

Amicus *Curiae*

The Journal of the Society for Advanced Legal Studies



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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.

EDITOR'S INTRODUCTION

MICHAEL PALMER

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Welcome to the third 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.

Dr Maria Federica Moscati, from the University of Sussex, introduces and edits the Special Section on “Children’s Rights: Contemporary Issues in Law and Society” (Part 2).¹ In her edited section, a broad array of studies provides indepth socio-legal and interdisciplinary examinations of critical questions related to children’s rights. This comprehensive approach not only explores the legal frameworks and protections afforded to children but also explores the multifaceted impacts of these rights on their wellbeing and development. Furthermore, some of the efforts seek to expand the diversity of contributions made to scholarly journals, by introducing new perspectives

and methodologies that enrich the academic discourse surrounding the rights of children. Through this innovation it is hoped to enhance our understanding and advocacy for these fundamental rights, highlighting their importance in shaping a just and equitable society for all children. *Amicus* is especially grateful to Dr Moscati for stepping in and filling in what might have been a hole in contributions to the journal in this and the previous issue.

In the Articles section, the contribution made by Justice Sir Dennis Adjei of the Court of Appeal, Ghana, entitled “Freedom of Expression and its Legal Ramifications in the Era of Social Media” is based on a public lecture delivered at Kwame Nkrumah University of Science and Technology. The contribution notes that the concept of freedom of expression is now a widely recognized term, and carries a meaning that goes deeper than

¹ Part 1 was published in *Amicus Curiae Series 2* 5(2).

its surface-level interpretation, as evidenced in various international and national legislation. The Universal Declaration of Human Rights, adopted by the United Nations (UN) General Assembly in Paris on 10 December 1948, aimed at preventing human rights abuses following the atrocities of the Second World War. It highlighted freedom of expression as a cornerstone of democracy. Today, all 192 UN member states are committed to that value, thanks to their adherence to subsequent UN treaties, despite its original non-binding nature. Over time, this Declaration has evolved into a value in customary international law, carrying obligatory weight. Freedom of expression, an inherent human right, allows individuals to seek, receive and impart information across borders through any media, thereby playing a crucial role in educating people about their rights.

Dr Neels Kilian (Faculty of Law, North-West University, South Africa) in his contribution entitled “What about Insurance Law Principles? A Comment on the South African Case of *African Unity Life Limited v Prosper Funeral Solutions* Case No 2021/55922/” examines legal issues in South African law associated with the concept of an insurance net premium. The term “net premium” encompasses both individual

premiums and the collective aggregation, often referred to through a loss ratio calculation. This calculation holds particular relevance for a specific agent within an insurance company, known as a binder holder, which is analogous to a cover holder at Lloyd’s of London. In the South African context, a binder holder represents an approach equivalent to a cover holder, functioning as an insurance entity without possessing an insurance company licence. This arrangement enables the execution of tasks such as drafting policy wordings and adjudicating claims. The article reviews a case where the court overlooked the significance of both a binder holder and a net premium, as well as the relevance of a bordereau in the operational undertakings of the company called Prosper Funeral Solutions.

In his essay “The British Courts and Compulsory ADR—How Did *That* Happen?” Dominic Spenser Underhill examines the nature and significance of the Court of Appeal’s decision of 29 November 2023 in *James Churchill v Merthyr Tydfil County Borough Council* by which the Court ruled that courts in England and Wales have the legal authority to compel parties to participate in alternative dispute resolution (ADR) processes outside of court. This landmark decision aligns

with expectations. This article demonstrates, through case law, judicial commentary and the Civil Procedure Rules (CPR), that this ruling reflects a longstanding judicial tendency to encourage parties towards negotiated, consensual resolutions, rather than relying solely on court judgments. This decision addresses a discrepancy in the CPR, which requires parties to consider ADR to achieve the overriding objective, yet previously did not grant courts the power to enforce this requirement. The article will explore the origins of the Court of Appeal's decision, assessing how it represents both a continuation in the trajectory of judicial evolution and a significant processual innovation.

Dr Mei Ning YAN in her contributed essay on Hong Kong entitled "Is There a Right to Newsgathering in Hong Kong? Putting The CFA Judgment of *Choy Yuk Ling* in Context" examines the Court of Final Appeal decision in the recent case of the *HKSAR v Choy Yuk Ling*. The Court overturned the convictions of a journalist charged with making false statements while searching a government-maintained vehicle register that held personal data crucial for journalistic investigations. The Court ruled that the interpretation

of permitted search purposes should not be so narrow as to exclude legitimate journalism. It emphasized the importance of freedom of speech and press freedom, noting that data protection laws allow for the disclosure of personal data in the public interest for journalistic activities. However, the Government in Hong Kong quickly countered this decision with new regulations that effectively barred any use of the register for journalistic research, undermining the court's stance on press freedom.

As part of the Special Section on Children's Rights, in the Visual Law section,¹ Alankrita S's essay "Participation of "Walled" Children Begins When Adults Listen—The Right to Participation of Children in Conflict with the Law in India" studies children experiencing legal troubles. It employs qualitative methodology to explore adult practitioners' perceptions of the participation rights of juveniles who are in conflict with the law within India's juvenile justice system. The research seeks to identify obstacles that hinder these children's right to participate. The findings indicate that adults often view these children merely as future contributors, thereby underestimating their capacity

¹ Readers of 'Visual Law' are also encouraged to peruse the article by Caralyn Blaisdell, Fatmata K Daramy & Pavithra Sarma at page 399.

for meaningful participation. However, the study reveals that when children's voices are heard, they can significantly enhance the knowledge and methodologies of adult practitioners. Additionally, feeling listened to makes children feel valued, increasing their willingness to engage. This underscores the responsibility of adult practitioners to create safe spaces for children to express

themselves and meaningfully contribute to decision-making processes.

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.

Special Section:
Children's Rights: Contemporary Issues in Law and
Society (Part 2), edited by Maria Federica Moscati,
pages 387-563

INTRODUCTION TO THE SPECIAL SECTION (PART 2)

MARIA FEDERICA MOSCATI*
UNIVERSITY OF SUSSEX

Happiness is me when I wake up in the morning, and I smile.

(Quoted from the project Children, Law and Happiness)¹

Why don't you talk about children in war?

Where can we learn about children's rights?

(Quoted from meetings on children's rights with children in Italy)²

A THANK YOU BEFORE THE INTRODUCTION

I wish to start this introduction by thanking the children who have inspired this Special Section.³ I will then move on to present the Special Section (Parts 1 & 2).⁴

Dear Children/Young People,

Thanks for motivating me to edit this Special Section.

Thanks for the conversations, in person and online, we had over the last two years. Thanks for your questions and for your advice. Thanks also for your criticism. Among others, my appreciation goes to the young people who have contributed to

* I wish to express my gratitude to Michael Palmer, Marie Selwood and Narayana Harave for their invaluable support.

¹ Ethics Certificate of Approval: ER/MFM30/3 (Social Sciences & Arts C-REC, University of Sussex). Empirical data was collected between 2018 and 2024 through art-based research methods involving 500 children and adolescents in England, Italy, Brazil, China, Germany, Bolivia and China.

² In person meetings held in Italy between 2022 and 2024.

³ The content of the letter is my responsibility alone and is not attributable to the journal, the Institute of Advanced Legal Studies or the authors that have published in the Special Section.

⁴ Part 1 is available in *Amicus Curiae* Series 2, Volume 5, No 2.

this Special Section (see Hope & Ors in this volume), the child who contributed a drawing to Part 1 of this Special Section, the children attending the Italian School in London,⁵ the children attending the Istituto Comprensivo Statale Picentia,⁶ and those from other schools in European countries who invited me to the online workshop ‘Children’s Rights Seen through Children’s Eyes’.⁷ Thanks also to the children who agreed to write for this Special Section but then, for several reasons, could not submit.

During our conversations, we touched upon so many aspects of children’s rights—what they are, why some children are not protected, why parents always have the last word, how you can learn about children’s rights, and how I should do research on children’s rights. You showed me that knowledge about children’s rights is still not accessible to all children, that the voices of several of you are not heard, that it is embarrassing for adults that so many rights and children’s lives are neglected. You advised me on how to make academic publications accessible to you. In your words, you articulated and made visible the inconsistency between the theory and the practice of children’s rights. But you also suggested how to start addressing that inconsistency, including by inviting children to publish in this Special Section, leaving them free to explore the topic they wanted and using the means they preferred.

When discussing what in your view were the important topics and rights to talk about, you (rightly) pointed out that all topics concerning children and all children’s rights are equally important, but one of you asked me: ‘Why don’t you talk about children in war?’ Thus, I wish to express all my support to the children in Palestine, Burkina Faso, the Democratic Republic of Congo, Myanmar, Somalia, Sudan, Syrian Arab Republic, Ukraine, Yemen and to all children involved in or affected by armed conflicts—their rights are violated and, apart from blaming each other, the adults who caused those conflicts are hardly doing enough to stop the killing, torturing, abuse

⁵ SIAL School [website](#).

⁶ Istituto Comprensivo Statale [website](#).

⁷ Online 29 November 2023. The schools involved were: C Picentia—Italy; Collège Marcel Cuynat—France; Osnovna Škola Laslovo—Croatia; Lepi Poti Public School #4—Georgia; Olcay Külah Ortaokulu—Turkey; Başiskele Gübretaş Ortaokulu—Turkey; Kiskunfélegyházi József Attila Általános Iskola—Hungary; Școala Gimnazială “Professor Paul Bănică”—Romania; Școala Gimnazială “dan barbilian”, Galati—Romania; Kynopiastes Primary School—Greece.

and neglect of those children!⁸ When you asked that question, you encouraged me to reflect on my work as a researcher and activist, and so I believe that current children's rights discourses and research should be re-thought in light of the horrendous violations happening at this very moment. The academic and research communities need to be held to account and be guided by children's own priorities.

Although it is well-known that the notion of childhood, the boundaries between childhood and adulthood, and the interpretation of the United Nations Convention on the Rights of the Child 1989 are socially constructed (for a comprehensive and accessible overview, see Tisdall & Konstantoni 2023), in our conversations it was even more striking the gap between how children see themselves and their rights, and how adults do. It was also obvious that how we communicate is so different. Thus, this Special Section is an attempt to address some of your questions and advice.

Powerfully, the young people who contributed to this Special Section highlighted the importance of poetry, as it “offers a condensed form of communication that can be especially accessible to children and young people” (Hope & Ors, this volume). Thus, trying to communicate my appreciation for you, and also because poetry helps me with my cognitive limitations—it makes writing in another language less self-judgmental and performative for me—I end this letter with a poem dedicated to you.⁹ But the poem is a work in progress; if you think other stanzas should be added, just email me and I will add yours.¹⁰

If you wish to listen to me reading the poem, then please follow the link below.

Introduction to the Special Issue and reading of the poem

I AM A CHILD

⁸ For a comprehensive overview, see [Secretary-General Annual Report on Children and Armed Conflict](#), 13 June 2024.

⁹ I wish to thank my dear friend and poet Barney Ashton-Bullock for guiding me in this endeavour.

¹⁰ Feel free to email me at m.f.moscatti@sussex.ac.uk. Changes will be made to the version of the poem uploaded onto my university profile.

I AM A CHILD

I am a child

Nennella

Criança

Niña

Wonderment stirred not dulled

Spirit budding not hulled

I am a child

孩子

طفل

Mtoto

Knowledge created not imposed

Power is mine not only yours

I am a child

Nwa

கழந்தை

Zarok

These bombs are not mine

These bombs are just yours

I am a child

শিশু

Ume

Ingane

Identity to nurture, not suppress

A voice, a body ... don't neglect! Respect!

And many, many more

A happiness inside

If left free to retrieve ...

If gifted love to believe

But tell me, stranger, please

Who do you think I am?

[A] THE SPECIAL SECTION: A COLLABORATIVE JOURNEY

To fulfil the children's advice, this Special Section was driven by a twofold aim. On the one hand, centring children as creators of knowledge, offering them a space to convey their knowledge while using their preferred means. On the other hand, accommodating various ways of discussing, doing research on and writing about children's rights. In this endeavour, several questions arose in relation to how to negotiate the *100 creative languages*¹¹ that children and young people use to create knowledge and express themselves in the context of the rather structured and homogenising tradition of academic writing. Although it is not the first time that—as editor—I find myself reflecting on how to balance pushing the boundaries of academic writing and working within academic parameters,¹² this time I found it more challenging, owing to the different epistemic registers involved in the production of this Special Section.

I went back to the notes I had taken during meetings with children in Italy, and it was apparent that the children with whom I talked gave me clear advice on how to proceed towards a more collaborative (and fun) publication process. They showed that all issues concerning children's rights demand attention while suggesting creative ways to write about children's rights. Overall, the children encouraged me to adapt the Special Section to authors' creativity, choices and languages. Therefore, the title and the aim of this Special Section were purposefully designed broadly in scope (in other words, the label "Special Section" was chosen just to group the articles that focus on the broad theme of children's rights). We welcomed researchers, activists and practitioners from different disciplines, backgrounds and geographical areas. We also offered the possibility to non-academic contributors, who could not submit written essays, to be audio recorded and then have their recording transcribed by the editor.¹³ Children, young people and youth activists were invited to contribute using the means they preferred.

We drew upon the Reggio Emilia Pedagogical Approach and Loris Malaguzzi's 100 Languages, according to which:

¹¹ See [Reggio Emilia Approach](#).

¹² Similar questions arose in the context of the publication of the edited collection *Queer Judgments* that I have had the honour of co-editing with Nuno Ferreira & Senthoran Raj (forthcoming, Counterpress, 2024). See info at the [Queer Judgments Project](#).

¹³ Ethics Certificate of Approval: ER/MFM30/24 (Social Sciences & Arts C-REC, University of Sussex). Three paediatricians kindly talked to me and some of their answers have informed this introduction.

The child has
a hundred languages
a hundred hands
a hundred thoughts
a hundred ways of thinking
of playing, of speaking.¹⁴

Consequently, this Special Section welcomed creative pieces. Contributions have taken the form of essays, letters, creative writing, reflective writing, drawings, poems, spoken poetry, videos and audio.¹⁵

Further insights into how to develop this Special Section emerged during the meetings I had with Kristen Hope and the group of young people and activists who contributed to it. Questions concerning copyright, ethics and language arose, highlighting how academic writing—as it stands at this very moment—is obsolete and auto-referential. Thus, we prioritized the inclusion of children’s and young people’s productions in their own terms, without pushing them to be infantilized or to shape their voice according to what is considered academically rigorous and publishable. Although conscious about emphasizing the obvious, my conversations with children and young people pinpointed all the practical aspects of academic writing embedded in colonial, elitist, adult-centred and ableist traditions.

In this regard, decisions on academic style, and whether to use languages other than English, swear words and profanities, required particular attention. Writing in non-native languages undermines and empowers at the same time; it requires shifting, acceptance, self-confidence and resilience that—as human beings—we do not always possess. The efforts that non-native speakers make to adapt to another language and style of academic writing are often overlooked, whereas the rules of rigorous/plain/clean/publishable academic writing are imposed without questioning their very colonial and elitist nature. That imposition is generally uncritically accepted and normalized. Language and academic style are political and can be used politically, at the same time to embrace and to exclude. For the non-native speaker choosing to adapt to a certain language and academic style represents not only a matter of grammar or syntax, but also prompts deeper reflections and compromises about cultural power imbalances.

¹⁴ For the full text of this poem, see [100 languages](#).

¹⁵ See all multimedia content on the *Amicus Curiae* dedicated [YouTube channel](#).

The young writers who participate in this Special Section have transparently described the challenges that writing in another language brings (Hope & Ors in this section):

One significant challenge was the language barrier, with some young writers expressing that it was their first time writing poems in a non-native language. Though there was no obligation to write in a non-native language, they faced hesitation in expressing themselves in their native languages. The difficulty in translating ideas and the fear of misinterpretation while translating influenced this decision. Some felt it challenging to choose suitable words to make the writing decent.

Thus, this Special Section welcomed the publication of works in languages other than English too.

Another issue concerning language is the use of swear words in academic writing and academic writing concerning children. In the paper by Blaisdell and others, swear words are used. The authors clearly explain that:

[I]n keeping with the enmeshed nature of researcher and researched, particularly as two researchers are women of colour, we use swearing in one section via spoken-word poetry. Swearing is framed as a coping mechanism and response to narratives witnessed in the project, alongside the navigation of systemic racism and the colonial edifice that children and young people of colour and their families are forced to navigate. There will be usage of Pavi's mother tongue, Tamizh (Tamil), via phrases and a few sentences alongside translations, capturing these intimate reflections.

It has been shown that swear words and profanities can serve several personal, relational and social functions; deciding whether and how to use them depends on the context and on personal reasons; they are both related to emotions (Ashwindren & Ors 2018; Stapleton & Fägersten 2023). The journal's production team, the general editor of the journal and I—as editor—reflected on this.¹⁶ We discussed, and we felt that the use of profanity was appropriate in this context and was not meant to inflict harm. We were inclined to allow the swear words and profanities in the interest of freedom of expression and authenticity. We knew we had the option to “bleep” out the words in question, but we were reluctant to do this, as the text is powerful and, when the phrase is used (as a “chorus”), it is not directed at an individual but used as a form of emphasis.

¹⁶ See, for instance, the Oxford University Press's [Ethics Guidelines](#) on publishing; [COPE Code of Conduct for Journal Editors](#); OFCOM's [Ofcom Guidance on Offensive Language](#) on radio; and the BBC's [Editorial Policy Guidance Note: Language](#).

The reader might now expect that this Special Section includes plenty of works authored by children and young people. This is not the case. Some of the groups of children and their teachers who agreed to contribute did not submit, owing to other school commitments or lack of interest in academic publications, or for finding academic publishing intimidating or boring. Thus, “to ensure children and young people’s participation is not only the *subject* of such knowledge production but also part of the *process* of such knowledge production” (McMellon & Tisdall 2020: 172), further conversations with children and young people are needed to understand how to innovate academic writing by making it *child-led* and not only *child-friendly* and to ensure that children are the protagonists of such works (Liebel & Ors 2023).

Although creative methods have demonstrated to be important to involve children and young people in academic publications (Kara 2015; Tatham-Fashanu 2023), more is needed. My conversations with the children emphasized how children’s rights and how we learn/research/talk about them is very much about bodies and movement. Working with children on academic writing requires us to overcome the separation between brain, emotions and bodies in academic writing *on children*. To achieve that, a humble shift in epistemic hierarchy on the academics’ side should happen. I believe that academic researchers should start by questioning the level of participation in deciding whether and how to use specific theoretical frameworks to investigate children’s lives. Even when we, as researchers, adopt theoretical frameworks that aim to break epistemological hierarchies, we should ask children and young people if they agree with our approaches. We should then involve children and young people in the whole process of publication by reshaping traditional academic publications according to what children and young people experiment ... still keeping high standards of quality but leaving children and young people to decide what “high quality standard” means. Of course, in this shift we need to be mindful of all ethical implications and avoid ethics paternalism (Alves & Ors 2022). Participation is not static, and it does not happen in a vacuum; it is naturally in motion and so, therefore, should be academic research and publishing about children’s rights.

[B] THE SPECIAL SECTION: THE PAPERS, THE POEMS, THE VIDEOS

The contributions in this Special Section (Part 1 & Part 2) feature analyses of several topics concerning the nature, application and knowledge of children's rights. A common motif that emerges from the papers published in this volume and in Part 1, and that also reflects the more general *status quo* of children's rights nowadays, is that more than ever children's rights now appear to be aspirational! The inconsistency between the rights *in the books* and the *lived rights* is evident. Together with all the examples offered by the contributors, I believe that the aspirational dimension of children's rights is also performed by some adults with recourse to erasure of identities and by overlooking the silence of those children who, for their own safety, prefer to stay silent. One of the participants in the project "Children, Law and Happiness" suggested that "Happiness is me when I wake up in the morning, and I smile." This answer, and the drawing that came with it, made me wonder how many (children) "me"s can say the same. The papers in the Special Section show that several "me"s are not happy because social, political and cultural factors have profound impact on whether children's rights are implemented and respected. Thus, not removing those barriers represents one of the faces of structural violence (Galtung 1969: 175) that cannot be tolerated anymore.

The paper by Caralyn Blaisdell, Fatmata K Daramy and Pavithra Sarma opens Part 2 of the Special Section. The authors reflect on their experience with the project "The Impact of the Covid-19 Pandemic on Children of Colour in Scotland: Visions for Change". Using creative writing, spoken word poetry, images and reflective writing, the authors highlight how the relation between the researcher and the researched is linked to extractive practices, ethical care and navigations of systemic racism in children's rights research with children of colour. The authors do so by positioning themselves and their personal narratives, at times, as axles within this piece of work using Unarchigal (உணர்ச்சிகள்)—Modalities of Resistance, which is an embodiment resistance approach created within postcolonial radical feminist autoethnography.

In her essay, Susie Bower-Brown encourages the reader to reflect on the evolving nature of the conversation around gender identity among young people. Although there is a growing recognition of gender diversity within schools, this recognition is accompanied by widespread debate and highlighted by the United Kingdom (UK) Government's recent introduction of controversial draft guidance that in schools bars social transitioning. Central to this debate is the concept of safeguarding. By

offering a thorough and critical examination of the current discourse concerning gender-diverse students in schools in the UK, the author sheds light on the manner in which the wrong construction of gender-diverse children together with the misuse of safeguarding unjustly limits the rights and autonomy of gender-diverse children and young people.

Debra L DeLaet, Brian D Earp and Elizabeth Mills dig into the limitations of international and national legal frameworks concerning the protection of children with intersex traits against involuntary medical interventions on their sexual anatomy. After reviewing relevant international human rights laws and national laws, the authors comment on the current inefficient and limited legal protection of the rights of intersex children. The authors show how the rights of intersex children to bodily autonomy are hindered by a variety of intersecting cultural, legal, medical and political factors, and rightly suggest that to overcome such limitations a multifaceted approach encompassing legal reforms, increased education for medical professionals, cultural transformation and consciousness-building at a societal level is needed.

The article contributed by Marianna Iliadou on “International Surrogacy and Stateless Children: Article 7 UNCRC and the Harmful Effects of Statelessness” explores the extent to which conflicting national laws and opposition by national authorities undermine children’s rights in international surrogacy arrangements. In particular, by focusing on statelessness arising from such arrangements, the author critically suggests that Article 7 of the UNCRC should be interpreted together with the Verona Principles. Such combined and holistic reading and application of Principles and children’s rights would address the broader social, legal and personal implications that statelessness creates for children.

Carmelo Danisi and Tomas Caprara, focusing on sexual abuses perpetrated against children by members of the Catholic Church, offer insight into the challenges posed by applying the UNCRC to the Holy See. They argue that, despite the Holy See’s ratification of the UNCRC, the rights and the best interests of children are overlooked due to, among other factors, the unique international legal standing of the Holy See. Taking also into account the latest reform of Pope Francis, the authors show how the Holy See can be held internationally responsible for the violations of the UNCRC originating from the sexual abuses perpetrated by local bishops and priests.

Maria Mercedes Frabboni engages the reader in a reflection concerning the concept of children as authors and creative entities through the lens of Maria Montessori’s educational philosophy. Her contribution addresses

the critical question of whether current copyright laws respect and protect the creations by young authors. Drawing upon Montessori's insights into children's creative freedom, the author argues that the early years are crucial for children to exercise their creative authorship, allowing them to showcase unparalleled freedom and originality. To fully respect and celebrate the creations of children, Maria Mercedes advocates for a copyright law framework based on the UNCRC.

Chelsea Wallis contributes this Special Section with a poem that addresses the subjective experiences of neurodivergent children within the classroom. The poem gently walks the reader through the experiences, voices and feelings of neurodivergent adults who talked with the author to share their reflections on their years at school.

Kristen Hope, Dhruv Bhatt, Januka Jamarkatel, Brian King, Osish Niroula, Jeshis Jamarkatel, Siroun Thacker, Purnima Bhattarai, Rodoshee Sarder, Samikshya Dahal and Prathit Singh close the Special Section and gift the reader with a groundbreaking contribution "Poetry for Rights! Intergenerational Co-creation for Child Rights Scholarship!" This collective work, undertaken by an inspiring group of child rights advocates, including children, young people and an adult ally, using narrative, poetry and videos, manifests that intergenerational scholarship on children's rights is achievable. In theory, as for the other contributions, I should offer here a summary of the paper. However, I believe that you, the reader, should read the essay and listen to the poems just following your emotions and without any guidance. I wish, however, to share with you that meeting this group of authors has been empowering for me as a researcher, activist and editor! I have met with them twice since 2023. The first time, we introduced ourselves to each other and had a conversation on how they could develop their contribution in a way that "would not leave the child behind" and would not overlook the reality that all children and all their rights (even when violated) are contemporary and important. The second meeting offered me the opportunity to learn more about their work-in-progress and to answer technical questions about publications. Both encounters were for me precious gifts of knowledge, acknowledgment and gratitude. We saw each other, we connected with each other, and, to put it in Giovanni Allevi's words, I thank all the authors of "Poetry for Rights!" for showing that we can lose a lot, but never "the hope, and the wish to imagine".¹⁷

¹⁷ Monologue by Giovanni Allevi.

About the author

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Legislation, Regulations and Rules

United Nations Convention on the Rights of the Child 1989

THE IMPACT OF THE COVID-19 PANDEMIC ON CHILDREN OF COLOUR IN SCOTLAND: METHODOLOGICAL AND ETHICAL REFLECTIONS

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Abstract

In this article, we offer methodological and ethical reflections from our research project, “The Impact of the Covid-19 Pandemic on Children of Colour in Scotland: Visions for Change”. The project was conducted from January to July 2021, largely under Covid lockdown conditions. Our reflections take the form of creative writing, spoken-word poetry, images and reflective writing. Particularly, we highlight the ongoing, enmeshed and entangled nature of researcher and researched and how this relates to extractive practices, ethical care and navigations of systemic racism in children’s rights research with children of colour. We do so by positioning ourselves and our personal narratives, at times, as axles within this piece of work using Unarchigal (உணர்ச்சிகள்)—Modalities of Resistance, which is an embodiment resistance approach created within postcolonial radical feminist autoethnography. We suggest that researchers might consider similar reflexivity around these issues in their own children’s rights research.

Keywords: children’s rights; anti-racism; ethics; auto-ethnography.

¹ The authors would like to thank the children and families who took part in this project and trusted us with your experiences and vision, and Shakti Women’s Aid for help with ethical reflections and recruitment. Thank you as well to Dr Osarenkhoe Ogbeide and the artists from [New Africa Comics](#) for creating beautiful panels illustrating the children’s views. This project was funded by the Scottish Funding Council’s “Research Funding to Mitigate the Effects of COVID-19 on the Research Base”, and the School of Arts, Social Sciences and Management at Queen Margaret University.

A note for readers: in keeping with the enmeshed nature of researcher and researched, particularly as two researchers are women of colour, we use swearing in one section via spoken-word poetry. Swearing is framed as a coping mechanism and response to narratives witnessed in the project, alongside the navigation of systemic racism and the colonial edifice that children and young people of colour and their families are forced to navigate. There will be usage of Pavi's mother tongue, Tamizh (Tamil), via phrases and a few sentences alongside translations, capturing these intimate reflections.

[A] INVOCATION

To begin the paper, we have placed an invocation, written in Tamizh (Tamil), Pavi's mother tongue. The invocation draws attention to resistance, drawing on verses denoting liberation from British colonial rule. Please watch the video for an explanation and a translation.

Kummi Adi Invocation



Figure 1: Invocation

Invocation Video

Invocation Transcript

[B] INTRODUCTION AND BACKGROUND

In this article, we offer methodological and ethical reflections from our research project, “The Impact of the Covid-19 Pandemic on Children of Colour in Scotland: Visions for Change”. The project took place from January to July 2021, largely under Covid lockdown conditions. Fatmata was the research associate, Cara the project lead, and Pavi a consultant on the project. In the first half of the article, we review the background, methodology and findings of the project. We then offer methodological and ethical reflections, which are rooted in our own experiences but relate directly to the ways the project with children of colour was designed, carried out and disseminated. These are inspired by Unarchigal (உணர்ச்சிகள்)—Modalities of Resistance, an embodiment resistance approach created within Pavi’s Masters research, drawing on postcolonial radical feminist autoethnography. We hope these offerings help other researchers think through similar tensions and questions, although there are not always clear answers.

At the time our project began, early data about the spread and distribution of the Covid-19 virus in the United Kingdom suggested that in England and Wales, people from Black and South Asian ethnic backgrounds had increased risks of death involving Covid-19 compared to the white population (ONS 2020), a pattern that persisted through the first two years of the pandemic (ONS 2023). In Scotland there was a similar pattern, with those of Pakistani, Chinese, Indian and other Asian ethnicities suffering higher rates of hospitalizations and deaths compared to the white population (Public Health Scotland 2022). The disparity illustrated how effects of the Covid-19 virus intersected with existing racist inequalities in healthcare and social/working life (Nazroo & Becares 2020), as well as increased vulnerability in racialized groups because of the long-term health impacts of experiencing racism (eg Selvarajah & Ors 2022). However, there was little research at the time—and still today—that focused on children of colour and their views on the pandemic in Scotland. This gap compounds the silencing of children of colour (eg Intercultural Youth Scotland 2020), who have the right under the United Nations Convention on the Rights of the Child 1989 (UNCRC) to express their views on all matters that affect them and to have those views given due weight (Article 12), but who are frequently left out of policy and practice research.

Children and young people’s participation in research about their lives is not a specific right enshrined in the UNCRC but has been linked to several Articles in the Convention. For example, Beazley and colleagues

(2009) argue that Article 12 (right to be heard), Article 13 (freedom of expression), Article 3 (highest possible standards in work with children) and Article 36 (protection against exploitation) interweave to create the “right to be properly researched”, encompassing considerations around ways of participating, methodological approaches and ethical issues. Indeed, children’s participation in research studies has burgeoned in recent decades, with an accompanying body of literature examining the shifting positionality of children as objects, subjects, participants and/or co-researchers (eg Woodhead & Faulkner 2008; Nkimba 2023); methodological considerations (eg Punch 2002; Nxumalo 2021); and ethical principles and practice (eg Garcia-Quiroga & Agoglia 2020; UNICEF 2022). However, as Abebe and colleagues (2022: 258) note, a great deal of published research with, on and about children proceeds from a northern/Euro-Western-centric gaze, with “accompanying knowledge extractivism”; the role of the child being to supply data, from which northern-influenced “universal” experiences are produced and circulated. Decolonial scholars have called for change in the “why and how” of knowledge production and representation—for example, the dominant practice of extracting data in the form of disembodied “voice-reliant” methods, the dominance of publishing in English in Euro-Western academic journals, and the expected structuring of papers into methods, findings, discussion etc (Abebe & Ors 2022). As our article will demonstrate, these are issues we have grappled with ourselves as we reflect after the project concluded.

[C] METHODOLOGY

Given the gaps identified in research about the perspectives of children of colour, the Visions for Change² project aimed to explore the social and cultural elements of how children of colour were experiencing the pandemic in Scotland and how they wanted public services to support them and their communities. To facilitate participation beyond an Anglocentric lens, the informational flyers were translated into 16 languages by community translators recruited through Pavi’s grassroots networks. To maximize flexibility, participants were offered a range of ways to take part:

- ◇ Zoom interview;
- ◇ writing or drawing;
- ◇ making voice recordings.

Participants could also choose a combination of the above or suggest their own Covid-safe way of participating. These methods were designed in conversation with two Scottish children of colour acting as advisors

² See the project webpage: ‘[Impact of Covid-19 on children of colour in Scotland](#)’.

(age 11 and 12 years), and with the project advisory group comprised of three adult women of colour anti-racist activists living in Scotland. Given the disproportionate effects of Covid on people of colour, we focused the research on children's desire for change rather than asking them to recount individual traumatic events.

Underpinning these methods was an anti-racist, intersectional perspective in which the realization of children's rights—including participation rights—was understood as a recognition of children's "presence", embedded in interdependent relationships and shaped by the power dynamics of broader social relations—including racism and colonialism (Moosa-Mitha 2005; 2017; Nxumalo & Cedillo 2017). Therefore our project offered multiple, flexible ways of taking part and did not seek to extract perspectives from children isolated from the relationships of their lives. For example, many child participants were supported by an adult, and several adults took part with/on behalf of their very young babies. Overall, 35 children and young people of colour in Scotland took part. The age range of child participants was nine months old to 15 years old. The participants were fairly evenly divided in terms of gender, with 57 per cent identifying as male and 43 per cent as female in an open text box.³ Most children were living in Central Scotland, with the majority in SIMD 1 and 2 postcodes.⁴

[D] SELECTED FINDINGS

The data was analysed thematically, with four key findings emerging. Some of these are encapsulated in Figures 2 to 4, over the following pages. The themes were also mapped onto the UNCRC. As the findings illustrate, children of colour expressed a range of ideas for how they wanted things to change. These desires relate directly to children's rights as enshrined in the UNCRC. First, children of colour want to be heard (Article 12: and see Figure 2). The child participants were very clear that people in power should hear their experiences and learn from them. They wanted us to "give [the findings] right to them"—ie tell people in power about the research. However, another participant was pessimistic about the effects of this, saying they didn't think people in power would listen. Second, children of colour should not experience racism (Article 2). The

³ We used an open textbox to avoid limiting the ways children might describe themselves. However, going forward, it may be more meaningful and consistent to LGBTQ+ participants to offer multiple choices and an open text box (eg Guyan 2022).

⁴ The Scottish Index of Multiple Deprivation is a relative measure of deprivation across 6,976 small data zones. If an area is identified as "deprived", this can relate to people having a low income, but it can also mean fewer resources or opportunities (Scottish Government 2020).

participants wanted everyone to be treated equally and that there should be “support for all races”. However, two participants described their experiences of racism related to the pandemic. For example, a child aged seven, who identified themselves as Chinese-British, had “horrible names” shouted at them in the park and was told they were not invited to a birthday party because they were Chinese. Third, children of colour and their communities should have what they need to thrive (Articles 22, 24, 27, 29: and see Figure 4). This included specific resources and groups for people of colour, appropriate healthcare services, adequate benefits including good housing stock, support for refugees and asylum seekers and resources to support their education. Finally, children did not want to be isolated, should lockdown measures return (Article 15). They missed things like playgrounds, youth clubs, museums, the zoo, cinemas and restaurants, and wished they could see family who lived at a distance. When returning to school, they were arranged into strict groupings and not allowed to mix and match, which meant they missed their friends in other groups (although one child thought the groupings made it easier to concentrate at school).

The thematic analysis also led to three recommendations from children:

- ◇ Recommendation One: People in power should learn about racism and take an active role in fighting racism! (see Figure 2)
- ◇ Recommendation Two: People in power should invest in services, to support children of colour and their communities to thrive!
- ◇ Recommendation Three: People in power should fight Covid!

Selected themes from the findings and recommendations are represented below in Figures 2 to 4, in the form of comic book panels created for the project by [New Africa Comics](#).⁵ The panels were created based on the thematic analysis and represent a composite based on data collected with multiple participants, sometimes dramatized as a single story. The comic book offers a different way to engage with the findings, going beyond the written word alone, and particularly highlights the emotionality of the project’s findings.

⁵ The full comic can be found on the [project website](#).



Figure 2: Black and Brown children should be heard by those in power (Article 12: the right to be heard).

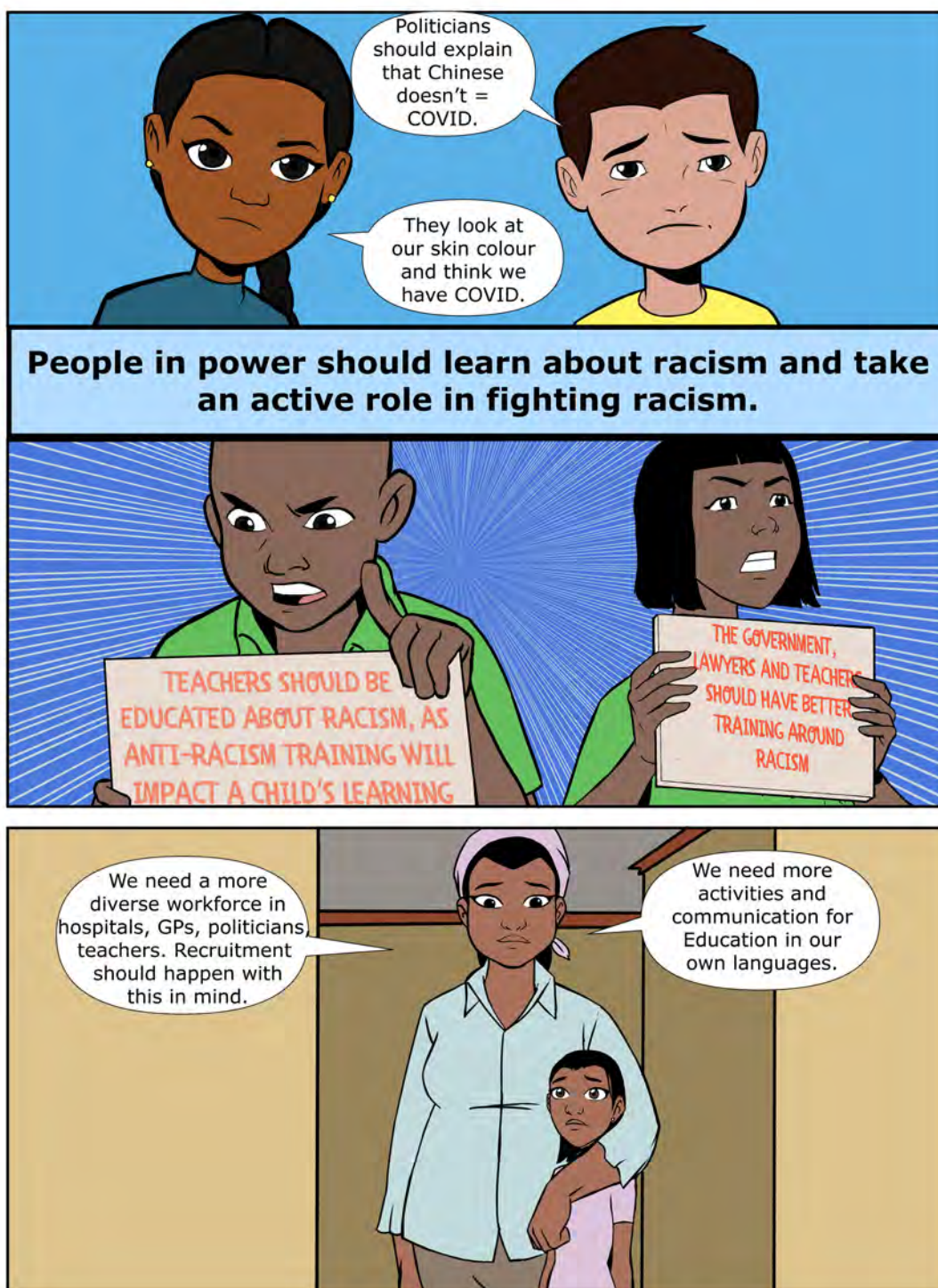


Figure 3: People in power should learn about and fight racism (Article 2: obligation to ensure non-discrimination in the realization of rights).

