ+ inclusion training and consultancy to professionals.

*But above and beyond his roles as Educator and Consultant, his most important job is being Papa to two little humans, both of whom he was pregnant with and gave birth to.*

Email: [hello@transparentchange.co.uk](mailto:hello@transparentchange.co.uk).

## OPEN LETTER TO THE EDITOR

FRANCESCA CAVALLO  
Children's Author

Dear Editor,

**M**y name is Francesca Cavallo, and I'm the co-author of two *New York Times* bestselling books named *Good Night Stories for Rebel Girls* and *Good Night Stories for Rebel Girls 2*. Over the past 12 years, I have written 13 children's books published in more than 50 languages and the focus of my artistic exploration has been the decolonization of children's literature.

I am a queer woman, and I grew up in a small town in Southern Italy. I was always an avid reader, but I never stumbled on anyone like me in any of the many books my mother bought me, or in the ones I borrowed from my school library. I never saw anyone like me in the cartoons I watched with my sister. As a result, it took me 23 years to figure out a) that lesbians existed; and b) that I was one.

At about the same time I discovered I was a lesbian, I started reflecting upon the heritage of colonialism in my identity as a Southerner. I grew up in a town that is 2 kilometres away from a huge dump for "non-dangerous toxic waste" and 20 kilometres away from an enormous steel factory—both the dump and the steel factory are the biggest in Europe in each category. Like too many other factory workers, shortly after retiring my grandfather died of a kind of leukaemia that killed many thousands of people who spent time producing steel or just living close to those who did.

As I started opening my eyes to who I was, I started seeing more clearly where I was coming from. Things I had considered unworthy of attention, started to seem important ... crucial even. Not just for me, but for the entire world. But if these "things" were important ... why were they not in the books I was reading? The stories, the characters that had seemed so varied, so different from one another, suddenly started to appear irritatingly homogeneous. Why was I reading yet another book about a man who was braving the wilderness and finding a way to tame other men, other creatures, or an entire civilization to prove his value?

Why was I reading yet another story about a good-hearted, invariably beautiful princess unable to defend herself from the meanness of an ugly stepmother/stepsisters/husband/passing-by witch? Why was I reading yet another story that was inventive enough to describe in vivid detail fantastic animals, but somehow could not muster up the courage to get rid of a rigid class system? What else was missing from the stories I had been fed? And what were the effects on society, and kids in particular, of silencing all those *other* stories?

I knew what the effects of those voids were on me.

Because I was never presented with a queer character, I spent my entire adolescence and early adulthood feeling like there was something wrong with me.

Because the places I found in books always looked different from the one where I came from, I grew up thinking that we were not worthy of being in books. As embarrassing as it is to admit, I grew up thinking there was a reason why the dump and the steel factory were placed close to my town: what did we have that was worthy of being preserved after all? Not grass, not apple orchards, not cows, no castles ... just olive trees, sand and unfinished buildings.

Children's literature is imbued with colonialism not just for what is in the books, but also for all that's missing. The missing characters, the missing places, the missing stories teach kids what deserves to be in books, and what doesn't.

Historically, children's stories have always been considered instrumental in building the foundation of our society. There is a lot we can learn from children's books about the kind of society our ancestors considered desirable, perfect even. Children's literature has always been considered a lesser art because of its audience—many grown-ups consider children “humans in the making” rather than humans—and because of this moral aspect. Children's stories traditionally must teach something, hence—the thinking goes—it can't be as pure an art as “regular” literature which is free from these kinds of concerns.

We are all very familiar with the moral of some of the most famous children's stories of our tradition. Pinocchio? Lies get you in trouble. Little Red Riding Hood? Don't trust strangers. Three Little Pigs? Hard work is important!

Children's entertainment has changed significantly over time, and the moral of the stories our kids consume can't be nailed so simply

anymore. Let's think of *Frozen*, for example, a modern classic seen by tens of millions of children around the world. The moral of the movie is complex and modern: the story teaches kids about family love, but also about the importance of embracing one's true self; it even goes as far as questioning the importance of romantic love—unheard of for a story starring two princesses!

But the moral of the story is not all children learn when they read a story or watch a movie. In fact, the “message”, the thing that makes us—the grown-ups—feel good, and even tear up about what we are showing our kids ... in most cases remains of no interest to the kids. Kids tend to focus on much, much smaller details and experience stories in ways that are fundamentally different from ours. Understanding what happens in children's imagination when they are exposed to a story is crucial if we want to try decolonizing the stories we are offering them.

But what do I mean when I say “decolonize” in this context?

I mean making sure that our stories do not reinforce values that are fundamental to colonialism such as economic exploitation, ethnocentrism, racism, paternalism etc.

To go back to the *Frozen* example: despite the modernity of Elsa's journey of self-discovery, there isn't a single moment where the fact that she lives in a castle is put under scrutiny. Yet, we know very well that the social structures that allowed some of us to live in castles were based on economic exploitation.

When girls buy Elsa's toys to feel more like her, what they buy is the colonial ideal of beauty and success: her blonde, thin body, her castle, her beautiful gown.

The inner journey of this character may have changed, but the circumstances, the details, and the way the character is presented to kids haven't changed ... at all.

One of my closest friends in Sidney is from Sri Lanka. She and her husband have an incredibly smart daughter, who—one day—got home and announced she wasn't going to eat chocolate ice cream—her favourite—any more. When my friend asked her why, she said she wanted to be like Elsa ... and she thought chocolate ice cream would make her skin darker.

Children explore stories in ways that are different from ours, and their unique perspective has the power to reveal agendas we may not even be aware of, an imprinting we received and forgot about, one that we may be uncomfortable acknowledging.

By making a princess living in a castle the character worthy of such an important spiritual journey, we are *de facto* replicating the colonial idea that whiteness and wealth make people not only more powerful but also morally superior to other human beings.

This idea is rooted in us way deeper than most of us are willing to admit.

At this point, you may be ready to label as “wokeism” the approach I am describing. After all, adding marginalized people in TV shows and (to a lesser extent) in children’s books—even going so far as to change published works by deceased authors—seems to be the latest trend. However, the obsession with using the “right” words isn’t all there is. The right words matter when they allow our conversations to go deeper. If all they do is sanitize our communication with the hope that we don’t find ourselves in any uncomfortable places, we are simply failing to produce culture that matters. We are fabricating our own irrelevance, and by doing so, we are damaging our democracies.

The journey to decolonize children’s literature is a political and a spiritual one.

It starts with our willingness to look within ourselves, and to do the work that is necessary to free ourselves from the need to dominate others.

It’s not the topic we choose that makes a story “decolonized”.

It’s the kind of human we want to be after reading it.

I never write to teach children about something. I write to learn with them. I never start from “the message” because that is the kind of paternalistic concern used by colonial powers to hide (not just from others, but from themselves) their lust for domination. I ask myself difficult questions, and I share with my little readers—and with their families—the process of looking for answers.

I try to find ways to show children the world in all of its glorious diversity: I do not censor the presence of entire categories of people simply because they don’t serve the kind of narration I am comfortable with. I do my best to sit with my little readers before the complexity of the world, to hold their hand when it gets a bit harder, or even painful. As a children’s book author, my job is to be there, to make it possible for them to see, to wonder about the nature of life, to question our role in the creation of a just, peaceful world.