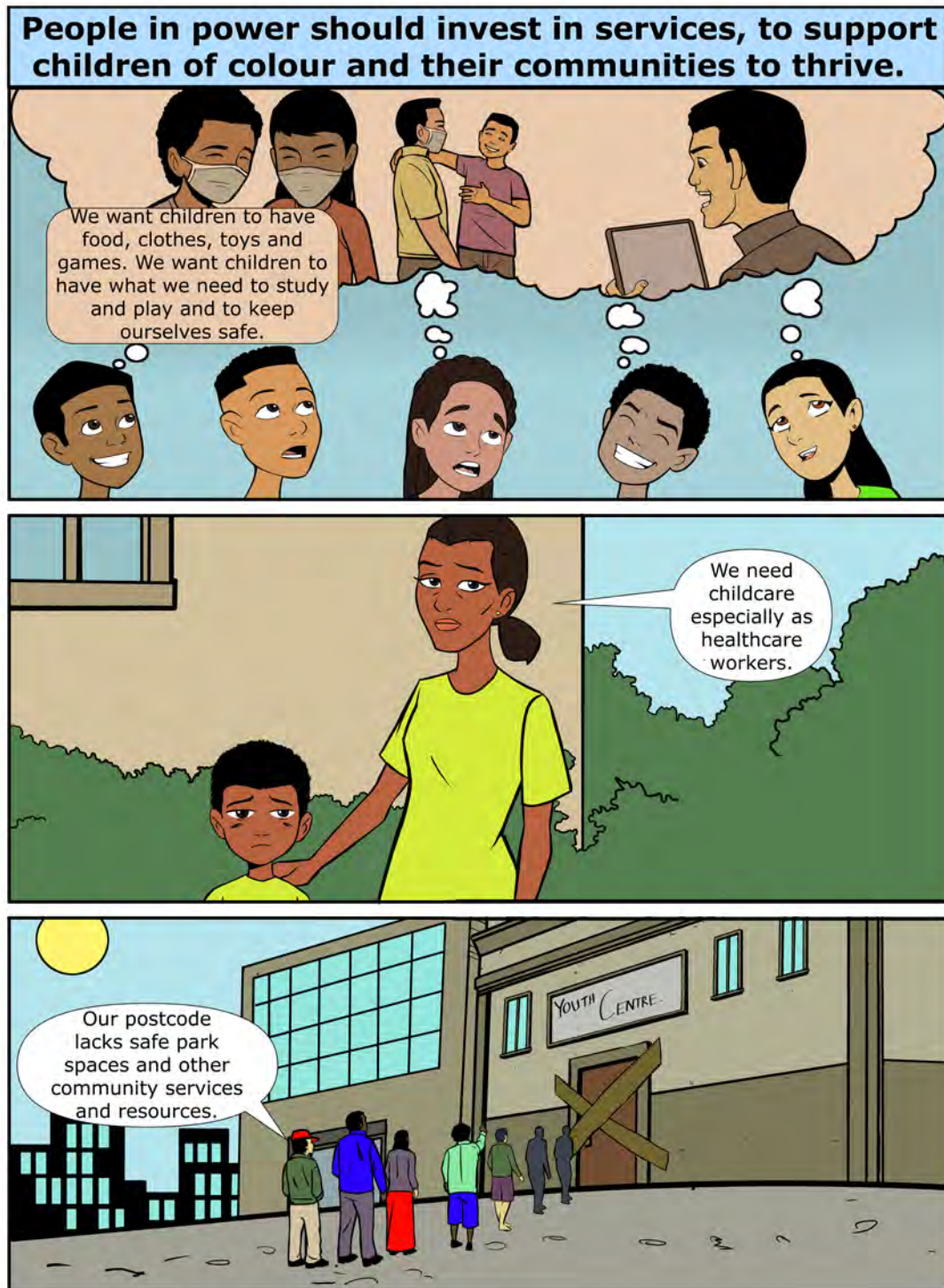


Figure 4: People in power should support children of colour and their communities to thrive (Article 27: right to a standard of living adequate for the physical, mental, spiritual, moral and social development of the child).

[E] METHODOLOGICAL AND ETHICAL REFLECTIONS

In the second half of this piece, we each offer intertwined methodological and ethical reflections on the project. We hope these provoke thought and action for other researchers doing similar work. To guide our reflections, we have been inspired by Pavi’s work on Unarchigal (உணர்ச்சிகள்)—Modalities of Resistance, an embodiment resistance approach created within Pavi’s Masters research, drawing on postcolonial radical feminist autoethnography. Unarchigal, which means “emotion” in Tamil (Pavi’s mother tongue), is a conduit and praxis for learning, feeling, disrupting and resisting colonialism, coloniality and its violence. Pavi has created a short audio clip explaining Unarchigal in more depth, with a transcript also available.

[Audio Clip Explaining Unarchigal](#)

[Unarchigal Transcript](#)

Our reflections, inspired by Unarchigal, take multimodal forms including creative writing and poetry. Fatmata and Cara have framed these in relation to one particular participant, Yewande,⁶ while Pavi’s reflections range more broadly and encompass the plethora of entanglements that emerged in her role as a consultant on the project and continue to be present in her ongoing grassroots and academic work.

Yewande was a new (single) mother, seeking asylum, recently arrived in Scotland from an African country. She took part in the project on behalf of her baby, who had been a newborn when the pandemic began. Figure 5 is a composite panel from the comic, visualizing many of Yewande’s statements while also incorporating broader themes from children and young people regarding support for refugees and asylum seekers. As Figure 5 illustrates, during her interview Yewande described the isolation of being a new mother in a new country during lockdown, her attempts to access support, and her fears that social services would take her child. Other participants highlighted the need for help in the immigration process and the need for provision of money and housing for asylum seekers.

⁶ Pseudonym.



Figure 5: Refugees and asylum seekers should have support (Article 22: protection and assistance in enjoyment of rights for refugee children).

Fatmata's reflection: "What was the point of doing this research?"

During the course of this project, as a Black individual and thus an insider researcher, an array of emotions unfolded. When conducting the interview with Yewande, profound empathy became the lens through which I not only comprehended, but also felt the pain articulated by the participant. However, despite the wealth of knowledge gained as part of the research, a sense of powerlessness permeated my experience. The awareness that this poignant story, the struggles faced by Yewande and her child, would ultimately be distilled into a mere few lines within the confines of a thematic analysis, remained ever-present.

Being an insider researcher thus became a double-edged sword, with a heightened awareness of the inability to enact change on behalf of the participant. Deep empathy became a burden. I felt guilty and somewhat self-indulgent for finding the interview emotionally taxing when the participant was the one experiencing turmoil, not me. The participant's struggle tugged at my conscience and evoked a deep sense of responsibility. Some questions nagged at me: "What was the point of doing this research if I couldn't do anything tangible to help this mother and child right now? What could I do to help?"

The following story is a vehicle for conveying the emotions that unfolded during the interview process. The story is rooted in Yewande's experiences and also weaves in aspects from other participants' experiences, creating a composite that blends data with emotion and narrative.⁷ This narrative technique transcends the conventional approach of merely outlining thematic elements and allows readers to experience and resonate with some of the emotions portrayed. Importantly, the story acknowledges the importance of understanding not just the children in the study but also the experiences of the parents and how those experiences could have a profound impact on their offspring.



Yewande stirred from her sleep, her ears perking up as she listened out for her two-month-old baby Oluwa⁸ who she had finally managed to get to sleep.

"Please God ... please let him stay asleep," Yewande whispered into the silence, hoping, pleading and praying that God would hear her prayers.

⁷ Direct quotes from participants are indicated by bold text.

⁸ Pseudonym.

Covid-19 had started about a month ago, just one month after she had given birth to her baby. Things had been crazy. **Everything was crazy.** For an asylum seeker with no family or friends to help, Covid-19 had truly led to a disaster that she did not know how to survive.

Oluwa had gone quiet. Still listening out for him, Yewande gingerly lifted her legs out of the bed and headed towards the small kitchen. Her throat felt ticklish and tight, the same way it did before she had one of her painful coughing episodes. Turning on the tap, she filled a glass with water, carefully lifting it to her lips and sipping it, hoping she did not have another coughing episode.

As she set the glass down on the countertop, Oluwa exercised his lungs and started crying. The piercing sound reverberated through her body and reached her head, triggering the piercing headache she always now had lingering at the back of her eyes.

She rushed back into the bedroom to pick up her baby, who had managed to sleep for a whole hour. She pulled out the changing mat. Changed his diaper. Made his milk. Fed him. Burped him. Tried to soothe him. Oluwa wailed through the whole process, his tiny body flailing in anger. Not knowing what else to do, Yewande held her **crying baby** and also started to cry.

She spun around with her baby in her arms, making shushing noises as she glanced at the clock on the nightstand. The red bulky numbers on the clock were blurry through her tear-filled eyes ... 2:27am. She knew she would not get much sleep tonight. Again. With tears streaming down her face, Yewande did everything she could to stop her baby from crying.

Nothing worked.

3:52. Oluwa threw up.

4:18. Oluwa quietened down. He was clean. He wasn't too hot or cold. He was fed. He was cuddled. But he was still awake.

5:51. Oluwa finally fell asleep again.

Yewande decided that when she woke up from her short sleep, she would again contact one of the charities or services that were supposed to help her. The antibiotics she had been given to help with her chest infection were not working, and she suspected that the lack of sleep was contributing to her ill health. She needed help. She had called before, but they had said that because of Covid-19, they could not have someone visit her to help teach her how to take care of her baby, even though this was her first child. She had no one. As an asylum seeker, she was in Scotland with no one. No family, no friends—nothing.

She laid back in bed and thought about her home. She thought about the support she would have been able to get from her family. Someone

back home would know what to do with a crying child. With these thoughts in her mind, she drifted off to a fitful sleep.

The next morning, Yewande picked up the phone and started working through the list of charities and health services she had been recommended. This was the sixth time she would be calling to see whether anyone could come and offer some physical help.

She disconnected the phone after two hours, disappointed and full of sadness. The answer was the same. No one could come and offer any physical help including maybe having the baby sleep so she could also rest. Covid-19 meant that the staff were not allowed to do so, and if they came to visit, the nurses could not come inside, only stand outside the door. The only help she would be able to get was from social services. However, Yewande had heard stories of other people having their children taken away for good by social services, and she did not want that to happen to her. More than once that day, she wished for **more support during the immigration process**.

Yewande looked around the room and wished for some company. The only sounds she heard were either that of Oluwa crying, or stifling silence. There was no one to talk to, and with the panic attacks she had been having, the thought of taking Oluwa out in his buggy to go for a walk scared her. She knew some people might find it silly but she was scared to even use the buggy ... how was she to carry her boy? Yewande remembers the zoom call she had had with another new Mum, who was also struggling with her new baby. Her friend had said that her baby **cried a lot whenever in public**. The fear of distressing the baby meant that a lot of people were scared to go outside for fresh air or exercise.

There was nowhere to go because of Covid. No one could help beyond phone calls because of Covid. She was sick but could not be properly checked out by the doctor because of Covid. She was isolated because of Covid. She did not know how to take care of a baby by herself and any of the health visitors who would have normally helped could not because of Covid.

Holding the phone in her hand as a failed lifeline, Yewande slid down onto the floor and stared at her baby who seemed to be finally dozing off. She hugged her knees to her chest, resting her heavy head on her knees and closed her eyes. She hoped for respite. She hoped for anything to be different. To be better. Anything. Anything at all.





Figure 6: An idyllic walk in the countryside.

Cara's reflection: responsibility and fragility

The Impact of Covid project was the first time I had led a project with the size of budget, number of people, and—crucially—the urgent importance of the topic. I had been working with Pavi already for some months, as part of an anti-racist collective, and proposed to her we submit a funding application. When it was successful, the fear set in. As a white American woman, who was I to lead this project about children of colour?

I have organized my reflections around two images. The first image (Figure 6) captures a friend's Labrador swimming in a lochan near their home. When Fatmata interviewed Yewande over Zoom, I was visiting this friend, who had recently moved to the countryside. In Scotland, lockdown restrictions had only just been eased, to allow travel outside our local area and limited socializing in other people's homes. The image captures a moment from an evening walk we took later that day.

Fatmata called me after the interview because it had been so intense. I took the call in my friend's back garden. Standing in the garden, looking over the wall at the picturesque cow pastures in the distance, I was struck by the disparity between my idyllic surroundings and the suffering Yewande had described. I was also struck at how separated I was from Fatmata's experience of the interview, taking a call while listening to birdsong, while Fatmata processed the intensity of the interview and her desire to do something, anything, to help Yewande. Our ethics forms included the usual signposts to resources, such as mental health support,

but Yewande knew all the places she could go—they just hadn't delivered. There was actually nothing we could do for her. We had also written into our ethics forms a process to follow should any of us, particularly the women of colour, be subject to harassment for working on an anti-racist project. However, I had not thought through the provision for Fatmata's own wellbeing as thoroughly. This was because we had tried to avoid eliciting children's stories of trauma or difficulty, but it was naïve and a sign of my own white detachment and privilege that I thought this would avoid Fatmata being exposed to trauma as a Black woman herself.

The second image (Figure 7) relates to the online launch event we held for the project in June 2022, a year after data collection was completed. The timeline of the project, my own health issues during the pandemic, and general malaise and struggle of lockdown meant I always felt like I was failing in my role as principal investigator. Throughout the project, I struggled with feelings of responsibility and imposterhood—although, it is not imposter syndrome when you really are an imposter. I felt that I hadn't done enough to push the findings into the world, that I should do more to put them in front of policymakers and practitioners. I tried to keep these from tipping over the edge into a white fragility reaction such as defensiveness and outbursts of discomfort (eg Bates & Ng 2021), but fragile and on the edge was exactly how I felt. Now, I wonder what could have happened if I had expressed these feelings more openly to Pavi and Fatmata. Could that discomfort have been generative, moving beyond guilt to informed action (Lorde 1987)?



THE IMPACT OF THE COVID-19 PANDEMIC ON CHILDREN OF COLOUR IN SCOTLAND: VISIONS FOR CHANGE

Welcome!

Research launch
7th June 2022

*Funded by the Scottish Funding Council
(Research Funding to Mitigate the Effects
of COVID-19 on the Research Base)*

*Follow up funding from the School of Arts,
Social Sciences and Management and
Centre for Applied Social Sciences at QMU*

AMIC Queen Margaret University
EDINBURGH

Figure 7: Welcome message for the research launch.

When we held the research launch event, there was much interest beforehand and it was well attended by a range of policy and practice workers across Scottish sectors. But there was radio silence afterward. During the launch, we read out and displayed the full comic book ([available here](#)), which demonstrated very clear messages from children about how people in power could help fight racism. We also had a panel discussion from women of colour activists in Scotland and voice clips from children of colour about their experiences and vision. In the final moments of the launch, as we prepared to close the session and log off, someone asked a question in the chat box along the lines of: but what did the children want people to *do*? This question still haunts me. I cannot remember how we answered. What level of clarity and detail would be enough? Were children of colour expected to produce a fully costed policy proposal to solve racism? Were we? This was like Ahmed's (2017) metaphor of diversity work as banging your head against a brick wall; the wall does not simply stop you but also serves to harden and create a boundary around what is possible. In this case I felt the brick wall was "atmospheric" (Ahmed 2014); it allowed people to appear to listen, while avoiding seeing and hearing what the children were saying. As a white woman, this was the first time I hit this particular wall. Lorde tells of how oppressed people are continuously required to bridge the gap that denies racism, putting their own humanity on the line in service to others' supposed learning (1987). I suspect that brick wall was more familiar to my women of colour co-researchers, and, enragingly, to the children and young people themselves.

Pavi's reflections: anger and resistance

My first reflection takes the form of a poem/free verse called "Bad Ass Bitch", and the second is a spoken free verse performance called "What the Fuck is Your Problem". The swearing throughout my reflections acts as a response to embodied and visceral experiences of trauma, pain (Stephens & Ors 2009) and various forms of violence. Both pieces encapsulate my reflections for our project, expectations around "doing research", the myriad ways in which we navigate colonial architectures as bodies of colour and how systemic inequities and inequalities continue to be reproduced.

"Bad Ass Bitch" was part of an introduction I wrote for a final essay submission for my Froebel and Social Justice course, as part of my Master of Science in Education (Sarma 2023).

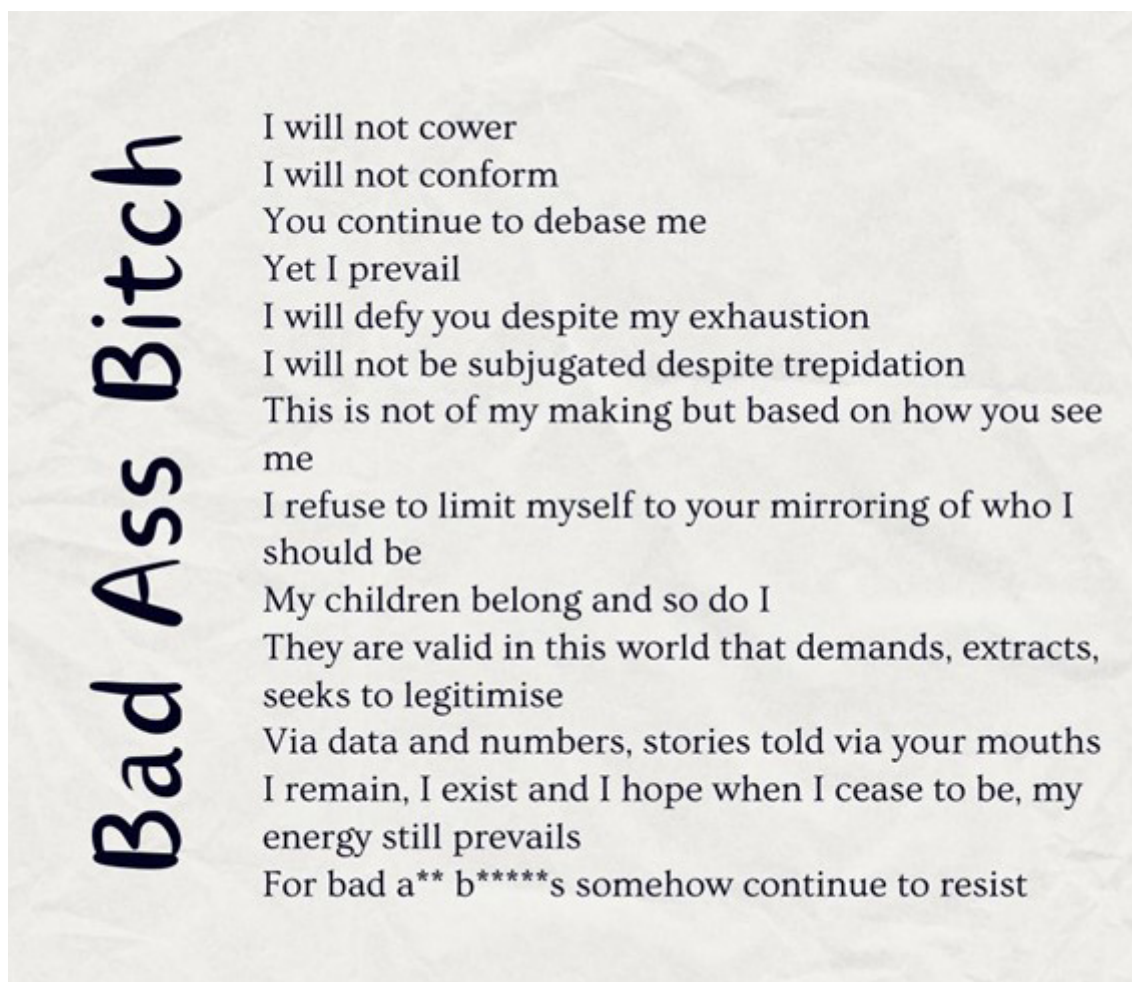


Figure 8: “Bad Ass Bitch” poem/free verse.

As Cara’s reflections point out, in our project launch, four women of colour shared our experiences, as did two children of colour via pre-recorded voice clips. We were angry that our children had experienced various forms of violence in Scotland ranging from a combination of physical, emotional and psychological abuse within schools and outwith, before, during and after Covid. Our experiences mirrored the data collected with children of colour during the project. We were angry and we also questioned policymakers and the civil servants from the Scottish Government whether there was any actual intent to engage with the lives of children and young people of colour within communities, as opposed to assuming a “one shoe size fits all” approach. The query raised by a white woman in the audience around what these children actually want, after we had shared our experiences and presented the findings from our project, suggested what so many of us of colour know—our anger is invisible and makes you uncomfortable. Our anger will be dismissed, ignored and not validated within whiteness. However, our anger is not for you to consume though.

The performance of “So What the Fuck is Your Problem” is a further response to the requirement to appear detached, impassive and cold as an “appropriate” reaction to oppression. The poem can be heard below, mixed and edited in the Music Maker Jam app. A visual slideshow version is also available, created on Canva.

Spoken Word: So What the Fuck is Your Problem?

Visual Slideshow Version

The tonality within the audio clip for “So What the Fuck is Your Problem?” can be interpreted in myriad ways and I would leave this up to the listener. My children, for example, thought I sounded like an AI (artificial intelligence) activated voice due to the monotones in parts. A couple of colleagues of colour suggested I recite with more power and the varied feedback received around the draft version of this audio narrative only encapsulates my reasoning for oscillating between sounding weak, exhausted, angered, frustrated, a monotone, so as to accentuate how communities of colour, in particular, are expected to respond to violence and oppression. There is also an allusion to DARVO (Deny, Attack, Reverse Victim & Offender), a tactic and mechanism commonly employed by perpetrators of different forms of abuse, sexual and domestic violence. The layering of echoes during the narration refers to the level of outrage, the frustrated and despondent cries for the genocides to stop alongside the demand for an acknowledgment of racism and systemic disruption. The voices then abruptly stop to ask if people are actually listening.

The use/origin of a phrase like “bad ass bitch” is synonymized with African American Vernacular English (AAVE)/ebonics, which has also been used by Black female rappers to subvert patriarchal oppression and reclaim power (Layne 2014). The commodification of rap, its origins, subculture, the potentially appropriative usage by myself as a Brown woman from India and its possible reinforcement of essentialist views of Black women, are all ruminations I have been engaging in. However, when I titled the piece as “Bad Ass Bitch”, it was in the context of the morphological significance that this phrase possesses in Tamil, my mother tongue, which I translated into English as such. This phrase is a contextual translation of two pejorative phrases, namely “porikki thevadiya” (பொறக்கி தவேடியா) or “Theru poriki” (தரெபொரிக்கி). “Poriki thevidiya” is a term used against men and masculine people, but can also function as a gender-neutral term, with “Poriki” possessing

various synonyms such as “crazy”, “insane”, “useless”, “a wastrel” and “thevidiya” being a pejorative way to describe a sex worker as a “whore” or a “prostitute”. “Theru poriki” means street picker/scrapper/bitch and it can imply “bad bitch”, amidst other variations when used against women and femmes. As a girl and then a woman who dared resist sexist, casteist and patriarchal impositions, I was subjected to these pejoratives to imply “bad bitch” alongside other forms of violence, to subjugate, dehumanize and vilify me. Therefore, I use “bad ass bitch” in a manner where I reclaim my power and agency to suggest that I refuse to be subjugated to, and will continue to resist, colonial and patriarchal impositions around power and violence.

[F] CONCLUSIONS

In this reflective piece, we have presented an overview of the project and shared methodological and ethical reflections, which are intertwined. We have done this through the lens of Pavi’s Unarchigal approach, which helped us draw out the role of emotion and connection to tensions that continued to unsettle us after the research was concluded. Key issues included the double-edged sword of the insider role for researchers of colour, obligations and responsibilities to participants, the danger of white detachment and role of white fragility, and the transformative capacity of anger and resistance in anti-racist research with children of colour. These reflect only a fraction of the ethical and practical considerations around the project and the authors welcome contact from fellow researchers to discuss in more detail. While the reflections focus on our own emotions, they connect directly to the ways that the project was designed, carried out, and the findings shared, with much learning for future work. These tensions do not have clear outcomes or resolutions; we have shared our reflections in the hope they will help other researchers think through similar issues in their own children’s rights research.

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Pavi's ongoing doctoral work/life/living explores home education, race, class, gender, coloniality and self-directed learning using postcolonial radical feminist autoethnography. Pavi has been engaged with decolonization of "research", ways of doing it and the linguistic rupture around the conceptualization of research.

Pavi was also an ethical entrepreneur and has worked extensively with communities, third sector and in domestic violence, enabling her to see the lacunae between policies, theories and practice, thus facilitating her own (un)learning around whiteness and the need to address injustices through embodied decolonial and intersectional ways of doing, being and living.

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Legislation, Regulations and Rules

United Nations Convention on the Rights of the Child 1989

Appendix 1: Kummi Adi Invocation Transcript

Invocation

Script:

Hi there, my name is Pavi. My full name is Pavithra Sarma and I shared these verses on the slide during an introductory workshop with the Centre for open Learning, University of Edinburgh in March of 2023. This workshop is part of a series of modules I had created for my anti-racist and decolonial work called 'Learning to Unlearn' and was titled "Exploring decolonisation: An Introduction."

Therefore, it is only apt that we begin our paper with an invocation to resistance, using some of the verses denoting liberation from British colonial rule, which was penned by Mahakavi Bharathiyar or Subramani Bharathiyar. This anticolonial piece of work and Bharathiyar's verses has a huge historical context in my Tamizh ancestry and in the Indian independence movement. I have not recited this poem in its entirety and have only picked two paragraphs, which I will translate, but I'm going to show you how it actually sounds and I have set the rhyme and rhythm of the accompanying clapping to my own tempo.

கும்மியடி தமிழ்நாடு முழுவதும் குலங்கிட கைகொட்டி கும்மியடி...
நம்மை பிடித்த பிசாசுகள் போயின நன்மை கண்டோமென்று
கும்மியடி...

ஏட்டையும் பெண்கள் தொடுவது தீமையென்றெண்ணி இருந்தவர்
மாய்ந்துவிட்டார்...
வீட்டுக்குள்ளேயே பெண்ணை பூட்டி வைப்போமென்ற விந்தை மனிதர்
தலை கவிழ்ந்தார்...

And we can also sing the song like this.... Expedite clapping....

Mahakavi translates to 'great poet' in Tamil, my mother tongue. Mahakavi Bharathiyar was an anti-caste feminist fighting for liberation in India and was from my state of Tamil Nadu, one of the Southernmost Indian states. He was a polyglot who wrote this poem when the British were finally forced to flee India in 1947, in the aftermath of genocide, pillage, rape, carnage, wealth, riches that were extracted, exploited, severe devastation and divisions that were stoked and ignited.

Kummi is a folk dance performed in Tamil Nadu and possibly in Kerala to denote auspicious occasions and festivals, such as the harvest festival known as 'Pongal' in Tamil. From what I've understood, Kummi is actually said to originate from the Telugu word 'Kommai' meaning 'dance involve hand clapping' or 'hand clapping dance'.

Women, femmes and other folk tended to dance in circles clapping their hands to a rhythm and maintaining a tempo. The dance itself is a joy to behold with alternate bowing and clapping, with sometimes men joining in the outer circle with sticks. This dance and genre of folks songs, is actually said to originate from a time with no instruments and is a popular art form in Tamil Nadu in India and by The Tamils of Sri Lanka.

Kummiyadi – Thundering claps/ clap your hands.... Let the whole of Tamil Nadu resound with the thundering claps and with open palms.

The demons who caught us are gone and we have seen the good...

The man who thought it was evil for women to touch the book has died...

The strange man who said women should be locked up inside the house has bowed his head...

Thank you very much

Appendix 2: Unarchigal Transcript

‘Unarchigal (உணர்ச்சிகள்) – Modalities of resistance’

I created ‘Unarchigal (உணர்ச்சிகள்) – Modalities of resistance’ as a part of my recent Masters thesis in 2023 titled “Using postcolonial radical feminist autoethnography to explore self-directed learning within home education”. Unarchigal became both a path and a funnel that allowed me to sit with complex and often deeply uncomfortable emotions, that did not always require a solution, an outcome or a conclusion. Some of these reflections and emotions are unfinished and continue to evolve, like a tapestry that continues to be woven.

A postcolonial feminist autoethnographic approach allows me to explore and disrupt the fluidity between the researcher and researched, while also delving into the cognisant tensions of traversing through white spaces through dual/ multiple and intersecting identities. Hence, the conceptualisation and perception of ‘data’, its ‘collection’, and the power dynamics/ differentials between a researcher and a research participant or research partner, will be explored through these approaches and reflections. This is perhaps best encapsulated by the following paragraphs on pages 27 and 28 of my thesis within the section titled ‘Autoethnography and Postcolonial Radical Feminist Autoethnography – How do they differ?’.

‘Autoethnography has intersects with Critical Race Theory (Delgado and Stefancic, 2013), which considers race to be systemic and shaped by socio-political frameworks influencing the legal system, legal and media discourse which are symbiotic. It also pushes against rationalist and positivist thinking which demands objectivity and numbers. However, the history of autoethnography pre-dates its usage and coinage within the Western episteme. For example, I was profoundly inspired by Arab women’s poetry (Abdullah al-Udhari, 2017), which were rendered via deeply immersive writings as a response to identity, sex, gender, resisting ‘the male gaze’ and traversing through life, spanning a period of 5000 years. This poetry sought to be emotive while seeking to situate the voice, the narratives and the observations of those who embraced their power, exerted defiance, were oppressed and also systemically excluded in spaces, thus offering resistance to the embodied power differentials that existed and continue to.

I reflected on the challenges traversed by autoethnographers and on postcolonial feminist activism and scholarship, which sought to intervene in response to men who were proponents of postcolonial theory but were primarily focused on nation-building after the extirpation of

colonies due to European colonisation. The significant difference between autoethnography and postcolonial radical feminist autoethnography is that, I draw inspiration from my Arab sisters in summoning my resistance to patriarchy in its various forms, including its impact on masculinities, by situating my voice as someone from a former colony which continues to be steeped in coloniality. When I searched and explored postcolonial radical feminist autoethnography as a term, it did not exist, but autoethnography as a feminist tool and de/postcolonial autoethnography have been explored and written about. Postcolonial writers, scholars and activists like Lorde (1983), hooks (1984, 1994), Mohanty (1984), Curiel and De Roo (2021) and Venkateswaran (2021), to name a few, are all postcolonial radical feminists who have engaged in autoethnographic work. Their resistance echoes much of what we tend to do and what we have done all our lives, where we tend to 'just do and be' without coining a term that requires validation within the western episteme (Chawla and Atay, 2017)'.

I further expand upon Unarchigal within my thesis as such: '*Unarchigal, which means 'emotions' in Tamil (my mother tongue) seeks to disrupt the current normalised modalities that are colonialist and steeped in white hegemonic praxis. We are all made up of emotions and emotions not only are seen as unnecessary, and heightened emotions are also ascribed to femininity as a defining trait that usurps one's mind and renders them incapable of logic (Ahmed, 2017). However, emotions are needed and necessary in our bid to survive, fathom how to make sense of the world and how we traverse it together. Simply put – Unarchigal is our conduit for learning and, much as we would like to remain detached, we cannot. (p.30)*

Resistance and disruption are concomitant with dismantling, and this takes a toll on the body, as the mind and body are acutely connected, and hence we feel, react and respond as we continue to receive, experience and process emotions. The resistance I was engaged in at the Scottish Government sub-committees on education and anti-racism, while being subjected to repeated forms of violence (racism, ableism, sexism), caused my body to store stress around my hips and back, eventually causing my lack of mobility. Bodies store memories, an array of feelings and primaevial responses, in the same way decolonial feminist philosopher Favela (cited in Trejo Méndez, 2023) refers to 'everyday memories' and 'enfleshed resistance' (Trejo Méndez, 2023). Hence, Unarchigal via its fluidity, troubles this long-accepted Western hegemonic rigidity and conformity posed by the separation of method and methodology, as this approach stems from multitudinous emotions relating to severe lassitude while traversing colonial systems of education and living. These systems are racist, ableist, sexist, patriarchal and heteronormative, alongside the coloniality that internalises and replicates this.

Unarchigal has undergone a process of ligature, convulsing and metamorphosis over the years resulting in its germination within this dissertation. Hlabangane's (2018, quoted in Sheik, 2021. p. 119) insightful observation about imperial approaches expresses this succinctly "The very idea of 'methods' follows the imperial need for certainty and stability. It is antithetical to ambiguity and flux". (p.31)

Anger is a very pivotal part of Unarchigal and I raise the context of anger, its potency, viscosity, its transformative capacity and, therefore, the recognition of pluriversality around harnessing anger as opposed to the dichotomy of emotions as positive and negative. Pluriversality and pluriversal knowledge systems, as Hlabangane (2021) discusses, offer resistance to western hegemonic impositions. Whose oppression and responses to understanding oppression is privileged? Why is anger not an appropriate response to oppression? Anger informs our agency and autonomy, as a response to violence.

The imposition to seem cold, unaffected and polite within whiteness as an 'appropriate' response to oppression, only amplifies the cycle of abuse, violence and reiteration of power hierarchies. As Lorde (1987) states: "*Women respond to racism. My response to racism is anger. I have lived with that anger, ignoring it, feeding upon it, learning to use it before it laid my visions to waste, for most of my life. Once I did it in silence, afraid of the weight. My fear of anger taught me nothing. Your fear of that anger will teach you nothing also.*

Women responding to racism means women responding to anger; the anger of exclusion, of unquestioned privilege, of racial distortions, of silence, illuse, stereotyping, defensiveness, misnaming, betrayal, and co-optation."

SAFEGUARDING? CRITIQUING GENDER-CRITICAL DISCOURSE AROUND GENDER DIVERSITY AT SCHOOL

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Abstract

More and more young people are identifying their gender in different ways, and gender diversity at school has become an increasingly debated topic. Within the United Kingdom (UK), sociopolitical discourse has become progressively fractured, with the UK Government recently releasing controversial draft non-statutory guidance prohibiting social transitioning, or the changing of names, pronouns and/or appearance amongst gender-diverse individuals at school. One term which has been increasingly utilized in this discourse is “safeguarding”, a term which refers to the practice of promoting child welfare and protecting children from harm. Safeguarding is a key consideration when discussing gender inclusion at school. However, harmful and discriminatory policies, such as “outing” gender-questioning children to their parents, are now being mislabelled as safeguarding practices. This article will argue that the concept of safeguarding, and wider discourses around child vulnerability, are being misappropriated in order to justify anti-trans policies. This article will explore the current UK discourse around gender-diverse children at school, demonstrating that gender-diverse youth are perceived as both vulnerable to “gender ideology” and a threat to others at school, a social positioning that serves to restrict their rights and agency. This article will discuss the ways in which the term safeguarding is being weaponized against gender-diverse children, before reviewing the social scientific research on risk and protective factors for gender-diverse youth, to understand what safeguarding gender-diverse children actually means.

Keywords: gender diversity; trans; school; cisgenderism; safeguarding; childhood.

[A] INTRODUCTION

Within the UK, there are a number of ongoing sociopolitical debates about gender-diverse children, meaning children whose gender does not correspond with the sex that they were assigned at birth.¹ Gender-diverse children were 23 times more likely to be mentioned in the press in 2018/2019 than in 2012 (Baker 2019), demonstrating an unprecedented interest in their lives. Moreover, in recent years there has been an increase in anti-trans discourse within the United Kingdom (UK) (Pearce & Ors 2020), accompanied by the rise of gender-critical feminism, a trans-exclusionary form of feminism whose proponents argue that gender identity is a contested belief (Shaw 2023). Gender-critical theorists and policy-makers have previously focused their activism on excluding trans women from women’s spaces, but more recently they have turned their attention to children, parents and schools (Amery 2023), calling for schools to immediately inform parents if their child is questioning their gender (see eg Moore 2023). Indeed, gender-critical theorists suggest that schools *not* disclosing information about a child’s gender exploration to their parents is a “clear safeguarding red flag” (Benjamin 2023: 209). Gender-critical activists have also focused on the perceived problem of gender-diverse children socially transitioning at school (Amery 2023) where social transitioning refers to individuals changing their name, pronouns and/or appearance to align with their gender identity.²

The prohibition of social transition at school is now being espoused by the UK Government and, in December 2023, the Government released draft non-statutory guidance for schools, stating that “there is no general duty to allow a child to ‘social transition’” (Department for Education 2023a: 6), and that there will be “very few occasions” (ibid 13) where a school should agree to a child’s change in pronouns. This non-statutory guidance has been widely condemned as harmful, discriminatory and unlawful (see White 2024) and the Equality and Human Rights Commission (2024) has critiqued the non-statutory

¹ This term has been used within this article as an umbrella term, including binary-trans, non-binary and gender-questioning individuals. Where articles have used different terminologies, these have been employed.

² A recent article was published by the head of Transgender Trend, a prominent anti-trans organization, titled “The Government Needs to Put Safeguarding First. It Should not Allow Social Transitioning in Schools” (Davies-Arai 2023).

guidance for not clearly explaining and referring to key concepts in the Equality Act 2010, section 7.³

This article will argue that this guidance and the wider gender-critical discourse within which it resides have the potential to cause significant harm to gender-diverse children, as well as having worrying implications for children's rights more generally. This article explores one key question: how is the concept of "safeguarding" being utilized in discussions around gender diversity at school? In order to address this question, I will review the current sociopolitical discourse, before discussing the way in which key concepts of vulnerability and safeguarding are being weaponized against gender-diverse children. Finally, I will review the social scientific research on risk and protective factors for gender-diverse youth, to explore how we can effectively safeguard gender-diverse children at school.

[B] GENDER-CRITICAL DISCOURSE WITHIN THE UK: A MORAL PANIC?

Cisgenderism is a global phenomenon that invalidates and pathologizes non-cisgender (ie trans) gender identities (Ansara & Hegarty 2012). However, the UK has been identified as a country with a unique and increasingly negative discourse around trans inclusion. Scholars have suggested that 2017 was a turning point in public discourse, with 2017 labelled "the year of the transgender moral panic" (Barker 2017), triggered in part by the UK Government's announcement of plans to reform the Gender Recognition Act 2004 (Pearce & Ors 2020). One aspect of anti-trans discourse that is particular to the UK is trans-exclusionary feminism, or gender-critical feminism (Faye 2021; Amery 2023). Gender-critical feminists seek to exclude trans women from single-sex spaces and from being defined as a woman, based on the argument that gender identity is a contested belief or a set of "extreme ideological ideas" (Moore 2023: 8). Faye notes that the term "gender-critical" is in some ways a misnomer, given the lack of criticality that gender-critical feminists display about gender (2021). Gender-critical feminists rely on biological and essentialist understandings of gender that contradict widely recognized definitions; the World Health Organization, for instance, notes that gender identity is "a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex

³ The Equality Act 2010 prohibits discrimination against trans children at school, under the protected characteristic of gender reassignment. Interpretations of this legislation vary, leading to different schools having considerably different policies (Long 2024). The UK Government has published numerous pieces of non-statutory guidance to support schools in making policy decisions; for more information about the legal context, see Long (2024).

at birth” (World Health Organization 2024). This clear definition from a major international health organization opposes the gender-critical belief that “gender identity” is an extreme ideological idea.

Gender-critical activism has been primarily focused on the perceived threat of trans women in women’s bathrooms (Westbrook & Schilt 2014); however, this is now increasingly being targeted towards children, parents and schools. Prominent groups, such as Transgender Trend and the Safe Schools Alliance, have been campaigning in this area for many years, but their concerns have recently reached a wider audience, with gender-critical activism becoming more prominent and views more polarized (Amery 2023). Gender-critical activism rests on the assumption that children are vulnerable to “gender identity ideology” or “gender ideology”, a term recently defined by the UK Government as “the belief that a person can have a ‘gender’ that is different to their biological sex” (Department for Education 2023a: 3). Indeed, gender-critical activists see “gender ideology” as a predatory and dangerous narrative that aims to confuse children about their gender (Amery 2023).

The perceived threat of gender ideology to children can be seen as a moral panic (Balieiro 2018). According to Cohen’s (2002) original definition, a moral panic occurs when a social object becomes defined as a threat to societal values and is presented in a sensationalized way by the media. “Experts” are drawn upon to cope with the panic, before the panic ultimately reduces or dissipates. Cohen also notes that moral panics involve disproportional reporting, hostility, concern, a consensus that “something should be done” and volatility. Such a conceptualization clearly applies to the current discourse around gender ideology as a threat to children: proponents of this belief suggest that trans communities and their allies are “transing” LGB children in huge numbers (see eg Bindel 2023), despite the overall number of gender-diverse youth remaining small.⁴ These beliefs are reported often and in a sensationalized way in the media (Baker 2019; Shaw 2023).

Parallels can be drawn between the current panic around gender ideology, and the historical moral panic around LGB identities that was exemplified in section 28, legislation which was introduced in the Local Government Act 1988, and not repealed until 2003, that prohibited educators from promoting homosexuality at school (Robinson 2008). Cohen (2002) notes that moral panics can also trigger changes in legal

⁴ For instance, despite Bindel’s (2023) concern about the “ever-increasing numbers of children ... put on an irreversible medical pathway”, BBC News recently reported that fewer than 100 young people in England are being prescribed puberty blockers by the NHS (Parry 2024).

and social policy, and this can clearly be identified in the Government's recent draft guidance. The language and approach differ dramatically from a previous inquiry into trans equality in 2016, in which the Government used the term "gender identity" without qualification (Women and Equalities Committee 2016: 74). The Government's new labelling of gender identity as a "contested belief" (Department for Education 2023a: 6) demonstrates the way in which media and public discourse have influenced policy. To understand this changing sociopolitical landscape further, it is important to consider the ways in which concepts such as vulnerability and childhood are conceptualized in public discourse.

[C] VULNERABILITY IN CHILDHOOD DISCOURSE

Childhood is often associated with concepts such as innocence and vulnerability, and these concepts are highly relevant to debates around gender-diverse children at school. Appell argues that children's vulnerability and dependency perform differently "along racial, class, and gender lines" (2009: 706) and critical childhood scholars have explored and questioned the unique discourses of vulnerability relevant to different groups of children, such as those experiencing political violence (Gilligan 2009). With respect to gender, the socially constructed nature of vulnerability is made clear by the contradictory treatment of trans and intersex children—the former are discouraged from early medical intervention, on the basis that they are making irrevocable decisions that they do not understand, and the latter are encouraged towards (if not subjected to) early irreversible medical procedures, in order to fit within binary sex categories (Paechter 2021). These opposing practices are both deemed to be in the child's best interests, highlighting the way in which vulnerability can be conceptualized in vastly different ways (Appell 2009).

As discussed, trans children are framed by gender-critical discourse as being vulnerable to "gender ideology", a supposedly dangerous narrative which aims to confuse children about gender and harm them through medical procedures (Balieiro 2018; Nash & Browne 2019; Sadjadi 2020). Transness amongst children is framed as a new phenomenon, contradicting extensive cross-cultural and historical evidence (Gill-Peterson 2018), and this "newness" contributes to the vulnerability of children to this supposedly predatory ideology. Moscati (2022) highlights that the legal system conceptualizes gender-diverse children as vulnerable and in need of protection, whilst also disregarding their agency, rights and capacity to express themselves. In the case of *Bell & Ors v The Tavistock*

and *Portman NHS Foundation Trust* (2020), the High Court decentralized the voices of children and disregarded qualitative evidence from gender-diverse children themselves (Moscati 2022). Notably, the press release for the UK Government's recent draft guidance labels the guidance a "parent-first approach" (Department for Education & Ors 2023), rather than a "child-first approach", suggesting a paternalistic approach to gender-diverse children's best interests, where children's views are not considered of central importance.

In contrast to their supposed vulnerability to gender ideology, it has also been suggested that gender-diverse children pose a risk to cisgender children; this unique social positioning serves to deny their autonomy and restrict their rights. It is argued that gender-diverse children might cause confusion and discomfort to cis children, by "invading" single sex spaces (Sørliie 2020). It is particularly argued that trans girls will threaten the safety of cis girls within school toilets (Pearce & Ors 2020), despite trans students reporting lower levels of safety in school toilets than cis students (Wernick & Ors 2017) and research finding no association between trans-inclusive policies and safety violations in public toilets (Hasenbush & Ors 2019). The rights and needs of gender-diverse children are thus pitted against those of cisgender children. Such rhetoric is evident within the Government's draft guidance, which states that "schools and colleges should only agree to a change of pronouns if they are confident that the benefit to the individual child outweighs the impact on the school community" (Department for Education 2023a: 13). The guidance does not make clear what this impact may be, but implies that a trans student changing their pronouns might threaten the school community as a whole, a discourse which has the great potential to increase discrimination towards gender-diverse children.

"Impacting the school community" may also be a proxy for threatening cisheteronormativity; indeed, schools have been identified as a battleground for arguments around sexuality and gender, and a space in which normative gender experiences are legitimized (Robinson 2008; Frohard-Dourlent 2018; Nash & Browne 2019). Research highlights that cisheteronormativity may function in both overt ways, through staff utilizing and legitimizing discriminatory language (Bower-Brown & Ors 2021; Horton 2023), and covert ways, through viewing same-sex relationships as a sensitive topic, whilst discussing heterosexual relationships openly (Gillett-Swan & van Leent 2019). Indeed, childhood innocence is a concept which is mobilized by conservative groups to "protect" children from being exposed to information about sexuality and gender (Robinson 2008). Researchers have highlighted that

representations of children are defined by innocence and an absence of sexuality, and Amery (2023) notes that this contributes to the “impossibility” of trans children from gender-critical perspectives, as trans identities are portrayed as inherently sexual. Therefore, gender-diverse children are perceived as both an impossibility and a threat to other children’s innocence from gender ideology, an argument which serves to further marginalize gender-diverse youth at school.

[D] SOCIAL TRANSITION IS NOT A NEUTRAL ACT

One prominent phrase used by policy-makers and gender-critical commentators is “social transition is not a neutral act”, a phrase first used by Hilary Cass when reviewing the gender services provided to children in the UK (Cass Review 2022). Social transition, meaning the changing of pronouns, names and/or appearance, has even been somewhat bizarrely labelled by Moore as a “medical intervention” (2023: 13), despite involving no medical treatment or procedures. Social transition is often contrasted with the “watchful waiting” approach, which is promoted as rational, impartial and safe, or the “only neutral approach” (Transgender Trend 2023). In practice, this means ignoring children’s requests to socially transition until schools can be sure that it is a “properly thought through decision” (Department for Education 2023a: 9). However, as many scholars have noted, watchful waiting is not a neutral act (Ammaturo & Moscati 2021; Paechter 2021) as refusing to allow a child to explore their gender through the changing of names, pronouns, or appearance can have significantly negative implications for gender-diverse children’s mental health (Ashley 2019; Horton 2022). Moreover, social transition, which involves no medical procedures or intervention, is a form of gender exploration (Ashley 2019) that schools have no right to prohibit.

Indeed, the prohibiting of a social transition represents a significant threat to children’s rights. Researchers have highlighted that denying access to puberty blockers threatens *Gillick* competence, meaning the threshold of competence for a child to be able to consent to medical procedures, as well as threatening the bodily autonomy of all children (Moreton 2021; Moscati 2022).⁵ Similarly, I would suggest that the prohibition of identity exploration at school threatens the agency of all

⁵ Policies around access to puberty blockers in the UK have changed considerably. In *Bell & Ors v The Tavistock and Portman NHS Foundation Trust* (2020), puberty blockers were restricted and this was overturned in *Bell & Ors v The Tavistock and Portman NHS Foundation Trust* (2021). However, in March 2024, NHS England banned puberty blockers for children, outside of clinical trials (NHS England 2024).

children to explore names, appearance and identities. Research with cis youth has shown that using and trying out alternative names (ie nicknames) at school is common, with many students viewing their nicknames positively (Starks & Ors 2012), and clothing has been identified as an important form of identity exploration and expression in adolescents (Piacentini & Mailer 2004). Additionally, Renold (2010) highlights that gender fluidity may be more readily tolerated when it is assumed that children are going through a phase, with a cisheteronormative future. Identity exploration is therefore a key part of childhood and adolescence (Erikson 1994), and prohibiting social transition in trans youth, whilst recognizing that cis youth can and do explore their names, gender and appearance, represents a threat to the rights of gender-diverse children.

It is also important to note that suggestions that social transition is a harmful intervention are not supported by social scientific evidence. Research suggests that binary-trans young children who have socially transitioned with parental support report depression and self-esteem levels that align with population norms, although they report slightly higher rates of anxiety (Olson & Ors 2016; Durwood & Ors 2017). Qualitative research with parents also highlights that parents perceive their child to be happier and less distressed following a social transition (Horton 2022). One recent UK study found that social transitioning was not associated with mental health status (Morandini & Ors 2023), highlighting that research findings in this field are mixed, and these authors note that more longitudinal research is needed to understand further the link between social transitioning and mental health over time. One study that compared the mental health outcomes of trans people who transitioned as a child, as an adolescent, and as an adult found no association between social transition during childhood and adverse mental health outcomes during adulthood (Turban & Ors 2021). Social transition during adolescence was associated with suicidality in adulthood, but this association was not significant when the researchers adjusted for school harassment (Turban & Ors 2021). This association was not found amongst those who transitioned during childhood, suggesting that children who transition earlier might be more resilient in the face of discrimination. Therefore, although findings may be mixed, there is certainly no evidence that supports the view that banning social transitioning will protect gender-diverse children.

[E] SAFEGUARDING AT SCHOOL

Many gender-critical organizations describe their campaigns to prohibit children from social transitioning as a means to “uphold child safeguarding in schools” (Safe Schools Alliance UK nd). Safeguarding refers to the practice of trying to promote the welfare of children and to protect them from experiencing harm, and one key aspect of safeguarding is deciding whether and how to share information that a child has shared with others. Information-sharing is often brought up as a key concern for gender-critical feminists—for instance, a recent chapter on gender-critical approaches to school policy argued that schools not sharing information about a child’s gender exploration with potentially unsupportive parents is a “clear safeguarding red flag”, one which amounts to teachers being advised to “collude with children in keeping significant secrets from their parents” (Benjamin 2023: 209).

Indeed, the Government’s draft guidance states that, when schools consider a child’s request to socially transition, they should “engage parents as a matter of priority ... other than in the exceptionally rare circumstances when involving the parents would constitute a significant harm to the child” (Department for Education 2023a: 6). This position contradicts previous Government guidance around safeguarding, which stated that staff should aim to create a “safe space” for LGBT children, as it recognized that LGBT children without a trusted adult may be at higher risk (Department for Education 2023b: 51). Additionally, this previous guidance noted that safeguarding should be managed with a child-centred approach, and that school staff should consider what is in the best interests of the child (Department for Education 2023b). The Government’s new draft guidance contains no mention of the “best interests of the child” as a guiding principle (White 2024), and, as discussed above, describes its guidance as a “parent-first approach”. This arguably positions parents’ rights to know about their child’s gender above children’s rights to have a safe space at school.

When we consider the best interests of the child, it is clear that the Government’s guidance, rather than protecting children, is a safeguarding concern in and of itself. Lacking control over disclosure of their identity is distressing for gender-diverse youth (Bower-Brown & Ors 2021), and parental rejection and indifference have been found to predict depressive

and anxiety symptoms amongst trans youth (Pariseau & Ors 2019).⁶ Research has identified that gender-diverse youth with lower levels of parental support report higher levels of mental health problems (Wilson & Ors 2016; Weinhardt & Ors 2019; Grossman & Ors 2021), and research with LGB populations highlights that experiencing a negative reaction to coming out has a significant impact on wellbeing and self-esteem (Ryan & Ors 2015). Notably, 43 per cent of trans and non-binary young people surveyed by Galop (2022) reported experiencing abuse from a family member and LGBTQ+ homelessness charity *akt* (2021) found that 55 per cent of trans young people reported that they were afraid that expressing their identity to family members would lead to them being evicted. These findings highlight that the Government's suggestion that parents causing harm to gender-diverse children is "exceptionally rare" is incorrect. Indeed, schools disclosing information in a non-sensitive, non-consensual way to parents presents a significant risk to the mental health and safety of gender-diverse children. It is clear that concerns about safeguarding are being misappropriated, and as such it is important to outline the research that has explored what safeguarding gender-diverse children at school entails.

[F] WHAT DOES SAFEGUARDING TRANS CHILDREN ACTUALLY MEAN?

There is a growing body of research examining the experiences of gender-diverse youth at school, and much of this research focuses on experiences of bullying. In general, research highlights that LGBTQ+ youth are more likely to be bullied than non-LGBTQ+ youth (Myers & Ors 2020), and gender-diverse youth are more likely to be bullied than cisgender LGB youth (Bradlow & Ors 2017). A survey in Scotland found that 57 per cent of trans youth experience bullying at school, but only 26 per cent feel confident reporting it (LGBT Youth Scotland 2022). Relatedly, gender-diverse students report experiencing bullying from teachers (Bower-Brown & Ors 2021), and schools have been found to tolerate, and thus legitimize, transphobic bullying (Bower-Brown & Ors 2021; Horton 2023). Qualitative research has highlighted that navigating the school environment might be particularly challenging for non-binary and gender-

⁶ One study from the United States found that initial parental reactions to youth's gender identities were very mixed—for transfeminine youth, 38 per cent of initial reactions from mothers and 36 per cent of initial reactions from fathers were negative or very negative (Grossman & Ors 2021). For transmasculine youth, these numbers were higher, with 51 per cent of initial reactions of mothers and 38 per cent of initial reactions from fathers being negative/very negative. This suggests that initial disclosures to parents can be challenging, although parental responses were found to improve over time (Grossman & Ors 2021).

questioning youth, whose experience of gender fluidity directly opposes the binary gender structure at school (Bower-Brown & Ors 2021).

One study explored trans children's experiences at primary school, highlighting that a lack of an effective trans-inclusive policy, in combination with a lack of understanding of legal protections for trans children, can enable discrimination at school and lead to educational injustice (Horton 2023). Indeed, gender-diverse youth who lack choice in their bathroom/changing room use are more likely to experience sexual assault (Murchison & Ors 2019), highlighting that restrictive policies threaten the safety of gender-diverse youth.

Relatedly, gender-diverse youth report high levels of mental health issues, with trans and non-binary youth being three to four times more likely to report self-harm than cisgender LGBTQ+ youth (Jadva & Ors 2021). Importantly, the literature consistently demonstrates that around 40 to 60 per cent of gender-diverse young people report suicidal ideation/suicide attempts (Bradlow & Ors 2017; Eisenberg & Ors 2017; Thorne & Ors 2019), highlighting the critical importance of understanding the best way to support gender-diverse youth. Proponents of a gender-critical approach have asked whether poor mental health can be considered a cause or symptom of gender distress (Moore 2023). However, a large body of research has identified that mental health outcomes are associated with experiences of bullying and discrimination, with adolescents who report higher levels of discrimination reporting higher rates of mental health issues (Wilson & Ors 2016; Veale & Ors 2017; Jadva & Ors 2021). Importantly, LGBTQ+ youth who are also facing economic precarity report poorer health outcomes (Frost & Ors 2019), highlighting the importance of taking an intersectional perspective to understanding stigma. Based on empirical evidence, reducing discrimination against gender-diverse youth is a key mechanism for improving their mental health, and safeguarding them from self-harm and suicide.

Research has also explored protective factors amongst gender-diverse youth. Chosen name use in multiple contexts has been found to be associated with lower rates of depression and suicide in gender-diverse youth aged 15 to 21, with young people whose chosen name was used in all key contexts (home, school, work and with friends) reporting the lowest rates of depression and suicide (Russell & Ors 2018). Young people's positive perception of their school connectedness and safety is also associated with lower rates of self-harm and suicide (Jadva & Ors 2021), suggesting that supportive school environments and policies safeguard young people from harm. Gender-diverse youth report experiencing more

support from their friends than their family (Weinhardt & Ors 2019), and good quality friendships are associated with wellbeing and meaning in life (Weinhardt & Ors 2019; Alanko & Lund 2020). Relatedly, engaging in activism, educating others and building an LGBTQ+ community at school have been identified as effective strategies for managing discrimination (Bower-Brown & Ors 2021; Frost & Ors 2019). In the current political context, where gender-critical discourse is further threatening gender-diverse children's safety at school, it is therefore crucial to support young people to engage in activism and build safe spaces themselves.

[G] CONCLUSION

This article has explored the way in which the concept of “safeguarding” is being utilized in discussions around gender diversity at school. I have considered the current UK media and political discourse, and have highlighted the way in which the current moral panic around gender ideology is impacting political discourse. I have argued that concerns about safeguarding are being misappropriated and utilized to justify harmful school policies. The UK Government's recent draft guidance (Department for Education 2023a) contradicts previously published guidance on safeguarding and takes a dramatically different approach to previous enquiries into trans equality; it remains to be seen whether this draft guidance will lead to similar statutory guidance being published. It is clear that children's rights are not at the forefront of restrictive policies: prohibiting young people from choosing their name and pronouns threatens the rights of gender-diverse children and is restrictive to children's rights in general. The suggestion that schools should immediately inform parents about a child's gender exploration is particularly harmful, and poses a risk to the health and wellbeing of gender-diverse children. Safeguarding is a concept that is being utilized to justify these harmful policies, but when reviewing the social scientific research on gender-diverse youth, it is clear that, if we are serious about safeguarding gender-diverse children from harm, we should focus on reducing discrimination at school, rather than legitimizing transphobia and restricting children's autonomy further.

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WHICH CHILDREN HAVE RIGHTS? THE CHILD'S RIGHT TO BODILY INTEGRITY AND PROTECTION GAPS FOR CHILDREN WITH INTERSEX TRAITS UNDER INTERNATIONAL AND NATIONAL LAWS

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Abstract

This article examines protection gaps for children with intersex traits under international and national laws governing non-voluntary medicalized interventions into sexual anatomy. Various United Nations (UN) bodies, including the UN Special Rapporteur on Torture, the Office of the High Commissioner for Human Rights, human rights treaty-monitoring bodies and the Human Rights Council, have called for full acknowledgment and substantive protection of the rights of children with intersex variations—as with all children—to bodily integrity and (future) bodily autonomy in relation to their own sexed embodiment. However, these global norms generally have not been codified under international law, and most countries have not passed adequate, or any, legislation to secure these rights. We review relevant global norms, international human rights treaties and legislative developments in a range of countries to illustrate potential pathways for closing legal gaps in the protection of all children's rights to bodily integrity and (future) bodily and sexual autonomy.

Keywords: bodily integrity; children's rights; gender binary; non-voluntary medical interventions; human rights; intersex.

[A] INTRODUCTION

This article examines protection gaps under international and national laws governing medically unnecessary, non-voluntary interventions into children's bodies—including their sexual or reproductive anatomy—that fail to secure the rights of children born with congenital variations of sex characteristics or intersex traits (hereafter, “intersex children”)¹ to bodily integrity and (future) bodily autonomy. Various United Nations (UN) bodies, including the UN Special Rapporteur on Torture, the Office of the High Commissioner for Human Rights (OHCHR), human rights treaty-monitoring bodies (2023) and the Human Rights Council (Human Rights Watch 2024), have called for recognition and protection of the rights of intersex children (irrespective of their sex designation or socially assigned gender) to physical and mental self-determination in relation to such intimate matters as identity, sexuality and sexed embodiment (eg the choice to remain genitally intact versus altered) (Bauer & Ors 2020; Carpenter 2020). Despite these normative developments within the UN, people born with intersex variations are not explicitly protected by international human rights treaties or recognized under most national legal systems (Bird 2005; Carpenter 2024).

Our primary focus is the right of children (including intersex children), defined here as legal minors under the age of 18, to bodily *integrity*. We understand the right to bodily integrity broadly as a defensive moral right against unwarranted intrusions into one's physical embodiment, where this right applies even to individuals who may lack, or who have not yet developed, the capacity for fully autonomous decision-making in the relevant sphere (eg infants) (Earp 2019; Pugh 2023; see also Mazor 2024). How this right relates to the associated but distinct right to bodily *autonomy* is a complex matter that goes beyond the scope of the present analysis. We, therefore, focus primarily on the defensive right to bodily

¹ The term intersex is used to describe variations in sex traits due to one or more differences of development, including statistically atypical reproductive anatomy or sex organ morphology and distinct hormonal or sex chromosome patterns. Such variations may be evident at birth, may be recognized later in life, or may go unobserved (ILGA 2023: 11). We acknowledge at the outset diverse perspectives regarding the appropriate terminology to use when discussing this topic. Some individuals born with variations in sex characteristics describe themselves as intersex. Others prefer person-first terminology and refer to themselves as people with intersex variations. Yet others rely on medicalized labels or discourses describing intersex variations as conditions or disorders, while embracing a “binary” male or female identity (ILGA 2023: 11). Because this manuscript centres a rights-based framework seeking to advance intersex rights as human rights, we primarily rely on the language used by intersex rights advocates and organizations. Accordingly, we use the terminology “intersex” when discussing the broad class of persons born with congenital variations in sex characteristics, without thereby implying anything about the appropriate sex or gender designation of any particular individual born with such characteristics.

integrity possessed by all individuals, whether they have the relevant capacities for autonomy.

Relatedly, we are concerned only with bodily interferences (for example, by means of surgery or the administration of hormones) that are *non-voluntary* (viz, performed without the valid consent of the individual, whether due to competent refusal or a lack of consent capacity), unless the interference is medically necessary (see Brussels Collaboration on Bodily Integrity (BCBI) 2019; Wilkinson 2023; BCBI in press), that is, necessary to preserve or restore the physical health of the individual where the intervention in question cannot ethically be avoided or delayed (for example, until the individual is able to consent on their own behalf).²

Despite calls by UN agencies to protect intersex children's rights to bodily integrity, approximately 94 per cent of UN member states have not adopted adequate legal measures. According to ILGA World (International Lesbian, Gay, Bisexual, Trans and Intersex Association), only two countries—Greece and Malta—have adopted legal prohibitions and criminal liability for medically unnecessary, non-voluntary (hereafter “unwarranted”) genital interventions on intersex minors (ILGA World 2023: 18-19). Four countries—Germany, Iceland, Portugal and Spain—have passed legal prohibitions against such interventions but have not established criminal liability (*ibid*). Three additional countries, Austria, Belgium and Uruguay, have adopted weaker measures intended to restrict or reduce unwarranted genital interventions on intersex children but do not prohibit or criminalize these interventions. Similarly, some cities—Delhi (India), Geneva (Switzerland) and Austin, Texas (United States)—have sought to restrict or reduce such interventions, but these efforts have been minimally effective (*ibid* 60-61). Failed legislative efforts to advance

² It is important to emphasize that the detection of intersex variations in infancy or early childhood can, in some cases, signal the likely existence of a physical health problem requiring urgent medical intervention (eg through hormones or surgery) to save the life of the child or otherwise prevent a likely and substantial loss to health or wellbeing (Hegarty & Ors 2021). We are not concerned with such cases here. Rather, we have in mind non-voluntary interventions whose proximate goal is to cosmetically reshape the child's anatomy to more closely conform to perceived ideals for male or female embodiment. We acknowledge that such interventions may often be intended to secure the child's future wellbeing considered from a psychosocial perspective, based on certain assumptions about how they may later identify or potentially be (mis)treated by others (Hegarty & Ors 2021). However, there is no compelling evidence that non-voluntary surgery or hormones are necessary or generally effective toward such ends, at least when compared with psychosocial-only interventions and/or voluntary surgery or hormones later authorized by the individual themselves (that is, when they are able to provide their own valid consent, or at least their morally significant assent or agreement, for example in conjunction with parental proxy permission) (Zeiler & Wickström 2009). By contrast, there is a large body of evidence suggesting that many intersex persons greatly resent, or feel harmed by, having been non-voluntarily subjected to surgeries or hormones to alter their sex characteristics (Carpenter 2016; Kennedy 2016; Munro & Ors 2017; Carpenter 2020; Carpenter 2024; BCBI, in press).

the rights of intersex children occurred in Argentina, Chile, New Zealand, the Philippines, South Africa, Spain and the United States. Even in cases where national legislation has been passed, legal loopholes, imprecise legal commitments and weak enforcement limit the effectiveness of these measures (Danon & Ors 2023).

The next section provides an overview of global norms calling for basic human rights for intersex children, with an emphasis on the right to bodily integrity, and considers the absence of such protections in binding international human rights treaties. The subsequent section outlines a typography of gaps between global norms calling for rights-based protections for intersex children and the failure of most countries to adopt such protections. Our analysis identifies potential pathways for closing legal gaps in the protection of all children's bodily integrity rights. It also sheds light on the cultural and political barriers to advancing the rights of intersex people as human rights.

[B] INTERNATIONAL HUMAN RIGHTS LAW AND GLOBAL NORMS: CONSTRUCTING THE RIGHTS OF INTERSEX CHILDREN TO BODILY INTEGRITY

Transnational advocacy by intersex activists and organizations has been a major force driving the development of emergent global norms asserting intersex rights as human rights (Bauer & Ors 2020; ILGA 2023: 59). The UN has served as an important political site for the development and dissemination of norms advancing intersex human rights generally and the rights of intersex children to bodily integrity specifically. Intersex activists and organizations have been successful in placing intersex rights on the agendas of major UN bodies which, in turn, has elevated the visibility of intersex rights globally (Garland & Ors 2022). Although important, emerging global norms constructing a vision of intersex rights as human rights have not been codified into binding international treaties.

Our conceptualization of global norms in this section has been shaped by constructivist international relations theories focusing on how ideas and discourses can mobilize political actors and new forms of advocacy, shape state interests, shift the agendas of international institutions, and alter patterns of global politics (Finnemore & Sikkink 1998: 891-893). Global norms, often advanced by non-state actors and characterized as "soft law", are distinct from the binding international treaties forming the state-centric core of positive international law (Abbott & Snidal 2003).

The emergent soft law calling for the rights of intersex children to bodily integrity is non-binding and has not been formally codified by states into human rights treaties. As we will see in the subsequent section, the substantial gaps between UN normative frameworks, international human rights treaties, and national laws governing non-voluntary medicalized interventions into sexual anatomy help explain the pervasive absence of concrete legal protections globally for intersex children's right to bodily integrity.

Unwarranted (ie medically unnecessary, non-voluntary) interventions, including surgical procedures, into the sexual anatomy of children implicate numerous human rights, including the right to be free from torture, the right to equality under the law without discrimination, the right to the highest attainable standards of physical and mental health, and rights to (future) bodily autonomy, bodily integrity and self-determination. These rights have been codified in numerous international human rights treaties, including the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Elimination of All Forms of Discrimination Against Women 1979, the Convention on the Rights of the Child 1989 and the Convention on the Rights of Persons with Disabilities 2006. Although a right to bodily integrity for intersex children might be read into these codified rights, international human rights law does not formally recognize people with intersex traits as a protected category. The non-discrimination clauses of major human rights treaties include sex as a category for which discrimination is proscribed but do not expressly cover variations in sex characteristics. Instead, international human rights treaties traditionally have interpreted sex as referring to biological sex categorized according to a male/female binary (O'Connor & Ors 2022).

Despite these legal gaps, there has been significant development of global norms articulating intersex rights as human rights. The evolution of the Yogyakarta Principles illustrates the progressive development of such global norms. Developed in 2006 by a coalition of human rights and SOGIESC (sexual orientation, gender identity, expression and sex characteristics) advocacy organizations, the Yogyakarta Principles are a non-binding set of 29 Principles aligning SOGIESC rights with human rights standards under international law (Vance & Ors 2018). Without explicitly identifying variations in sex characteristics as a protected category, the Yogyakarta Principles laid a normative foundation for claiming bodily integrity and autonomy rights for intersex people. Principle 18 calls for states to ensure full protection against "harmful medical practices based on sexual orientation or gender identity". This

Principle calls upon states to take measures “to ensure that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child”. Additionally, Principle 18 criticizes state policies condoning or allowing practices treating diverse sexual orientations and gender identities as medical conditions in need of correction or treatment.

The Yogyakarta Principles plus 10 (YP+10), adopted in 2017, extend protections to intersex people by expanding the list of protected categories to include sex characteristics as well as SOGIESC. Principle 32 articulates rights to bodily autonomy and integrity and calls for non-discrimination on the basis of sex characteristics:

Everyone has the right to bodily and mental integrity, autonomy and self-determination, irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression, and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

Importantly, Principle 32 links bodily integrity and autonomy rights with the right to be free from torture and cruel, inhuman, or degrading treatment.

Drawing partly on the normative standards set by the Yogyakarta Principles, the transnational intersex advocacy movement has worked within the UN system to amplify advocacy for intersex rights as human rights (ILGA 2023: 43). A wide array of UN bodies has been involved in the development of global norms articulating human rights for intersex people. Treaty-monitoring bodies for the core human rights treaties have played a leading role in interpreting codified principles of international law in ways that advance the human rights of intersex people. The Committee on the Elimination of Discrimination Against Women (CEDAW) was the first treaty-monitoring body to formulate intersex rights as human rights. In its 2009 concluding observations on Germany’s sixth periodic report, CEDAW recommended that Germany “enter into dialogue with non-governmental organizations of intersexual and transsexual people in order to better understand their claims and to take effective action to protect their human rights” (CEDAW 2009: paragraph 62).

The Committee on the Rights of the Child (CRC) has interpreted Article 19 of the Convention on the Rights of the Child 1989, which calls for states parties “to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” in a manner affirming bodily integrity rights for children with variations in sex characteristics. In General Comment No 13, the CRC identified a range of harmful practices, including corporal punishment, female genital cutting/mutilation and violent and degrading initiation rites, which constitute a form of violence under article 19 (CRC 2011: paragraph 29). Building on this interpretation, the CRC characterized non-voluntary, medically unnecessary interventions on intersex children as violations of the right to bodily integrity and of the “emerging” autonomy of the child in General Comment No 20. The CRC emphasizes “the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy” and “condemns the imposition of so-called ‘treatments’ to try to change sexual orientation and forced surgeries or treatments on intersex adolescents” (CRC 2016: paragraph 34).

In General Comment No 3 (2016), the Committee on the Rights of Persons with Disabilities, the treaty-monitoring body for the Convention on the Rights of Persons with Disabilities 2006, also condemns forced medical interventions, including “treatment performed on intersex children without their informed consent”, as a violation of fundamental human rights (paragraph 44). Similarly, the Committee on Economic, Social and Cultural Rights (CESCR), interpreting the right to health under the International Covenant on Economic, Social and Cultural Rights 1966, characterized “medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children” as harmful practices in violation of the fundamental right to sexual and reproductive health in its General Comment No 22 (CESCR 2016: paragraph 59).

UN Special Rapporteurs have played an essential role in constructing global norms asserting bodily integrity rights for intersex children. The 2009 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, citing Principles 17 and 18 of the Yogyakarta Principles, identified intersex people (along with other groups minoritized on SOGIESC grounds) as deserving of “special consideration regarding the protection of informed consent” (Grover 2009: paragraph 46). The report also asserted that “[h]ealth-care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is

sufficiently mature to provide informed consent” (ibid: paragraph 49).³ The Rapporteur’s 2015 report called for states to “prohibit discrimination against intersex people, including by banning unnecessary medical or surgical treatment” (Pūras 2015: paragraph 112, m). The Rapporteur’s 2022 report further clarifies state obligations by indicating that state failure to prosecute or discourage harmful traditional medical or cultural practices, including “unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children”, constitutes a violation of the right to health (Mofokeng 2022: paragraph 20). The 2022 report also called for broadening the definition of gender-based violence to encompass violence committed based on sex characteristics (ibid: paragraph 27) and characterized surgical interventions that irreversibly alter the genitals of intersex children as intersex genital mutilation (ibid: paragraph 59).

In its 2013 report, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment condemned non-voluntary medical interventions, “including forced genital-normalizing surgery” (Méndez 2013: paragraph 77). Preceding Principle 32 of YP+10, the Rapporteur characterized such interventions as a form of torture prohibited under international human rights law. The Special Rapporteur’s 2016 report reaffirmed that non-voluntary medical interventions, including “irreversible sex assignment, involuntary sterilization, and genital normalizing surgery”, may constitute torture under international law (Méndez 2016: paragraph 50).

Other UN bodies have issued statements condemning unwarranted genital interventions on children. These include a World Health Organization (WHO) statement calling for the elimination of forced, coercive and otherwise involuntary sterilization, including the loss of reproductive capabilities due to unwarranted medical interventions on intersex children (WHO 2014). The UN Free & Equal Initiative, launched by the OHCHR in 2013, affirms that human rights belong to all people, without distinction based on sexual orientation, gender identity, gender expression, or sex traits.⁴ One of the initiative’s major campaigns

³ Paragraph 49 also states: “Safeguards should be in place to protect children from parents withholding consent for a necessary emergency procedure.” This provision suggests that consent and the best interests of the child are the human rights standards that should guide decision-making. This provision offers guidance on how to potentially reconcile the interests of different groups of children with different health needs vis-à-vis medical interventions. For example, the best interests of intersex children may be served by being protected from non-voluntary medical interventions. In contrast, the interests of transgender adolescents or young adults seeking gender affirming care might allow for medical interventions based on their health needs and preferences (Grimstad & Ors 2023).

⁴ See [UN Free & Equal](#) (the United Nations’ Global Campaign for LGBTIQ+ Equality).

focuses on raising awareness about intersex issues and the ways that unnecessary medical interventions to “normalize” the genitals of intersex children cause a range of physical, psychological and emotional harms and violate the basic rights of these children.⁵ Most recently, in April 2024, the UN Human Rights Council passed an intersex rights resolution reaffirming that medically unnecessary surgeries performed without consent constitute a violation of fundamental human rights (Human Rights Council 2024).

The significant development of global norms framing intersex rights as human rights within UN bodies has elevated the visibility of intersex rights globally. The emergence of these norms represents an important achievement of transnational advocacy by intersex activists and organizations. However, this emergent soft law is non-binding and has not been codified by states into formal treaties. Additionally, significant legal gaps exist between global norms framing intersex rights as human rights and the status of intersex rights under national laws. An analysis of these gaps between global norms and national laws is the focus of the next section.

[C] GAPS BETWEEN GLOBAL NORMS AND NATIONAL LAWS IN THE PROTECTION OF BODILY INTEGRITY RIGHTS FOR INTERSEX CHILDREN

This section provides an overview of the gaps observed between relatively robust global norms claiming bodily integrity rights for intersex children and generally weak or non-existent institutionalization of those norms at the national level. The most prominent gap between global norms and national laws is *the failure of most countries to adopt legislation or other potentially protective legal measures*. At present, 181 countries have not passed any laws establishing bodily integrity rights for intersex children.

As noted in the introduction, a small number of countries offer nuance to this global picture. In 2015, Malta adopted the Gender Identity, Gender Expression, and Sex Characteristics Act which prohibits and establishes liability for performing non-voluntary medicalized interventions on intersex children (ILGA World 2023: 38-39). Following a successful campaign by intersex rights advocates, the Greek Parliament adopted Articles 17-20 in Law No 4958 of 2022; these provisions prohibit and establish criminal

⁵ See UN Free & Equal, “[Intersex Awareness](#)”.

liability for doctors who perform procedures proscribed under the law (ibid: 29-31).

Four countries (Germany, Iceland, Portugal, Spain) have prohibited certain interventions but without establishing criminal liability. The German Law on the Protection of Children with Variants of Sex Development 2021 prohibits medical interventions performed to modify the appearance of the sex traits of intersex minors. Despite adopting legal prohibitions, Germany allows family courts to approve such interventions in cases where they determine such procedures would be in the child's best interests. Furthermore, the German law allows for civil fines but does not establish criminal liability in cases where the law has been violated (ILGA World 2023: 73). In 2020, Iceland adopted Law No 154 which amended the Law on Sexual Anatomy 2019, Law No 80. The amendments provided that irreversible medical interventions performed on intersex children with the purpose of permanently changing their sex characteristics should "only be made in accordance with the child's will and development of gender identity, and always with the child's best interest in mind". The law further provides that legal guardians may provide consent on behalf of minor children under the age of 16 who are incapable of doing so (because of age or other reasons), following consultation with medical professionals and if such interventions are deemed to be performed for health reasons (ILGA World 2023: 75). In the Law on the Right to Self-Determination of Gender Identity and Gender Expression and the Protection of Everyone's Sex Characteristics 2018, Law No 38, Portugal prohibits medical intervention modifying the sex characteristics of intersex minors unless such interventions are performed to address proven health risks. Despite the formal prohibition of non-voluntary medicalized interventions on intersex children, the Portuguese law does not provide criminal sanctions or clear mechanisms for enforcement (ILGA World 2023: 82). In 2023, Spain passed the Law for the Real and Effective Equality of Trans People and for the Guarantee for the Rights of LGTBI People (Law No 4/2023). All genital modification practices on minor children under the age of 12 are prohibited under Article 19 of this law with the exception of procedures performed for medically indicated health reasons. The law allows genital modification practices for children between the ages of 12 and 16 with the informed consent of these children. Although Spanish law formally prohibits non-voluntary medicalized interventions on intersex children, intersex advocates have criticized Spain for failing to establish either civil or criminal liability (ILGA World: 83-84).

Several other countries have adopted partial restrictions governing non-voluntary medical interventions performed on intersex children.

In an additional seven countries, bills have been proposed that were not ultimately adopted or voted into law. The remainder of the world's countries—the vast majority—have not considered adopting legislation or protective measures to protect the bodily integrity rights of intersex children (ILGA 2023).

Even where national laws have been adopted, the *failure to fully enforce existing national-level laws* contributes to significant gaps between global norms and the realization of bodily integrity rights for intersex children in practice. For example, in Germany, Malta and Portugal, surgical interventions continue to be performed on children with variations in sex traits despite the adoption of legislation prohibiting such procedures (Garland & Slokenberga 2019; Danon & Ors 2023). A range of factors contribute to the limited enforcement of national laws prohibiting non-voluntary medicalized interventions into sexual anatomy on intersex children. In the following section, we suggest that limited enforcement of intersex children's rights reflects a broad cross-cultural commitment to the gender binary. Contraventions of intersex children's rights occur, we argue, in the fulcrum connecting legal, political and medical professionals who, in their different capacities, participate in corresponding actions (across policy and practice) that ultimately reify binary expectations that children's biological sex features should be culturally legible as *either* male or female.