The idea that we can or should aspire to a world that doesn't trouble us, that never puts us on the spot, the idea that we should dream of a life that is tailored on our dreams and capabilities ... is at the core of most children's narratives. And it is a colonial one. Colonial powers justified all sorts of violence against humans and against nature by buying into the delusion that by bending nature, by coercing other human beings to comply with their desires, by appropriating as many resources as they could, they could bring their vision to life. Then, they sold us the idea that bringing our vision to life, no matter the cost, is what makes us heroes. That it makes us stand out. And that standing out is not only preferable to blending in, but the one thing that makes a life worthy.

When I wrote *Good Night Stories for Rebel Girls*, a book of bedtime stories where fictional princesses are replaced by tales of real women who took their destinies into their own hands, I worked hard to challenge that narrative. Many of the stories we selected were of women and girls most people had never heard of. Some of them were important scientists, or politicians, sure, but there were bakers, surfers, schoolgirls ... my goal was to show that many of these women rebelled not only against sexism, that their rebellion lay in the strength they showed to live life on their own terms, to explore themselves and the world not for the sake of success, but because of a much more powerful and enchanting force: curiosity.

Within the colonial mindset, curiosity without conquest is childish. Exploration without appropriation is the worthless exercise of people who "don't have what it takes". There is a quote that opens one of my favourite books of all times, *Da cosa nasce cosa* by the Italian master of design, Bruno Munari. The quote is from Lao Tsu.

Here it is:

To give birth, to nourish,

To bring forth without taking possession, To produce without appropriation,

To create without controlling—

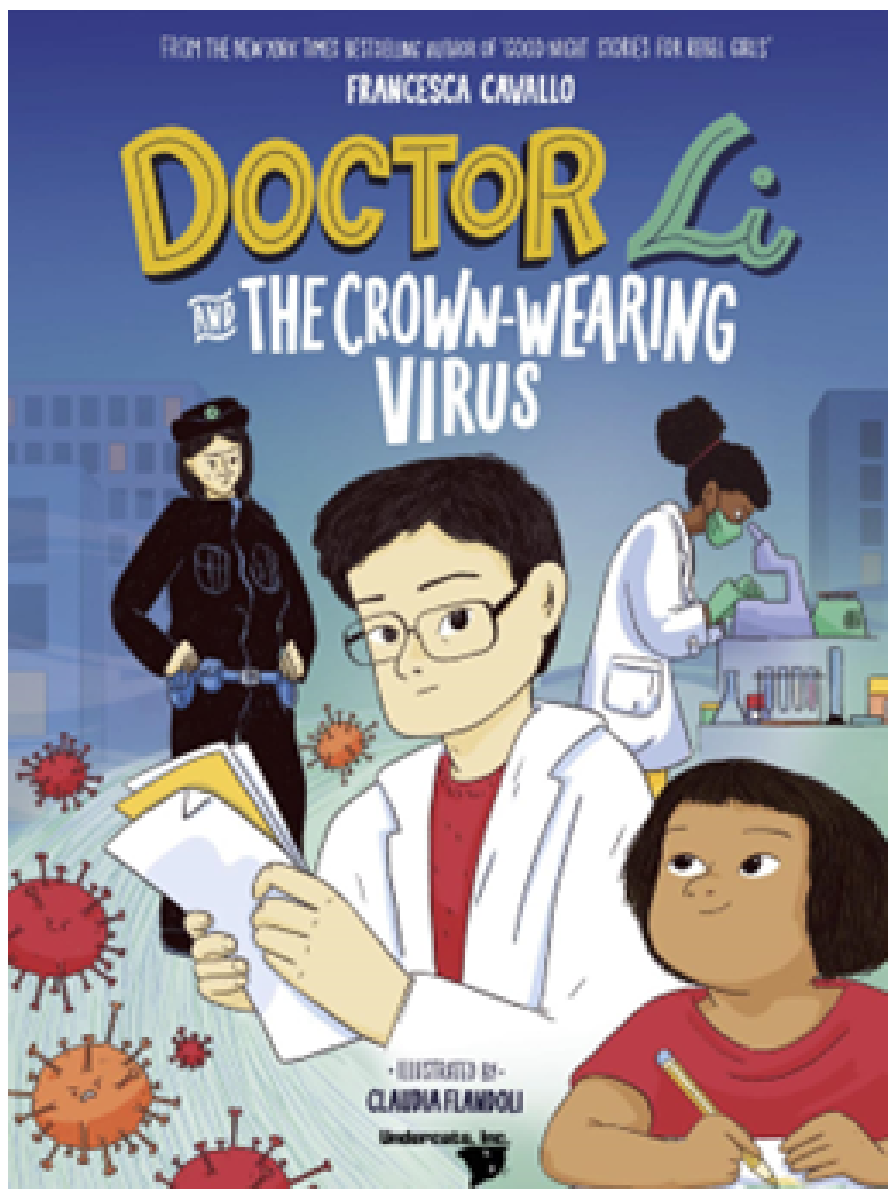
That is the hidden virtue.

Forget the moral of the story: what are the hidden virtues that are woven into the stories we tell our children?

I wrote *Doctor Li and the Crown-Wearing Virus* in 2020, during the first Covid lockdown and in the midst of a surge of anti-Asian racism. Donald Trump was referring to corona as the "Chinese virus" daily. Chinese authorities were monitoring closely whoever spoke about the virus. I felt

like no one was trying to explain to kids what was going on. We were consuming huge quantities of news to have a sense of where we were heading, but kids barely knew why they had been pulled from school. I didn't find that democratic, so I wrote a short story to tell them about Doctor Li Wenliang, the brave Chinese doctor who had challenged his government to tell the world about the virus spreading in his hospital.

I held their hand and spoke about neighbours cooperating and scientists looking for vaccines. I told my little readers what was going on, and tried to hold their hand. The story, which I shared for free on my website, went viral; it became the widest-read children's story during the pandemic, and it was translated by volunteers into 38 languages. It was also censored by the Chinese Government.



The books I wrote have been censored in Russia, Turkey, Georgia, Iran and China. Luckily, since children's literature is considered inherently harmless, they have always been censored AFTER they had been published.

The book bans in the United States, though, reveal that conservatives are trying to do everything in their power to prevent children to access a decolonized literature, because they realize—perhaps more than progressives—that if children grow up reading stories that challenge the way our society is structured, it will be incredibly hard to put the genie back in the bottle when they grow up and convince them that inequality is a necessary evil, or that LGBTQ+ people are a danger to society.