Several additional factors help to explain the significant gap between global norms establishing the right of intersex children to bodily integrity and the minimal incorporation of such norms into national law. Active resistance among many medical practitioners and professional medical societies has played a role in impeding the development of national laws (Garland & Slokenberga 2019; Cuadra & Ors 2024). Additionally, deference to parents in medical decision-making has limited the adoption of national laws that would restrict presumed parental authority to make decisions in the "best interests of their children" as they see it (Greenberg 2011; Greenberg 2017; Garland & Slokenberga, 2019). Furthermore, political opposition, often by conservative or anti-LGBTQIA+ political forces, has played a role in blocking the development of national legislation protecting the bodily integrity rights of intersex children (Danon & Ors 2023; Hegarty & Ors 2021). Concerns that restrictions on intersex surgeries might end up limiting routine or religious male circumcision may also serve as a potential obstacle to laws establishing bodily integrity rights for intersex children. In both cases, a perceived or actual tension may arise between (a) the claim that children have a right to be free from medically unnecessary, non-voluntary surgical intervention into their sexual anatomy, and (b) the

claim that parents should be free to authorize such interventions in accordance with their cultural or religious commitments or judgments of the child's best interests (which may include consideration of those very same commitments). In many countries, these tensions shape political and sociocultural debates over genital-cutting practices involving children and contribute to the application of inconsistent legal standards to boys, girls and intersex children (Shweder 2013; see also Reidy 2017).⁶

At a macro level, the dominance of a binary body-gender model in prevailing medical discourses and practices pathologizes variations in sex traits and contributes to the conceptualization of "genital normalizing" surgeries as medically appropriate interventions in many contexts. Relatedly, the lack of effective communications between medical providers and parents clearly delineating health versus sociocultural rationales leads many parents to opt for medical interventions to be performed on their children with variations in sex traits (Greenberg 2011; Greenberg 2017; Liao & Ors 2019). In general, there is an absence of consistent,

⁶ As medical historian Elizabeth Reis (2013) notes, both non-therapeutic (eg, routine or religious) penile circumcision, when performed on children who cannot consent, and medically unnecessary, non-voluntary intersex surgeries can be understood as "gendering" practices designed to physically shape the child's anatomy into what is considered socially normative for persons of their designated sex. They are thus both instances of a broader category of socio-cultural interventions into the body which anthropologist Michela Fusaschi (2023) calls "gendered genital modifications", a category that also includes (primarily non-voluntary) ritual female genital cutting and (primarily voluntary) so-called female genital "cosmetic" surgeries, including labiaplasty. Increasingly, scholars argue that *all* genital modifications performed on minors must be analysed together, both morally and legally, irrespective of the particular sex traits of the child, with special attention paid to procedures that are neither voluntary nor medically necessary (Van Howe & Cold 1997; Van Howe & Ors 1999; Ehrenreich & Bar 2005; Van Howe 2011; DeLaet 2012; Antinuk 2013; Svoboda 2017; Coene 2018; BCBI 2019; Kehrer 2019; Townsend 2020; Earp 2022; Bootwala 2023; Buckler 2023; Earp & Ors 2023a; Earp & Ors 2023b; Higashi 2023; Lempert & Ors 2023; Townsend 2023a; Townsend 2023b; BCBI in press). Since all such procedures performed on non-intersex females are already considered to be human rights violations (irrespective of harm-level, parental religious beliefs, or degree of medicalization), as well as contrary to national and international law, it stands to reason that similarly non-voluntary, medically unnecessary procedures performed on children with intersex traits, whether designated female or male at birth, as well as non-intersex children designated as male at birth, must also be in conflict with human rights principles and should be similarly legally prohibited. Aware of this, some defenders of non-voluntary religious penile circumcision have begun to argue in favour of broad parental rights to authorize (without fear of criminal punishment) genital modifications for their children (of any sex) that are neither voluntary nor medically necessary, just so long as they do not pass an arbitrary and ill-defined harm threshold as judged by parents and medical professionals (eg Arora & Jacobs 2016; Jacobs & Arora 2017; Shweder 2022a; Shweder 2022b; Duivenbode 2023). In this, they seem to suggest that children—including intersex children—*do not* have a right to bodily integrity according to which medically unnecessary, non-voluntary interventions into their sexual anatomy are necessarily impermissible, insofar as the parents judge the intervention to be consistent with, or at least not too seriously contrary to, the child's "all things considered" best interests (eg including perceived psychosocial interests) (see eg Mazor 2013; Mazor 2021, for discussion). Relevant to this, it is notable that some recent state-level efforts in the United States to prohibit certain hormones and surgeries for transgender adolescents have included explicit exceptions within the bills or laws for both intersex surgeries and newborn penile circumcision: see [Trans Legislation Tracker](#).

consensus-based standards for distinguishing between necessary and unnecessary medical interventions (Godwin & Earp 2023). Ambiguous legal terminology often fails to clarify what counts as a relevant intersex condition (eg a lack of clarity around hypospadias:⁷ Roen 2023; Roen & Sterling 2023). Finally, a lack of will among law enforcement organizations to prosecute medical professionals who believe they are acting in their patients' best interests contributes to gaps in enforcement (Danon & Ors 2023).

Taken together, these legal gaps suggest at least three different levels at which future advocacy and consciousness-raising may need to focus. First, legal language may need to be clarified to make it more obvious which procedures are included or not included and why. Second, there needs to be more buy-in from the medical community itself, whose failure to appreciate the implications of the laws, or active resistance to them, may reduce the perceived legitimacy of the laws. Third, there is a need for broader advocacy and education to raise public awareness about the health versus sociocultural reasons for medical interventions performed on intersex children and bodily integrity rights under national and international laws. Finally, relationship-building between intersex advocacy organizations and medical professional associations may build support for bodily integrity rights at the grassroots level.

[D] DISCUSSION AND CONCLUSION

Despite the development of a global normative framework advancing the rights of intersex children to bodily autonomy, a profound and persistent disjuncture remains between global norms and their interpretation at a national level. In this final section, we articulate two interlinked arguments accounting for the persistence of gaps between global norms and national laws. First, we propose that the construction of a global normative framework claiming intersex rights as human rights has not penetrated broad-based, cross-cultural sociopolitical resistance to SOGIESC rights in most states. The absence of a specialized treaty codifying SOGIESC rights shows the relative thinness of support for global norms supporting the advancement of intersex rights as human rights and prefigures the absence of legal protections in national laws. Second, and relatedly, we suggest that the failure to adopt or enforce intersex rights in national legislation reflects a broad cross-cultural commitment to the gender binary globally: by working with the assumption that gender is, or ought

⁷ A condition in which the penile urethra opens otherwise than at the tip of the glans, along the underside of the penile shaft.

to be, a binary (and that a person's sex characteristics should conform to this normative expectation), political, legal and medical professionals in many countries are more likely to view medical interventions as central to rather than a contravention of children's human rights.

Regarding our first argument, transnational advocacy networks have successfully advanced global norms articulating SOGIESC rights generally and intersex rights particularly. In recognizing the achievement of transnational activists and advocacy networks,⁸ we acknowledge the distance that has already been travelled, evident in the adoption of global norms supporting SOGIESC rights by various UN bodies. We also recognize the political and legal distance that has yet to be covered to institutionalize these norms at both the international and national levels. Whereas widespread support has emerged in the UN bureaucracy, the UN's primary political bodies have not endorsed norms supporting the rights of intersex children to bodily autonomy. The UN General Assembly has not issued a declaration supporting SOGIESC rights. And member states have not sought to advance a specialized treaty codifying SOGIESC rights, a major gap in the international human rights protection regime. This gap contrasts starkly with the specialized treaties established to articulate basic human rights and offer explicit legal protection to other groups of marginalized people, including women, children and persons with disabilities, who face distinct human rights challenges. This gap reveals the limitations of international human rights law in establishing formal protections for the basic human rights of intersex children, including the right to bodily integrity.

This gap in international human rights law exists despite growing recognition by international bodies, like the WHO (Langlois 2020) and the UN (Lhant 2019) that failure to address discrimination linked to SOGIESC has significant social, economic and political ramifications not only for marginalized individuals and communities but also for countries (Badgett 2020; Belmonte 2020; Badgett & Ors 2021). Despite decades of advocacy around SOGIESC rights in general, and LGBTQIA+ rights in particular, much work remains to raise awareness around the importance of securing the rights of these marginalized groups, particularly the rights of intersex children (Mills 2018; Vaast & Mills 2018; DeLaet & Cramer 2020). It follows, then, that efforts to shift national laws face a steep uphill battle. While local-level activism has certainly contributed to

⁸ We believe it is important to acknowledge some of the scholars and activists who have successfully campaigned for and advanced claims for legal, rights-based protections for intersex children. These scholars and activists include Anne Tamar-Mattis, Emi Koyama, Georgiann Davis and Morgan Carpenter.

national and international developments in a range of legal protections (as seen in the advocacy around access to essential medicines for people living with HIV, for instance), international human rights treaties can play an important role in catalysing changes in national laws. The absence of codified international law signals a lack of widespread political support for global norms claiming intersex rights as human rights. In this context, the failure of states to adopt national legislation providing legal protections for intersex children's rights should not be surprising.

Turning to our second argument around the cross-cultural commitment to the gender binary, our discussion of national laws identified a set of legal, political and medical actors who play a key role in constraining or blocking measures to protect the rights of intersex children. Pathologizing discourses, undergirded by beliefs in, and commitment to, the gender binary, contribute to the pervasive view among medical practitioners, parents and lawmakers that congenital variations of sex characteristics are abnormalities in need of medical correction. The importance of such language is supported by a rich history in medical anthropology showing how discourse fundamentally shapes sociocultural understandings of health, medical practices and national regulations of health-related policies (Danon 2018; King 2022). For instance, scholars in medical anthropology have shown how intersex variations have been pathologized through medical interventions, including the use of surgery or hormones (Feder 2009; Newbould 2014; Schwend 2020). Ellen Feder argues that the cultural commitment to what is broadly constructed as "normal" leads to the narration of "intersex variation" as a form of "disorder"—or a deviation from the norm (2009).

Writing about the implications of this cultural construction of the gender binary as the norm, Charlotte Jones describes how this narration moves into legal and medical practices (2022). In addition to having serious ramifications on children's rights, Jones found that failing to protect children's bodily integrity and (future) autonomy by insisting on surgical or hormonal interventions was a factor in their experience of long-term physical and psychological violence, including greater degrees of loneliness and isolation among intersex people. There is, we suggest, a link between the discursive construction of (and investment in) the gender binary, and the legal and medical practices built to reinforce this binary through surgical and other medical interventions. Writing about the role that medical and legal gatekeepers play in wedging open the gap between protective international measures and national legislation, Maayan Sudai (2018: 1) similarly argues that any attempt to challenge the medical standard of so-called "genital-normalizing surgeries in infancy" requires

a full reconceptualization of the gender binary and serious rethinking of the ostensibly scientific ground upon which current medical protocols have been established and continue to be legitimized through national legislation (or the absence thereof).

Given these interlinked and stubborn challenges to advancing the rights of intersex children, some intersex scholars and activists⁹ have suggested that, in addition to seeking meaningful legislative reform, we also find new and creative ways to shift ontological and epistemological approaches to gender. This entails a commitment to tracing and unpicking the roots of the discursive construction of the gender binary in medical practices and legal discourse.

Despite international recognition of the social, economic and political ramifications of discrimination based on SOGIESC, a notable absence of explicit international human rights treaties and national laws prohibiting such discrimination reveals the limitation of international human rights law as a tool for promoting the rights of intersex children to bodily integrity. Our analysis points to a complex interplay of cultural, legal, medical and political factors hindering the effective translation of global norms into concrete protections for intersex children at the national level. Addressing these challenges requires a multifaceted approach encompassing legal reforms, increased education for medical professionals, cultural transformation and consciousness-building at a societal level. Together, this might better enable a dismantling of the socially prescribed and medically enforced gender binary to more meaningfully ensure that the rights of children with intersex traits are recognized and integrated into national laws and into the medical and legal frameworks that are guided by these laws.

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⁹ We acknowledge that activists and scholars working in this field have a wide range of views and priorities. This plurality of perspectives is valuable, and we wish to note this. We also wish to note that this plurality may also mean that it is less possible to successfully advocate around a small number of priorities.

civil society to translate abstract global norms into concrete human rights practices within communities.

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International Principles

Yogyakarta Principles 2006

Yogyakarta Principles plus 10 (YP+10) 2017

INTERNATIONAL SURROGACY AND STATELESS CHILDREN: ARTICLE 7 UNCRC AND THE HARMFUL EFFECTS OF STATELESSNESS

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Abstract

This article examines statelessness resulting from international surrogacy arrangements by exploring whether there is protection afforded under international law and the overall consequences of statelessness for surrogate-born children. The aim of this contribution is to shed light on the statelessness problem in view of recent developments in the field. In particular, for an updated and holistic approach to surrogacy and statelessness, this contribution advocates for the United Nations Convention on the Rights of the Child 1989 (UNCRC) to be read in conjunction with the recently established Verona Principles. These Principles are specifically designed for international surrogacy, able to complement the existing UN protection, and it is argued that a combined reading of the UNCRC and the Verona Principles provides stronger protection of children's rights. In addition, this contribution aspires to bridge the gap between legal and other consequences of statelessness, with the latter often overlooked in the context of surrogate-born children.

To explore the above, this article first addresses the phenomenon of statelessness for children born through international surrogacy via an examination of conflicting laws and international surrogacy cases. The article then discusses how this state of affairs infringes the rights of the surrogate-born children, and in particular the right to acquire a nationality (Article 7 UNCRC). It is also submitted that, for surrogacy, Article 7 UNCRC should be read in conjunction with the recently established Verona Principles for a more holistic protection. Finally, this article examines the harmful effects that result from the surrogate-born children's statelessness, advocating for a more comprehensive approach that goes beyond the strictly legal consequences of statelessness.

Keywords: surrogacy; statelessness; UNCRC; nationality; citizenship; cross-border assisted reproduction.

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[A] INTRODUCTION

Surrogacy is an agreement whereby a woman (surrogate) gestates and gives birth to a child for someone else to raise, the intended parent(s) (IPs). It is often the case that IPs travel from their home country to another jurisdiction to access surrogacy services. This has resulted in the phenomenon of international (or cross-border) surrogacy. There are, however, hidden dangers lurking behind international surrogacy. One such danger is that surrogate-born children may become stateless due to, for example, conflicting laws on conferring nationality between the IPs' state of origin and the jurisdiction where the children are born. A question arises as to whether children are afforded any protection to avoid such occurrences by relying on international law, and what are the overall consequences of statelessness for surrogate-born children.

The aim of this article is to shed light on the statelessness problem in view of recent developments in the field. In particular, for an updated and holistic approach to surrogacy and statelessness, this contribution advocates for the United Nations Convention on the Rights of the Child (UNCRC) to be read in conjunction with the recently established Verona Principles.² These are Principles specifically designed for international surrogacy, with their protection covering aspects in addition to those covered by the existing UN protection. It is argued, therefore, that a combined reading provides stronger protection of children's rights. In addition, this contribution aspires to bridge the gap between legal and other consequences of statelessness, with the latter often overlooked in the context of surrogate-born children.

Accordingly, this article first addresses the phenomenon of statelessness for children born through international surrogacy. Conflicting laws, refusal to grant nationality and international surrogacy cases are covered in this first part. The article then discusses how statelessness infringes the rights of surrogate-born children in light of Article 7 UNCRC, the right to acquire a nationality,³ read jointly with the Verona Principles. It should be noted that the terms "nationality" and "citizenship" are used interchangeably here to refer to the legal relation between an individual

² International Social Service. "Principles for the Protection of the Rights of the Child Born through Surrogacy" (Verona Principles), May 2021.

³ Article 7 UNCRC: "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

and a state (Vink & de Groot 2010: 1).⁴ Finally, this article examines the harmful effects that result from surrogate-born children's statelessness, advocating for a more comprehensive approach that goes beyond the strictly legal consequences of statelessness.

[B] STATELESSNESS OF SURROGATE-BORN CHILDREN

Statelessness can be broadly defined as the lack of enjoyment of “various rights and entitlements guaranteed by states to their nationals, including the right lawfully to reside somewhere on the earth's surface”, a definition which includes both *de jure* and *de facto* stateless people (Gibney 2014: 47). The danger of statelessness for children born through international surrogacy arrangements mainly arises due to two issues: first, conflicting laws of conferring nationality and parenthood between the IPs' state of origin and the jurisdiction where the children are born; second, in states where surrogacy is unlawful, the unwillingness of national authorities to recognize the IPs' legal parenthood established through international surrogacy, which then severs the child's link to nationality (Ní Ghráinne & McMahon 2017: 327-328). The two issues are intertwined, and this section showcases the predicament of statelessness through addressing both problems, each followed by an example of statelessness case law.

Starting with conflicting laws, it is important to understand the main ways of acquiring citizenship. Given the focus on surrogate-born children and the fact that the great majority of people in the world acquire citizenship at birth (Shachar 2009: 21), this article will engage with birthright citizenship only, as opposed to other means of acquiring citizenship (eg naturalization). Birthright citizenship is conferred (to children) in two ways: a child acquires the nationality of the state in whose territory they are born (*jus soli*), or the nationality of their parents based on “blood” ties (*jus sanguinis*) (Weil 2001: 17). However, most states operate a system which combines both approaches to a lesser or greater extent (de Groot & Vonk 2018).

One issue that can arise for international surrogacy is that the state where the child is born (hereinafter state of birth) might not confer nationality solely based on *jus soli*, which, if so, would make surrogate-born children ineligible for their state of birth's nationality. Unfortunately,

⁴ While the terms “nationality” and “citizenship” can have different connotations (von Rütte 2022: 11-13), given their close relationship and this article's focus on the content of human rights protection rather than the label, it is considered unnecessary and unhelpful to distinguish between the two (Edwards 2014: 14).

this is not uncommon in places that are international hubs of surrogacy.⁵ The only hope for these children not to become stateless is conferral by *jus sanguinis*, acquiring the nationality of their legal parents. The focus, thus, turns to the assignment of legal parenthood. Who is the legal parent, and does the legal parent's state confer nationality based on *jus sanguinis*? If the legal parent's state of origin does not award nationality based on *jus sanguinis*, then the child will be stateless. However, a more common problem is when the legal parents' state of origin offers *jus sanguinis* conferral, but the child's state of birth deems the IPs to be the legal parents, while the IPs' state deems the surrogate to be the legal mother.

To better understand the above, it is important to bear in mind that laws on legal parenthood vary vastly, particularly in terms of surrogacy arrangements. As addressed later in this article, there is no international agreement on the rules of conferring legal parenthood and recent attempts to reach international agreement on cross-border parenthood recognition are yet to come to fruition (The Parentage/Surrogacy Project, HCCH).⁶ Some states focus on genetics or legal presumptions to establish legal parenthood (Tesfaye 2022: 4), while others may rely on intention (Igareda González 2020: 917).⁷ Therefore, legal parenthood can be established differently in the state of birth and the IPs' state. A common reason why IPs choose to go abroad is that in many states, hubs of international surrogacy, IPs can acquire legal parenthood from birth, and the surrogate is not considered the mother of the surrogate-born child (Horsey 2018: 39). Nonetheless, given the absence of cross-border recognition, the IPs' state does not recognize legal parenthood as established abroad, imposing their own legal rules of awarding parenthood, even if birth occurs abroad. A common way of establishing legal motherhood across the world is the rule that the woman giving birth to the child is the legal mother (Schwenzer 2007: 3), also known as the Roman law principle *mater semper certa est*. This can mean that, in the eyes of the IPs' state, the child's legal mother is the surrogate, and IPs might need a domestic court order to transfer legal parenthood.⁸ Until such transfer of legal parenthood occurs, the child is not eligible for the IPs' nationality, but at the same time they may

⁵ Some examples include Ukraine and Russia (Kozyr 2007) and Greece (Tsitselikis 2007).

⁶ See Hague Conference on Private International Law, [Parentage/Surrogacy Project](#).

⁷ An example of the former is the United Kingdom (UK), and an example of the latter is Greece (Igareda González 2020: 917).

⁸ This happens in the UK, where surrogacy is lawful, but the legal parents of the surrogate-born child are the surrogate and her partner, if any: Human Fertilisation and Embryology Act 2008, sections 54-54A.

not be eligible for the surrogate's nationality, as the state of birth does not recognize a parental link between the surrogate and the child.

An example of how conflicting laws can lead to statelessness is the (in)famous case of Baby Manji (*Yamada v Union of India* 2008). This is a case of a surrogacy arrangement in India commissioned by a Japanese couple, using the intended father's sperm and an egg donor. On the one hand, according to India's laws, nationality is acquired through *jus sanguinis* and not *jus soli*; however, the surrogate was not the mother of the child and, therefore, the child was not eligible for Indian citizenship (de Alcantara 2010: 421). On the other hand, Japan follows the *mater semper certa est* principle and fatherhood is established through presumptions or acknowledgment of paternity (de Alcantara 2010: 419-421), while there are no rules on conferring or transferring legal parenthood on the basis of surrogacy (Spaulding 2021). Given that the intended father was not married to the Indian surrogate, he had no means of establishing his legal fatherhood. The matter was further complicated by the relationship breakdown and divorce of the IPs before the child was born, with only the intended father wishing to raise the child. As a result, adoption was not an option, as India strictly prohibited single-father adoption (Mohapatra 2012: 419). In the absence of any legal ties between Baby Manji and her father, she was not eligible for Japanese nationality, as Japan confers citizenship based on *jus sanguinis* (de Alcantara 2010: 421). The conflict of laws in this case meant that Baby Manji was stateless and remained "trapped" in India. It was not possible for her father to take her with him to Japan until Indian authorities issued a certificate of statelessness for the child and Japan issued a humanitarian visa to allow Baby Manji entry to the state (Wolf 2014: 474-475). It remains unclear whether upon arrival in Japan Baby Manji was granted Japanese citizenship (Wolf 2014: 475). This raises concerns about the protection of Baby Manji's rights and is criticized in the next section of this article.

A second issue that can give rise to statelessness is the refusal of authorities to recognize the IPs' legal parenthood as established abroad through surrogacy. This is again related to conferral of nationality and legal parenthood, but the additional obstacle in these cases is the authorities' outright refusal to recognize legal parenthood, which goes beyond conflict of laws. IPs from states where surrogacy is unlawful are driven abroad to undertake surrogacy, and authorities treat their international surrogacy as an attempt to circumvent domestic law. This can lead to the child's statelessness where the state of birth does not confer citizenship based on *jus soli*, while the refusal to recognize the IPs' legal parenthood severs the children's link to the nationality of the

IPs' state via *jus sanguinis*. While in the first scenario described above, the legal framework did not accommodate for the recognition of the IPs' legal parenthood, the difference in this case is that there is a possibility in domestic law to recognize legal parenthood, but the IPs' state refuses to do so, which can consequently hinder travel of the children to the IPs' state.

An example of this is *D and others v Belgium* (2014). IPs from Belgium went to Ukraine to undertake surrogacy there, using the intended father's sperm and a donated egg. In Ukraine, nationality is passed from the parents to children via *jus sanguinis*, but according to domestic law, the IPs are the legal parents, and not the Ukrainian surrogate (Kirshner 2015: 85). By contrast, in Belgium, the authorities refused initially to recognize the legal parenthood established abroad, given the involvement of a surrogacy arrangement, even though it was possible to establish the legal fatherhood via genetic fatherhood (*D and Others v Belgium* 2014, paragraphs 4-18). Eventually, the Belgian authorities issued a laissez-passer, but the initial refusal led to four months of statelessness. In the meantime, the IPs' permission to remain in Ukraine expired, which meant that the IPs had to be separated from their child, just like in the *Baby Manji* case. The IPs had to entrust their child to someone they barely knew, fearing that their child would be deemed abandoned and placed in an orphanage (*D and Others v Belgium* 2014, paragraph 44).

The above considerations showcase the ways in which international surrogacy can lead to a child's statelessness, while the examples given aimed to demonstrate the dimension and scale of the problem. A question then arises as to whether children are afforded any protection to avoid such occurrences by relying on international law.

[C] ARTICLE 7 UNCRC AND THE RIGHT TO ACQUIRE NATIONALITY

It is believed that nationality is not in principle an issue for international law to regulate (Foster & Lambert 2019: 53). Nonetheless, the lack of nationality has not escaped international review, not least because of the devastating effects of statelessness, as addressed later in this article. Therefore, there is currently an international legal framework specifically designed for the protection of stateless people, comprising two Conventions: the Convention relating to the Status of Stateless Persons 1954 and the Convention on the Reduction of Statelessness 1961.⁹

⁹ There are also regional Conventions, such as the European Convention on Nationality 1997.

While these UN Conventions do not apply exclusively to children, they do demonstrate efforts to eradicate statelessness in general. However, only a small number of states have ratified these Conventions,¹⁰ and it has been observed that adopting the Convention on the Reduction of Statelessness 1961, for example, “has had limited to no effect” (Stein 2016: 600).

In view of the above observations, and given the focus on children’s statelessness, this article proceeds by outlining the potential protections offered by the UNCRC for children who are threatened with statelessness through international surrogacy. For children, the UNCRC has been described as the “single most significant expression of children’s rights in a global context” (George & Ors 2023: 568) with its innovation found in providing a binding legal framework that includes both welfare and agency rights (Harcourt & Hägglund 2013: 287). It is also the most widely ratified human rights treaty (Kilkelly & Lundy 2006: 331), and, therefore, it is used in this article because of its geographical scope, the almost universality of its application. The UNCRC framework is also chosen over potential private international law instruments, particularly due to the slim likelihood of such agreements being reached (Ní Ghráinne & McMahon 2017: 339). This is evidenced by the Parentage/Surrogacy Project of HCCH, which since 2011 has attempted to convene an international agreement on recognition of cross-border parenthood, with an optional protocol on surrogacy. As recently observed, there are different approaches to legal parenthood and the relevant public policy matters, with little consensus or compromise on surrogacy among states (Horsey 2024: 6).

The above demonstrate that the UNCRC is preferable to other frameworks. Nonetheless, it is not suggested that the UNCRC should operate in isolation from other (soft or hard law) instruments. As elaborated below, this article advocates for the UNCRC to be read in conjunction with the (soft law) Verona Principles and their guidance on statelessness for surrogate-born children, which were supported by the UN Committee on the Rights of the Child.

There are different Articles of the UNCRC enshrining rights relevant to children’s statelessness. For example, Article 2 aims to combat discrimination by requiring states to uphold the children’s Convention rights without discrimination of any kind, explicitly mentioning discrimination based on birth or other status. Of particular importance here, however, is the Article directly addressing the issue of

¹⁰ 83 states have ratified the 1954 Convention and 61 states have ratified the 1961 Convention: see [UN Conventions on Statelessness](#).

statelessness—Article 7 UNCRC.¹¹ Article 7 requires that, among other rights, children have the right to acquire a nationality, and states shall ensure the implementation of these rights, *in particular where the child would otherwise be stateless*. It has been suggested, however, that this right does not warrant a right to a certain nationality, nor does it clarify which nationality is to be obtained (Stein 2016: 604). Also, given that Article 7(2) mentions explicitly that the implementation of the rights in Article 7(1) must be ensured in accordance with national laws, this questions whether it imposes positive obligations on states (Ziemele 2007: 24). To better understand this right, recourse is needed to the interpretative guidance provided by the UN Committee on the Rights of the Child (the Committee).

The UNCRC established the Committee to monitor states' compliance with the Convention (Article 43 UNCRC). Very importantly, the Committee can issue general comments to provide guidance on the content of the UNCRC (UNCRC Committee, Rules of Procedure 2015: Rule 77), and it can receive individual communications (complaints) brought against states for an alleged violation of Convention rights (Article 5 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure). These represent a useful tool to understand and interpret the Convention, which can shed light on the potential protection of surrogate-born children from statelessness. While the Committee has yet to address the issue of surrogacy and statelessness, existing interpretation can serve to gain a broader understanding of what is required of states. For example, in terms of Article 2 UNCRC, the Committee has prompted states not to discriminate against children who are born under conditions “that deviate from traditional values” (Wade 2017: 114). This is significant, as “elements of discrimination and inequality are common to all forms of statelessness” (Blitz & Lynch 2011: 5).

More directly on statelessness, in a Joint General Comment with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee has interpreted Article 7 UNCRC as follows:

While States are not obliged to grant their nationality to every child born in their territory, they are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born. A key measure is the conferral of nationality to a child born on the

¹¹ However, while focus is placed on Article 7 UNCRC, the rights under this Convention are interdependent, and, particularly, Article 2 on non-discrimination and Article 3 on the best interests of the child are briefly mentioned.

territory of the State, at birth or as early as possible after birth, if the child would otherwise be stateless (UN Doc CMW/C/GC/4-CRC/C/GC/23 2017: paragraph 24).

Similar guidance on statelessness provided by the UN Refugee Agency (UNHCR) highlights as well that Article 3 (best interests of the child being a primary consideration) and Article 7 UNCRC dictate that a child must not be left stateless for an extended period of time; instead, a child must acquire a nationality at birth or as soon as possible after birth, with the obligation imposed not only on the state of birth, “but to all countries with which a child has a relevant link, such as through parentage or residence” (UN Doc HCR/GS/12/04 2012: paragraph 11). While this is guidance provided by the UNHCR and not the Committee, it nonetheless sheds light on the interpretation of Article 7 UNCRC.

Article 7’s focus on preventing statelessness was further clarified by the Committee in the recent case of *MKAH v Switzerland* (2019). In *MKAH*, a child and his mother—the mother being of Syrian nationality—applied for asylum in Switzerland by first entering Europe through Bulgaria, where there was evidence that they were ill-treated. Upon applying for asylum, it became clear that MKAH was stateless. The Swiss authorities wished to return the child and mother to Bulgaria. However, the Committee highlighted that states need to take proactive measures to secure that the right to nationality under Article 7 can be exercised (Cabral 2022: 297). In this case, Switzerland had not taken the necessary measures to check whether MKAH would be able to acquire a nationality in Bulgaria. However, Article 7 entails positive action to implement the right to acquire a nationality and, therefore, returning MKAH to Bulgaria would infringe his rights.

Applying this to the context of surrogacy, surrogate-born children should not be discriminated against because their circumstances of birth deviate from “traditional values”. Both the state of birth and the IPs’ state should place safeguards to prevent the surrogate-born child’s statelessness under Article 7 UNCRC. In addition, they are required to adopt appropriate measures, both domestically and in cooperation with the other state, to ensure surrogate-born children acquire a nationality at birth or as soon as possible after birth. Therefore, practices seen in the previous section of this article infringe the right of children to acquire a nationality. The lack of proper cooperation between India and Japan, both state parties to the UNCRC, and the eventual statelessness of Baby Manji exemplifies this failure.

Such an approach to statelessness and surrogacy is in agreement with the findings of the Special Rapporteur on the sale and sexual exploitation of children. In 2018, the Special Rapporteur de Boer-Buquicchio emphasized that the state of birth and the IPs' state should work cooperatively and are both responsible for preventing statelessness (A/HRC/37/60). Furthermore, in 2019, she reminded states that they should adopt, both domestically and in cooperation with other states, measures to ensure that every child has a nationality upon birth, and that states are required to prevent statelessness as part of the child's right to identity (A/74/162: 30). This echoed the Human Rights Committee findings (General Comment No 17: Article 24).

Similarly, Principle 13 of the Verona Principles specifically addresses the problem of statelessness for surrogate-born children, urging states to prevent statelessness as part of a child's right to acquire a nationality, which is also part of the child's right to identity, reminding states that the application of nationality laws by states should be done without discrimination "related to circumstances of birth, including surrogacy" (Principles 13.1-13.2). In addition, the Verona Principles indicate that states should also grant without delay the necessary documents for the child to either remain in the state of birth or travel abroad (Principle 13.8). This article submits that Article 7 UNCRC should be read in conjunction with these recently established Verona Principles to ensure an updated and holistic approach to the protection of surrogate-born children from statelessness. The Verona Principles, specifically designed for international surrogacy, complement Article 7 by going beyond the Special Rapporteur's findings (described in the preceding paragraph). An illustration of the benefits of such interpretation is found when considering the Belgian example used above, which resulted in four months of statelessness for the child involved, left behind in Ukraine, without the parents. Given the eventual acquisition of nationality, the current application of Article 7 would not entail a violation; however, when read together with the Verona Principles, under Principle 13.8, the delay to grant the necessary documentation for the child to travel or lawfully remain in Ukraine would be unacceptable.

Notwithstanding the seeming consensus on the application of Article 7 to surrogacy, a major issue with upholding UNCRC rights is the lack of enforcement mechanisms. Described as incredibly weak, the main mechanism for state accountability within the UNCRC is reporting to the Committee every five years, with procedural delays meaning it might take even longer (Vandergrift 2004: 551). The weakness of the UNCRC is evidenced by the fact that it is usually ignored in surrogacy cases,

as Article 7 UNCRC was not discussed either in the *Baby Manji* case or the Belgian case. Studies have shown that children's rights are better protected in states where the UNCRC has been given legal status in a systematic way, supported by necessary procedures to monitor and enforce its implementation (Lundy & Ors 2013: 461). Therefore, for the systematic protection of UNCRC rights, states are urged to reinforce their domestic mechanisms of monitoring and enforcement of the Convention.

Bearing in mind the above, so far, this article has considered the way in which statelessness is generated in the context of international surrogacy and the available protection offered by international law through the right to acquire a nationality, safeguarded particularly by Article 7 UNCRC and complemented by the Verona Principles. Notwithstanding the lack of UN enforcement mechanisms, this article endorses the protection of surrogate-born children under Article 7 UNCRC in light of the harmful effects of statelessness, which are addressed next.

[D] HARMFUL EFFECTS OF STATELESSNESS

Stateless people have been compared to “a vessel on the open sea, not sailing under any flag”, or called a “flotsam, *res nullius*” (Weis 1954: 193). The severe impact of statelessness on individuals has long been acknowledged by international human rights bodies (eg Human Rights Council, Resolution No 32/5: paragraph 16). This section addresses first the harmful effects of statelessness both in strict legal terms, but also explores the wider consequences that arise from such a lack of legal protection. The wider effects of statelessness on surrogate-born children are often overlooked, therefore this article ultimately advocates for a more comprehensive approach that goes beyond the strictly legal consequences of statelessness for surrogacy.

Starting with the legal consequences arising from statelessness, nationality is the means through which persons enjoy protection under international law, but it also entails physical entry to the state of nationality, alongside the enjoyment of certain economic, political and social rights (Foster & Lambert 2019: 53-54). Stateless individuals are deprived of these protections. Examples of vital entitlements that stateless persons are devoid of include acquiring a passport, the right to vote, and access to education and healthcare (Wade 2017: 128). The exclusion of stateless individuals from key benefits has been divided into three categories: privileges, security and voice (Gibney 2014: 51). According to Gibney, privileges are associated with access to public goods (housing, healthcare, education, etc), public service positions, which is

directly related to the potential for social advancement, and the right to own different forms of property. Security is principally associated with the security of residence in the state and diplomatic protection abroad, while voice is associated with the right to elect and be elected, and more generally participate in debates within the state as an equal member of the community.

The above evidence the intertwining nature of the consequences of statelessness beyond the strictly legal, as they have further implications for the individual within society. Political exclusion has been particularly emphasized, drawing on the seminal work of Arendt on stateless people, where “fundamental deprivation is manifested first and above all in the deprivation of a place in the world which makes opinion significant and actions effective” (Arendt 1968: 296). In relation to children, this can be understood through their position within society. For example, Wells-Greco argues that the UNCRC requires a broader approach, which entails, among other things, “full respect for and implementation of the rights of every child” to enable children to lead an individual life within a society through active and constructive participation, which would further “acknowledge the child’s growing autonomy and identity” (Wells-Greco 2015: 449). Thus, integration within society is understood in broader terms, which accords with the above findings of Article 7 UNCRC directly impacting on the identity of children and their integration within society. The correlation between the child’s identity and their right to acquire a nationality have been highlighted by both the Special Rapporteur and the Verona Principles, as elaborated above.

While for surrogate-born children, as seen through examples in the second section of this article, the immediate visible legal consequences concentrate on lack of nationality in relation to travel and recognition of legal parenthood on birth and shortly afterwards, discussion of these broader consequences is still significant. It has been argued that surrogate-born children have not been left permanently stateless, as states have provided remedies to ensure children can travel with the IPs and therefore do not remain stateless (Wells-Greco 2015: 450). Nonetheless, the legal limbo in which surrogate-born children are placed impacts “the political relationship between citizen and polity” (Levy 2022: 137). Some IPs might choose to “stay under the radar” and not attempt to regularize the child’s status (Wells-Greco 2015: 261), which would leave those children exposed to a variety of harmful effects beyond the ability to travel to the IPs’ state, as explored above.

Having said that, this article does not underestimate the intersectional vulnerabilities of stateless children (eg Menz 2016) and stateless individuals more generally. Crossing borders to access surrogacy is not an option available to everyone, and IPs are usually from relatively privileged socio-economic backgrounds, given the “complex legal, psychological, social and *financial challenges*” of international surrogacy (Hammarberg & Ors 2015: 690, emphasis added). This could place surrogate-born children in a more privileged position compared to other stateless children, whose parents might not have the choice or freedom of movement. However, intersectional vulnerabilities are possible for surrogate-born children too, for example for children of rainbow families (McGee 2020: 80; Cook 2023: 298). Furthermore, the impact of statelessness on surrogate-born children is not less significant; instead, as seen in the *Baby Manji* case, recourse to international surrogacy did not necessarily translate into eventually acquiring a nationality. Therefore, the wider consequences of statelessness should not be overlooked for surrogate-born children, as this broader understanding of statelessness places them on a similar footing with other stateless children and individuals, who, for different reasons, might find themselves excluded from acquiring a nationality and, thus, further excluded from fully participating in society.

[E] CONCLUSION

This article explored statelessness resulting from international surrogacy arrangements by first addressing the main causes of statelessness for children born through international surrogacy. Conflicting laws, refusal to grant nationality and international surrogacy case law were examined to demonstrate the scale of the problem. Given the dimension of statelessness, the potential legal protection of surrogate-born children was considered under Article 7 UNCRC—the right to acquire a nationality. Based on a broader consensus of the meaning of Article 7 by the Committee and other international standards, it was submitted that states are required to take positive steps to prevent statelessness. In the context of surrogacy, both the state of birth and the IPs’ state of origin should cooperate to prevent statelessness and not discriminate against surrogate-born children based on the circumstances of their birth. Furthermore, this article submitted that Article 7 should be read in conjunction with the Verona Principles so that the delay in issuing the relevant documentation to either enable travel or the lawful stay of the surrogate-born child would be condoned.

Notwithstanding the UNCRC’s lack of enforcement mechanisms, the harmful effects that result from statelessness are severe and touch upon different aspects of a person’s life. They range from the exclusion

from public goods to the exclusion from political life. For surrogate-born children, emphasis is placed on the exclusion from acquiring a passport and public goods. Nonetheless, this article advocated for a more comprehensive approach that goes beyond the strictly legal consequences of statelessness for surrogate-born children, bearing particularly in mind the identity of children and their integration within society.

To conclude, in an attempt to address the question identified at the introduction of this article, as to whether children are afforded any protection against statelessness by relying on international law, and the overall consequences of statelessness for surrogate-born children, the following thoughts are worth highlighting. In light of the broader consequences of statelessness for surrogate-born children, states should cooperate to eliminate and prevent the statelessness of these children notwithstanding any conflict of laws and the (un)lawfulness of surrogacy. This is required both by the constraints placed on states to prevent statelessness (Foster & Lambert 2019) and the harmful effects of statelessness itself.

About the author

Dr Marianna Iliadou is a Lecturer in Law at the University of Sussex. Her principal areas of research include healthcare law, human rights and, more particularly, reproductive rights. Titled ‘Surrogacy and the European Convention on Human Rights’, her PhD thesis examined the potential violation of the right to respect for private and family life by contracting states that impose a blanket ban on surrogacy. Beyond the framework of the European Convention on Human Rights, Marianna’s research focuses on international surrogacy and the legal protection available to the relevant stakeholders (ie children, IPs, surrogates).

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THE UNCRC AND THE HOLY SEE: HOW ISSUES OF STATEHOOD, ATTRIBUTION AND IMMUNITY CONSTRAIN CHILDREN'S RIGHTS

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Abstract

This contribution analyses the complex problems arising from the application of the United Nations Convention on the Rights of the Child (UNCRC) to the Holy See. Taking the continuous scandal of sexual abuses on children within the Catholic Church as a case study, it highlights the still persistent tension within international law between the protection of sovereignty and the full enjoyment of human rights, including children's rights. To this end, after a preliminary analysis of the Holy See's *sui generis* international legal personality, this contribution investigates two issues that prevent the Holy See from being held responsible for violation of children's rights under international law. First, it examines the attribution of the conduct of local bishops/priests accused of sexual abuses worldwide to the Holy See, also in light of Pope Francis' latest institutional reforms. Second, it addresses the immunity granted to the Holy See in these circumstances, thus questioning the rationale of such immunity when children are involved. Indeed, this article argues that, despite the Holy See having ratified the UNCRC (Article 34 of which calls on parties to protect the child from all forms of sexual exploitation and sexual abuse), children's rights and their best interests are generally ignored when the sexual abuse plague within the Church is encountered in international fora.

Keywords: UNCRC; Holy See; Vatican City State; international law of responsibility; immunity; sexual abuses.

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[A] INTRODUCTION

The relationship between the United Nations Convention on the Rights of the Child (UNCRC) and the Holy See has always been a troubled one, yet this is often overlooked (Hailu, 2017; Worster 2021; Zambrana-Tévar 2022). When it became a party to the UNCRC in 1990, the Holy See made it sufficiently clear, by way of a reservation to the Convention, that its application should be compatible “in practice with the particular nature of the Vatican City State and of the sources of its objective law (art. 1, Law of 7 June 1929, no. 11)”.¹ Moreover, through a declaration, the Holy See also added that, by joining the UNCRC, it did “not intend to prescind in any way from its specific mission which is of a religious and moral character”.² In a nutshell, according to the Holy See, its unique nature and position within the international community should be taken into account in determining how it respects its international obligations under the UNCRC.

Yet, the never-ending scandal of sexual abuse of children perpetrated by members of the Catholic Church has raised several questions as to the compatibility of the role and prerogatives that the Holy See (and the Vatican City State) enjoys under international law with the duty to fully respect the UNCRC. The victims of abuse and their families usually claim violations of a range of substantial rights protected by the UNCRC (eg protection from all forms of physical or mental violence, including sexual abuse—Article 19 UNCRC; prohibition of torture—Article 37 UNCRC). However, too often, at national and international levels, they are prevented from seeking judicial redress and from having their allegations heard and publicly assessed. In this respect, it should be noted that the Holy See has not (yet) accepted the competence of the Committee on the Rights of the Child (UNCRC Committee) to receive individual complaints; it is also not a party to any other human rights treaty that has set up a judicial body empowered to receive and decide on individual claims, such as the European Convention on Human Rights (ECHR).³ Even when

¹ For the status of ratification of the UNCRC and the reservations/declarations attached to it, see UN Treaty Collection, [Convention on the Rights of the Child](#).

² On the distinction between “reservation” and “declaration”, see the ILC, Guide to Practice on Reservations to Treaties 2011, paragraphs 1.2 and 1.3. For a discussion on the compatibility of the reservations with the UNCRC’s object and scope, see Hailu (2017: 789-805).

³ The Holy See never applied for membership of the Council of Europe (CoE) or wished to become a party to the ECHR. It nonetheless has held the status of “observer” within the CoE since 1970. Documents of the Parliamentary Assembly of the CoE referring to the Holy See indicate that it “participates [in the CoE] according to its specific nature and mission”: Parliamentary Assembly, The Council of Europe and Its Observer States: The Current Situation and the Way Forward, resolution 1600 (23 January 2008) and Doc 11500 (21 January 2008), paragraph 30.

alleged victims who are prevented from seeking justice at the domestic level against the Holy See resort to the European Court of Human Rights (ECtHR) to claim a denial of their right to a fair trial (Article 6 ECHR) against state parties to the ECHR, the privileges enjoyed by the Holy See under international law prevent such an international claim from being assessed on its merits. Other international mechanisms, by virtue of their specific mandate, have also proved ineffective in addressing the sexual abuse plague. The example of the much discussed, yet controversial, attempt to involve the International Criminal Court (ICC) in the investigations against high-level Vatican officials for crimes committed by priests and others associated with the Roman Catholic Church is a case in point (Akande 2010).⁴

In the context of the complex legal scenario where different international rules intersect and different interpretations of the position of the Holy See under the UNCRC are increasingly emerging (UNCRC 2014), this article aims to provide a significant—yet brief—contribution to the way in which the international responsibility of the Holy See (and the Vatican City State) could be established when the rights of the child are violated by local clergy worldwide. The plague of sexual abuse serves as a case study to offer new insights into how international law “protects” the Holy See from being held accountable for violations of the rights of the child perpetrated by Church officials. This contribution is therefore structured as follows. Section B offers a preliminary consideration of the peculiar international legal personality of the Holy See. Section C investigates the attribution to the Holy See of the conduct of local bishops/priests that have been accused of sexual abuse worldwide, also incorporating a discussion of Pope Francis’ latest institutional reforms. Section D turns to the issue of immunity enjoyed by the Holy See. It questions the overall rationale of immunity rules when children’s rights and their best interests are involved. Section E concludes with some remarks on the best way forward to ensure justice for abused children and their families despite the international law constraints discussed here. The contribution posits that, given the gravity of the sexual abuse phenomenon and the international obligations of the Holy See emerging from the UNCRC, children’s rights must be central to the discussion. The protection of children’s rights should indeed prevail over other general rules of international law given

⁴ ICC (2013), Office of the Prosecutor, ICC Doc No OTC-CR-159/II. For the Office of the Prosecutor, the alleged crimes do not fall within the ICC’s jurisdiction. According to the ICC Rome Statute 1998, the ICC has jurisdiction over crimes included in the Rome Statute only if committed on the territory of a state party or by one of its nationals. However, whereas it is unclear whether sexual abuses could be qualified under the crimes included in the Rome Statute, neither the Vatican City State nor the Holy See are parties to it.

the value they represent for the international community as a whole. This leads us to argue that the Holy See should be held accountable under the UNCRC if it is found that the Pope gave instructions to suppress or was negligent or acquiescent in addressing sexual abuse-related claims. Thus, the abuses should be publicly acknowledged and victims should have access to reparations.

[B] THE INTERNATIONAL LEGAL PERSONALITY OF THE HOLY SEE: A NECESSARY PREMISE

The terms “Catholic Church”, “Vatican City State” and “Holy See” are often used synonymously and thought to be interchangeable, but from an international legal perspective this is not the case (Morss 2015).

The conclusion of the Lateran Pacts in 1929 allowed for the creation of the small enclave in the Italian territory, over which the Roman Pontiff reigns (see Articles 2, 3 and 4 of the Lateran Treaty). The term “Vatican” thus refers to the city state enclosing St Peter’s Basilica and the Apostolic Palace, giving the Holy See an instrument to fulfil its religious mission (Cardinale 1976: 45).

The term Holy See itself does not therefore refer to a specific territory. According to the Code of Canon Law (CCL), it designates, *sensu stricto*, the moral personality of the Pope,⁵ thus entailing more ancient roots in comparison with the Vatican City State. Yet, the Pope exercises sovereignty over the Vatican and, at the same time, is also the entity at the head of the Catholic Church (Duursma 1996: 387). As a result, the Holy See has a dual nature as the government of a specific territory and as a world religious organization.

From an international law perspective, such a scenario raises questions about the exact international legal personality enjoyed by these different entities.⁶ On the one hand, the Vatican City can be defined as a state because of its internal (a government, a territory and a population) and external (independence) sovereignty, thus enjoying the rights and obligations connected to statehood such as immunity (Ryngaert 2011;

⁵ Article 331 CCL states that the Pope “possesses supreme, full, immediate, and universal ordinary power in the Church”. Article 360 CCL states that the Pope “usually conducts the business of the universal Church by means of the Roman Curia, which fulfils its duty in his name and by his authority”. See also Article 361 CCL.

⁶ Despite its limitations, for a definition of “state”, see the Convention on the Rights and Duties of States 1933, 165 LNTS 19, Article I: “The State as a person of international law should possess the following qualifications: a. a permanent population; b. a defined territory; c. government; and d. the capacity to enter into relations with the other States.”

Greppi 2017). Despite the doubts raised in relation to its lack of a stable population and its exiguous territory,⁷ it cannot be said that the acquisition of statehood is dependent on *de minimis* thresholds for the number of inhabitants or the size of the geographical area over which an entity exercises control (Crawford 2006: 223). On the other hand, even though the Holy See can enter into international agreements,⁸ it is traditionally regarded as entailing a *sui generis* legal personality under international law, rather than clearly being qualified as a state (Cassese 2021: 175-176; Conforti & Iovane 2023: 10).

It therefore follows that, by recognizing the Holy See's "dual nature", the UNCRC Committee stated that the Holy See had an obligation to comply with the UNCRC *inside* the Vatican City State and "*worldwide* through individuals and institutions under its authority" (UNCRC Committee 2014: 8 emphasis added). Although briefly, the next section analyses the implications of this dual nature when victims of sexual abuse try to hold the Holy See internationally responsible for failing to observe the relevant rights of the child.

[C] INTERNATIONAL RESPONSIBILITY: THE PROBLEM OF ATTRIBUTION

Research has shown that, often, efforts to hold members of the Catholic Church accountable for alleged sexual abuses against children have resulted in private settlements with local dioceses paying economic concessions to victims (Child Rights International Network 2013: 12). Such settlements do not generally imply admission of wrongdoing and they tend to avoid public scrutiny of local churches' conduct. From an international law perspective, private settlements obscure the possible role played by the Holy See in not preventing, or even actually facilitating, such abuse through its policies or by its omissions. Any attempts to assert the responsibility of the Pope in such cases have always failed. Immunity issues aside (see Section D), it is difficult to establish a hierarchical relationship between the Pope and officials involved in the sexual abuse of children that would trigger the duty of the Holy See to take preventative action. Although not legally grounded in the UNCRC, it being the result

⁷ Citizenship and other residence rights may be withdrawn at any time at the discretion of the Pope (Duursma 1996: 383).

⁸ The Holy See is party to bilateral and multilateral treaties, including the Vienna Convention on Diplomatic Relations 1961, and has formal relations with most states worldwide. It is worth mentioning that, in the *travaux préparatoires* for the Vienna Convention on the Law of Treaties 1969, the International Law Commission noted that treaties are "entered into [force] not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State".

of an individual claim before the ECtHR for the alleged violation of the ECHR, the ECtHR's judgment in the case *JC & Others v Belgium* (2021) illustrates this point.

As a brief reminder of the facts of the case, several people who alleged that they had been sexually abused during their childhood by Catholic priests in Belgium initiated a claim for compensatory damages against the Holy See. At that time, the evaluation of claims relating to sexual abuses was possible in Belgium only for a limited time through the creation of a special arbitration chamber. According to the applicants, such a redress mechanism was ineffective given the limited compensation awarded to the victims in comparison with how Belgian ordinary justice would have assessed similar cases (*JC & Others v Belgium* 2021: paragraphs 4-17). Their action before the Belgian courts was, however, rejected on the grounds that the Holy See enjoys in Belgium, as well as in other states, immunity from jurisdiction. With Belgium being a party to the ECHR, the applicants therefore claimed, before the ECtHR, a violation of the right to a fair trial (Article 6 ECHR) for not having the opportunity to have their case heard and assessed in a court of law.

One of the applicants' key arguments was that the Holy See was responsible for the ill treatment (as for acts contrary to Article 3 ECHR) that they had allegedly suffered. In fact, the systemic dissimulation policy over sexual abuses adopted by the Roman Curia hindered prevention of such crimes as well as any attempts to carry out effective investigations and to prosecute those responsible in each case. Interestingly, in the applicants' view, the international responsibility of Vatican City as a state was not at play here. They argued that, as a non-state entity separate from the Vatican City, the Holy See was the only relevant actor and as a religious organization would not enjoy immunity privileges because these would be denied to any such organization.⁹ Not surprisingly, acting as a third intervener before the ECtHR, the Holy See did not address the Vatican City State/Holy See distinction; but rather it pointed out that "the complex relationship between the Pope and the local bishops" should be assessed through the relevant rules in the CCL (*JC & Others*: paragraph 52).

In this respect, the ECtHR found that the Belgian judges were correct in rejecting the assertion that the alleged actions or omissions of the Belgian bishops could be attributed to the Holy See (*JC & Others*: paragraph 69). It shared the view that local bishops are not *under the direction* of the

⁹ This argument was already raised in domestic litigations concerning similar facts, yet unsuccessfully. See the United States developments in this field: *O'Bryan v Holy See* 2009.

Pope. Further, owing to the ECtHR's deferential attitude towards national authorities, no real attempt was made to analyse the Holy See's authority over local dioceses or clergy, in the context of the impact of its policies on the Church worldwide. Furthermore, the ECtHR did not address the case from the perspective of children's rights by reading the ECHR's obligations in light of the principle of the best interests of the child (BIC), which is its usual approach when children are involved. Indeed, applying the principle of systematic interpretation (Article 31 of the Vienna Convention on the Law of the Treaties), the ECtHR is expected to read the ECHR's provisions in light of other—more specialized—human rights treaties, including the UNCRC (Danisi & Crock 2018). It is also for this reason that the Court often reiterates that “there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance” (*Jeunesse v the Netherlands* 2004: paragraph 109). However, despite this stance, there is no guarantee that a different conclusion would have been reached if the ECtHR had given consideration to children's rights. Nevertheless, it would have raised at least the duty to specify the weight to be afforded to the BIC and, indirectly, to the UNCRC's obligations in similar cases.

Given the ECtHR's conclusion, the issue of the relationship between the Holy See and the Catholic clergy worldwide for the purpose of establishing international responsibility under the UNCRC remains open. Yet, in customary international law as codified by the International Law Commission (ILC) (2001), when establishing the international responsibility of a state, the attribution of an action or an omission to a state depends on the specific subjects involved. For example, according to Article 4 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), conduct is considered an act of a state under international law when it is carried out by one of its organs, regardless of the position it holds within its organization and provided that it has this status in accordance with its internal law and internal practice, as pointed out by the ILC in its commentary (ILC 2001: 42). Although the Holy See is not a state, it enjoys certain prerogatives reserved to states and has relations with other states in a position of equality (see also Section B above). Moreover, as the rules concerning the responsibilities of other international subjects (ILC 2011) have been based on states' responsibility, drawing upon the ILC's work to establish attribution of conduct to the Holy See might not be inappropriate.

It therefore follows by analogy that an investigation of the CCL in order to verify the status of bishops with respect to the Pope is necessary (under Article 4 DARSIWA). In this regard, the reform undertaken by

Pope Francis through the promulgation of a new Apostolic Constitution “Praedicate Evangelium” in 2022 is noteworthy. Beyond the internal aspects concerning the Roman Curia (Pope Francis 2022: I.3, 12), the overall reform is characterized by a

spirit of a “sound decentralization” to leave to the competence of Bishops the authority to resolve, in the exercise of “their proper task as teachers” and pastors, those issues with which they are familiar ... always acting with that spirit of co-responsibility, which is the fruit and expression of the specific *mysterium communionis* that is the Church (Pope Francis 2022: II.2).

Whereas the previous Apostolic Exhortation *Evangelii Gaudium* (Pope Francis 2013: Article 32) had already pointed out that it would be inappropriate for the Pope to replace local episcopacies in tackling every issue taking place in their territories, it seems clear that the maintained decentralization of power would allow bishops to act even more autonomously within their dioceses than they had in the past.

From an international law perspective, however, the Pope’s authority is not undermined by such a decentralization because it would always involve the exercise of sovereign powers over local bishops and clergy. For instance, in the context of the renovated effort promoted by Pope Francis to put an end to the sexual abuse of children and avoid the cover-up of such abuse,¹⁰ the Pope has already exercised his power to accept, deny or even call for the resignation of bishops who had been involved in the sexual abuse of children.¹¹ Moreover, as Judge Pavli duly noted in his dissenting opinion in the ECtHR’s *JC & Others* case analysed above, the determination of a chain of attribution directly to the Holy See cannot be excluded when a clear code of silence was imposed by way of official acts of the Holy See.¹² These few elements suggest that, at the very least, a chain of command connects the Catholic Church from the centre in Rome to its borders, while specific omissions on the part of the Holy See—when it did not take action despite having knowledge of possible sexual abuse by local clergy—may be relevant for the purpose of establishing its

¹⁰ Book VI CCL was already amended in 2021 out of the necessity to tackle the plague of sexual abuse, whereas the Pontifical Commission for the Protection of Minors, which was instituted by Pope Francis in 2014, is now integrated in the Dicastery for the Doctrine of the Faith to signal a stronger effort in this respect.

¹¹ For example, in 2017 the Holy See reported that Pope Francis accepted the resignation of the French bishop Hervé Gaschignard. According to the media, the Pope invited him to resign following the alleged accusations of sexual abuse towards young people in the diocese of Aire et Dax: RaiNews (2017).

¹² *JC & Others v Belgium*, Judge Pavli’s dissenting opinion, paragraph 14, where reference is made to a letter approved by Pope John XXIII, *Crimen sollicitationis*, in 1962, and John Paul II’s *Motu proprio, Sacramentorum Sanctitatis Tutela* (2001).

international responsibility under the UNCRC. If one, instead, accepts that the local clergy do not operate within the Holy See in the same way as state agents under Article 4 DARSIIWA, it remains unclear why their relationship cannot be assessed under other rules of attribution concerning state responsibility. For example, given the role of the Holy See's instructions over bishops and other local clergy, an investigation into the attribution of the latter's conduct based on the criteria provided for by Article 8 DARSIIWA (instructions, direction or control of a person or group of people) should not be excluded.¹³ These criteria would help to identify what effective chain of command is really at stake on a case-by-case basis in every claim alleging sexual abuse of children.

An investigation of this kind was not carried out in *JC & Others* before the ECtHR. For both domestic and European judges, the decentralization of power between central and local Church authorities seemed to grant enough autonomy to bishops to preclude attribution of their conduct to the Pope (Pasquet 2021; Ryngaert 2021). If compared with the rules of attribution as applied to states, such a different approach can only be explained by the *sui generis* nature of the Holy See. Yet, other human rights developments show that another interpretation of the international responsibility of the Holy See under the UNCRC is possible as far as the problem of attribution is concerned. The findings related to the implementation of the International Convention on the Elimination of Racial Discrimination 1969 (CERD), which is another human rights treaty ratified by the Holy See, are a case in point. The CERD Committee, having considered that the Holy See had ratified the CERD "in part to manifest its moral authority", found that:

the Holy See was not responsible for racist acts by Catholic priests acting in other countries. At the same time, ... responsibility could be engaged if it failed to take appropriate measures to prevent and redress the conduct of its citizens or others *under its authority or control* (CERD Committee, 2015: emphasis added).

A similar stance can be identified in the UNCRC Committee's 2014 concluding observations on the second periodic report of the Holy See (UNCRC Committee 2014: paragraph 8), despite the criticism it drew in the literature (Hailu 2017: 785-789). Although it comes with a risk of overlapping different concepts (ie attribution and jurisdiction under human rights treaties), this approach seems to suggest that it would be perhaps wiser to focus the overall reasoning on "jurisdiction" for the

¹³ Article 8 DARSIIWA: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

purpose of the application of the UNCRC. This would seem appropriate in light of the specific meaning that this term has acquired in the latest UNCRC Committee litigation (*LH & Ors v France* 2019) and in international human rights law more widely (Vandenhoele 2019), while also applying it to the specific authority exercised by the Holy See over the clergy worldwide (Worster 2021: 396-421). If jurisdiction is established and omissions are at stake, in terms of a lack of action to protect the child from all forms of sexual abuse under Article 34 UNCRC, any discussion on attribution arguably becomes less central in establishing the international responsibility of the Holy See, while also taking into account its *sui generis* nature.

Whether such an approach would eventually lead to a better definition of the Holy See's obligations concerning the rights of the child and the consequences of its violations remains to be seen, as the immunity granted to the Pope under international law is likely to prevent further developments on this matter, as the next section illustrates.

[D] INTERNATIONAL RESPONSIBILITY AND THE PROBLEM OF IMMUNITY

A different, yet connected/preliminary, problem in establishing the international responsibility of the Holy See with respect to sexual abuses is indeed the recognition of immunity before national courts. The Pope enjoys immunity from jurisdiction similarly to any other head of state. While immunity *per se* cannot be a problem because, overall, it corresponds to the current practice of states with respect to the Holy See,¹⁴ the difficult question is whether an exception to this immunity applies, given the violations of the rights of the children who are victims of sexual abuse. In this regard, two specific aspects are worthy of discussion here. Again, the reasoning of the ECtHR in the *JC & Others* case is useful to critically assess the state of affairs on this subject.

First, the nature of the alleged abuse against children calls into question the usual distinction between sovereign acts (so-called *acta jure imperii*) and private acts (*acta jure gestionis*) (Gragl 2019: 230-231). Immunity from jurisdiction can be invoked by states and the Holy See, to which state privileges extend, only in connection with the first category

¹⁴ See discussion *JC & Others v Belgium*, paragraphs 55-59, 63. In that case the ECtHR seems to identify the source of the Holy See's immunity in customary international law whereas jurisdictional immunity had arguably been enshrined to the Holy See on the sole basis of bilateral agreements or domestic legislation, for example, via the Lateran Pacts in Italy (Article II of the Lateran Treaty; yet see interpretation given by Corte di Cassazione, Judgment No 22516, 21 May 2003) and the Foreign Sovereign Immunity Act in the United States.

of acts. When the ECtHR was confronted with this distinction, it adopted the Belgian court's approach in referring to the "policy of silence" on sexual abuse and the related omissions of the Holy See in the context of the exercise of its public powers. As such, immunity from jurisdiction applied. This approach was criticized because it seems to ignore the dual nature of the Holy See as discussed above (Section B). In fact, it does not discriminate between acts performed by the Holy See in the exercise of the government of the Vatican City State, to which immunity certainly applies, and those it instead performs worldwide in the context of the Roman Catholic Church. In the latter context, its nature as a religious organization, combined with the disputable nature of its acts as sovereign (Ryngaert 2011: 857), suggest that the immunity of the Holy See cannot be equal to that of states, thus it should be restricted or not granted at all (Pasquet 2021).

Perhaps, it is even more striking that, in assessing the existence of a possible exemption to this rule when alleged cases of sexual abuse involve torture or inhuman or degrading treatment, the ECtHR (again) did not take into consideration the rights of the children or the BIC principle by, possibly, referring to the UNCRC. Indeed, in what seems an exercise in detaching children's rights from the plague of sexual abuses within the Church, the ECtHR did not even investigate whether the domestic judges have paid appropriate attention to the children's best interests as it would have done in other cases concerning children (Danisi & Crock 2018). Instead, the ECtHR limited its analysis to the current state of customary international law as determined by the International Court of Justice in the case of *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* 2012: paragraphs 81-97); no exemption to immunity of jurisdiction has yet emerged in cases concerning serious violations of human rights, humanitarian law or *jus cogens* (*JC & Others v Belgium*: paragraph 64).¹⁵ Again, it is not clear whether a consideration based on the BIC principle would have led to a different conclusion. However, this would at least have required an investigation into the practice and the *opinio juris* of states in order to assess potential developments on this subject,¹⁶ something that the ECtHR *a priori* denied.

¹⁵ In the same terms used in previous case law: eg *Jones & Others v UK* 2014: paragraphs 186-198.

¹⁶ On this evolution, see the debate on "comfort women" in South Korea and the dispute with Japan and the final decision adopted by the Central District Court of Seoul (*Comfort Women* 2021); and, previously, the Italian Constitutional Court's decision of 22 October 2014, in Case No 238. See also the interesting, yet not fully persuasive, *Changri-la* case 2021, decided by the Brazilian Supremo Tribunal Federal.

Second, there is the question as to whether claims of sexual abuse of children can trigger the application of one of the exemptions to immunity that have already been recognized as being part of customary international law. The rule codified in Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property 2004 is a case in point. It provides, under some conditions, for the possibility that a state cannot “invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding that relates to pecuniary compensation for death or injury to the person” harmed by an act or omission of the first state. Of course, the relevant conduct needs to be attributable to the first state. For the reasons already discussed in the previous section, the issue of the attribution to the Pope of local clergy’s conduct prevents even such exemption from being raised by alleged victims in proceedings against the Holy See. Again, the *JC & Others* case shows how such an argument risks being paradoxical. On the one hand, bishops are qualified as autonomous entities with respect to the Pope, so that their acts carried out under his “mere influence” cannot be attributed to the Holy See and no exemption from immunity applies. On the other hand, both the acts and the omissions of the Pope concerning sexual abuse have been identified to fall within the exercise of sovereign powers (*acta jure imperii*) over the Catholic Church worldwide, of which bishops and local clergy are nonetheless essential components. As a result of this unpersuasive reasoning, the restriction of the right to a fair trial suffered by children/victims of sexual abuse during their childhood was deemed to be proportional to the legitimate aim pursued (ie the respect of international law on immunity of states).

The reasoning discussed so far is mainly based on the traditional presumption that the Holy See should always enjoy immunity, just like any other state. Yet, given the special nature of the Holy See’s international legal personality and the commitments to human rights for the entire international community, now is the time for questioning such a presumption because it should—at least—be based on a more coherent set of arguments than those that were relied upon in the past. More importantly, a more restrictive interpretation should be applied where children and their best interests are concerned.

[E] CONCLUDING REMARKS

This contribution has highlighted the difficult relationship between the UNCRC and the Holy See by focusing on some of the legal obstacles, such as immunity and attribution, which prevent the Holy See from being held accountable in cases concerning the violation of children’s

rights as protected by the UNCRC. With regard to the plague of sexual abuses, despite the obligations undertaken by the Holy See in ratifying the UNCRC (see, among others, Article 34), its peculiar international personality and internal organization protect the Holy See from even responding before national judges to allegations of children's rights violations that are committed by Catholic priests worldwide. With it being impossible for victims or their families to raise a complaint before the UNCRC Committee, the analysis of the first international case ever to raise (indirectly) these issues before the ECtHR has shown not only the difficulty of attributing either acts or omissions concerning sexual abuses to the Pope but also highlighted the privileges which the Holy See still enjoys as a *sui generis* subject of international law when children's rights are at stake. The ensuing judgment is a clear indication of the current state of affairs, where the traditional interests connected to the protection of "the sovereign" prevail over children's rights and their best interests, despite the fact that the latter are arguably increasingly being held up as a common value by the international community. So far, this state of affairs removes any incentive to resort to procedural justice and, where possible, to international human rights mechanisms to tackle the systemic reasons behind such abuses.

If a new report under the UNCRC were (ever) to be submitted by the Holy See,¹⁷ the UNCRC Committee would have a difficult role to play. Unlike the ECtHR in the *JC & Others* judgment, it would primarily need to address the absence of a children's rights perspective from any examination of sexual abuses in which the Holy See is involved. To this end, the UNCRC Committee will need to clarify how the balance of opposing interests underlying any restriction of children's rights should be solved in cases where other general rules of international law, such as those on immunity, enter into conflict with children's rights and/or the fundamental principles underlying the UNCRC. The evolution of the interpretation of the rules on state immunity when serious violations of human rights are at stake could support the UNCRC Committee in adopting a brave(r) position and, in turn, contribute to that general evolution. Moreover, bringing the UNCRC to the centre of such debates would mean giving primary attention to the notion of jurisdiction (Article 2 UNCRC), thus shedding light also on the real scope of application of the Holy See's international obligations as a preliminary step to the problem of attribution.

¹⁷ Which is doubtful given the delay of 14 years in the submission of its second and last periodic report: UNCRC Committee 2014: paragraph 2.

The roots of most of these issues arguably lie in the confusion generated by the dual nature of the Holy See. Only a twofold process would make it possible to move beyond this state of affairs. On a state level, more evidence is required to critically reassess the privileges of the Holy See as an international actor¹⁸ and the continuous legitimacy of the original rationale used to justify the granting of privileges intended for states. The special treatment reserved to the Holy See was traditionally justified on Eurocentric historical grounds, namely the attempt to universalize the values of a religious community developed mainly in Europe during the Middle Ages (Pasquet 2021). Yet, such a rationale is highly disputable today, especially when it puts at risk the protection of other—now consolidated—universal values, including the protection of children’s rights and their best interests. With regard to the Holy See, given the renewed willingness of Pope Francis to tackle the plague of sexual abuses within the clergy worldwide and the Holy See’s international obligations under the UNCRC, a clear recognition of its role in ensuring impunity in relation to the conduct of local Catholic authorities when involved in sexual abuse would facilitate attribution from an international law perspective. If both of these processes take place, positive implications for better accountability of the Holy See under the UNCRC and justice for children who are victims of abuses will certainly follow.

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¹⁸ See, for example, the judgment of the Italian Supreme Court, *De Jorio Rosada de Sangro v Pontifical Lateran University*, No 12442/2022. Here the alleged immunity of the Pontifical Lateran University was denied on the basis that it cannot be considered, as the Holy See argued, a “central body of the Catholic Church” according to Article 11 of the Lateran Treaty. The Court also stressed that judicial protection is “intimately connected with the very principle of democracy to ensure to all and always, for any controversy, a judge and judgment”, something that would be clearly denied if immunity were recognized to *acta juri gestionis* (ibid paragraphs 5.7-5.8).

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BORN TO BE AUTHORS: CHILDREN, CREATIVITY AND COPYRIGHT

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Abstract

This article analyses the role of the child as an author and creative individual, according to the paradigm of Maria Montessori, to expand the question of whether the law provides a sufficient and just safeguard to this category of copyright authors. Montessori's exploration of the creative freedom of children shows how irresistibly strong and indomitable their creativity is in the early years. This article submits that the early years are a most significant phase when children, in their exercise of creative authorship, are able to express the utmost freedom and originality. Accordingly, a scholarship of copyright law "of" the child and, significantly, authorship "by" the child should be at the core of a just and balanced legal system that brings together the rights and safeguards embedded within international rules and the copyright framework.

Keywords: children; creativity; copyright; education; United Nations Convention on the Rights of the Child; Montessori; ingenuity; expression; originality; creative choices.

[A] INTRODUCTION

It is a delight to watch with what enthusiasm the child works when he is given freedom, and when he finds to hand suitable objects with which to satisfy his desire for activity (Montessori 1931: 784).

Authorship is a universal notion. It cannot disregard the junction between creativity and education as epitomized by the authorial work of children in their physical, social, emotional and cognitive development. The language of Dr Maria Montessori is propaedeutic to focusing on creativity in the early years as a lesson on authorship. It provides several analytical themes detailed in this article: (1) what constitutes creativity from the eyes of the child; (2) the role of the law—copyright law specifically—in the safeguarding of the creativity of the child; and (3) the need to build a scholarship on children's copyright to recognize their fruitful contribution to the understanding *inter alia* of authorship and originality.

Invariably, a parent or guardian would be looking at the creative works authored by a child under their care while honestly holding the belief that the child will become the most excellent writer, dancer, composer, painter, sculptor, singer of their time. Nevertheless, it is rare for a parent to be aware or raise concerns on how copyright protected works created by the child sit within the relevant legal framework. The gap between children's perspectives on creativity and legal fictions is especially manifest when considering the early years. The copyright framework provides a structured terminology for the interests involved. The education model which inspires this article points at the finding that the early years will be those when children express themselves in the least derivative ways, making free and creative choices with a degree of ingenuity that is particularly unaffected by prior knowledge and experience of creativity as expressed by others. Born to be authors, children are the most original of all creative minds, being able to express their personality. This calls for a systematic analysis of children's copyright, starting from its foundations in the policy that underpins copyright protection of any types of creative endeavours, in the literary, dramatic, musical, artistic and other expressive forms.

By looking at sources within and beyond the realm of copyright law, this article advocates for a correct recognition of children as authors and participants in creative communities from their early years. The first section of this contribution discusses the interdisciplinary component that needs to be present in the discussion of children's authorship. This is done by looking at sources from international legal bodies, authorities from international and comparative copyright law and literature from education studies. The second section addresses the meaning of what it is to be an author, with a specific emphasis on the shift that is required in copyright scholarship in order to fully respect the rights that emerge with the expressive contribution of the child. The third section of this article questions the problematic approach of how copyright is currently exercised when children are concerned. It provides exemplars of how copyright practice needs to improve in the recognition of the role and contribution of the child as a copyright author.

[B] POLICY PERSPECTIVES

The study of this topic must be an interdisciplinary exercise. The analysis below shows the need to learn from a variety of sources—exemplified in different frameworks—in order to establish the long-term policy aims and objectives for such new streams of copyright

scholarship. It also shows the potential impact of copyright scholarship on the recognition of children's authorship in education and other disciplines. This aligns with the objectives of Articles 12 and 13 of the United Nations Convention on the Rights of the Child (UNCRC), whereby a child should be given the right to be heard, to seek and to receive information and ideas of all kinds, but also to impart them as forms of expression. Such an approach is fully contemplated under copyright law (Geiger & Izyumenko 2020: 288).

The first guiding framework approached in this section comes from the United Kingdom (UK) Government's Department of Education. The UK standards for learning, development and care for children from birth to five consider the matter of arts and design by acknowledging the following:

The development of children's artistic and cultural awareness supports their imagination and creativity. It is important that children have regular opportunities to engage with the arts, enabling them to explore and play with a wide range of media and materials (Department for Education 2023: 10-11).

From an early age, children have the opportunity to perform music and this is encouraged within the education sector: "Early years settings and schools should start from the premise that all children are musicians—embracing music in their provision, sparking children's musical curiosity and developing their ability and interest" (Department for Culture & Ors 2022: 15). Musical composition is also a tenet of this approach (ibid 31).

A second and further type of recognition is not limited to children but contains a specific focus on them as a key category of persons. The 5 Music Rights set out by the International Music Council founded by UNESCO read as follows:

- 1 The right for all children and adults to express themselves musically in all freedom.
- 2 The right for all children and adults to learn musical language and skills.
- 3 The right for all children and adults to have access to musical involvement through participation, listening, creation and information.
- 4 The right for musical artists to develop their artistry and communicate through all media, with proper facilities.
- 5 The right for musical artists to obtain just recognition and remuneration for their work (International Music Council 2001).

It is particularly compelling that the list above addresses the participative role of children for three out of the five headings. This emphasizes children's ability to express, learn and access musical content.

The third framework at the core of the discussion is the recognition of creativity within intellectual property law, and copyright specifically. What is acknowledged is an abundance of legal analysis concerning toys, "helmets, juvenile T-shirts, or ride-on kids' suitcases, as there is a profitable industry based on children's entertainment and their special attachment to the commodities associated with that entertainment" (Bellido & Bowrey 2022: 1). There is value in the understanding of intellectual property matters for the benefit of the child, for the commodities that surround the child's physical, social, emotional and cognitive development. Overall, however, it could be argued that there is a focus on the commercial exploitation of commodities geared towards the entertainment of children. In other words, such a focus is on an intellectual property system for children rather than the legal recognition of copyright or intellectual property works as devised by children.

On this basis, a fourth component concerns the legal safeguards needed when children approach and interact with content, media and technology as users or consumers. Access to creative content is only one element of a child's interaction with media. Arguably, there is another element that is impossible to neglect: that is the participation of the child as author of creative works. To return to the UNCRC, children's rights should not be limited to them seeking and receiving information and ideas. Children must be able to act as rightsholders and be safeguarded as they impart content in the form of creative expression. An example of this approach is evidenced in a report by the British Academy on its Reframing Childhood programme:

Children have a right to protection – an imperative that is obviously a primary motivation for the regulation of particular kinds of media content. Yet they also have a right to the provision of material that meets their needs and reflects their experiences – a right that many would argue is only partially met in an increasingly commercialized media and cultural environment. And they also have a right to participation – to be able to use the media and other cultural forms to create their own content, and to have their voices heard (British Academy 2019: 53).

The selection of interdisciplinary sketches on the authorship of the child shows the significance of creativity in the development of the child, the expressive potential flowing from a child from or even before birth (Pound 2022) and the need to safeguard such potential in all areas of creativity.

Nevertheless, the different pictures continue to present a focus on the ability of children to be the recipients of content in order to facilitate their development. The emphasis remains that only through access will they be able to engage in the development of their artistry. This appears to be insufficient in light of their ability to express themselves and impart content.

Also highlighted in this section, research on children and creativity can go beyond the recognition that children approach and interact with creative content, with an industry that craves their attention on the basis of their curiosity and creativity. The step to be made for a full recognition of children's creativity starts with the acknowledgment of broader, urgent and inclusive research that fills a gap:

Too often, intellectual property is either left out of lessons or the focus is on how students can stay out of trouble; for example, by avoiding infringing copyright rules around film or music (TES Magazine 2021).

A comprehensive analysis of children's creativity from a legal perspective can embrace the wider array of issues, with intellectual property and copyright laws being capable of transforming and innovating the landscape. This is based on the recognition of the innocence of children in their creative efforts—possibly presumed, initial, variable—as expressed particularly in their approach to play, drawing, writing, dramatic expression (eg mime, dance, pretend play), music *et cetera*.

[C] A SHIFT: THE RECOGNITION OF THE INTELLECTUAL CREATION BY THE CHILD

Children are born to be authors. The thesis put forward in this article is that a rigorous understanding of authorship in copyright law—internationally, regionally and domestically—requires a shift in perspective to fully respect, value and embrace the contribution that children make among other categories of authors. A development in copyright scholarship is capable of working as a driver in the protection of any forms of creativity by a child, starting with the most elemental expression children make in their early years and, subsequently, later in life. This is the profound and changing role that copyright law can play, including within the scenarios set out above and the right to freedom of expression enshrined in Article 13 of the UNCRC.

There is a specific methodological basis in the choice of focusing on creativity by children in the development phases that attach to the early years. This resides in the types of skills that children acquire during

different periods of growth, with regard to physical, social, emotional and cognitive development. In stressing the importance of the early years, it has been submitted that:

[t]he science of early childhood development reveals that the period from conception to the age of 5 plays a crucial role in lifelong development. Throughout this period, the brain is changing rapidly. During the first year after birth the size of a child's brain increases by 101% on average ... By the age of 3, a child's brain is estimated to be twice as active as an adult's brain (Ipsos MORI 2020: 9).

This stream of research informs the nature of what children can do as authors. This ought to be linked and evaluated in conjunction with many pedagogical approaches. The Montessori view is only one of the lenses and analytical tools that can be adopted in this exercise, when the adult should act as spectator to the discovery process of the child in this developmental phase. To explain this approach, I will use Buckley's scenario, which serves as an epitome of the gap between the perspective of the authorial child compared to what adults see in the art of offsprings (Buckley 1969: 460).

The following portrayal depicts a child who was going to paint a picture and told the teacher that he was going to paint the sky. Starting with the colour blue, the child included many other different colours, lines, mixtures of experiences of how the sky might have looked: "All the blue and the pink and the purple; All the white and the black: All the red and orange and green: All the yellow that had turned brown." The next part of the depiction addresses the significant gap that this article focuses on. The teacher stated: "I thought you were going to make the sky'. 'I did' said the boy" (Buckley 1969: 460).

The paradox arises at the junction presented in the introduction. It is often the case that copyright experts are asked to play the part of *abritri* or legal *personae* and wear the spectacles of such individuals in order to provide an artificial but neat assessment of what copyright or other forms of intellectual property should or should not protect and safeguard (*Philips Electronics BV v Remington Consumer Products* 1998: 318). They are called to establish what may be thought to qualify as literature, drama, music or art under the law. When, in fact, it is the child who delivers a creative form of expression.