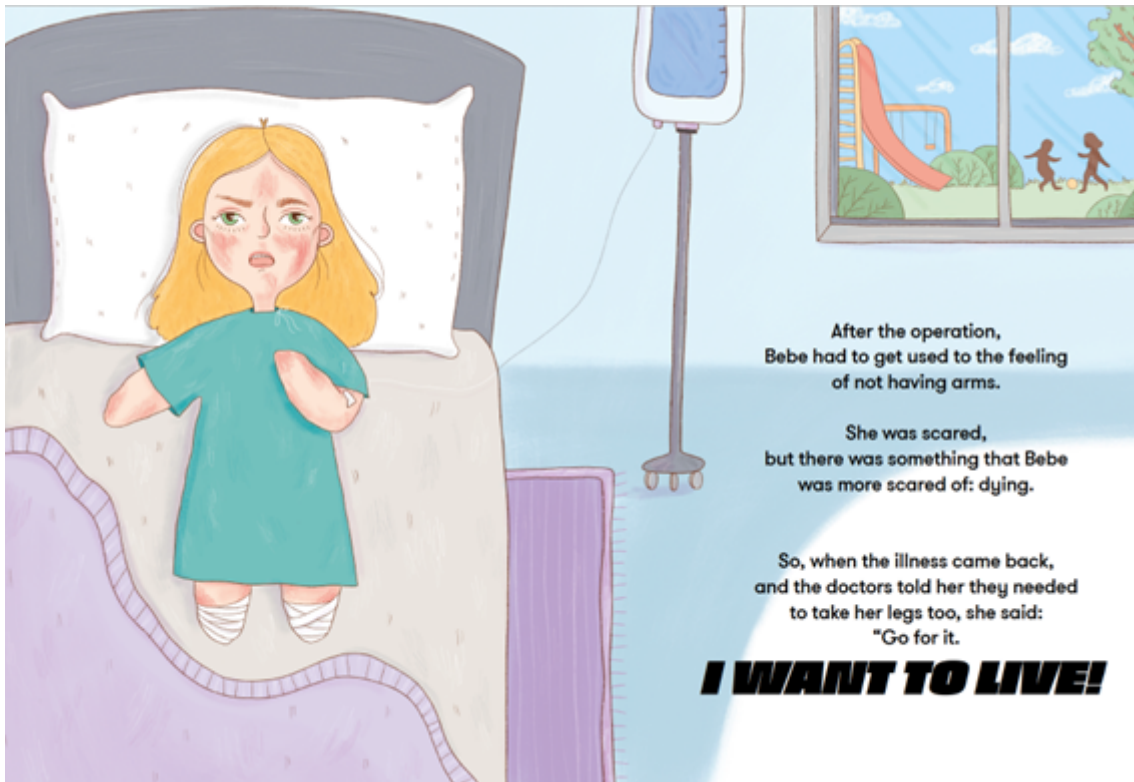
With “Paralympians”, my picture book series about some of the greatest paralympic athletes of our times, I focused on the portrayal of non-conforming bodies in children's books—often censored because we are primed to think that the stories of people with disabilities are inherently too sad and too dark to be told to children.

One interesting aspect of our fear to share stories of disability is that on the rare occasions when these stories are told, disability is almost always portrayed as a superpower. Portraying disabled people as superheroes though plays into the ableist narrative that, in order to survive with a disability, you must be a super-human. The key word in this view of disability is “despite”. “Despite her disability, look at what this woman was able to accomplish.” This approach—called “inspiration porn”—uses the stories of disabled people as a reminder for able-bodied individuals that “it could be worse” and that we should be grateful because we are not “like them”, and if they managed to accomplish so much “despite” being disabled ... well, maybe we should be able to find the motivation to lead more exciting lives.

The road to hell, they say, is paved with good intentions.

However, I did not become a *New York Times* bestselling author “despite” the fact that I am a queer woman. Similarly, the champions featured in the Paralympians series did not become champions “despite” their disability. They accepted their life journey, they made it their own, they refused to interiorize our pitiful looks and lived on their own terms. Sometimes, life is painful. Sometimes, it is hard. Sometimes, all we will have will be our pain, but still we can find meaning in our journey, and we don't need to have perfect bodies or a castle to do that. We can do that from whatever body we were born in, from whatever place. That seems something important for children to learn.





After the operation, Bebe had to get used to the feeling of not having arms.

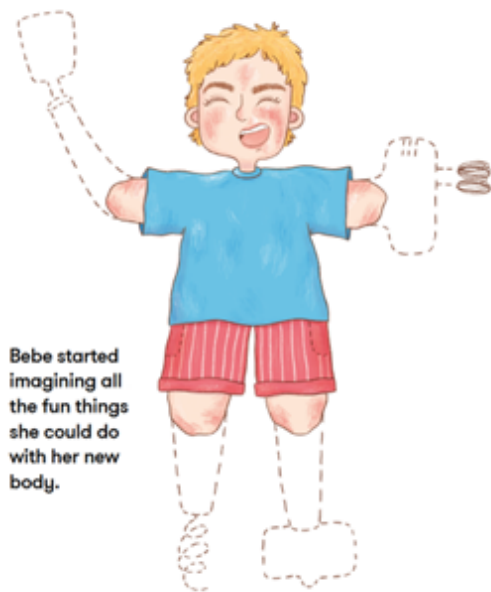
She was scared, but there was something that Bebe was more scared of: dying.

So, when the illness came back, and the doctors told her they needed to take her legs too, she said: "Go for it."

**I WANT TO LIVE!**

On Guard—by Francesca Cavallo and Arianna Giorgia Bonazzi, illustrations by Irma Ruggiero, published by Undercats in 2022.

In the meantime, her mum invented a new pair of waterproof legs for when she took a shower. Many focused on what Bebe couldn't do, but...



Bebe started imagining all the fun things she could do with her new body.



On Guard—by Francesca Cavallo and Arianna Giorgia Bonazzi, illustrations by Irma Ruggiero, published by Undercats in 2022.



Fastest Woman on Earth—by Francesca Cavallo, illustrations by Luis San Vicente, published by Undercats in 2022.



The Long Jump—by Francesca Cavallo, illustrations by Kezna Dalz, published by Undercats in 2022.

By challenging the traditional narrative and the traditional imagery associated with disability, we were able to create books that celebrate the beauty of these athletes' bodies, the strength of their character, and the breathtaking love that surrounded them and emanated from them throughout their journeys.

Decolonizing children's literature also means working with artists with different aesthetics than the ones we are used to associating with "quality": it means trying to make our eyes see beauty in different traditions, and it means challenging the artists we work with to think differently, to try new things, to unlearn some of what they learned in art school about what bodies are supposed to look like.

This is why I love to work on picture books: it is a form of art that can't sustain theory. Theory is necessary, but what we want to say must be so clear, so radiant, that it can bear to be expressed in pictures and in just a few simple words without losing an inch of meaning.

The path that leads us away from domination and toward peace is certainly a long one, and some may say that the creation of a better world is nothing more than utopia. But why write for children at all if we are not interested in the longest possible shot, in the widest possible horizon?

### **About the author**

**Francesca Cavallo** is co-author of the ground-breaking New York Times bestsellers *Good Night Stories for Rebel Girls books 1 and 2*. The books have been translated into 49 languages and sold more than 7 million copies.

In 2018, Francesca received the Publisher's Weekly *StarWatch Award* in the United States, the *Australia Book Industry Award* in Australia, the *Wissenschaft Buch des Jahres* in Germany, the *Golden Book* in Italy, and many other international awards. In 2019, Francesca parted ways with *Rebel Girls* and started *Undercats*.

In 2020, she wrote and released for free the picture book *Doctor Li and the Crown-Wearing Virus* which has been translated into 38 languages and censored by the Chinese Government, becoming the most-read story for children about the coronavirus pandemic.