There needs to be a recognition that an assessment by an adult on creativity as expressed by the child does not align necessarily with the fulfilment of the objectives of the recognition of authorship. A question needs to be raised as to whether an adult as *arbiter* can leave aside

any subjective perception of intellectual or artistic merit (Brown & Ors 2023: section 3.25) when looking at the work of a child. Accordingly, the development of a copyright scholarship of the child as an author will offer a unique opportunity for the world of adults to be able to approach the creative effort of children. In this respect, the tension between copyright and freedom of expression as addressed by, for example, Geiger & Izyumenko (2020) can be enhanced by the implementation of the principles and balance as set out in the UNCRC. This approach will identify the rights and safeguards that attach to the creative expression of children as authors with an accurate account and consideration of their creative contribution, regardless of their age.

Authorship and authorial works in the early years

Qu'est-ce qu'un auteur? (Foucault 1969: 777).

The recognition of children as authors is connected to the definition of authorship to various degrees. Commentators found that the roots of the term “author” could be found in the Greek word *autentim* or *autentin*. This means that the author is “worthy of faith and obedience”, someone who possesses credibility and knowledge. The Latin word *auctor* has been translated as “the originator”. In turn, *auctor* comes from *augere* (“to increase, to enlarge, to augment” but also “to enhance, to exalt”) (Ascoli 2008: 15). From *augere*, there is an element of continuity that defines the author that, in their role as someone who enlarges and augments, they are also someone who contributes to the birth of new processes and growth in value. Both *auctor* and *augere* appear to be relevant to the notion of the copyright author to illustrate its role also in the context of a legal analysis. There is nothing that prevents a child from being an author under any of the definitions or exemplifications set out above, however adult-centred they might have been when devised. Significantly, there is no anachronism in children being authors in their ability to create metamorphosis through ingenuity (Ascoli 2008: 21).

The question “*Qu'est-ce qu'un auteur?*” by Foucault remains relevant to all types of authors: with the development of a scholarship on the copyright of the child, further research needs to be undertaken to consider how Foucault’s question—among others—shapes the understanding of creativity also for children and other vulnerable authors. The copyright author is someone who starts a process within himself or herself, but also promotes the development of something that is already existing, enhances the raw material and elevates it in the process (De Santis 2018). As the paragraphs below establish, the child is no different when

involved in creative processes. Children share the same characteristics as adults, in the way they express their creative choices and personality, through their authorial works. The sections below explain how the copyright system is formally favourable to the recognition of rights, but how the ability to exercise those rights diminishes their significance and effectiveness.

The recognition of what qualifies as authorship is a process that goes through key steps on the analysis of the copyright work. For the purpose of this contribution, the approach will look at authorship in the context of harmonization of copyright within the European Union and, particularly, the approach by the Court of Justice of the European Union (CJEU). This is to demonstrate the strength of the standing of authorship by the child within the copyright framework in different jurisdictions.

Sterling explains that, following the determination that the item in question is within the sphere of copyright protection, it is necessary to establish whether the necessary criteria of protection are fulfilled and, for the purpose of this piece, particularly in relation to the originality criterion (Sterling 2022: section 6.07). In other words, this means that the first step is to consider and apply the definition of what constitutes an authorial work; then it is necessary to identify the “properties” that such work must possess in order for copyright protection to arise, and the degree such properties must feature as embedded within the relevant subject matter. To a large extent, the relevant issues and definitions have been established formally as a question of law (Pila 2021: 66)

To qualify as works, the relevant objects need to have unity and stability of expressive form (Pila 2021: 68). Depending on the jurisdiction, this does not mean necessarily that such works need to be fixed in a material form. In some jurisdictions, the law provides broad categories and lists of examples of what might be protected. In others, the works in question should fall into set statutory categories of, for example, literary, dramatic, musical or artistic works (Sterling 2022: section 6.05). By analogy, the sketches a child creates on a tablet or similar device while waiting in an airport lounge could easily fulfil the first step under both approaches.

Before reaching a conclusion on whether an item created by a child qualifies as an authorial work, it is helpful to return to the Montessori model and the day-to-day creative engagement of a child in the early years, with particular regard to the role of art materials. It is in her later contributions that Maria Montessori approached the role of art, describing the activity of “painting leading to drawing as means of self-

expression” by the child (Lillard 2011: 30). There are other educational models which emphasise the role of such materials linked to children’s imagination to a more significance extent (van Alphen 2011: 23). The question to be answered is whether the work of children with art materials, for example, could be considered an expressive form worthy of copyright protection.

Courts have made attempts to decide what should be the definition of “artistic” in the context of authorship and copyright laws, not just in relation to fine art but also with regard to applied art and useful objects such as costumes for film productions (*George Hensher v Restawile Upholstery (Lancs)* 1976; *Lucasfilm Ltd & Ors v Ainsworth & Anor* 2011). Academic commentary provides direction in the interpretation of the meaning of those definitions (Dutfield & Suthersanen 2020: 237). In the shift of perspective recommended in this piece, there is an alignment with the relevant case law which states that the subjective intention of the author should not be taken into account. Ultimately, the child does not know the details of what constitutes a work of art. The child just creates. The fact is that the child—through unconscious, absorption and conscious efforts—engages with information and ideas and transforms them into creative expression.

There is a controversial element to a child’s expression of creativity that show the paradox between copyright law and a child’s free and creative choices. In *Lucasfilm Ltd & Ors v Ainsworth & Anor* (2008: 118), the Court stated that:

[a] pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of [a] driveway for 2 weeks preparatory to a building project is equally plainly not.

The work of a child may be done with the author’s mindset (ie of the child) of the mountain of modular bricks to be for the purpose of a building projects. However, when the adult looks at them without the eyes of the child, that pile of bricks looks more like a work of art rather than a functional work-in-progress towards a building renovation. In the eyes of a teacher, the school project of a child is an educational tool. It would be wrong to deny copyright protection to works that possess objective qualities of creativity. This is how the requirement of originality as discussed below works as a necessary property in the recognition of authorship and authorial works for children as well as other types of authors.

Originality

Authorial works need to be original for copyright or author's right protection to arise. Originality is a key property for an author to be able to rely on the safeguards reserved to copyright authors. In the language of the CJEU, this means that an output must be the author's own intellectual creation (*Infopaq International A/S v. Danske Dagblades Forening* 2009; Rosati 2023: 216). CJEU case law develops the concept of originality in establishing that this encompasses the making of free and creative choices and the reflection of the personality of the author (*Brompton Bicycle Ltd v Chedech/Get2Get* 2020: 461). It could be argued that the relevant approaches do not suggest that these criteria should be the outcome of meticulously calculated decisions. This is deeply relevant to the creativity of children. In its drafting, however, the language reflects experiences of creativity by an adult rather than a child.

The understanding of originality is only rigorous if it considers the paradigms of educators and their scholarships. Dr Maria Montessori engaged with the characteristics that apply to different periods of growth. She explained that:

typically, for the age group between 0 and 3, the growth of the child will be unconscious and characterised by the absorbent mind of a child of that age. Following that period, the child begins to bring knowledge on his unconscious to a conscious level. This is the environment of primary classrooms (for 3- to 6-year-olds) where children also have the practical life exercises, as well as materials for sensorial, math, language, culture, music, art, and geography education (Salkind 2005: 845-847).

The Montessori approach calls for an analytical understanding of what the creative effort by the child means, in their unconscious phases and following such phases. The reason for a necessary exploration of a scholarship of the child lies with the way originality materializes in the early years, how copyright law may possess the necessary tools to interpret what free and creative choices are, and how to identify the reflection of the personality of the author during such a key time of the physical, social, emotional and cognitive development of the individual. Dr Montessori explains that:

the child is not interested in understanding things through the medium of others, but has within him an uncontrollable motor force that urges him to grasp them for himself, and that only when his mind is allowed to work in its own way can it develop naturally (Montessori 1932: 64).

In accepting these findings, it is submitted that children (especially in the early years) are the quintessential authors, imparting ideas and information in an expressive mode, and not really externally constrained when they make free and creative choices. This process reflects their personality according to their age and/or period of growth.

[D] A NEW PERSPECTIVE FOCUSED ON STEWARDSHIP

For a systematic understanding of authorship residing with children's creativity, there is also a necessity for the copyright system to draw upon Article 12 of the UNCRC and provide the tools for such authorship to be exercised in a participative and competent manner. This is normally implemented by parents, guardians, teachers and other stewards on behalf of the child. It can be argued that any form of expression by a child, also within the copyright system, would not be fully recognized unless it is heard, seen, perceived.

The model of stewardship in copyright has been addressed in a seminal contribution by Helena Howe who emphasized how the copyright system involves both rights and duties (Howe 2011: 200; Howe 2013: 298-301). A key duty for the steward is to "manage and conserve" the relevant resources for the benefit of future generations. This model is enforced in the way children's works are shared with and by parents, guardians and teachers on behalf of the authors of the relevant works. Stewardship, in the context of this article, develops across two dimensions: firstly, the protection of a child's authorial interests in the work; secondly, the ability to share a child's authorial effort with a wider community, from the classroom to the metaverse, as set out in the examples below. Through this model of stewardship, there could be a better understanding of the rights pertaining to children as authors.

Often, the child's contribution to a school poetry collection will require a parent or guardian to provide a copyright licence or assignment to the school or publisher, with the name of the child credited below the text of their poem. Parents or guardians will feel rewarded by seeing the names of their children on the publication. In fact, parents happily contribute to the cost of the publication. Arguably, many other authors share the same type of gratification, particularly in academic publishing. This does not diminish the need to form a rigorous understanding of authorship within the relevant groups of individuals who act as stewards of the child author (parents, guardians, teachers, governors *etc*) and exercise or influence the recognition of their rights. Such understanding is the

premise for the ability of the relevant stewards to exercise rights on behalf of children and to influence the overall recognition of children as authors.

It is uncommon but not unheard of that stewards may exceed the limits of what it is within the scope of their role with regard to exercise of copyright. By way of example, this was made apparent in the form of a lawsuit brought by a group of parents in Canada, following the actions of an art teacher who allegedly uploaded and was selling the artwork of pupils without their permission. Gendreau from the Université de Montréal commented on the news by stressing how “[o]ne rarely thinks about minors as authors, but this situation reminds us that the Copyright Act applies to all those whose works display originality regardless of their age” (Gendreau 2024). The current lack of a scholarly recognition and established practice of the copyright by the child in the early years should prompt a change. Moreover, the observation of the current copyright licensing terms and conditions show the urgency. Art or writing competitions would often start when children are five years old or younger (and further along in the course of primary education).

Two exemplars show the impact of copyright licensing and a steward’s ability to control and share the copyright of the child. In the case of an artwork, even when the piece is produced by a five-year-old child, the following may apply:

By entering the competition, each winning entrant grants the GLA [Greater London Authority], the competition sponsors, and all media partners an irrevocable, perpetual license to reproduce, enlarge, publish, or exhibit, mechanically or electronically on any media worldwide (including the internet) the entrant’s winning artwork (Mayor of London 2023).

The additional insight to these terms and conditions concerns the exercise of rights:

Entry to the competition must be made by a parent, guardian, teacher or play scheme leader on behalf of a child. Teachers and play scheme leaders must ensure that they have the necessary parent/guardian permission before making the entries (The Mayor of London’s Christmas Card Competition, 2023).

This shows another decisive action to be analysed with regard to the copyright of the children as exercised by their stewards.

By way of comparison, similar wording is found in a writing programme promoted by the BBC for its “500 Words” competition:

Entrants retain the copyright in their entries but their parent or guardian grants to the BBC a perpetual non-exclusive royalty-free licence to publish, broadcast (across all media) and post the entry online and on any other platforms yet to be envisaged ... By submitting a story, the entrant's parent or guardian agrees that the BBC may at its sole discretion edit, adapt, abridge or translate the entry (BBC 2023).

It is clear that, without the permission of a steward, a child will not be able to disseminate the relevant authorial output. Royalty-free also indicates the lack of remuneration for this type of licence.

A scholarship on the copyright of the child need not view the individual who exercises copyright on behalf of a child as an antagonist to the author, but rather see that person as someone who enables copyright works to be recognized for their status. In light of the stewardship model, it could be argued that the means of exercising copyright are not uniquely based on a liberal and individualistic model, but present many instances where the role of the steward is essential in order to achieve economic objectives and public interest objectives.

[E] CONCLUSION

This article has presented an interdisciplinary perspective to obstacles which exist in the recognition and exercise of rights of children as authors in various sectors and forms of expression. There are some key, impellent questions and directions that a copyright scholarship of the child should resolve, given the call for the most appropriate recognition—currently lacking—of the child as the most original author. Methodological questions should continue to be asked: *cui prodest?* Who are the beneficiaries? Are there significant policy and commercial objectives to be attained in law and policy that are neglected in the current copyright framework, in conjunction with the principles of the UNCRC?

Koempel provides an insightful perspective on creativity, prompting a reflection on the link between the creativity expressed by children and the current focus of regulators on artificial intelligence. He writes: “AI applications themselves need to become more like children with their innate curiosity and creativity” (Koempel 2024). The two key criteria which should drive the copyright discourse on this matter ought to be curiosity and creativity. With originality continuing to be a threshold of the utmost significance and yet an artificial one in some cases, it is critical to discover how creativity by children can shape copyright law in its different facets. From the encouragement of learning (Statute of Anne 1710), to the progress of science and useful

arts (Constitution of the United States, Article I, section 8, clause 8), to the lack of formalities (Berne Convention for the Protection of Literary and Artistic Works 1886, Article 5). Just in the way children would see it, it is children who are the most irresistible and indomitable authors and the persons who should drive any understanding of their creativity and originality.

About the author

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Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended on 28 September 1979).

United Nations Convention on the Rights of the Child 1989

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NEURODIVERGENT CHILDREN'S RIGHT TO COMMUNITY AND EDUCATION EQUALITY

CHELSEA WALLIS
UNIVERSITY OF OXFORD

My contribution takes the form of a poem exploring the affective experience of belonging and alienation within the education system. I am a late-diagnosed Autistic woman, and I have been engaged in research on the pressure for neurodivergent children to be integrated within mainstream schooling, rather than being provided with opportunities and spaces for community building and pride amongst fellow neurodivergent young people. The United Nations Convention on the Rights of Persons with Disabilities 2006 (in particular, General Comment No 4) is premised on the belief that integrated schooling offers children the best educational experience, despite the vast majority of schools being under-resourced and under-trained in neurodivergent children's needs (eg sensory differences that make many classrooms a hostile space for these young people).

Furthermore, within mainstream schools the neurodivergent children who are most likely to be overlooked are those who face intersectional oppression, as these are the groups most susceptible to "masking" their neurodivergent traits in order to assimilate with their peers (including girls and non-binary children, people of colour, those with other disabilities, and those from lower socioeconomic backgrounds). Masking takes a tremendous toll, as cognitive energy is spent on concealing oneself rather than engaging in learning.

My poem addresses the subjective experiences of neurodivergent children within the classroom, integrating a chorus of voices derived from my interviews with fellow neurodivergent adults reflecting on these formative years.

The unfurrowing

Sing to me your people
and I will sing you mine

Here in this hall so empty, so
Full of echoes, footfalls low
and growing distant, rooms
of sharpened lead teeth:

It is a place of safety
You say. It is a place
for young, for growth—
The fear, you leave unsaid.

A cell of sound and light it was
Their eyes all biting mine

I drifted on your rigid
tides, I tried to float on

parcelled hours and
the rules of mimicry,

I wore your masks as
easily as a chain around

my febrile mind
grasped by iron vice—

Such clay we are to your
Will: the kiln is fired.

In the quiet I bide when
it sings, the clear call of

Green— crisp as the linnet
and lithe as morning,

she thrills the loam and
wakes that enclosed living thing:

Following, we soften, elastic—
Dance in rhapsodic stride

to know ourselves again:
taste the salt of deliverance.



About the author

Chelsea Wallis is completing a DPhil in Law, focusing on feminist jurisprudence, human rights and domestic abuse in the context of First Nations Australians and women with disabilities. She is Managing Editor of the Oxford Human Rights Hub and teaches in the Faculty of Law and at University College. As a former teacher and an Autistic and chronically ill person, Chelsea also publishes widely on neurodiversity, disability, and the right to educational equality. Her poetry and prose writing has been featured in *The Turl*, *Cultivate*, *Womankind* and *Storyboard*, and her collection *Apricity* received the DL Chapman prize in 2021.

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Legislation, Regulations and Rules

United Nations Convention on the Rights of Persons with Disabilities
2006

POETRY FOR RIGHTS! INTERGENERATIONAL CO-CREATION FOR CHILD RIGHTS SCHOLARSHIP

KRISTEN HOPE
University of Bath

Poets and Child Rights Activists and Defenders

DHRUV BHATT
JANUKA JAMARKATEL
BRIAN KING
OSISH NIROULA
JESHIS JAMARKATEL
SIROUN THACKER
AMRIT RIJAL
PURNIMA BHATTARAI
RODOSHEE SARDER
SAMIKSHYA DAHAL
PRATHIT SINGH¹

Abstract

This article presents the work of a group of child rights activists including children, young people and a supporting adult, who creatively convey their thoughts and feelings about the most pressing contemporary issues in the field of children's rights and explore implications for intergenerational co-authorship in the child rights space. The children and young people decided to use poetry as a form of communication to express themselves about the challenges and aspirations of being child rights activists in an era of polycrisis, and they then worked together to analyse the poems, identifying cross-cutting themes around mental health, navigating power relationships and demands for

¹ Authors' note: The authors are deeply indebted to Maria Moscati for her visionary leadership in holding space for children and young people's perspectives in this special issue, as well as her generous encouragement and delicate patience throughout the writing process.

a more inclusive, equitable future. The text of the article contains links to online video recordings of the authors performing their poetry, inviting readers to immerse themselves in a multi-sensory experience of child-led, child rights scholarship. Accordingly, the article presents an exploration of imaginative, interactive and intergenerational scholarship on children's rights and suggests that co-creation with children may provide a way of upholding children's rights while making space for new epistemologies that challenge Eurocentric, adultist norms of knowledge production in the child rights space.

Keywords: child rights; child participation; arts-based methods.

PART ONE

[A] INTRODUCTION

Nearly 35 years after the launch of the United Nations Convention on the Rights of the Child 1989 (UNCRC), the landscape around international child rights in the post-Covid world has become characterized by a narrative of compounding crises. UNICEF (2023) has identified eight trends that constitute the drivers and stressors of the “polycrisis” for children: the long-tail of the Covid-19 pandemic; economic instability and inflation that negatively impact child poverty and wellbeing; food and nutrition insecurity; the energy crisis and climate collapse; underinvestment in children; fragile democracies that undermine civic and political rights, such as freedom of expression; fragmentation of the multilateral system that upholds the international human rights framework; and increased uncertainties and disparities in the digital environment and new technologies. Similarly, since 2020, global child rights advocacy conducted by international non-governmental organizations (NGOs) has been shaped by calls for governments and world leaders to take urgent action to address the cumulative impacts of compounding crises on children, with some notable examples involving children and young people themselves in participatory processes (Save the Children 2021; OSRSG/VAC 2022; Terre des hommes 2022a; Terre des hommes 2022b).

Meanwhile, children around the world continue to be actively involved in civil society movements to claim their right to be heard, as outlined in Article 12 of the UNCRC. Article 12 is both a substantive right in itself, and a procedural right that is key to fulfilling the full spectrum of rights set out in the Convention. Children's involvement in social justice causes is often intergenerational: child activists often look towards young people aged between 18 and 25, who, only having recently transitioned out of childhood and into adulthood, still acutely feel the precarity of childhood

and the enormity of the compounding crises that threaten children's and adults' human rights. In turn, young activists regularly stand alongside older adults, seeking to learn from the experiences of previous generations of human rights defenders. For example, these intergenerational dynamics are particularly visible in climate activism, in which child- and youth-led movements such as #FridaysForFutures have come to shape the climate justice landscape through direct action and peaceful protest (Nissen & Ors 2021; Skovdal & Benwell 2021). Nevertheless, although some notable cases of impactful child-led climate actions have been documented (Tanner 2010), children and young people's demands for governments to uphold their commitments in line with internationally agreed-upon targets are increasingly ignored, as demonstrated by significant shortfalls in recent climate conference agreements. A sharp contrast exists between the (now ubiquitous) images of children leading the way in climate justice protests and the actual "difference" that child-led activism makes on macro-level environmental policymaking (Trott 2021).

The uneven terrain of intergenerational partnerships in civil society advocacy around children's rights can be understood as reflecting a hierarchy of epistemologies, which need to be analysed through an intersectional lens. Firstly, due to social norms that link children's young ages with an assumed immaturity, children are not listened to. Consequently, through "their very being (onto-): a child is unable to make claims to knowledge, because it is assumed that they are (still) developing, (still) innocent, (still) fragile, (still) immature, (still) irrational" (Murriss 2020: 2). Secondly, the momentum around the decolonization of human rights has raised questions about the ways in which mainstream conceptions of child participation and agency, particularly with respect to children from the Global South, are grounded in Eurocentric, individualist, neocolonial and patriarchal frameworks (Cheney 2018; Abebe 2019). It follows, therefore, that the epistemologies of children and young people from the Global South are more susceptible to being marginalized or "Othered" if they fail to fit within the post-Enlightenment norms that structure the paradigms of universal human rights.

While the repercussions of these hierarchies are apparent in the worlds of policy and practice, they are even more glaring in the realm of child rights scholarship: children and young people, particularly those from the Global South, are very rarely offered meaningful opportunities to be included in academic writing about children's rights. Apart from a handful of notable examples linked to advocacy initiatives in which children and young people have been invited to co-author academic journal articles (Lundy & Ors 2021; Lee & Ors 2022), the formalities and exigencies of

academic publishing often exclude children and young people from playing meaningful roles in generating knowledge about children's rights that are considered to be meaningful in the academic spaces of the Global North.

Against this backdrop, this article presents the work of a group of child rights activists, comprised of children and young people from the Global South and a supporting adult from the Global North, who creatively convey their thoughts and feelings about the most pressing contemporary issues in the field of children's rights through: poetry; thematic analysis of the poetry; and reflections on using poetry as a means to talk about children's rights. Based on this, the authors conclude by exploring implications for intergenerational co-authorship in the child rights space.

[B] METHODOLOGY—WHY POETRY?

The co-authors comprised a group of five children in their teens and six young people aged 18-23 from Bangladesh, India, Kenya and Nepal, alongside a European adult child rights practitioner. The group came together through a global child rights campaign called #CovidUnder19. Formed in April 2020 at the start of the Covid-19 pandemic, the initiative was “born out of the human rights imperative to seek children's views and engage with them so that they can inform and shape national and international responses to the crisis for and with children” (Lundy & Ors 2021: 262). #CovidUnder19 brought together children, young people, UN offices, academics and local and international NGOs to conduct participatory research and advocacy about how children's rights were impacted by the pandemic and its aftermath. With academic leadership from the Centre for Children's Rights at Queen's University Belfast, who led the research design and analysis based on their unique child rights-based methodology, #CovidUnder19 rolled out the Life Under Coronavirus survey (Terre des hommes 2020), available in 28 languages including an easy-read version, which received over 26,000 responses from children around the world. The results of the survey provided a unique snapshot into children's perspectives at a moment of unprecedented global crisis, and indicated that “children, right across the world, felt that their governments were not considering children as a priority and were definitely not seeking their views when crucial policy responses to the pandemic were formulated and implemented” (Lundy & Ors 2021: 281).

Working through a process of co-creation, understood as a “knowledge process that employs creativity through arts-based methods as an alternative way to listen to the voices of marginalised communities and involve them in generating shared understandings of their [environments]”

(Hovarth & Carpenter, 2020: 4), the co-authors collectively decided on both the form and the content of the article. Building on Kara's typology of creative methodologies in social science research (2015), the co-authors integrated both an arts-based component in the form of written poetry, alongside a transformational component, in terms of an iterative, group analysis of both the poetry and the process of writing poetry, in order to bring about new ways of thinking, experiencing and acting in relation to contemporary issues in children's rights that are grounded in epistemologies of children of the Global South. The process of group co-creation expressed in this article reflects the cyclical and iterative nature of art and research, whereby the "making" of poetry has led to a deeper "making sense of" children's rights (Kara 2015: 16). The process of co-creation sought to uphold international good practice around child participation, according to the nine basic principles for meaningful and ethical participation as set out in General Comment No 12 of the UNCRC (Committee on the Rights of the Child 2009).

The article was written through a combination of online participatory workshops and individual writing activities. Between July 2023 and the end of January 2024, a total of seven online workshops were convened. In the first meeting, the scope of the special issue was discussed and the group collectively decided how they would like to respond to the call. At the end of that session, the children and young people decided that they wanted to write poetry to explore contemporary issues in children's rights. One of the co-authors set up a WhatsApp group called "Poetry for Rights" where the other participants shared ideas about their poems and eventually first drafts of their poetry, and then exchanged feedback. It was an iterative and peer-led process. After the poems were all written up, some final workshops were convened to focus on analysing the key themes of the poems as well as reflecting on the process and the implications of the methodology. Children and young people named as co-authors underwent a process of informed consent to be part of the publication, including with parental agreement.

The children and young people who co-authored this article understood poetry to be a form of artistic expression where feelings and ideas could be conveyed through a distinctive style with rhythm. They chose to express themselves through poetry because they felt that it was a way to convey emotions and complex ideas without conforming to adult-centric academic scripts. They agreed that poetry offers a condensed form of communication that can be especially accessible to children and young people. They felt that the current generation of children and young people often struggle to articulate their thoughts and feelings, maybe because

of a lack of knowledge on expressing themselves or an inability to find the right words to convey their feelings. Poetry emerges as a valuable avenue of expression, utilizing words, rhythm and emotions to make young people and children feel heard. They saw poetry as an avenue for free self-expression that served as a pure manifestation of thoughts and feelings, offering an opportunity for children, particularly in the Global South, to voice their unfiltered opinions. Poetry enables young children to tell their stories untampered and uninfluenced, conveying their thoughts and pushing their own agendas. Unlike articles or papers that may face challenges or misinterpretations, poetry stands as a pure means of expression, fostering a connection between the reader and the writer and allowing personal interpretation. In the words of one of our young people “poetry transcends the debates of right or wrong, serving as an expression of personal thoughts that provides solace and comfort to both the reader and the writer”.

When it comes to discussing complex and layered topics like children’s rights, they felt that the brevity and clarity of poetry made it easier for them to express their feelings. Some felt that this process was cathartic in helping them navigate and comprehend their experiences. Additionally, they felt that poetry possesses the ability to cultivate empathy. Through imagery and evocative language, it can elicit emotional responses in readers. This fosters a sense of understanding and compassion towards the experiences of others. They felt that considering children’s rights in this way can raise awareness about children’s lived experience. They felt that the symbolic and metaphorical nature of poetry prompts readers to engage in not only thinking about, but also feeling the issues being addressed. This stimulates a comprehension of children’s rights matters urging readers to delve into these topics on a profound level.

Finally, it was very important for the children and young people that their work be accessible beyond the pages of the academic journal and be available to audiences of children and young people from the Global South, like themselves, who would not necessarily read a journal in English. The idea emerged early on for co-authors to record their poems and have these available online so that their poetry could reach wider audiences of children, young people and also non-academics.

Before reading further, we invite you to listen to the children and young people’s poetry about contemporary issues in children’s rights via this link:

Poetry for Rights!

The full text of the poems can be read in Part Two.

[C] ANALYSIS OF POEMS

The following section presents thematic analysis of various themes that emerged through group analysis of the poems. Three key themes were identified: feelings of powerlessness, helplessness and erosion of mental health in the face of the polycrisis; children and young people recognizing their agency; and building horizontal and vertical communities for intergenerational transformation.

Feelings of powerlessness, helplessness and erosion of mental health in the face of the polycrisis

Many poems paint a vivid picture of the world that the authors navigate, which elegantly elaborates on the “polycrisis” that defines the post-covid world.

*The light of a thousand corporate suns. The light of another airstrike,
another raid ...*

Not ice nor fire, the world ends in light—Dhruv

The exploration commences with Dhruv’s personal reflection on consumerism, the corporate realm, and a polarized world that begets conflict. This highlights the impact of this polarized reality, a dystopian world where people are reduced to petty labels.

Once there were the birds of heaven

In a world full of hell and torment, ...

Now the birds are foodless, shelterless, motherless, fatherless-

*Losing their families and rights, they now become the empty shells-
trembling in fear,*

Crying in despair.

Now they scream in pain, now they scream in hunger

Counting their days until they see the light of their home again ...

So they plead for their rights, crying for peace- wanting freedom ...

All the birds now cry, moan and sigh

As the world has brought a havoc upon them—Rodoshee

Rodoshee’s allegorical depiction of birds in conflict further amplifies the theme of young lives ensnared in turmoil. The metaphorical “empty shells” and the desperate plea for rights portray a stark reality where the youth are deprived of essential elements for growth, resonating with the

sentiment that “the world has brought a havoc upon them”. Samikshya’s portrayal of a shrinking space for expression emphasizes the challenges children face in aligning with societal ideals, their voices drowned amidst the growing cacophony of the world:

*The world is getting louder and louder so i am in the corner,
Where no one see me I am far from you
Can you come closer, I am scared—Samikshya*

Brian’s account adds a layer to this narrative, illustrating the stark transition from carefree childhood to incarceration, encapsulated in the lines:

*TV watching, playing with glee,
Police at the door, world descends on me.
Lost everything, to bars and jumpsuits,
Punishment on them, punishment on me.—Brian*

Amrit’s reflection on unheard voices and unfulfilled promises reinforces the overarching theme of disillusionment, encapsulated in the words:

*Their voices, precious, clear, and bold,
Their thoughts and wishes, still not at the threshold,
Promises made, but hearts in fear,
Lost in a fate, far from clear.—Amrit*

In a context of uncertainty and threats, many poems conveyed a sense of disillusionment with the *status quo*.

Siroun’s lines resonate strongly with this sentiment, capturing the erosion of trust in the system:

*The path you paved- the one I was destined to walk- cracked ...
I question your system.
I question your thoughts.
I question a world.—Siroun*

Moreover, the poems illustrate how the polycrisis results in adverse effects on the mental health of children and young people. Many verses evoke a sense of desolation, hopelessness and anxiety stemming from the relentless challenges faced by children and young people.

Januka’s rallying cry for the de-stigmatization of poor mental health warns readers that:

*Deep in the soul where sufferings reside,
Mental struggles often choose to hide.—Januka*

Dhruv's poignant lines express a yearning for dreams in a world where light seems thick and elusive, mirroring the mental turmoil faced by many:

*I light a diya, too. I walk into the leathery light.
Like moths in the streetlight, I am lost. I am hurt. When will I dream?
—Dhruv*

Purnima articulates the struggle of dreaming big in a reality filled with dissatisfaction, betrayal and the weight of societal expectations. The reference to living in a cage symbolizes the constraints imposed on the young, limiting their expression and fostering insecurity:

*Dreaming big in the dreams,
Unsatisfied in reality with some screams.
Hoping for a great friendship for real,
Although she always gets a betrayal.
Fed up with life at such a young age,
Started ignoring others and living in a cage.
Afraid of expressing herself with tons of questions in mind ...
Insecurities every moment.—Purnima*

Samikshya's poignant wish for happiness and rights without a fight encapsulates the pervasive desire for a world where mental wellbeing is not a constant battle:

*I wish I was happy and would live joyfully and would have a right
without a fight.
I never felt enough.—Samikshya*

Moreover, the pervasive feeling of powerlessness in the face of oppressive systems, climate anxiety and societal pressures further exacerbates the erosion of mental health. Brian's insight into societal pressures highlights the additional burden placed on the younger generation.

*A wrong turn, a misplaced plea,
Cuffed and labeled, my innocence plea.
From childhood to inmate, my rights erased,
A child I am, with dreams to chase.—Brian*

The verses collectively convey the emotional toll of being in conflict with justice systems and influential leaders, recognizing the draining and potentially perilous nature of such confrontations. These multifaceted challenges underscore the urgent need for comprehensive support and understanding to address the complex interplay of mental health and the tumultuous world children and young people navigate.

Children and young people recognizing their strength and agency

Following from the authors' different expressions of the trials and mental burdens linked to the precarity of existing as a young person in a world of multiple and compounding crises, the poems also give a glimpse of how children and young people come to recognize their agency and role in shaping the world. The disillusionment they experience propels them to take an active stance in reshaping their own destinies and contributing to a better future.

Brian's poem portrays a generation setting the pace, redefining their space and demanding inclusion.

*Soweto's trailblazers, setting the pace,
Under 18, redefining our space.
Taking the lead, taking the ropes,
Nothing for us, without us.—Brian*

Osish's lines emphasize the responsibility of children and youth to ignite change and catalyse the sharing of information:

*Oh (we are the one) who will ignite the fire ...
Oh we are the one who were the past, who will build the future,
who will sustain knowledge and create change.—Osish*

Jeshis envisions a dream where everyone's basic needs are met, highlighting the empathetic and social justice-oriented outlook of the younger generation:

*We minors will come up ...
A dream everyone possess, a hungry wants to eat, a homeless wants
some sleep,
an orphan wants some love, everyone wants someone to talk.—Jeshis*

Samikshya's poem underscores the commitment to champion children's rights, advocate for diversity and equality and create a more just and equal society:

We speak for you. "Children's right" matters first.

We request diverse equality equity, and a just and equal society.

*Together we will build a better world. Children's for today & tomorrow.—
Samikshya*

Rodoshee's metaphorical shift from looking up to gods and goddesses to recognizing the potential for change within themselves reinforces the empowering narrative:

So now we search for Athena and Eirene-

unaware that they live among us.

*Hence shall we come together and fight for their rights ... protect
these birds—Rodoshee*

Brian's mention of children holding a constitution in their hands emphasizes a proactive stance in reclaiming their rights and space within the system:

Swear on the book, protect the planet for us all.

Justice for the child drowning in the coast, and the one

Suffocating in the city, justice we must boast.—Brian

Purnima's depiction of a resilient young girl underscores the transformative power of personal battles, as she learns to fight against the world in her unique way. The experiences of betrayal and challenges contribute to the building of confidence and motivation, akin to playing with life as a piece of art. The poignant question, "Why can't I?", reflects the resilience that emerges from questioning and overcoming obstacles. Januka's perspective introduces the notion of normalizing feeling low as a means to break the chain of societal expectations. This pragmatic approach acknowledges the inevitability of challenging emotions and positions them as integral to personal development.

Together, these verses echo a collective determination to lead and build a better world, transcending the disillusionment experienced in the face of polycrisis. The idea of standing on one's own power emphasizes the strength derived from the self-discovery that comes through overcoming adversity. However, it is crucial to recognize that this growth narrative should not overshadow the significant mental and physical abuse that today's generation faces due to polycrisis, emphasizing the need for a

balanced perspective that addresses both resilience and the urgent need for support and change.

Building vertical and horizontal communities for transformation

Following on from the authors' journeys through hardship and resilience, the final theme that emerges from the poems is the translation of hopes for a better world into strategies to build communities for transformation at different levels.

Firstly, several of the poets are scathing in their criticism of adults in positions of power who ignore or perpetuate injustices, and this raises serious questions about the conditions under which real intergenerational partnerships may be forged.

Osish's criticism of the lack of accountability from leaders aligns with the overarching demand for change and accountability from those in power.

Follow who? Those who are hypocrite? Those who believe climate change is not real?

Those who look around just to stay in comfort? Those who unsee the consequences?—Osish

Siroun highlights how her leader's failure has left her without the hope for accountability, she seeks new beginnings outside the current system.

mr Leader, i finally see you-

you dont want me to be a star

you pave me to be a bulb that dims out; the fuel running out ...

so goodbye, Mr Leader, for i leave your world,

to start my own.—Siroun

In the face of these failures, the authors express their aspirations around alternative, horizontal communities of solidarity, often characterized by peer-to-peer support. Both in the poems themselves and in the discussions within the group about the poems, there was widespread acknowledgment that sharing negative emotions was very difficult, particularly with figures of authority such as parents. In the face of this, support amongst friends and peer groups was particularly valued.

Everybody has problems; you aren't alone.

Open up your burdened soul, don't deny.

Seek support, share burden - don't hesitate.

The mind, too, needs an understanding peer—Januka

Several of the poems explicitly appeal to collective action, such as these verses from Amrit's and Jeshis's poems:

Let's listen, let's engage, let's realize,

Child participation can't be compromised.—Amrit

We are the future,

We are the hope,

We'll create change,

today or tomorrow—Jeshis

This segment not only highlights the imperative of constructing an intergenerational community but also delves into the significance of cultivating a supportive community among peers. Januka's insightful poem emphasizes the importance of peer support, urging everyone to recognize that they are not alone in their struggles. The encouragement to open up one's burdened soul, seek support and share burdens creates a sense of community where individuals can rely on each other for understanding. The authors express a shared vision around building a world marked by hope, justice and a commitment to challenging the prevailing *status quo*.

In summary, this segment showcases the multifaceted nature of community-building. While the broader focus is on constructing an intergenerational community, the emphasis on peer support adds a layer of depth to the narrative. It reveals aspirations for communities where individuals, regardless of age, support one another, creating a network of shared experiences, understanding and encouragement.

Recap

Overall, the poems express a visceral entanglement with the profound consequences of children's disillusionment in the face of polycrisis. They highlight the unravelling mental health challenges faced by children and young people, unveiling a landscape of emotional turmoil and the burdens felt by social pressures. The poems illustrate a collective sense of loss and hopelessness, echoing the universal experiences of anxiety, dissatisfaction and powerlessness. At the same time, they convey a collective realization among children and young people that they are the architects of change. The disillusionment with existing power structures

propels them to actively redefine their space, ignite the fire of knowledge, and advocate for a more equitable and just society. This recognition of shared purpose becomes the cornerstone for the formation of communities rooted in solidarity, hope for change, and a collective vision for a better world. It is within these shared negative emotions that communities find a common ground, fostering empathy and understanding. In response to these shared struggles, diverse communities become a source of solace and support. This gives rise to a compelling narrative of resilience, unity and the formation of diverse communities. These communities emerge as a response to both the recognition of agency and the erosion of mental health experienced by the younger generation.

The intertwining of these consequences accentuates the importance of community-building as a coping mechanism and a catalyst for change. The diverse communities that emerge are not only a testament to the resilience of the younger generation but also a powerful force challenging the *status quo*. Through shared struggles, these communities amplify the voices of the disenfranchised, create a space for collective healing and demand accountability from duty bearers to take action to change the doomed *status quo*.

Reflections on process

The children and young people faced a variety of challenges and gained valuable learnings while composing and analysing poems. One significant challenge was the language barrier, with some young writers expressing that it was their first time writing poems in a non-native language. Though there was no obligation to write in a non-native language, they faced hesitation in expressing themselves in their native languages. The difficulty in translating ideas and the fear of misinterpretation while translating influenced this decision:

Sometimes non-native English speakers hesitate to write in their native languages. Because translating ideas is a hard thing to do. This happened to me so I started writing in English because it is very tough to translate and availing these services (online) is also not that easy.

Similarly, choosing a topic for a poem addressing child rights issues was challenging due to the numerous urgent issues demanding attention. Young writers faced the dilemma of potentially neglecting equally important problems if they focused on just one. Some felt it challenging to choose suitable words to make the writing decent. In the same way, they were in a dilemma about which socioeconomic group of children

to write about because they wanted the majority of children and young people to relate to their selected topic.

There are numerous child rights issues that need to be addressed. So, selecting a specific topic to write a poem in regards to child rights issues was challenging for me.

I was unable to compose/produce a decent writing despite having it in my brain.

Young writers were unsure if their poem would resonate with readers and effectively express their voice to be heard by the world. They were concerned if their words would harm anyone and felt an increased level of frustration due to such thoughts.

For a certain time, I was like words are hard to choose. I felt: Will my words harm anyone? Will my poem give the same meaning to other readers? Will it be a poem for goodness and will it express our voice that the world should hear?

Analysing the poems and the process was another challenge. One of them expressed the personal challenge of interpreting poems effectively, aiming for a clear conclusion while staying true to the original poet's thoughts.

Despite such challenges, this was an opportunity for self-discovery, with a few of them highlighting that it was the first poem they had ever written, allowing them to identify their poetic potential. The writers were able to discover and embrace their creativity that had been hidden within, helping themselves to be more thoughtful and innovative. They overcame the challenges and learned the importance of continuous effort for achieving their goals. Some used the internet to discover rhyming words and to help themselves in word selection. Some felt that art, especially in the form of poetry, serves as a highly effective means of conveying messages, where the readers can derive diverse and relevant meanings. They were able to write poems on specific themes, gaining the skill of using poetry as a powerful tool for raising awareness.

I learned to be bold enough to express my inner-self, and to take small steps to put an end to violations.

Young writers believed that this experience could mark a potential turning point in their lives as poets. The experience helped in the learning of crucial literary elements such as irony, as writers recognized and applied this technique while composing their poems.

I learned to use irony in the poem, and I was realizing this even while composing the poem.

Overall, it was a journey of growth and self-realization, which included overcoming language barriers, trying out new tools, and co-creating an advocacy piece, eventually leading to a collective journey of making meaning about children's rights together.

[D] CONCLUSIONS

This article has illustrated how poetry enables children and young people to explore children's rights in a way that allows for emotions to be expressed and empathy to be shared. Poetry offers a platform for children and young individuals to express themselves more freely and actively participate in feeling and thinking about children's rights in a more holistic and embodied manner than other traditional forms of writing.

In sum, the authors highlight the significance of co-creation with children on two levels: firstly, the poetry stands in and of itself as a substantive contribution to child rights scholarship using arts-based methodologies; secondly, the reflection about the use of creative methodologies for including children in scholarship about children's rights in a way that can move beyond disembodied "expertise" and the view from nowhere that can be profoundly Othering, particularly to children and young people from the Global South.

This article suggests that the use of creative co-creation methodologies in child rights scholarship is necessary not just because they can be more "child-friendly", but because they open up space for bringing emotions back into discussions about rights as a cornerstone of reclaiming the epistemologies of children of the Global South. This reflects what Boaventura de Sousa Santos calls "corozonar", which is described as a way of thinking with the heart (Santos 2018). In turn it is precisely by centring the creative forms of expression of children and young people in the Global South that scholars of children's rights in the Global North and South may start to dismantle the colonial, Eurocentric paradigms of knowledge that perpetuate the false dichotomy between mind and body, and that sanitize rights discourse by removing emotion and the weight of lived experience from the discussion. Centring children and young people's poetry and analysis in a discussion of contemporary children's rights is an intentional effort to move away from the tendencies of colonial epistemologies which:

even if they attempt to take the participants' poetic claims into account, they are likely to translate these into the neutral, objective and rational language of Global North science, which would inevitably

dispossess the participants' emerging voices of their passion, urgency, authenticity and authority (Davies & Ors 2020: 288).

In contrast, echoing Santos, this article suggests that the transformative and liberatory potential of children's rights to catalyse a more fair, equal and socially just world cannot be achieved without epistemic justice for children and young people, and that creative, arts-based methods are key to unlocking these epistemologies. Or, in the words of Santos:

Before us there are more ruins than well-defined plans. But ruins may be creative too. Starting anew means rendering creativity and interruption possible under hostile conditions that promote reproduction and repetition (Santos, 2014: 5).

By foregrounding the views, perspectives and creative practices of a group of children and young people from the Global South who have been involved in international child rights advocacy, this article has provided an avenue to explore contemporary issues in children's rights through their eyes, and is an invitation for scholars from the Global North to decentre Eurocentric paradigms in creating new knowledge about children's rights.

PART TWO: POEMS

Dhruv's poem

Light

Not ice nor fire,
the world ends in light.

The light of a thousand corporate suns.

The light of another airstrike, another raid.

Shudder! Alas, the last candle in Filastine- flickers.

A match in Sudan is snuffed, a cigarette in New York lit.

Have you seen Dubai at night? The windows are honeycombs,
oozing square warmth on ashen faces that stare from labour
camps.

The light swallows them all. The shadows of silences fall large
and strong.

Can you smile for the camera? No? Does the flash hurt your
eyes? Does your

eye dazzle when lightning strikes? When another village is
swallowed by Our storm?

When the stars in the skies lie bare in mica mines. When little
hands bear large pickaxes.

And shovels. To bury loved ones. Their futures. How many more
before nightfall? Seventy?

Hanukkah. Diwali. Christmas. Festivals of light are many. Where
are the festivals of darkness?

I light a diya, too. I walk into the leathery light. Like moths in the
streetlight, I am lost. I am hurt.

When will I dream?



Brian's poems

A Child's Anthem for Rights



Constitution in hand, an umbrella on the other
Gown for protection, boots to stand in grace.
Bang the gavel, let the trees grow tall,
Swear on the book, protect the planet for us all.

Justice for the child drowning in the coast, and the one
Suffocating in the city, justice we must boast.
Litigate to protect, etched on our bosom,
For a child's future, Now and now.

Pueris et Jurisprudencia



A wrong turn, a misplaced plea,
Cuffed and labeled, my innocence plea.
From childhood to inmate, my rights erased,
A child I am, with dreams to chase.

TV watching, playing with glee,
Police at the door, world descends on me.
Lost everything, to bars and jumpsuits,
Punishment on them, punishment on me.

Soweto's trailblazers, setting the pace,
Under 18, redefining our space.
Taking the lead, taking the ropes,
Nothing for us, without us
Our Hearts, March with hopes.



Osish's poem



Oh (we are the one) ×2
who will ignite the fire
just to learn in the world
We become a buyer

Oh we are the one
who depends on other
those who support the destruction?
those who deteriorate the environment?
those who are called humans
With no sense of humanity

Oh we are the one
who will stop the climate change
it won't take long
we just need somebody to follow on

Follow who?
those who are hypocrite?
those who believe climate change is not real?
those who look around just to stay in comfort?
those who unsee the consequences?

Oh we are the one
who were the past
who will build the future
who will sustain Knowledge and
create change

Oh we are the one
who will change the world.



Jeshis's poem



Let's have some hope,
Let's be stronger,
Let's fight for rights,
and come together.

Together we'll create,
a new beautiful world,
where voices will be heard,
without anyone's pressure.

There'll be understanding,
there'll be faith,
there'll be lovely people,
which won't be too late.

We are the future,
We are the hope,
We'll create change,
today or tomorrow.

We minors will come up,
to fight for ourselves,
we will shine,
to fulfill our dream.

A dream everyone possess,
a hungry wants to eat,
a homeless wants some sleep,
an orphan wants some love,
everyone wants someone to
talk to.

So, Let's have some hope,
Let's spread some love,
Let's fight for ourselves,
in a new beautiful world.



Amrit's poem

***Child participation, a tale untold***

Child participation, a tale untold,
Where voices bloom, dreams are mold.

Participation, to find their space,
In shaping a world full of grace,
Participation, to Empower them,
Nurturing a globe that powers them.

Their voices, precious, clear, and bold,
Their thoughts and wishes, still not at the threshold,
Promises made, but hearts in fear,
Lost in a fate, far from clear.

It's their world too, their rightful claim,
Their voices echo, their dreams aflame,
For a future built on wisdom's guide,
Child participation stands by its side.

Let's listen, let's engage, let's realize,
Child participation can't be compromised.

Let's break the chains, shatter the bars,
Empower the young, reaching for stars,
For every child, a future bright,
Where their participation takes flight, in the morning's light.

Let's build a future, bright and free,
Where children thrive in harmony,
Their rights upheld, their dreams in flight,
In a world that champions their rights.



Januka's poem



Searching for comfort in a zone unknown?
Everybody has problems; you aren't alone.

At chapters of life, when you want to cry,
Let your tears fall, don't burden your eye.
In times of sorrow, it's okay, don't feel shy,
Open up your burdened soul, don't deny.

Sometimes loneliness might hit you hard,
You might struggle when life plays the card.
Bottling up yourself isn't the path to take,
Seek support, share burden - don't hesitate.

Deep in the soul where sufferings reside,
Mental struggles often choose to hide.
Remember, silence won't heal your pain,
Normalize feeling low and break the chain.

Just as we care for wounds, visible and clear,
The mind, too, needs an understanding peer.
At any point in life, when mental illness arise-
Early intervention is vital, you must recognize.

Come, together we can redefine our ways,
Challenge the stigma in the coming days.
Building resilience in childhood can thrive-
To better mental health outcomes later in life.



Samikshya's poem



Hey world,
 I heard ,
 The word "children's right"
 Wait i also hear ,
 morning shows the day ,
 The world is getting louder and
 louder
 so i am in the corner ,
 Where no one see me
 I am far from you
 Can you come closer,
 I am scared ,
 May i get love and care
 As i see morning; is loved with ray
 of sun
 Oh ! sun ray
 I wish , i love , i wished , i cared
 I wish i happy and live joy and have
 right without fight
 I never felt enough
 Unless, i was said
 You are stronger
 unless i show the power
 boundary free all i want
 unless i raise my voice
 And that matters
 I was stronger me
 I was growing
 I stand upon my power on my own
 The child inside me is me

I am younger
 growing clever
 I behave sometime
 Child , you getting a dumb in
 difficulty me
 Make me grow if you see
 I wish care love from you
 Nature of affection
 You will definitely find stronger
 me
 definition from me
 The way you raise me for act and
 action
 As a result as i am child
 I wish for right
 I am child i grow younger and
 make you proud
 Invest in me
 One day you say you are loud
 Again proud.
 Tick tick the clock rings,
 i dreaming the times with rights
 For one not getting
 Food , clothes ,shelter
 Oh ! peace is far away
 I see the war
 World fighting for world free of
 violence and abuse
 I don't want to hear i want peace
 and freedom

Dreaming the world	Strong hand to us
Far away .	Which protect me
From street to sweet home	Never cry for medicine
In loneliness; pet was my friends	Sun rays never make me feel hotter burn better warm in the cold
As the dog barks	No child be abuse ,
I choosed a path away .	Either climate be a reason
Less travelled	neither child marriage a prison
One less unless i wanted to survive	No child born to death
silence free of war .	Right to respire before expire
Twinkled the star	No any violence ,
No loud voice to hear	either; word of discrimination
children's playing in the ground	grassroots
Birds singing	Wish the word better respect me
Nature reflecting	that's "No"
Smiling , living happily	I am child first let me survive
I am a child who wished	around the world that scared me turn round
imagined world with books	While the darkness i see
sitting peacefully in the river banks	I wish to see the voice of happiness rays of happiness that hears loud and proud
I never dreamed rights to write as a poem	Have faith in us
Write to survive and fight live to life.	We speak for you.
I wish	"childrens right" matters first
In these days no one	We request diverse equality equity and a just and equal society.
None to left school	together we will build a better world
Or	children's for today & tomorrow
Far from home	
Survive to live the life	
May the child glow grow and bloom	
So better be a	
Shield to protect	



Purnima's poem



Let's start a story ...

Small hands, young brain and less experience of life,
Here comes the story of a child.

Born in the family as the eldest,
Duties and responsibilities made her strongest.

Dreaming big in the dreams,
Unsatisfied in reality with some screams.

Hoping a great friendship for real,
Although she always gets a betrayal.

Fed up with life in such a young age,
Started ignoring others and living in a cage.

Afraid of expressing herself with tons of questions in mind,
Had lots of questions about the existence of humankind.

Grew some older with some knowledge of life,
Now here comes the phase of her teenage life.

Insecurities every moment in each part of day,
Learned to fight against it in her own way.

Building confidence with tons of motivation in heart,
Playing with life as a piece of art.

Questioning herself if others can "Why can't I?"

Here comes a strong and risktaker girl with confidence in her
eye ...



Siroun's Poem

*letter to the leader*

Good morning Mr leader,
Kindly take my feedback about the
first 18 years of my life with a
pinch of salt.

Born into comfort

i was privileged!

but after 18 years of privilege, i
question:

i question your system, i question
my thoughts, i question your
world

after being taught to talk,

i was told to keep it down.

after being taught to run,

i was told to slow down.

after being told i could have the
world,

the world was reduced to 26 letter.

they said, "girl take a chance and
bet on yourself! the sky is the
limit and you are made for the
stars!"

but, alas! your system bluffed the
cards and i lost myself.

the path you paved- the one i was
destined to walk- cracked,

the fog in front of the facade of
the balanced world cleared,
now after 18 years of doubt,
i can finally see the full painting.

mr Leader, i finally see you-
you dont want me to be a star
you pave me to be a bulb that
dims out; the fuel running out.

unfortunately for you, I've caught
up and choose to point the
finger at you

the fire that you hosed down,
burns brighter than before,
cuz today,

today i made a choice,

the choice you didnt give me,
the choice to add to a plotline
that you started,

and the one that i take over
today.

so, im so sorry for your loss,
you lost a puppet in your own
game.

so goodbye, Mr Leader, for i leave
your world,

to start my own.



Rodoshee's poem

***Birds of Heaven***

Once there were the birds of heaven-
In a world full of hell and torment,
There born the birds of heaven-
They fly, they sing, some die before they get seen.
The Kings and Queens laugh in schadenfreude.
As the birds get drenched in rain and odour
Of gunpowder and phosphorus.
All the birds now cry, moan and sigh-
As the world has brought a havoc upon them,

As the bloodthirsty conquerors are thriving- shooting,
killing, enjoying
Shattering the dreams of those innocent birds- as if
they are the immortals,
as if they are animals.
The rain of fire and rocks fall upon the birds, so there
blasts the bombs-
Now the birds are foodless, shelterless, motherless,
fatherless-
Losing their families and rights, they now become the
empty shells- trembling in fear,
Crying in despair.
Now they scream in pain, now they scream in hunger-
Counting their days until they see the light of their
home again ...
So they plead for their rights, crying for peace- wanting
freedom from Momus, Perses and Ares.

Where are the Lords now?

Pretending to be deaf, enjoying the thrill!

So now we search for Athena and Eirene- unaware that
they live among us.

Hence shall we come together and fight for their rights,

Perish the conquerors and protect these birds.

Someday these birds of heaven shall get their rights,

Enjoy the tranquillity, laugh and fly.



About the authors

Kristen Hope, 38, has over 15 years' experience working in international development. Her areas of expertise include children's rights, child protection, participatory research methods and legal pluralism. Kristen has worked with children and young people from around the world who have experienced displacement, violence, discrimination and contact with justice systems, many of whom seek to leverage their lived experience to create change and claim their rights. Kristen is currently a PhD student at the University of Bath conducting research about decolonizing international child protection in the context of the climate crisis, with funding from the UKRI/ESRC.

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Dhruv Bhatt, 18, is an Environmental and Child Rights Defender working with several international organizations to highlight youth and child perspectives in policy-making and environmental action. They began climate activism at age 11, growing up in India and Nigeria, where children are most vulnerable to the impacts of climate change but often lack the resources to organize campaigns for their rights. Through various advocacy projects and affiliations, Dhruv works to engage, connect and empower children in rights-based climate activism.

Januka Jamarkatel, 21, is a Child and Youth Rights Activist from Nepal, who has been working in close collaborations with diverse stakeholders, including government agencies, civil society organizations and communities since 2015. With expertise in the field of child rights and youth empowerment, Januka is a Facilitator for Child-Friendly Local Governance. She led the Municipal Child Club Network of the Itahari sub-metropolitan as the President from 2018 to 2021.

Brian King, 18, is a passionate Child Rights Advocate based in Nairobi, Kenya. With a dedicated focus on challenging stereotypes and empowering children, he is committed to fostering their participation and amplifying their voices to address the challenges they encounter. Brian is an experienced journalist and child advisor, actively contributing to the promotion of children's rights and perspectives.

Osish Niroula, 16, is a Human Rights and Child Rights Activist from Nepal. He eagerly wants to implement technology in the field of children's rights. He started this journey when he was nine years old and works to fill the gap between children. He has worked with organizations such as Terre des Hommes, YOUNGO, Pathfinders and the Nepal Government.

Jeshis Jamarkatel, 16, is a Child Rights Activist from Nepal who has been working for the rights of children for more than six years. He is also one of many child advisors at #CovidUnder19. He began his journey through school level and is now contributing at the international level as well.

Siroun Thacker, 17, is studying in Nairobi, Kenya. She is an avid reader and writer who is an Advocate of action against climate change and the promotion of human rights. She also has a strong sense of community and a passion for community service.

Amrit Rijal, 22, is a young Child Rights Advocate from Nepal engaged in the field since 2015. He is a medical student at Kathmandu University, a research enthusiast, and also an actively advocating medical education campaigner. Amrit is a Peer Mentor at the #CovidUnder19 initiative, where he works on child rights-based research and advocacy. He is the founder of 'Lakshyadeep', which aims to empower youth and promote social entrepreneurship. He also moderates and facilitates workshops on Child-Friendly Local Governance and other child rights-based projects.

Purnima Bhattarai, 16, is a Child Activist from Nepal with six years' experience working in a child club for a child friendly environment. She is a passionate activist willing to work for the welfare of children.

Rodoshee Sarder is a 17-year-old Child Advisor of #CovidUnder19 and Child Rights Activist from Bangladesh. She is a determined teenager working for children's and human rights as well as environmental rights and thus wants to make this world safe, secure and peaceful. She wants to be a scientist contributing for the improvement of the world alongside everyone.

Samikshya Dahal, 19, is young Activist from Nepal. Along with her studies, she is active in advocating for positive changes in society. With her touching poems, she spreads messages to in-person and social media audiences. She has also been raising her voice for addressing important issues like gender-based violence, taking part in different consultations and conferences. Her motivation for being involved in activism is that she wants a fair, equal and just society.

Prathit Singh, 21, is a Youth Advocate, working for the past three years in areas of child protection, participation and justice. He is a student of International Development at the Geneva Graduate Institute, specializing in human rights and humanitarianism and has been passionately promoting meaningful child and youth participation and intergenerational partnerships between children, young people and adults.

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FREEDOM OF EXPRESSION AND ITS LEGAL CONSEQUENCES IN THE ERA OF SOCIAL MEDIA

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Abstract

Freedom of expression has become a household phrase, but its meaning is deeper than first appears, as found in some international instruments and national laws. The Universal Declaration of Human Rights, the first human rights instrument adopted by the United Nations (UN) General Assembly Resolution in Paris on 10 December 1948 to abate human rights violations and atrocities after the Second World War, addressed freedom of expression as one of the touchstones of democracy. Presently, all 192 member states of the United Nations have signed up to it, by virtue of the other UN treaties they have signed, even though it was intended to be a soft law. The Declaration was signed as a soft law to be respected but was without binding force. However, through the passage of time, it has become a customary international law with binding force. Freedom of expression, which is an inalienable right, permits human beings, among other things, to seek information, and if received, the recipient may impart the same through any media, regardless of frontiers, to inform and educate people about their rights.

The importance of freedom of expression is that it is one of the pillars of human rights and is found in all the relevant international and regional human rights instruments. The international human rights instruments that have provisions on freedom of expression are: the International Covenant on Civil and Political Rights (ICCPR), which came into force on 23 March 1976, after it had been adopted for signature, ratification and accession by the UN General Assembly on 16 December 1966; the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the UN General Assembly on 21 December 1965; and the Convention on the Rights of the Child, which was adopted by the UN General Assembly on 20 November 1989 and came into force in September 1990.

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All three regional human rights instruments have recognized freedom of expression as an indispensable part of human rights and have provisions for it. The three regional human rights instruments are: the European Convention on Human Rights (ECHR), which was signed in Rome in 1950 and came into force on 3 September 1953; the African Charter on Human and Peoples' Rights 1981 (ACHPR), which came into force on 21 October 1986; and the American Covenant on Human Rights (ACHR), which was adopted in 1969 and came into force on 18 July 1978. Freedom of expression is also recognized by the Declaration of Human Rights Defenders, which came into force in 1998 to protect human rights defenders within the context of their work. The rights specifically mentioned in the declaration include freedom of expression. There are also national laws on freedom of expression. The position of Ghana is contained in Article 21 of the Constitution of Ghana 1992, which guarantees freedom of speech and expression, which include freedom of the press and other forms of media such as social, print and electronic media.

The essay addresses the limitations placed on freedom of expression, even though it appears to be absolute when one reads Article 19 of the Universal Declaration of Human Rights. Article 19 of the ICCPR seems to suggest that freedom of expression is not absolute, and a person who seeks information may impart it through any media, including social media, upon receipt of the same, provided the information put out on media, including social media, is within the limitations placed on freedom of expression. Article 9 of the ACHPR also suggests that the right to receive information is absolute, but the right to express and disseminate opinion shall be within the law prescribed by the member states.

Freedom of expression is a term of art and such freedom may be expressed in the form of writing, orally, print, or any other form of art or pictorial representation, and the limitations are placed on any of the modes and forms of expression stated above. Article 13 of the ACHPR prescribes criminal punishment for a person who goes beyond the limitations placed on freedom of expression with the aim of protecting public order, social order, national security, public health, public morality, and respecting the rights or reputations of others.

The article aims to discuss all the limitations imposed on freedom of expression, including those punishable either civilly or criminally, or both, for the purposes of respecting the rights of others and not defaming or slandering another person, protecting national security, public order, public health, or morality. The recent trend of events is that people go on social media to defame others, violate their rights, cause fear and

panic, and publish information about security threats, public order, and morality with impunity under the guise of freedom of expression. Social media, as a set of interactive internet applications, facilitates the creation, curation and sharing of the contents of information created either by individuals or in collaboration with others, and at the moment it seems to be the fastest form of media. The article shall discuss freedom of expression and its limitations from different human rights instruments and domestic statutes in respect of sanctions that can be imposed on a person who goes beyond their rights to violate the rights of others or defame others, or on a person who has published material that would affect the security of the state, public order, public health, or morals. It shall further discuss the forum where an action may be brought against the person who violates the rights of others in the name of freedom of expression and the appropriate forum where a person charged with an offence under it may be prosecuted.

Keywords: admissibility of evidence; communication; African Charter on Human and Peoples' Rights; criminalization of freedom of expression; documentary information; freedom of expression; International Covenant on Civil and Political Rights; limitations on freedom of expression; social media; Universal Declaration of Human Rights.

[A] INTRODUCTION TO FREEDOM OF EXPRESSION

Freedom of expression is one of the major drivers for fundamental human rights, and it is meant to inform people of their rights to hold opinions on matters, seek information and, when the information is received, share it with other people around the globe to help them make an informed decision. Information should be shared for the benefit of all instead of shrouding it in secrecy to breed suspicion and rumour-mongering which could lead to an unsuitable outcome. The main cause of the Second World War was Germany's attack on the Polish as inferior people who did not deserve to live in Poland and who were forced to give way for Germans to live there. Germany had secretly built up its army and weapons supplies, but, if the information about them had been made known to its allies, they might not have renounced the Treaty of Versailles.²

² [Treaty of Versailles: Primary Documents in American History](#), Library of Congress Research Guides.

The Universal Declaration of Human Rights 1948 introduced the right to freedom of expression to enable people to seek information, and receive and impart the same information through any media in regard to its frontiers to expose any activity that people ought to know. The work of journalists derives its roots from freedom of expression, which enjoins them to seek, receive and inform the people at large. The right to information is not available to journalists alone but to all and sundry, as each person is supposed to be each other's keeper. The Treaty of Versailles was signed after the First World War between Germany and Allied Nations on 28 June 1919, and the treaty required Germany, which lost the war, to pay reparations for the harm and damage it had caused, to disarm its military, lose territory and give up its overseas colonies. Even though Germany agreed, it secretly built up its army and weapons to renounce the treaty by attacking Poland, and that accounts for why the right to seek, receive and impart information now appears to be one of the major drivers of fundamental human rights. If the Germans had known of the intention of Adolf Hitler to engage in war with Poland and the fact that he was secretly building weapons of war to cause mayhem had been known to his allies, the Allied Nations would have foiled his attempt. Where people have the right to hold opinions, seek, receive and share information, nothing can be hidden from the people on the globe, and national borders cannot be an impediment to the free flow of information. Freedom of expression has bolstered human beings to expose all forms of wrongs for redress to be provided and has further encouraged persons promoting good causes to be cherished and hailed; otherwise, the negative activities of persons made in secrecy might bring the world to a standstill, as Adolf Hitler sought to do, as a result of which more than 50 million people, both military and civilians, died.³

[B] TYPES OF INFORMATION

There are different types of information. These include documentary, real, scientific, demonstrative, digital, or electronic information. Freedom of expression requires that any of these types of information be sought, received and disseminated unless there is a legitimate cause preventing their disclosure. Documentary information includes any form of document that carries information, such as journals, newspapers, magazines, judgments, letters, agreements, plans, laws, maps and others. Real information includes physical objects, equipment and substances such as acid, water, knives, cutlasses, metals, weapons, stones, cannabis, gold, diamonds, food, bananas, plantains, weapons

³ See DMDC (Defence Manpower Data Center).

of mass destruction and atomic bombs. Scientific information deals with results obtained from science, and it includes ballistic reports, DNA, paternity test reports, pathological reports, handwriting reports, medical reports, fingerprint reports, autopsy records, nail records, hair samples and records, blood tests and medical records, voice reports, expert reports and others. Demonstrative information includes photos, graphics and sounds that are used to illustrate information. Digital or electronic information deals with information that is stored or transmitted on electronic devices, including Google, WhatsApp, Facebook, YouTube, emails, faxes, telefaxes, telexes, ATM card systems, credit cards, debit cards, scanners, images and footage.

[C] THE TRADITIONAL MODES OF EXPRESSING INFORMATION

Information is sent by a sender to a receiver for several purposes, including education, training and dissemination. Where the message received is clear, plain and does not require further interpretation, the sender's objective is achieved. On the other hand, where the text is unclear, ambiguous, vague, or coded, the receiver is required to interpret or decode it to make it relevant. Until recently, when technological developments have made it possible to retrieve information sent to a receiver, such as WhatsApp, the position was that information sent was irretrievable from the receiver. However, where the information sent to the receiver is read and subsequently retrieved by the sender, it becomes irretrievable in the mind of the receiver, and it shall be deemed to have served the purpose for which it was sent.

The main modes of expressing information for whatever purposes are written, verbal, nonverbal and visual. Written communication includes handwritten, typewritten, painting, WhatsApp, email, fax, text message, braille and drawings. Verbal communication is mainly spoken language and may be coded or uncoded. Non-verbal communication includes sign language, kinesics (gestures), oculosics (eye movement and behaviour) and facial expressions. Visual communication includes: drawings, artistic work, technical drawings, cartooning, doodling, both symbolic, and expressive; sculptures; social media platforms; Instagram; Zoom; Facebook; and symbols and signs produced by audiovisual aids. A person expresses oneself through any of the above modes of communication for others to understand and, at the same time, these may be used by the sender to a receiver to impart or educate on the information sought and obtained through whatever means.

[D] MODES OF OBTAINING INFORMATION: LEGALLY OR ILLEGALLY OBTAINED INFORMATION

Information may be obtained freely, in accordance with procedures provided by law, or through illegal means. There are some pieces of information that come naturally in the course of one's work. A person who has information to share may invite the press to attend a news briefing, issue a press statement, or attend a lecture or conference to seek, obtain and disseminate the same for educational, entertainment, political, or any other purposes. In Ghana, in the case of public institutions, including universities, hospitals, ministries, agencies and private organizations that receive public resources or provide public functions, any person may seek information from them in accordance with the Right to Information Act 2019 (Act 989) unless that information has been exempted under the Act. The exempted types of information that cannot be lawfully obtained under the Act are: information for the President or Vice President of Ghana but excludes document containing factual or statistical data; information relating to Cabinet except where Cabinet waives its right and grants access to it; or any information containing factual or statistical data, information relating to law enforcement and public safety but with few exceptions, information affecting international relations with few exceptions, information that affects the security of a nation, information with economic and any other interests, economic information of third parties, information relating to tax with an exception which permits the person whom the information relates to waive, internal working information of public institutions, parliamentary privilege, information on fair trial, information on contempt of Court, and privileged information unless it is knowingly waived by the person who is entitled to that privilege (Right to Information Act 2019 (Act 989), sections 5-15). The other exempt information under the Act is information about the disclosure of personal matters, whether the person is living or dead, and a disclosure of information for the protection of public interest that may be waived, and when it is waived, the person who disclosed it or authorized its disclosure shall not be liable to civil or criminal proceedings for the disclosure or authorization of the disclosure of that information (sections 16 and 17).

The rationale behind the Right to Information Act 2019 (Act 989) is that public officers hold their respective offices as trustees for the people of Ghana, and they cannot refuse to disclose any information that is available in their office unless it is exempted by law. The applicant is

first required to apply to the information officer of the institution, and where the information officer refuses to disclose, the applicant may submit an application for internal review of that decision to the head of that public institution. Where the head of the public institution fails to give a favourable decision on review, the aggrieved applicant may either apply to the High Court for judicial review or to the Right to Information Commission (sections 19, 31, 33, 36 and 40). The Right to Information Act 2019 (Act 989) helps to promote transparency and accountability in public institutions where information about the institution is sought, received and made known to the public for public consumption and scrutiny.

The security agencies are clothed with some powers to obtain information from people who ordinarily would not have cooperated. The state agencies, including the police, Economic and Organized Crime Office (EOCO) and the Special Prosecutor, have the power to arrest, detain and search a person, institutions, or organizations to obtain information in cases where there is a suspicion of crimes. The Criminal and Other Offences (Procedure) Act 1960 (Act 30) empowers the police, the Special Prosecutor and the EOCO, upon an application made *ex parte* to enter any private house or place, to search and seize tangibles and intangibles such as mobile phones, computers and equipment with or without the presence of the owner to obtain information to be used against them. The Special Prosecutor and the police have the power to make an application *ex parte* to obtain a warrant to intercept, detain, or open an article being sent by courier, post, or intercept communication and record or install a device used to intercept messages and retain the same. The service providers in Ghana, including Scancom (MTN Ghana), Vodafone and Airtel Tigo, have installed interception capabilities that mandate them to retain subscribers' information for a minimum of six years, traffic data (discussions on the phone) for a minimum period of 12 months, and any relevant content data for 12 months, but this can be used by a security agency on an application, for example made to the High Court for that purpose. It provides, thus:

- (1) A service provider shall retain
 - (a) subscriber information for at least six years;
 - (b) traffic data for a period of twelve months; and
 - (c) relevant content data for a period of twelve months.
- (2) Where it is necessary for traffic data and content data to be retained for more than twelve months, the investigative officer, the senior investigative officer authorized by a designated officer or the

designated officer, as the case may be, may apply ex parte to the High Court, for an extension of the period (Cybersecurity Act 2020 (Act 1038), section 77).

The phone calls made, text messages sent and subscriber information are stored for a minimum of 12 months and up to six years, and the voice recordings, messages sent (except WhatsApp, which is encrypted) and subscriber information may be released to security agencies on an order made by the High Court. Additionally, information stored on computers may be obtained by security agencies with an order from the High Court to search, detain and store the relevant information. A police officer of the rank of Assistant Superintendent may enter a shop, warehouse, ship, boat, or vessel, conduct a search and take, without a warrant, any property the officer has reasonable cause to believe has been stolen or dishonestly received.

Information may also be obtained through illegal means, including entrapment, undercover investigations, secret recordings and the payment of money to someone who has the capacity to obtain the information without the consent of the person holding the information, and such information can be used for the purposes for which it was sought and obtained unless a law specifically forbids its use. There is always a misunderstanding between illegally obtained information and illegally obtained evidence. Illegally obtained information may be used to educate and inform the people, even where the law is settled that a person who seeks and obtains such information commits an offence. It is an offence for a person who seeks and obtains sexual photographic images of another person to disseminate or share them with another person, or to distribute by any form of communication a person's private image or moving images of another person engaged in sexual conduct to extort money (sexual extortion), or use a computer online service, internet service, or local internet board service to give detailed information about a child to be identified for the purposes of engaging in sexual intercourse, sexually explicit conduct, or unlawful sexual activity (cyberstalking of a child, Cybersecurity Act 2020 (Act 1038), sections 62, 66, and 65).

Furthermore, it is an offence for a person to obtain classified information under the State Secrets Act 1962 (Act 101) and disseminate it (section 3). There are specific enactments made to regulate freedom of expression on information meant to be disseminated for the benefit of other persons by the receiver of that information in the interests of national security, public safety, the prevention of crime or disorder, the protection of

health or morals, or the protection of the rights and freedoms of others.⁴ However, where a person disseminates such forbidden information, the information is already in the public domain, and the offender may be charged and tried, but the information shall continue to be in circulation. A person may record their discussions with another person without that person's consent, and the information obtained may be made available to the public to show the conduct of the person.

Illegally obtained evidence refers to the use of information obtained contrary to the law to be used in court proceedings as evidence. An illegally obtained piece of information may be used for whatever purpose it was obtained, but where the information is to be used in court as evidence, that is where the laws on illegally obtained evidence would be invoked. The general common law position is that illegally obtained evidence is admissible, irrespective of the mode used to obtain it. The House of Lords in the case of *Attorney-General's Reference (No 3 of 1999)* (2001) did not follow the cases of *R v Sang* (1980) and *Delaney* (1989), where relevant evidence was rejected by the mode in which it was obtained, and reaffirmed the common law position that illegally obtained evidence is admissible. *Attorney-General's Reference* is a case where a rapist was made to take a DNA test to be used in a particular case but it was instead used in a subsequent case where the semen was proved to be that of the rapist. The House of Lords held that, even though the police should not have kept the DNA without the consent of the rapist, it was relevant because it proved that he raped another woman after the DNA test had been conducted. The exposition by the Supreme Court on illegally obtained evidence and the proper interpretation of Article 18(2) of the Constitution of Ghana are that illegally obtained evidence is admissible, subject to a few exceptions. Where it is obtained for the prevention of crime, protection of health and morality, or for public order or national security, it is admissible, but where it was obtained to be used in a civil suit without the consent of the person who was recorded, it is inadmissible.

In *Cubage v Asare and Others* (2017)-(2020), in which the plaintiff recorded a Presbyterian minister on a land matter where the minister admitted the ownership of the plaintiff to the land and denied the same in his witness statements, on a reference to the Supreme Court by the magistrate, the Supreme Court held that the illegally obtained evidence that was to be used in civil proceedings was inadmissible. A spouse who videos the sexual intercourse between that person's spouse and another person with a sexually transmitted disease may use it as evidence under

⁴ Article 2 of the ECHR, which can be used by virtue of Article 33(5) of the Constitution of Ghana 1992, and Article 19 of the International Covenant on Civil and Political Rights 1954.

Article 18(2) of the Constitution for the prevention of both health and morals and should be admissible as evidence. A person who obtains information through whatever means can disseminate it unless the dissemination of that information has been criminalized, but criminalizing such information cannot erase it from the minds of the recipients of that information. Therefore, where information is illegally obtained from an individual and it is the truth of the matter, the issue of defamation shall not arise unless it is circulated, such as in cases of sexual extortion or nude pictures that have been criminalized. Unless there is a legitimate limitation placed on freedom of expression, the source of information, as to whether it was illegally obtained or not, becomes immaterial when it comes to the dissemination of that information.

[E] INTERNATIONAL HUMAN RIGHTS INSTRUCTIONS ON FREEDOM OF EXPRESSION

The Universal Declaration of Human Rights, the first human rights instrument, made in 1948 after the Second World War, was made, *inter alia*, to provide standard guidelines for the people of the world to observe that there are rights that are inherent in people and should be protected and respected by governments and individuals, and that violations of each of which should attract sanctions, and, furthermore, it aimed to inform the populace about the barbarous acts that were perpetrated on human beings during the Second World War and which should never happen again. The Universal Declaration of Human Rights basically sought to safeguard and promote the human, civil, political, social and economic rights of people around the world to achieve peace, freedom and justice in the world. All 30 Articles of the Universal Declaration of Human Rights are important as they deal with human, civil, political, social and economic rights, but six of them are essentially considered the basic human rights. The basic human rights are: Article 3, which is on the right to life, liberty, and security of the human person; Article 4, which prohibits any form of slavery and servitude; Article 5, which avoids torture, cruel, inhuman, and degrading treatment; freedom of opinion and expression under Article 19; the right to work and protection against unemployment under Article 23; and the right to education under Article 26. Article 19 of the Universal Declaration of Human Rights appears to suggest that freedom of expression is absolute and without limitations. It provides thus:

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, regardless of frontiers.

Despite the fact that Article 19 seems on the face of the Declaration to be an absolute right without any restrictions or limitations, a careful reading of the Declaration as a whole clearly imposes restrictions on the right to freedom of expression. Article 1 of the Declaration, for instance, provides that human beings are born free and equal in dignity and rights and therefore places an injunction on other human beings to respect the rights of others. Therefore, where the exercise of a right by a person will attack the hard-earned reputation of another person, the attack would constitute an infringement of the right of the other person. Similarly, where freedom is exercised in a manner that will affect national security, public order, or morality, it should not be exercised to affect the peace and tranquillity the people have been enjoying. Generally, with the exception of Articles 4 and 5 of the Declaration, which are on prohibition of slavery and servitude of whatever form, torture, cruel and inhuman or degrading treatment or punishment, which are absolute rights, all the other rights are subject to the rights and dignity of others.

The Universal Declaration of Human Rights came into force on 10 December 1948, as a soft law. The United Nations (UN) member states, by their own acts and actions, accepted it as a binding document by pledging their support to cooperate with the UN to respect and observe human rights and fundamental freedoms. The member states accepted the Declaration as a common standard of achievement for all people and nations in the field of human rights and committed themselves to teaching and educating people and nations to respect the rights proclaimed in the Declaration. Indeed, the Declaration is a normative statement to observe and preserve human rights, but the international, regional, sub-regional and national courts have held that it has binding effects and violations could be found on it (Preamble) (see *Anudo Ochieng Anudo v United Republic of Tanzania (Merits)* (2018); *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania (Merits)* (2018); and *Mulindahabi v Rwanda* (Ruling) (2020)).

The three human rights courts on the globe, namely, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights, have held in their respective jurisprudence that the Universal Declaration of Human Rights is a binding declaration, and a state that violates any of the provisions in it may be found liable for a violation of the same. All the international courts,

including the International Court of Justice, have held that the Universal Declaration is a binding document and violations have been found against states (see *Anudo Ochieng Anudo* and *Mulindahabi v Rwanda*).

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly on 19 December 1966 and came into force on 23 March 1976, as a legally binding treaty to cater for human, civil and political rights. Ghana signed and ratified it on 7 September 2000. Article 19 of the ICCPR also deals with freedom of expression, and it provides:

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 the 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, of public order (ordre public), or of public health or morals.

The ICCPR set out the parameters within which limitations could be imposed on freedom of expression. The limitation should relate to the protection of the rights and reputations of others, the protection of national security, public health, public order, or morals, and, therefore, any limitation made outside the restrictions imposed by Article 19 cannot be justified. Freedom of expression was further reiterated in the African Charter on Human and Peoples' Rights (ACHPR), which was unanimously adopted on 27 June 1981, in Kenya, by the African heads of state and governments at the Organization of African Union (OAU) meeting. Ghana ratified the Charter on 1 June 1989 to make it a binding treaty there. Article 9 of the Charter provides, thus:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinion within the law.