An advocate for gender equality and LGBTQ+ rights, Francesca has spoken at the House of Lords, the Women in Tech Conference in Warsaw, the Nobel Museum in Stockholm, the Massachusetts Conference for Women and in many other venues all over the world.

For further information, visit: [www.francescatherebel.com](http://www.francescatherebel.com).

## NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

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### IALS Library Receives Major Gift from Former Visiting Fellow

The Institute of Advanced Legal Studies (IALS) has received a major gift of over US\$1.8 million from the estate of Professor Thomas C Fischer and Mrs Brenda A Fischer. The Institute was named as one of four residuary beneficiaries under a trust agreement established by the Fischers, along with the New England School of Law, Georgetown University Law Centre, and Wolfson College, Cambridge.

Professor Fischer was awarded an Inns of Court Visiting Fellowship to IALS in 1996 and was in residence for a year. While at the Institute, he developed his research in the area of international law and globalization. Professor Fischer was a distinguished American legal academic who graduated from the University of Cincinnati and Georgetown University. He served as Dean of the New England School of Law from 1978 to 1981 and remained a professor there until his retirement in 2003. He was the author of 12 books, including *The Europeanization*

of America (1996). The Fischers' transformative gift has been bequeathed "for the purpose of acquiring library resources concerning United States-European Union relations and globalisation".

Professor Carl Stychin, Director of the Institute of Advanced Legal Studies, responded to the news:

My colleagues and I are touched by the generosity of Professor and Mrs Fischer in remembering the Institute. It is particularly gratifying to know that Professor Fischer enjoyed his time as an Inns of Court Visiting Fellow. I have no doubt that this gift will have a major impact on the development of the IALS Library collection, further strengthening our position as the national law library.

Ms Marilyn Clarke, IALS Librarian, said:

The Library is deeply grateful and honoured to be the recipient of such a large sum. Our foreign, international, and comparative collections are a major national resource in support of academic research

in their field, and this generous gift will allow us to enhance our collection development as well as our engagement and outreach activities across the HE and law libraries sectors.”

The Institute will also now begin to plan how to commemorate the Fischers.

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## Selected Upcoming Events

### **Judicial Conversation. Exploring the judicial role and its challenges under the Protection of Children from Sexual Offences Act 2012**

**Venue:** IALS, 17 Russell Square,  
London WC1B 5DR

**Date and time:** 13 March 2024,  
6:00pm-7:30pm

**Speaker:** Dr Shailesh Kumar

**Chair:** Professor Leslie J Moran,  
Emeritus Professor, School of  
Law Birkbeck College

The Protection of Children from Sexual Offences (POCSO) Act 2012 introduced a new court into the Indian legal system. It is an institutional regime dedicated to dealing with the challenges within criminal justice that arise from cases of sexual offences against children. After setting out the key characteristics of this new criminal justice regime, the focus of the conversation will be the distinctive role that the judges play in these courts. The discussion will draw on

Dr Kumar’s empirical research in this field. Between 2019 and 2020 he conducted extensive fieldwork in India. This included courtroom observation and interviews with various stakeholders. Of particular significance for this conversation are in-depth face-to-face semi-structured interviews with 17 judicial officers (judicial magistrates and POCSO special judges) through which he explored judicial perceptions and experiences of the POCSO courts. One of the areas of particular interest is the role of stakeholder training. The discussion will explore what if any are the effects of such training on judicial stakeholder engagement with child victims and on child sexual abuse cases in the POCSO courts.

See [website](#) for details.

### **Technology, Transparency and Criminal Justice**

**Venue:** IALS, 17 Russell Square,  
London WC1B 5DR

**Date and time:** 19 March  
2024, 6:00pm-7:30pm

Marking the launch of *Observing Justice* by Judith Townend and Lucy Welsh (Bristol University Press, 2023), this evening seminar will consider how under-scrutinized legal, social and technological developments have affected the transparency and accountability of the criminal justice process.

Speakers from academic, civil society and legal organizations will

share insights from their research and professional experiences, as they relate to key legal policy issues such as equality of access, remote and virtual courts, justice system data management, and the roles of public and media observers.

Townend and Welsh's socio-legal work, based on both evaluative and empirical studies, highlights the implications of recent changes for access to justice, offender rehabilitation, and public access to information, and argues that a framework for open justice should prioritize public legal education and justice system accountability.

The event will also respond to the Government's 2023 consultation on open justice: a report is expected to be published in early 2024. Though this book focuses on England and Wales, the topic has international relevance, with—for example—open justice and access to justice initiatives led by the Organization for Economic Cooperation and Development, World Justice Project and Open Government Partnership.

See [website](#) for details.

### History of Arbitration Project

**Venue:** IALS, 17 Russell Square, London WC1B 5DR

**Date and time:** 27 March 2024, 6:00pm-7:30pm

**Speaker:** Dr Francis Calvert Boorman

**Theme:** *“Your Christmas holidays cannot be more dull*

*than mine. I pass the morning in arbitrations, the most irksome of all employments, and the evening in absolute solitude”*: Arbitration in Nineteenth-Century England

Arbitration, the settling of disputes by one or more party-appointed referees, continued to be a common experience in 19th-century England, even in a period of rapid change in the demography of society and economy. This talk will describe the multifarious disputes to which arbitration was applied, ranging from bankruptcy and land disputes, to divorce settlements, labour disputes and international relations. It will also chart the ways in which arbitration was changed, both in its relationship with the courts and via its inclusion in legislation relating to other aspects of governance, like the compulsory purchase of land and regulation of the railway industry. As a voluntary process it was also profoundly affected by the parties who turned to arbitration and the uses they made of it.

To help navigate this complex landscape, the individual experiences of parties, arbitrators and reformers are highlighted, showing how class, gender and region all affected attitudes to arbitration and its operation. These biographies encompass lawyers, such as the enthusiastic Lord Brougham LC and the reluctant Lord Campbell LC, who provides the quote for the title. However,

the diversity of disputes demands a wider cast of characters. There are also industrialist-politicians like AJ Mundella, engineers like Robert Stephenson, businessman and polymath, Leone Levi, and campaigner for women's rights, Caroline Norton.

See [website](#) for details.

**Legal History Seminar: The Origins of the Modern Criminal Trial: Evidence from the Old Bailey, 1674-1913**

**Venue:** IALS, 17 Russell Square, London WC1B 5DR

**Date and time:** 23 May 2024, 6:00pm-8:00pm

**Speakers:** Professor Tim Hitchcock and Professor Robert Shoemaker

**Chair:** Professor Catharine MacMillan, King's College London, IALS Senior Associate Research Fellow

Using evidence from computational analysis of the digitized Old Bailey Proceedings, this paper examines the major transformations in courtroom practices which took place in this influential court in the 18th and 19th centuries. It examines the changing roles played by courtroom participants (focusing on victims, juries and witnesses, but also with attention to defendants, counsel and judges), the evolution of the physical design of the courtroom, and changing trial outcomes (verdicts, punishments)

to argue that historians have overemphasized the role of judges and counsel and the development of the written law in their accounts of the history of the criminal trial. Changes in the courtroom roles of other trial participants, only detectable through analysis of actual trial proceedings and associated evidence, were at least as important in shaping the development of the modern criminal trial.

Professor Hitchcock and Professor Shoemaker are world-leading legal historians in the common law world. Their work is particularly interesting and important not only for its content but also for the uses to which they have put this content. These include the Old Bailey Online and the Digital Panopticon: their projects have worked to digitize and provide direct access online to billions of items of primary source material. This enables historians easy access to those sources which enable the writing of a new "history from below".

Their work is inherently cross-disciplinary, combining and enabling research in both law and history. It is also of importance in research training. This research has national and international appeal. It is important that IALS hosts this lecture for all of these reasons.

See [website](#) for details.

### **Essentials of Law of International Trade and Finance**

**Venue:** short course online via Zoom

**Date and time:** 5 April 2024-7 June 2024, 12:00pm-2:00pm

**Course Director:** Dr Mahmood Bagheri

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**Dates:** 26-27 June 2024

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will explore different ways of historicizing jurisprudence.

The Workshop aims to open up a new interdisciplinary research agenda for the history of jurisprudence. It seeks to animate the historiography of jurisprudence, connecting it to historiographical developments in other disciplines, including history of science and knowledge, history of literature and rhetoric,

history of emotion and the body, intellectual history, social history, and history of political geography. The conference will pursue these aims by probing three themes: person, community, and form. The Workshop organizers are Professor Maksymilian Del Mar, Queen Mary University of London, and Professor Michael Lobban, All Souls College, Oxford.

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# AESTHETIC VERDICTS: THE INTERSECTION OF ART CRITIQUE AND LAW IN *WHISTLER V RUSKIN*

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## Abstract

This article examines the landmark 1878 defamation case of *Whistler v Ruskin*, a pivotal legal battle that underscored the complexities of adjudicating art criticism under defamation law. The trial arose from John Ruskin's scathing critique of James McNeill Whistler's work, which led Whistler to sue for libel, seeking validation not just of his art but of his artistic philosophy. Despite the public fascination and Whistler's tactical use of the trial as a platform for self-promotion, the jury's award—a derisory farthing—hinted at their view of the lawsuit as frivolous. This case emphasizes the intrinsic challenge of legal systems grappling with subjective art valuation and critiques, the evolving norms of defamation, and the implications for the freedom of speech. While Whistler nominally won, the repercussions for both men were significant, affecting their finances, reputations and positions within the art world, and the trial's legacy continues to inform the discourse around art, law and cultural value.

**Keywords:** James McNeill Whistler; John Ruskin; Victorian libel law; defamation; art criticism; aesthetics; 19th-century British art; fair comment.

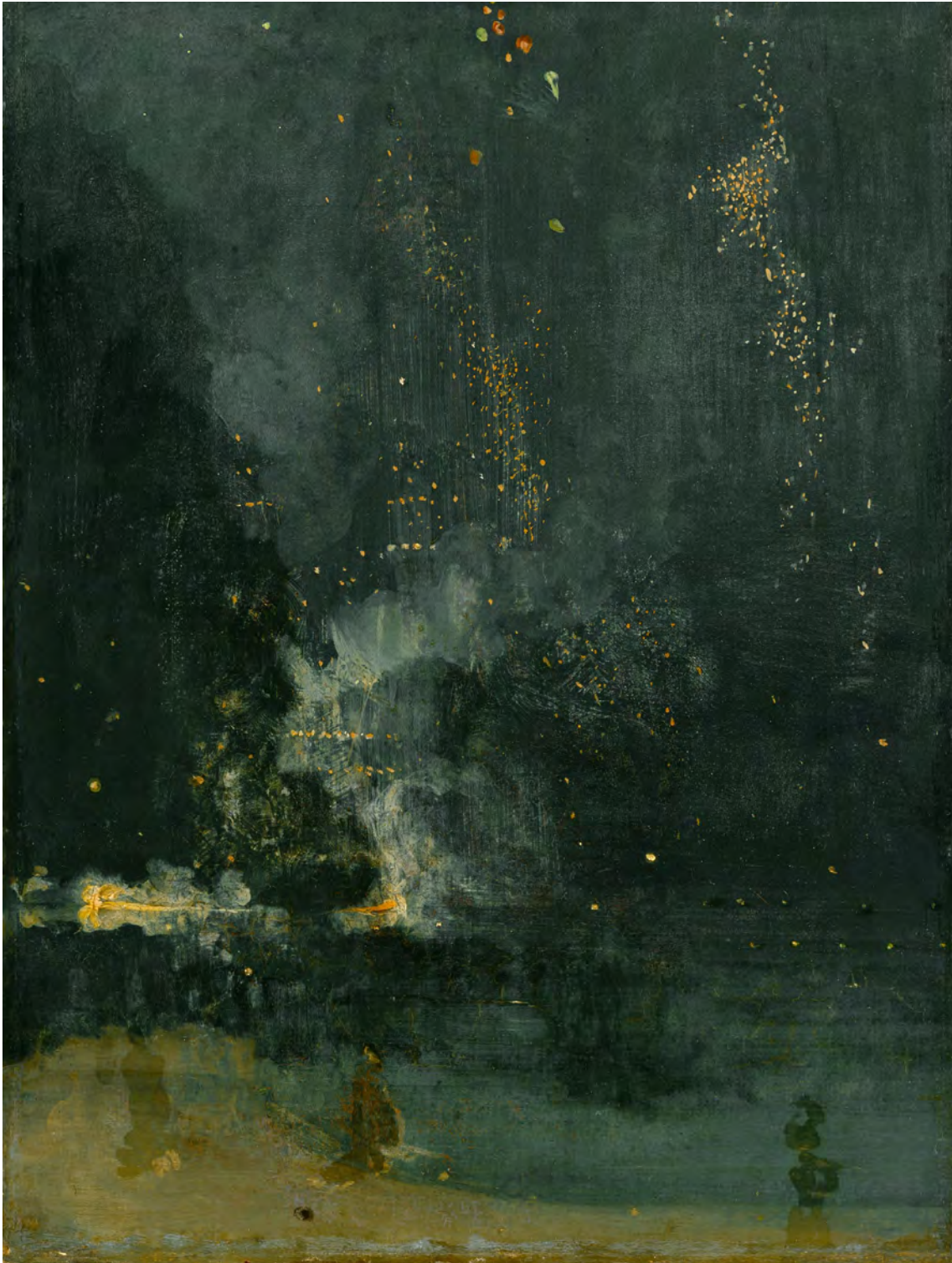
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In 1878, the libel trial of *Whistler v Ruskin* highlighted the fraught intersection of subjective art criticism with the objective rigour of judicial scrutiny.<sup>1</sup> James McNeill Whistler, the American-born, British-based artist, initiated legal

action against the esteemed critic John Ruskin following a vitriolic critique of Whistler's painting *Nocturne in Black and Gold—The Falling Rocket* (figure 1). The resulting proceedings transcended the particulars of defamation,

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<sup>1</sup> The case of *Whistler v Ruskin* was heard at the Queen's Bench of the High Court on 25-26 November 1878. The original court transcripts for the case of *Whistler v Ruskin* were not preserved. As a result, our understanding of the trial proceedings relies heavily on contemporaneous press accounts, which have conserved a significant portion of the dialogue and exchanges verbatim. These journalistic records—collated by Merrill (1992)—serve as the primary source for reconstructing the events of the trial in the absence of the official court transcripts.



*Figure 1: Nocturne in Black and Gold—The Falling Rocket*

prompting a broader discourse on the valuation and purpose of art in the Victorian era.

While defamation stood at the core of the trial, the proceedings

amplified Whistler's aesthetic philosophy and inadvertently diminished the visibility of Ruskin's critiques of the art market. *Whistler v Ruskin* thus influenced art

history's discourse, demonstrating how legal adjudications can steer cultural understanding. Although the case may not be remarkable for its legal significance alone, it serves as a pertinent example of how the law can impact and realign cultural narratives. Such legal encounters, though often considered peripheral, have the capacity to mould our historical and cultural consciousness— nudging the recognition and valuation of cultural expressions in new directions. The process itself, deserving of nuanced scrutiny, underscores the complex interplay between law and culture.

## [A] HISTORICAL TIMELINE AND CONTEXT OF *WHISTLER V RUSKIN*

The backdrop of late 19th-century defamation law in Victorian England primed a legal environment that heavily favoured the safeguarding of individual reputations. It was within this legal context that Whistler brought his action against Ruskin, seeking £1000 for damage

to his artistic reputation, following a harsh assessment of Whistler's exhibition at the Grosvenor Gallery published in *Fors Clavigera* (1877; in Cook & Wedderburn 1907: 149):

For Mr Whistler's own sake no less than for the protection of the purchaser, Sir Courts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of Cockney impudence before now; but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face.<sup>2</sup>

Opting for a jury trial, both parties entrusted their case to the discretion of their contemporaries, with the jury drawn from the affluent and educated classes. The selection of this special jury was nontrivial; it made the court a venue for perspectives that might align with social and cultural standings, and perhaps with prevailing art appreciations, more than with legalistic rigour.

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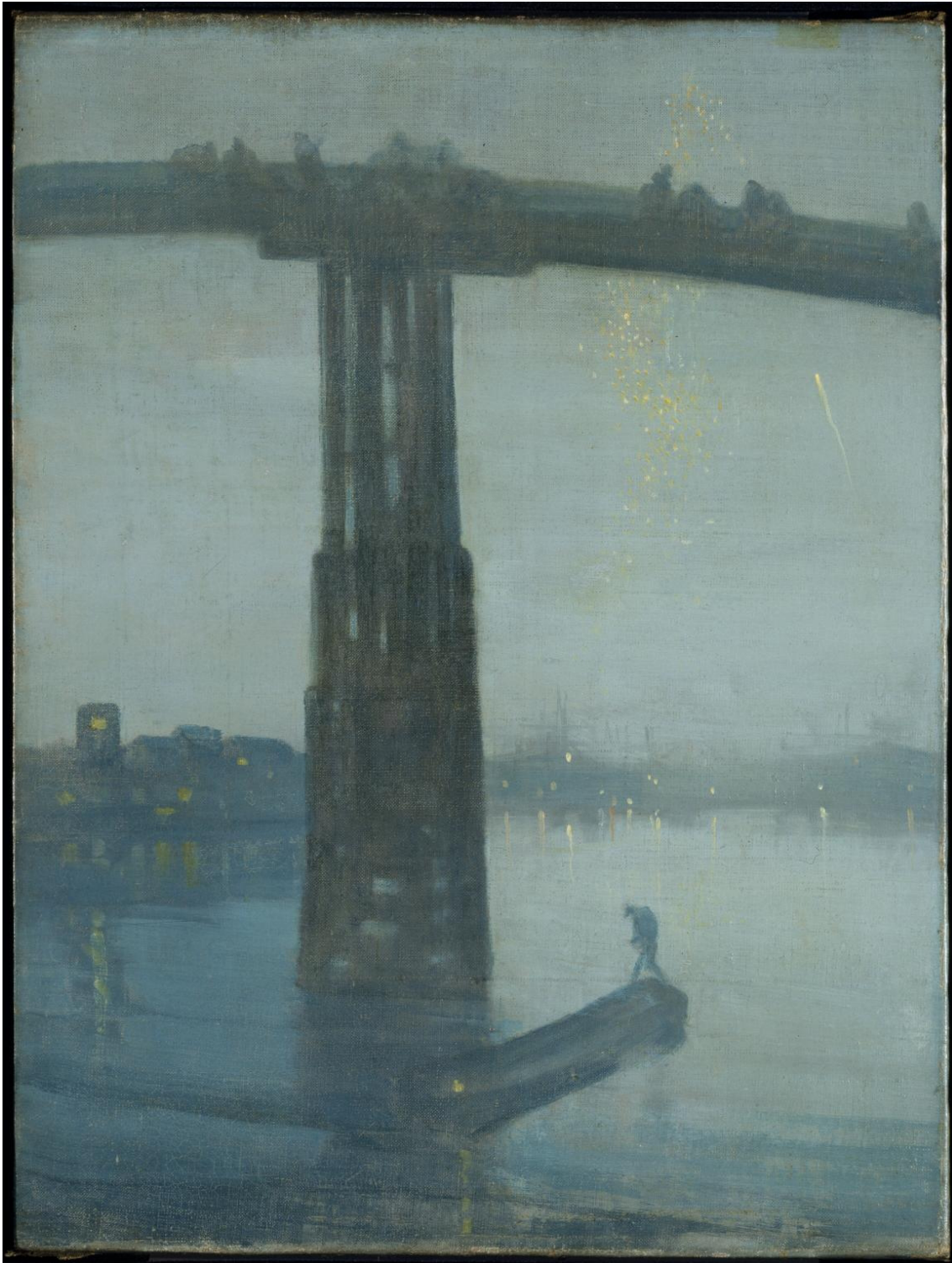
<sup>2</sup> Eight paintings were exhibited in the Summer Exhibition at the Grosvenor Gallery: *Nocturne in Black and Gold—The Falling Rocket*; *Nocturne in Blue and Silver* (later titled *Nocturne: Blue and Gold—Old Battersea Bridge*); *Nocturne in Blue and Gold* (later titled *Nocturne: Grey and Gold—Westminster Bridge*); *Nocturne in Blue and Silver*; *Arrangement in Black No 3: Irving as Philip II of Spain*; *Harmony in Amber and Black (Portrait of Miss Florence Leyland)*; *Arrangement in Brown*; *Arrangement in Grey and Black, No 2: A Portrait of Thomas Carlyle*. Of these painting only *Nocturne in Black and Gold: The Falling Rocket* was put up for sale, with an asking price of £200, and, while all eight paintings were discussed during the trial, it was *Nocturne in Black and Gold* that was singled out in Ruskin's defamatory criticism (Whistler 6 November 1878).

Whistler's legal position in initiating the libel suit was straightforward: he was tasked with showing Ruskin's review was published, that it referred to him specifically, and that it was defamatory. These steps were not onerous for Whistler to establish. The defence, however, found itself positioned to address a more complex legal challenge. While justification is a preferred and definitive defence in libel cases, affirming the truth of comments on something as subjective as art's value proved problematic. Consequently, the defence hinged on arguing fair comment, claiming Ruskin's critique as an honest and unmalicious expression on a matter of public interest.

Over the two-day trial in November 1878, the court became an arena for self-promotion as Whistler and Ruskin, poised to broadcast their convictions on the nature and purpose of art, presented their arguments before Judge Baron Huddleston and the jury. Whistler, ever the shrewd self-promoter, viewed the trial as an opportunity to not only vindicate his creative integrity but also to advertise his work, while Ruskin relished the prospect of expounding his views on art economy (Whistler 6 December 1878; Ruskin August 1877). The proceedings attracted significant public attention, with the gallery teeming with London's art scene elite, journalists and a notable attendance of women,

reportedly Oxford alumnae, alongside subpoenaed artists from both sides, all contributing to the fervour. However, the trial's dynamics shifted markedly due to Ruskin's absence owing to illness, leaving the ground open for Whistler to command the narrative. Whistler's testimony, delivered with charismatic embellishments, was met with ridicule by the defence counsel, but Ruskin's absence prevented a direct confrontation that could have further illustrated the stark contrasts between their respective philosophies.

Within the courtroom, the trial at times took on an almost farcical air. Whistler's *Nocturne in Blue and Silver: Old Battersea Bridge* (see figure 2) was displayed—to everyone's befuddlement—upside down, at which point the judge explained to the jury that it represented Old Chelsea Church. Once corrected, the disorientation lingered, prompting Judge Huddleston to query with unintended wit: "Is this part of the picture at the top Old Battersea Bridge?" ("Action for Libel Against Mr Ruskin" 26 November 1878: 2) This question became a humorous testament to the subjective nature of experiencing Whistler's art. The defence counsel further escalated the courtroom's slide into theatre, lampooning Whistler's techniques with a wit that bordered on mockery, challenging the very essence of non-representational art that broke from the era's pictorial conventions. The



*Figure 2: Nocturne in Blue and Silver: Old Battersea Bridge*

trial, oscillating between solemn deliberation and unintended satire, underscored the chasm between the esoteric world of modern art and the traditional courtroom.

Despite these courtroom antics, it is important to nuance that Ruskin's critique was not a blanket denunciation of abstract composition; he had, after all,

famously championed the work of J M W Turner (Munsterberg 2009). Instead, his disapproval targeted the philosophical underpinnings of Whistler’s art—the “art for art’s sake” principle that sought to divorce art from moral or narrative utility. The critique engaged with a broader debate, resonant with Marx’s conception of culture as historically and socially contingent, questioning whether the autonomy championed by Whistler could transcend its era or if it was inherently bound to the capitalist dynamics Ruskin deplored. Through the spectacle of the trial and the spirited defence of his aesthetic, Whistler personified the provocative idea of the artist as an individual creator, expressing an ethos of artistic independence that, while magnetic and visually striking, tested the boundaries of art’s function and value within society.

## [B] RUSKIN’S ECONOMIC INTENTIONS AND SOCIETAL CRITIQUE IN CONTEXT

Despite the trial’s focus upon Ruskin’s influence as an art critic, a reputation established by seminal works such as the multi-volume *Modern Painters* (Ruskin 1890), by the 1870s Ruskin’s intellectual pursuits had shifted

toward broader socioeconomic questions. The critical passage in *Fors Clavigera* that provoked Whistler’s suit was a minor portion of a larger discourse—a reflection of Ruskin’s fixation on wide-ranging social issues rather than focused art criticism.

His engagement with the Guild of St George, a charity he founded with the aim of melding arts, crafts and rural economy, signified his commitment to societal transformation.<sup>3</sup> Ruskin aspired to liberate the individual craftsman from the grind of industrial labour, envisioning a society that derived collective joy and spiritual enrichment from skilled artisanship. The sermon-like structure of his prose, increasingly didactic, revealed Ruskin’s distressed perception of an art world ensnared by market forces and his disdain for artworks that embodied, in his view, the ills of industrial capitalism (Ruskin 1877: in Cook & Wedderburn 1907; 146-163).

Within this period, Ruskin authored essays contending with the perils of environmental degradation, illustrating an association between the decline of natural environments, beset by what he termed “plague-winds”, and the corresponding decline in art and morality. Such environments were inimical to the urbanity celebrated in Whistler’s

<sup>3</sup> The Guild is still in existence today: see [website](#).

canvases, possibly intensifying Ruskin's aversion to Whistler's aesthetic (Ruskin 1884: in Cook & Wedderburn 1907; 5-80; in Robbins 2021).

These larger economic and moral criticisms of Ruskin, however, were not readily translated into the legal confines of a defamation trial. Ruskin's alarm at the commercialization of beauty and his depiction of Whistler's asking price as emblematic of a distasteful trend—art's valuation being equated solely with monetary worth—were sidelined by the trial's focus on the libel accusation and potential harm to Whistler's reputation.

Ruskin's gradual retreat from direct art commentary and his immersion into broader societal critique coincided with his deteriorating mental wellbeing. This decline might have influenced the tenor and coherency of his critique, rendering his art assessments even less suitable for articulation within the strict parameters of a libel proceeding. Certainly, Ruskin was not a man to shirk from disparaging language; as the judge commented in his summing-up: "Mr Ruskin is evidently a man accustomed to calling a spade a spade, and, indeed, he sometimes calls a spade something more" (Merrill 1992: 192-193).

In the end, the judicial process failed to engage with the full depth of Ruskin's grievances against

the commodification of art. The trial's findings, while addressing the narrow legal issue of defamation, left unaddressed Ruskin's profound concerns over the ethical and societal dimensions of art's economy—issues that went to the heart of his later life's work.

## [C] THE VERDICT: "WILFUL IMPOSTURE" AND THE BOUNDS OF FAIR COMMENT

In the Victorian courtroom of 1878, while the libel lawsuit of *Whistler v Ruskin* touched upon deeper philosophical questions of artistic intention versus public interpretation, it was Judge Baron Huddleston's task to steer the proceedings back to the legal issues at hand. Therein lay the legal quandary: the case's focus necessarily narrowed on the specifics of the law, which in turn marginalized the broader artistic dispute between the parties. The courtroom had to grapple with the distinction between what constituted libelous content and what fell within the bounds of lawful critique, ultimately prioritizing a resolution based on legal definitions rather than on the larger debate over the nature of art.

Central to the case was the defence of fair comment, necessitating opinions to be



subjective, devoid of malice, and concerning public interest, as dictated by the Libel Act 1843. It was Ruskin's use of "wilful imposture" that sparked the jury's pivotal debate: was this phrase an honest though scathing review, or did it unjustly insinuate deceit on Whistler's part?

Contemporary press accounts reveal the tension in the jury's deliberation. Judge Huddleston stated: "The jury has agreed that the defendant spoke his honest opinion, but that is not enough. The criticism must be fair and bona fide." Responding, the foreman of the jury reflected the collective's uncertainty: "The difficulty among us rests in the opinion of some of us that the words 'approaching wilful imposture' are meant to refer to the artist." To which a fellow juror asked for further clarity: "If there is no reflection upon the man, and the words apply simply to his works, would they come within bona fide criticism?" (Merrill 1992: 195-196) The judge's affirmative answer highlighted the critical concern: distinguishing personal defamation from genuine artistic critique, a conundrum signifying the jury's acute awareness of the significance placed on fair comment within the legal framework.

John Humffreys Parry, representing Whistler, argued that the defence's approach, while possibly intended to diminish Whistler's claim, inadvertently

escalated the case. Parry emphasized the importance of this distinction, stating in court: "When the honorable and learned gentleman sneeringly conjured up an imaginary group of young ladies admiring Mr Whistler's paintings, he must have forgotten that there are women's names in art that are entitled to the greatest consideration and respect" (Merrill 1992: 183). By suggesting that the defence's conduct had been offensive, Parry was opening the way for increased damages. Conversely, the defence counsel's strategy, eliciting laughter through ridicule, was a deliberate attempt to trivialize the suit and mitigate damages, although clearly not a strategy without risk.

The awarded sum—a mere farthing—indicated the jury considered Ruskin's critique honest but insufficiently fair, reflecting the nuanced challenges of adjudicating art criticism within the framework of defamation law. It was a verdict that spoke volumes about the case being anchored in a specific legal principle rather than a referendum on aesthetic values. The contemptuously minimal amount awarded also implies that the jury may have regarded the lawsuit as an inappropriate use of court resources, suggesting they felt the trial was employed more for self-publicity than for seeking redress of genuine harm.

## [D] EVOLVING DEFAMATION NORMS

The *Whistler v Ruskin* trial serves as a notable illustration of the incremental evolution from rigid common law defamation standards towards a more sophisticated balance between reputation protection and freedom of speech, heralded by subsequent statutory reforms.

This shift would soon be further codified via statutory reforms, including the Libel Act 1888 and the Law of Libel Amendment Act 1888, which introduced new provisions for press protections in reporting matters of public interest. While these reforms allowed defendants in libel cases to plead apologies and make amends, it is worth noting that, during the 1878 *Whistler v Ruskin* trial, Ruskin remained steadfast, instructing his counsel to declare unequivocally that he did not “retract one syllable of what he said in the criticism” (Merrill 1992: 171). Despite these firmly held positions, had the 1888 reforms been in place, they might have coloured the jury’s deliberations and affected the post-trial narrative. The statutes heralded greater focus on nuances of defamation concerning the press and public figures and set the stage for a more complex interplay of criticism, reputation and legal recourse.

When viewed through the prism of modern defamation standards, the Victorian judgment in *Whistler v Ruskin* contrasts sharply with current legal practices. Under the Defamation Act 2013, a claimant such as Whistler would bear the responsibility of proving that the defamation caused serious harm to his reputation. This contemporary requirement shifts the evidentiary focus significantly towards the claimant, a departure from the once defendant-centric burden of proof.

This evolution in legal benchmarks echoes a broader societal dialogue regarding the reconciliation of individual honour with the principle of free expression. In its historical moment, the *Whistler v Ruskin* trial became a platform where this delicate equilibrium was tested—an equilibrium that continues to be a subject of legal refinement and public debate. The serious harm criterion embodied in the Defamation Act 2013 exemplifies a legal pivot towards a discernible and substantial impact, rather than an inferred impact, from defamatory content.

## [E] CONCLUSION: MEMORY AND LEGACY

Though conclusively settled in court, *Whistler v Ruskin* etched a lasting impression on the history

of art. Whistler's ostensible win symbolized an ideological triumph if not a fiscal one. While society at large saw humour in the measly sum, many peers and institutions interpreted it as a moral victory, endorsing the preservation of an artist's reputation (Way 12 February 1880; in MacDonald & Ors nd).

The trial's fiscal impact on Whistler was, nonetheless, profound. In May 1879 he was declared bankrupt and his London home and effects put up for sale. The auction of his art works, which took place at Sotheby's, London, on 12 February 1880, marked a turning point in Whistler's career, compelling him to reconstruct his financial and artistic life ("London Bankruptcy Court" 7 May 1879).

Contrastingly, Ruskin's immediate post-trial years were characterized by a withdrawal from public engagements as health and vitality waned. The diminished frequency and fervour of his critical writings post-trial suggest that the legal dispute had a lasting impact on his role as a public intellectual and art critic.

In time, Whistler rebounded, his reputation recovering to assume a central role in the Aesthetic movement. Despite initial challenges, including the public and critical scorn that followed the contentious trial, Whistler's work gained appreciation and respect. Notably, the city of Glasgow acquired

his portrait of Thomas Carlyle in 1891. The "Nocturne" series, once the subject of disdain as evidenced by the hisses greeting *Nocturne in Blue and Silver* at an 1886 auction, gradually transcended its early reception (Merrill 1992: 5). Embracing the negative critique with characteristic flair, Whistler interpreted the public's disdain as inadvertent praise and noted as much in a letter to *The Observer*. Meanwhile, his self-narrative of the trial published in December 1878 crafted an image of resilience and vindication, a sentiment underscored when the *Nocturne in Blue and Gold—Old Battersea Bridge* eventually found a prestigious home in the Tate Gallery in 1905, affirming its status as a valued piece of art (Whistler 1890: 2-19; The Tate nd).

"The most celebrated lawsuit in the history of art" reflects a moment where the art world's connection with the principles of the Aesthetic movement intensified (Merrill 1992: 1). Moreover, through the public spectacle of the courtroom and the sensational press coverage that ensued, the trial actively participated in shaping the discourse on what constitutes the intrinsic value of art itself.

Reflecting on the trial's specifics, the legal process also altered the discourse in other ways. It is evident that Ruskin suffered losses both legal and professional, unable to articulate in court the theory of

art economy he believed might be “sent over all the world” through the publicity of the proceedings (Merril 1992: 62). Yet, the trial did not facilitate the broad dialogue he aspired to catalyse, falling short of engaging with his economic theory of art. His anticipation of using the trial as a forum to illuminate his ideas on art’s intrinsic value versus its market price was stymied by the defence’s requirement to prove fair comment. This legal constraint shifted the discourse from a potentially expansive debate on art economy to a more focused one—hinging on whether Ruskin’s exacting words about Whistler’s *Nocturne* were an honest yet tactful critique or a malicious denunciation camouflaged as assessment.

In the trial’s aftermath, Ruskin’s disillusionment with the law’s limitation on his critical commentary led to his relinquishment of the Slade Professorship, a self-perceived necessity under the weight of what

he interpreted as a judicial gag: “I cannot hold a Chair from which I have no power of expressing judgement without being taxed for it by British Law” (Ruskin 28 November 1878). Thus, the trial of *Whistler v Ruskin* contributed subtly to the shape of the cultural narrative—not through grand declarations about art’s purpose—but by revealing the limitations of the court as a venue for complex cultural debates. It underscored the inherent challenges in assessing and reconciling the theoretical underpinnings of art and its practice within the strictures of defamation law. While it may not have affirmed Ruskin’s theories nor furnished Whistler with substantial damages, the case remains a reflective mirror of this challenging reconciliation, a reminder of the complexities that arise when legal frameworks intersect with the multifaceted realm of artistic expression.

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