The ACHPR did not make the right to receive information an absolute right as it carries with it duties and responsibilities, unlike the provisions on all forms of exploitation and degradation of human persons, particularly slavery, servitude, torture and inhuman and degrading treatment, which have been absolutely prohibited (by Articles 5 and 9). The rights and freedoms exercisable by people under the Charter go with duties including

the rights of others, collective security, morality and common interests of the people. Article 27(2) of the Charter, which is on duties that go with the accompanying rights, provides thus:

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality, and common interest.

The right to information can be legitimately restricted by taking into account the respect of the rights of others; the collective security of the persons and the country; morality, that is, the principles of good and bad behaviour and right and wrong; and the common interest of every person living in Ghana. The three binding international human rights discussed above have placed emphasis on the importance of freedom of expression as one of the main drivers of human rights, but it is also subject to the rights of others, the collective security of the people, morality and common interest. A person who exercises freedom of expression in violation of the limitations placed on it by the instruments would be deemed to have violated the duties imposed on them, and this may have civil or criminal consequences.

[F] CONSTITUTIONAL PROVISION ON FREEDOM OF EXPRESSION IN GHANA

The Constitution of Ghana 1992, which is the supreme law in Ghana, came into force on 7 January 1993. It has the whole of its Chapter 5 on fundamental human rights and freedoms. Article 21(1)(a) is on freedom of speech and expression, which includes freedom of the press and other media. It provides, thus:

All persons shall have the right to (a) freedom of speech and expression, which shall include freedom of the press and other media.

The right to freedom of speech and expression seems to be an absolute right under the Constitution, but if Chapter 5 of the Constitution is read as a whole, it is also limited to respect for the rights and freedoms of others and for the public interest, which includes public order, national security and morality. Article 12(2), which does not make freedom of expression an absolute right in Ghana but is subject to the rights and other freedoms of people, provides thus:

Every person in Ghana, whatever his race, place of origin, or political opinion, colour, religion, creed, or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter, but subject to respect for the rights and freedoms of others and for the public interest.

The Constitution of Ghana gives rights to persons to exercise and at the same time imposes a duty on a person exercising those rights to ensure that the rights of other persons are respected, and, furthermore, the exercise of those rights will not cause insecurity or pose threats to the people of the country. The Directive Principles of State Policy, which are presumptively justiciable, also provide that the rights enjoyed by the people are inseparable from the duties and obligations imposed on them to perform or respect the Constitution (Article 41).

[G] FREEDOM OF EXPRESSION WITHIN THE NATIONAL CULTURE

Until the 21st century, the chiefs and opinion leaders in Ghana communicated with their subjects through “gong gong”, which was limited to the areas where the gong gong was beaten. The gong gong beater, who communicated with his natural voice without the support of a speaker, moved from one spot to the next to convey the message he had been tasked to deliver to the populace until his listeners were fully informed. Any listener who was opposed to the message conveyed or wanted to make a contribution could not have done so as the media was available from the Chief to his subjects and not *vice versa*. The gong gong was the property of the chief, and the gong gong beater could not convey any message to the people without the permission of the chief. In some areas, a person who had important information to share with others, such as the loss of their property or the arrival of a priest or pastor on a particular day, had to pay a token for the release of the gong gong and another token to the gong gong beater, whose work was primarily gratuitous, to convey the message. The use of gong gong to disseminate information is still used in some of the rural parts of Ghana, but in most cases, it is jointly owned and managed by the chiefs and the assembly members. This alludes to the fact that the right to freedom of information was practically absent in the country even though the three international instruments discussed above were in force.

Under the traditional setup, young people are not supposed to stand up against a decision taken by the elderly, whether it is in the best interests of the younger person or not. The Akans have a proverb that says that, when the elderly speak, the young person will not be granted audience. In the era of chieftaincy, the common statement is that at the palace the chiefs exercise power and not law. Freedom of expression is one-sided at the palace, as the chief and his elders can say whatever they would like to say, but the same right is not available to the other

side. The chiefs and their elders can insult and embarrass the person before them, and woe betides anyone if they retort or insist on defending themselves. Traditionally, the chiefs had the power to impose sanctions such as “panyarring” (the person is seized until their indebtedness is paid), inhuman treatment including human sacrifice, banishment and fines of different forms. When panyarring was abolished in 1844 among the seven coastal chiefs of the Gold Coast by the Bond of 1844, it continued in other parts of present-day Ghana until the British took over the prosecution of criminal offences and relieved the chiefs of the powers to try criminal cases. Freedom of expression is seen in customary arbitration cases before the courts, as the chiefs are supposed to be independent and hear both sides; otherwise, it may not be enforced by the courts on grounds of breach of the rules of natural justice: *audi alteram partem* (hear both sides); and *nemo iudex in causa sua* (do not be a judge in your own cause).

[H] NEWSPAPERS PRODUCED TO DISSEMINATE INFORMATION

The first newspaper was produced on the Gold Coast in 1922 under the name *Sir Charles McCarthy’s Royal Gold Coast Gazette*. It was a state-owned newspaper established on the Gold Coast during the commemoration of the silver jubilee of King George V, who was the head of the British Empire. The newspaper was established to transmit information from British Broadcasting Corporation (BBC) programmes to the then-Gold Coast to update the British and the few indigenous elites on events on the globe. The newspaper was used to counter information and give education to the few elites during the struggle for independence by the nationalist press. The *Ashanti Pioneer* was established in 1939 as the mouthpiece for the Asante people and carried out their political campaigns (Owusu Ansah 2014). At the time of Ghana’s independence, there were about 10 independent private newspapers, which were mainly established to educate and fight colonialism, but all of them died out during the First Republic as their agenda was anathema to the Socialist Government introduced by the then President.

The Newspaper Licensing Act 1963 (Act 189) was also passed to restrict the operation of private newspapers to curtail private ownership, as the agenda for the state was to promote state ownership. The Newspaper Licensing Act was repealed during the Second Republic to allow private newspapers to flourish, with the aim of promoting freedom of expression. Dr Kwame Nkrumah established the Ghana News Agency as a state-

owned entity to promote the agenda of the state. During the period of the First Republic, the Preventive Detention Act 1958 (Act 17) (PDA), which provided the President with the power to arrest and detain a person for up to five years, if the President was satisfied that the presence of the person was a threat to the security of the state. The PDA, which was associated with Dr Kwame Nkrumah, was not made by him, but it was one of the existing laws that were passed on to his Government. The PDA was enacted by the colonial Government and signed by the then Chief Justice, Sir Arku Korsah, in the absence of the Governor (see also *Asare v Attorney-General* (2003)–(2004): 855). Presently, there are two state-owned newspapers, the *Daily Graphic* and the *Ghanaian Times*. There are about 135 newspapers published in Ghana, and out of the 135, only nine are daily newspapers.⁵

[I] BROADCASTING SERVICE IN GHANA TO SHARE AND DISSEMINATE INFORMATION AND PROMOTE LOCAL MUSIC

On 31 July 1935, the first radio broadcasting station was established in the Gold Coast by the then Governor, Sir Arnold Hudson, to disseminate information from the colonial Government to the people who were predominantly illiterate. The state broadcasting station, which was known as Station ZOY, broadcast from a wired relay station in Accra and had a limited audience. On 31 July 1935, the Governor arrived at 5.45 pm with his message explaining the rationale for setting up the radio station as follows: “One of the main reasons for introducing the Relay Service is to bring news, entertainment and music into the homes of all and sundry” (Ghartey-Tagoe 2010: 70).

Even though one of the main purposes of establishing the radio was to broadcast news, it was carried out by the BBC. The English language was the official language used to broadcast; the other four Ghanaian languages that were used were Fanti, Twi, Ewe and Akan. The Hausa language was subsequently introduced as one of the local languages. It also promoted cultural music, which was also used to inform and impart the information gathered to the people. Some of the music was produced to inform the people about current and important issues, but being a national broadcast, any music that was likely to incite the people against the colonial master was not played. The indigenous people did not have the opportunity to disseminate or impart information they had sought and received on state-owned media, which determined what to publish

⁵ “List of Newspapers in Ghana”.

and what to reject, despite the fact that the British were signatory to all the international instruments recognizing freedom of expression as the driver of human rights.

[J] HISTORY OF TELEVISION IN GHANA

In 1965, Ghana established its first television station as a division of the Ghana Broadcasting Corporation, which was previously known as Station ZOY. The television division was for black-and-white screens and was primarily meant to disseminate information. Ghana Broadcasting Corporation was tasked with performing three mandates: as a state broadcaster charged with disseminating and imparting information; as a public service broadcaster; and, finally, as a commercial broadcaster in Ghana. People were not given the opportunity to buy airtime to impart information gathered by them and express their opinions, as stories were censored to suit the needs of the state. Freedom of expression through national television was one way, as presentations made by those in government were published while those by those in opposition and the downtrodden were not. In some matters, the individuals who could speak to them to inform them that the people had been taken for a ride by the politicians were criminalized, arrested and prosecuted. At the end of June 2023, the National Communications Authority had authorized 170 television stations to operate in Ghana.⁶ Out of the total number of authorizations given, only 43 cover the entire country.

[K] PRIVATE RADIO AND TELEVISION STATIONS

It took some time for private radio and television stations to operate in Ghana, as the Ghana Frequency Registration and Control Board established under the Supreme Military Council refused to issue frequencies to individuals to operate them for obvious reasons, mainly to deny the people the opportunity of establishing private radio and television to educate and inform them of the importance of democracy. The conditions required for a licence under the law were difficult to meet, and, in cases where the conditions were met, the panel would deny it on flimsy grounds. Due to the difficulty of obtaining a licence to operate private radio and television, the first private radio station in Ghana was not established until 1994 under the name Radio Eye. The radio station had the potential to educate the people on matters that were sensitive, but the Criminal Investigation Department of the Ghana Police Service seized

⁶ National Communications Authority, “[Authorised TV Broadcasting Stations](#)”.

its equipment and arrested the management of the station barely a week after it had started operations. It was a clear case of curtailing freedom of expression, and the police acted with impunity without resorting to the courts.

Furthermore, it was in 1995 that the Frequency Registration and Control Board issued a licence to Crystal Television to operate the first private television station in Ghana. In 1997, Metro Television and TV3 were also granted frequency licences to operate private television, and both operated the same within the year. It gave the people the opportunity to freely express their opinions through discussions on those media. The people could phone in and contribute to discussions on matters of national concern.

[L] CRIMINALIZATION OF FREEDOM OF EXPRESSION UNDER THE CRIMINAL OFFENCES ACT 1960 (ACT 29)

The Criminal Offences Act 1960 (Act 29), then the Criminal Code, criminalized some acts to restrain freedom of expression for various reasons. These offences included intentional libel, negligent libel and the publication of seditious materials. In 2001, the Criminal Code (Repeal and Criminal Libel and Seditious Laws Amendment Act) 2001 (Act 602) was enacted to repeal the laws on criminal libel and seditious law based on which some journalists were charged, tried, convicted and sentenced to various terms of imprisonment (Criminal Offences Act 1960 (Act 29), sections 112-119). The criminalization of negligent libel, intentional libel, publication of seditious materials and defamation empowered governments, including military and civilian, to threaten journalists and, in effect, curtailed freedom of expression. At the moment, there are two legislations that journalists deem to be an affront to freedom of speech. They are section 208 of the Criminal Offences Act 1960 (Act 29), which deals with the publication or reproduction of a statement or rumour that is likely to cause fear and alarm to the public or to disturb public peace when the publisher knowingly or did not have reason to believe that the said publication is true, and section 76 of the Electronic Communications Act 2008 (Act 775), which deals with a person who uses electronic communication services to send false or misleading information that is likely to endanger the life of a person, ship, aircraft, vessel, or vehicle. As a matter of fact, some journalists have been arrested and detained for having acted contrary to section 208 of Act 29, and the Ghana Journalist Association is asking for the repeal of both laws.

[M] RESTRICTIONS ON MASS MEDIA UNDER THE 1992 CONSTITUTION

The issue of censorship by the Media Commission and its power to control and direct media houses as to what to do within the Constitution were brought before the Supreme Court for its interpretation and enforcement of regulations 3 to 12 and 22 of the National Media Commission (Content Standards) Regulations 2015, LI 2224, as they amount to censorship and subject the operators of mass media communications to Media Commission control and direction. The Supreme Court held that censorship was permitted under the Constitution of Ghana but must be justified in the national security interest, for public order, public morality, or the protection of the rights of others. On the question as to whether the Ghana Media Commission is to control and direct the contents of media houses' publications, the Court held that it is the media houses that should determine this and not the Ghana Media Commission (*Ghana Independent Broadcasters Association v Attorney-General and Another* (2017)).⁷

[N] CONTEMPT OF COURT

Contempt of court is another area of law that people, and for that matter, journalists, see as an affront to freedom of expression and should cease to form part of the laws in Ghana. Contempt is a common law with inherent powers vested in the Superior Courts to punish for themselves and the High Court with additional powers to punish for the lower courts. Civil contempt is committed by a person who wilfully disobeys a speaking order of a court of competent jurisdiction, which is either compelling a person to do an act or restraining a person from doing an act. A criminal contempt may be committed on the face of the court (*in facie curiae*) or outside the face of the court (*ex facie curiae*) by a person whose acts constitute any of the following: making a statement to undermine the administration of justice; or tending to scandalize or scandalize the court; or prejudicing or impeding pending proceedings; or tending to lower the authority of the court; or prejudicing or tending to prejudice; or interfering or tending to interfere with pending proceedings; or tending to interfere with or obstruct the administration of justice (Articles 11 (1)(e), 19(12) and 126(2) of the Constitution of Ghana 1992).

⁷ See also the case of *Independent Media Association of Ghana and Others v Attorney-General and Another* (1996-1997) where it was held that there shall be legitimate restrictions on the mass media, particularly the broadcast media, within the limits provided by the Constitution.

[O] HISTORY OF SOCIAL MEDIA

The core function of the media is to promote freedom of expression, and they have been tasked with searching for information, and when it is received, it shall be imparted. Freedom of expression, even though it is the driver of all the human rights provisions by the fact that when people seek information and it is obtained, it is imparted to them to know their rights, but the right is curtailed to avoid a situation where its strict application will affect the other human rights that people are to enjoy freely without any hindrance. The regulation of freedom of expression is very difficult among the people in the media, and the emergence of social media has made it impossible to define the parameters of freedom of expression, which is also an affront to the exercise of fundamental human rights.

SixDegrees.com, the first social media site, was funded by Andrew Weinrich in 1997 to get people connected to their family members, friends and acquaintances by sharing information on current matters in politics, education and culture and to promote freedom of expression. Persons who ordinarily could not express their opinions, ideas and education on social media were given the opportunity to stay tuned on social media to exercise their freedom of expression with others, but it lasted for only two years after having operated as a social network service during that time. The media failed to convert its popularity into revenue and could not replace its “bubble”, which burst as a result of oversubscription after it had been sold out.⁸ Facebook was founded in 2003 by Mark Zuckerberg as Facemash and became known as Facebook in February 2004. Twitter was subsequently founded on 21 March 2006.⁹ Facebook was founded to help students at Harvard post their photographs and personal life information with respect to their respective clubs and class schedules. The objective of founding Facebook changed when it allowed users who signed up for free profiles to get connected with their friends, family members, work colleagues and people they did not know but wanted to establish acquaintances with for brainstorming and networking.¹⁰

The underlying idea behind the founding of the 10 principal social media platforms is to promote freedom of expression and enable their subscribers to share ideas, opinions, music, articles, videos and intellectual properties. Social media has been explained as a digital

⁸ “SixDegrees.com”.

⁹ “Twitter”.

¹⁰ “Facebook”.

technology that allows the sharing of information and opinions through text and visuals. Social media includes WhatsApp, Facebook, Instagram, Twitter, YouTube, LinkedIn, Snapchat, Pinterest, Reddit and Threads. They are made principally for the expression of information and ideas, and 59 per cent of the global population uses social media.¹¹ The rationale behind the introduction of social media is to enhance the use of text and visual communication to promote information and opinion-sharing. Social media is faster and cheaper than existing media such as radio, television, newspapers, fax, telegraph, telephone and journals, and it further updates the world with new things. The main advantage social media has over other media is that it helps people communicate from the comfort of their homes in a safe and secure environment. Mobile devices and computers, which are the main devices used for social media, are both affordable and accessible, connect anywhere in the rural parts of developing countries, and are indeed the dominant media in the world.

[P] SOCIAL MEDIA AND FREEDOM OF EXPRESSION

Social media providers do not check on their subscribers about what they say, write and post, unlike traditional media, which are visible in their respective countries and are held liable either in civil or criminal prosecution. When journalists write or make pronouncements that are outside the scope of freedom of expression, they are dealt with in accordance with the law, but social media subscribers say or post defamatory and other information that has been restricted by law, and their true identities may not be disclosed to suffer for their wrongdoings. The combined effect of Articles 21(1)(a) and 12(2) of the 1992 Constitution is that people have the right to freedom of speech and expression, which includes freedom of the press and the media, but those rights are subject to respect for the rights and freedoms of others and for the public interest. The restrictions imposed on the exercise of freedom of expression by individuals, the press and other media are limited to respect for the rights and freedoms of others and national interests.

Article 9 of the ACHPR, of which Ghana is a member state, gives individuals, the press and the media the right to receive information, but when it comes to the right of freedom and opinions, it is to be exercised within the law. The Charter has provisions on duties, which provide that the rights and freedoms that each individual exercises are subject to the rights of others, collective security, morality and common interest (Articles

¹¹ Buffer, "[Social Media Terms: A Comprehensive Glossary by Buffer](#)".

27, 28 and 29). It is not right for individuals, the press, and the media to exercise rights and freedoms on social media without corresponding duties and responsibilities.

There is no international human rights instrument that makes freedom of expression an absolute right to be exercised to defame others and cause fear and panic in society. However, a reasonable number of social media practitioners use the right to express and disseminate information to defame others, undermine the administration of justice, and cause security threats due to the fact that they cannot be arrested or dealt with within the jurisdiction or operate under pseudo names. Is this the Ghana we want?

The European Convention on Human Rights (ECHR), which has persuasive effect on Ghanaians by virtue of Article 33 of the Constitution of Ghana, permits Ghanaians to use rights, duties and guarantees with respect to fundamental human rights and freedoms that have not been specifically mentioned in the Constitution, provided that these rights, duties, and guarantees are considered to be inherent in a democracy and intended to secure the dignity and freedom of individuals (Article 33(5)). The ECHR provides detailed duties and responsibilities for the exercise of freedom of expression. It provides, thus:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (Article 10(2) ECHR).

The Convention clearly and succinctly prescribes the limitations to be placed on freedom of expression, including criminal sanctions. In a democratic country, people are supposed to be law-abiding to make the country worth living in. There are limitations to be placed on freedom of expression in a democratic state in a form of law that is both civil and criminal and shall be informed by factors such as national security interests, the territorial integrity of the state, public safety, prevention of crime or disorder, respect for the rights of others without unjustifiably damaging their reputation, disclosure of privileged information, and maintaining the authority and impartiality of the judiciary. Where limitations are placed on freedom of expression in the form of law, the violation may be addressed by civil rights, criminal law, or quasi-criminal law, depending on the nature of the case.

The established jurisprudence in common law countries is that where a person, press, or media does any act that will constitute criminal contempt, as discussed above, the act of that person or media would be deemed to lower the authority or impartiality of the court and should be dealt with by the court, unless it is a lower court where the contempt would be determined on its behalf by the High Court. The power of contempt is accepted in common law countries to enable the judiciary to maintain its authority and impartiality. In the case of *Republic v Mensa-Bonsu & Ors* (1994)-(1995) a journalist described Justice Abban, in a case where he delivered an opinion in the Supreme Court, as scandalous when the judge attributed a statement made in his judgment to former Prime Minister of Ghana, Dr K A Busia. Even though the statement was not made by him, he was convicted of criminal contempt for publishing scandalous, abusive and contumacious material intended to undermine the authority and impartiality of the court.

Where such a statement had been made on social media and the person involved changed their identity or the identity of the person is known but the statement was made outside the jurisdiction of the court, such a person will go unpunished while the image of the court that has been dented by that person cannot be restored. The established jurisprudence on contempt is that the truth of the matter is immaterial, provided the statement made would undermine the authority or impartiality of the court and cause the court to lose its potency.¹² In the case of *Zugic v Croatia* (2011), the European Court of Human Rights held that the applicant was guilty of contempt in so far as he used abusive words towards the national judge of Croatia who was sitting on the matter. The Court further held that the abusive words used against the judge in pending proceedings fell within the restricted part of the ECHR, which places restraint on freedom of expression to maintain the authority and impartiality of the judiciary.

There are some laws that are enacted specifically to criminalize freedom of expression to prevent security and national threats and are within the law. Section 76 of the Electronic Communications Act 2008 (Act 775) has been used to criminalize false or misleading communications by the use of electronic communications services that are likely to prejudice the efficiency of life-saving services or endanger the safety of any person, ship, aircraft, vessel, or vehicle. The Ghana Journalist Association is demanding its abolition; however, it is a restriction on freedom of

¹² *Saday v Turkey* (2006); and Bamford Addo JSC quoted the English position, which is part of the inherited common law in the case of *Republic v Mensa-Bonsu*. Anarchy would reign were people to fail to protect the integrity of the court, which is the bulwark of Ghana's democracy.

expression, which is permissible within the law. Any individual, press, or media that acts contrary to the law within the jurisdiction would be tried by a court of competent jurisdiction, but where it is made on social media and the persons involved are not within the jurisdiction, it is done with impunity while it endangers the lives of persons or the efficiency of life-saving services. The Inter-American Commission on Human Rights provision on freedom of expression, which is similar to that of the European Commission, goes further to state that any propaganda for war and any advocacy to promote national, racial, or religious hatred that amounts to violence or any similar action against individuals or groups of persons on any grounds shall be considered a criminal offence to be punished by law (Article 13(5) Inter-American Commission on Human Rights 1959). The test that is used to determine whether restrictions on freedom of expression are justified is known as the Three-Part Test. The first test is whether the restriction is provided by the laws of the country. The second test is that the restrictions must pursue legitimate purposes. The third test is that the restrictions must be necessary for a legitimate purpose (Article 19(2) ICCPR, of which Ghana is a member state).

The legitimate aims and purposes for making laws that provide for restrictions on freedom of expression have been stated in Article 10(2) of the ECHR, which include duties and responsibilities that are necessary in a democratic society in the interests of national security and public safety, for the prevention of crime and disorder, protection of health and morals, protection of the reputation of others, privileged information and maintaining the authority and impartiality of the judiciary.

Information that is to be received freely has also been restricted by enactments, including the Right to Information Act 2019 (Act 989), and a person who violates the restrictions commits a criminal offence. It provides that a person who wilfully discloses information exempt from disclosure commits an offence and, upon conviction, 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 imprisonment of not less than six months and not more than three years, or to both (section 81 Right to Information Act 2019 (Act 989)). However, on a daily basis, people on social media have access to some of the exempt information on the President, Vice President, Cabinet, law enforcement and public safety, international relations and security of the state, but they cannot be tried with those who disclose that information to them as they communicate on social media and are outside the jurisdiction of the courts and cannot be charged before the courts.

The purposes for introducing social media to share information and educate people have been abused, as people have been using it to defame and malign others and cannot be sued for a tort of defamation because the identities they provide are false. Furthermore, some of the people who are outside the jurisdiction of the courts undermine the authority and impartiality of the courts with impunity, as the courts do not have jurisdiction to deal with them. Information on national security, national interests, prevention of crime and disorder, protection of health, or morals that must be protected is posted on social media to undermine the security of the state, but those involved cannot be brought to Ghana to be prosecuted as they are neither universal nor extraditable offences.

Another serious legal consequence of social media is fake news. Social media was created to educate, but most of the information on social media is fake. At times, statements are attributed to some personalities, which is palpably false and could not have happened in the traditional media, where news is checked before it is broadcast or published. If it were the traditional media, the people behind the fake news could be exposed and dealt with, but social media is unregulated, and the genuineness of information on it cannot be guaranteed. All the traditional media platforms are regulated by the states concerned, but social media is unregulated, and fake information that may negatively impact the rights of other people or the security of the state may be posted for others to believe.

Cyberbullying remains a serious illegal effect of social media on the contemporary world. A person can send, post, or share false, misleading, negative, harmful, or defamatory information about another person to tarnish that individual's reputation. In some cases, false information is published on social media because it is unregulated to embarrass or humiliate another person, and the identity of the person using cyberspace to bully another one cannot be verified. Cyberbullying is an affront to freedom of expression, and a person who has been bullied can neither seek redress nor redeem their good name or correct their false personal data or information shared on the platform. Cyberbullying defies all the restrictions imposed on freedom of expression. Cyberbullying is also used to impersonate, to cause sexual extortion, and non-consensual sharing of intimate images of other people, which are criminal offences. Some people use cyberbullying to extort money by threatening to distribute by post, email, WhatsApp, or other electronic means a private image, nude pictures, or moving images of a person engaged in sexually explicit conduct or non-consensual sharing of intimate images, and it is difficult to arrest the person even where that person is within the country. Social media is unregulated, and information posted and shared on these platforms

cannot be controlled by administrators. The unregulated aspect of it makes it scary, as people who hack into the accounts of others can post any information there without taking into consideration the restrictions on freedom of expression.

[Q] RECOMMENDATION

The state should make some of the offences committed on social media universal offences for the people who commit those offences outside the jurisdiction to be dealt with in Ghana. The state should lobby for a treatise that will make some of the offences on disclosure of information on national security, protection of health and morals, and territorial integrity or public safety extraditable to enable Ghana to get Ghanaians living abroad who openly commit those offences extradited to Ghana to face prosecution. Persons whose reputations are dented on social media in Ghana should be able to sue the social media creators where the identity of the person who published the false information on the other person cannot be identified or where the person can be identified but lives abroad. That person and the social media creators involved should be jointly sued for defamation. The social media creators should help the police track these offenders. Social media has come to stay, along with its challenges, and technologies should be further developed to expose those who use social media platforms in complete disregard of laws made to restrict freedom of expression to be dealt with in accordance with such laws and to the same extent as those who commit offences and wrongs on the subject matter on the traditional media, whether within or outside the jurisdiction, are similarly dealt with.

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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WHAT ABOUT INSURANCE LAW PRINCIPLES? A COMMENT ON THE SOUTH AFRICAN CASE OF *AFRICAN UNITY LIFE LIMITED v PROSPER FUNERAL SOLUTIONS* CASE No 2021/55922

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Abstract

This article discusses the legal implications of an insurance net premium. A net premium refers not only to a single premium but also to premiums in the aggregate, commonly referred to as a loss ratio calculation. This calculation is relevant to a specific agent of an insurance company, namely a binder holder, the equivalent of which as regards Lloyd's of London is a cover holder. A binder holder is a South African approach to a cover holder and acts as an insurance company without an insurance company licence in order to, for example, draft policy wordings, and accept or reject claims. The article discusses an instance where the court did not consider the importance of a binder holder and a net premium, nor the importance of a bordereau and how it related to the business activities of Prosper Funeral Solutions.

Keywords: cover holder; binder holder; net premium; loss ratio; acknowledgment of debt; bordereau; premium collection company.

[A] INTRODUCTION

In *African Unity Life Limited v Prosper Funeral Solutions* (2021: paragraphs 11-12) the South African High Court (Gauteng Division) had to decide on the legal enforcement of an acknowledgment of debt entered into by African Unity Life (AUL) and Prosper Funeral Solutions (PFS). This was the result of an unauthorized transfer of ZAR10 million by PFS to an undisclosed bank account, which took place after hours to prevent the insurer, AUL, from monitoring the bank account (*African v Prosper* 2021: paragraph 46). The respondent, PFS, relied on previous verbal agreements to place the acknowledgment of debt in perspective. Despite this, the High

Court focused only on the acknowledgment of debt, making the judgment a simple one (*African v Prosper* 2021: paragraph 49).

However, neither the High Court nor the advocates (barristers) for the applicant applied the principles of insurance law, making it extremely difficult to understand the acknowledgment of debt and the legal position of PFS, for example, establishing what type of binder holder PFS was—was it an underwriting manager or a non-mandated intermediary (an underwriting manager receives a fixed binder fee and also shares in the profits of the insurer—profits being calculated with reference to a loss ratio: Kilian 2020)?¹ A binder holder is a South African legislative development, similar to a cover holder, as a company which exists separately from the insurer—Lloyd’s of London; however, the legal implications of being a cover holder fall outside the scope of our discussion.² In the case in question, the High Court did not focus on whether PFS was a binder holder, able to perform binder functions (eg to reject claims submitted by policyholders on behalf of the insurer as if it were the insurer and to draft own policy wordings on behalf of the insurer as if it were the insurer—very similar to a cover holder etc). As stated on its website at the time,³ PFS had a million policyholders and the High Court thus held that the reconciliation of the monthly premium payments by policyholders should be an easy exercise (*African v Prosper* 2021: paragraph 32). However, this opinion regarding the reconciliation may be criticized because the court proposed this without focusing on insurance law principles, ignoring the fact that a bordereau would be required to reconcile such transactions with a million policyholders (Reinecke & Ors 2013).⁴ In this case note, we will discuss the insurance law principles for a binder holder and how they relate to PFS by making research assumptions, which is an accepted practice, to illustrate an alternative legal relationship between AUL and PFS with reference to the ZAR10 million.

¹ See the amendment of the Short-Term Insurance Act 1998 in the Government Gazette No 34877 of 23 December 2011 (1076 and 1077) for the definition of an underwriting manager as a binder holder and section 6.4 with reference to a binder fee and sharing of profits. The same applies to the Long-Term Insurance Act 1998. Short-term refers to non-life insurance products, for example, vehicle insurance, and long-term refers to life insurance products, for example, death cover.

² National Treasury, Republic of South Africa, [Responses to Comments Received on Short-Term Insurance Regulations](#) (submitted to South African Parliament 17 November 2017), at page 105 with reference to AON South Africa—cover holder.

³ The website is no longer available due to the fact that the company has since closed down.

⁴ No definition for a bordereau is provided. Although this textbook is 10 years old, it remains an authoritative source in South Africa.

[B] FACTS AND THE DECISION PERTAINING TO THE CASE OF *AFRICAN UNITY LIFE v* *PROSPER FUNERAL SOLUTIONS*

Facts

In *African Unity Life v Prosper Funeral Solutions*, the High Court focused on the application for provisional liquidation of the respondent (PFS) (Bechard 2022; Bechard 2023). The application seems very simple: PFS previously signed an AUL acknowledgment of debt agreement on 14 May 2021, valid retrospectively from 1 May 2021 (*African v Prosper* 2021: paragraph 12). The debt acknowledgment amounted to ZAR10 million, because PFS had transferred this amount, without the knowledge of AUL, to an undisclosed bank account (*African v Prosper* 2021: paragraph 20). The transfer of the ZAR10 million occurred after hours when AUL could not monitor the bank account for the inflow and outflow of cash by PFS. Previously, on 25 March 2020, PFS had obtained “authority” to collect premiums (technically authority could refer to a binder holder relationship with AUL) from policyholders on behalf of AUL—as if PFS were an “insurer”. The High Court did not refer to the number of policyholders affected by the ZAR10 million transfer, but it is clear that PFS transferred the premiums it had collected without AUL’s permission. In terms of the intermediary agreement—between AUL and PFS—collected or earned premiums had to be paid to AUL without delay (*African v Prosper* 2021: paragraph 49). This is a common clause in a binder holder contract and states that a binder holder should pay over collected premiums to the insurer immediately. Therefore, the legal relationship between an insurer and a binder holder is regulated by an intermediary agreement or, more specifically, a binder holder agreement or contract. On the other hand, the acknowledgment of the debt agreement or contract concluded on 14 May 2021 stipulated the following in clauses a and c:

- a. Make a payment of R4 000 000 to African Unity Life Limited toward the outstanding amount (this amount is based ... on an agreed profit ratio [*also commonly known as a loss ratio calculation*] to African Unity Life for the period) ... The full outstanding amount R10 000 000, effectively R6 000 000 after payment of the R4 000 000, will be paid back on a monthly basis (*African v Prosper* 2021: paragraph 13). (Inclusion and italics added.)

...

- c. Sell the new African Unity Life individual product (new AUL product) where Prosper Funeral Solutions will receive five times the net premium as upfront commission on payment of the first

premium by the policyholder. Until settlement of the full debt ... only one time the net premium will be paid over to Prosper Funeral Solutions while the rest of the remaining upfront commission [four times the *net* premium] will be allocated towards the outstanding debt (*African v Prosper* 2021: paragraph 13). (Inclusion and italics added.)

We inserted “net” because otherwise the above clause is very vague and confusing with reference to the first part of the clause which specifically requires net premium (generally known as profits). The terms of the above-mentioned acknowledgment of debt agreement cannot be varied by any party, unless the amendments are reduced to writing and signed by both parties—AUL and PFS (*African v Prosper* 2021: paragraphs 14 and 27). The first repayment was scheduled for 9 June 2021 and consequently PFS failed to effect payment (*African v Prosper* 2021: paragraphs 14-15). The notice of breach of contract explained that the amount of the first premium from the policyholders of the new AUL product was never paid to AUL and, in addition, that PFS also acted “illegally” as an insurer for different funeral schemes. In this respect, PFS had no “authority” to act as a binder holder to sell funeral insurance cover on behalf of different insurers, for example, 1Life Insurance Company (*African v Prosper* 2021: paragraph 8).

Two different claim forms were found on the PFS website—one for 1Life Insurance Company and the other in the name of PFS—but no insurance company name was disclosed on the latter claim form.⁵ It is also difficult to understand how many of the million policyholders were actually part of 1Life Insurance Company and how many were part of AUL, or both, since the High Court did not make any reference to the number of policyholders, or to the administrative procedures that were put in place to distinguish between AUL and 1Life policyholders, or for which policyholders PFS acted as a binder holder, or more specifically as an “insurer”, as is evidenced by the presence of the PFS claim form.

Further, the PFS board of directors failed to submit an affidavit as to why the application for liquidation should not be granted by the High Court as a direct result of the failure to pay over the first premiums collected for AUL as part of the repayment of the acknowledgment of debt. Instead, a PFS consultant known as Fischer submitted an affidavit, stating why the application for provisional liquidation should not be granted (*African v Prosper* 2021: paragraph 7). The consultant argued that he was familiar with all PFS business activities and, in addition,

⁵ Unfortunately, these forms are no longer available due to the closure of the company and the shutting down of its website.

knew all the relevant contracts entered into by PFS, for example, the intermediary agreement discussed earlier. The consultant also stated that the intermediary agreement, pertaining to the acknowledgment of debt, should be interpreted in terms of previously agreed oral or verbal contracts—concluded on 1 June 2020 (*African v Prosper* 2021: paragraph 20). These oral agreements stated a 5 per cent lead commission (calculated on gross premium earned or collected per policy) only if the funeral products were profitable at 15 per cent (commonly known as a loss ratio; a specific formula is used to calculate a loss ratio, which will be discussed later) (*African v Prosper* 2021: paragraph 30). It would appear that, because of the written acknowledgment of debt agreement, this oral arrangement (15 per cent profitable) was not relevant to the new AUL product to be sold. In other words, we can assume that the acknowledgment of debt was repayable even if PFS, or more specifically AUL, was unprofitable.

The decision

The High Court firstly focused on the issue of whether a consultant could submit an affidavit on behalf of the board of directors as to why an order for provisional liquidation should not be granted (*African v Prosper* 2021: paragraph 9). The Court held that this civil procedure step was a very strange one; nevertheless, it could be accepted by the Court if certain legal requirements were met (*African v Prosper* 2021: paragraph 6). The legal requirements for the civil procedure fall outside the scope of this article, but these steps remain interesting since it is generally assumed that the board of directors is aware of all business activities and could therefore give a better explanation in an affidavit than a consultant, especially about the existence of a binder holder agreement (*African v Prosper* 2021: paragraph 7). Whatever the case, the court focused on the acknowledgment of debt contract signed by PFS and ignored the previous oral agreements since they were concluded in 2020 and there was no evidence to confirm their existence (*African v Prosper* 2021: paragraphs 13-15). The acknowledgment of debt agreement was signed in 2021 and carried the most weight in establishing the true intention of the parties—ZAR10 million was owed and should be repaid to AUL monthly (*African v Prosper* 2021: paragraph 49). No amendments were signed in this respect, for example, the 5 per cent lead commission or 15 per cent loss ratio to supplement PFS cash flow to repay the ZAR10 million, and as a result the Court granted a provisional liquidation order (*African v Prosper* 2021: paragraphs 25, 31 and 50).

[C] ANALYSING THE DECISION

The possibility exists that the PFS board of directors simply did not know how to argue its case or how to present an affidavit confirming the principles of insurance law, for example, the technical relevance of a binder holder. As a result, the High Court failed to focus on the million policyholders and their relationship to the binder holder. Had the Court focused on these policyholders it would have understood that it is extremely difficult administratively to collect premiums and report on the successful collection of premiums to either AUL and 1Life (Millard 2016: 1)⁶—a bordereau would have explained this in great detail, keeping in mind that there were one million policyholders (Marano & Noussia 2019).⁷ A bordereau is issued on a monthly basis to inform, in this case 1Life and AUL, about how many policyholders have paid their premiums on time, how many premiums were collected successfully, how many policyholders did not pay and how many policyholders were subjected to an additional premium collection procedure owing to their non-payment, as well as the aggregate amount of premiums that should have been received by AUL and 1Life for that particular month, among other things (*Liberty v Illman* 2020: paragraph 4; Huneberg 2020).⁸ Without a sophisticated software bordereau, the manual reconciliation of these issues is extremely difficult, if not impossible. To consider how difficult it was to reconcile payments, we will use the following simple funeral insurance example from a South African perspective. In South Africa, funeral policies are very inexpensive with a general lump sum payment of approximately ZAR20,000 per policy (it could be less or more, but is very seldom less than ZAR20,000 per policy). If the average funeral

⁶ Financial Sector Conduct Authority (FSCA) Notice 20/2020, section 2(4)(a), states the following: “The long-term insurer must before entering into an agreement for direct collection of premiums and all the times thereafter – Have the necessary resources and ability to exercise effective oversight over the independent intermediary performing the direct collection of premium services on an ongoing basis.” FSCA Notice 20/2020, section 2, also requires that the FSCA should be informed who has the authority to collect premiums on behalf of the insurer. The advocate for respondent in the AUL case should have asked FSCA who had the necessary authority to collect premiums on behalf of AUL.

⁷ A quick search of 713 pages did not reveal any paragraphs explaining a bordereau in insurance law—this is a very specialized term in insurance law.

⁸ In the *Liberty Group* case, Liberty advanced commission payments to brokers. Subsequently, Liberty Group claimed back the advanced commission owing to policyholders failing to pay their premiums. It is unclear whether Liberty Group had its own sophisticated software to collect premiums, or otherwise who had the authority to collect the premiums. This was not disclosed to the court. To understand this case more clearly, a bordereau should be updated every month for accuracy with regard to data. A broker does not have access to such a bordereau unless Liberty Group was transparent pertaining to which policyholders were paid or not. Generally, an underwriting manager as a binder holder will be able to receive such a bordereau from the company that collects the premium on behalf of the underwriting manager.

premium is ZAR20 per policy (it could be less or more but is very seldom less than ZAR20 per policy), the monthly premium collected could be ZAR20 million (1 million policyholders x ZAR20 equals ZAR20 million). We do not know how many of the million policyholders were allocated to AUL only, so it is extremely difficult to understand the ZAR10 million debt owed to AUL; however, on face value, it would appear that AUL had 50 per cent of the total number of policyholders (ZAR20 million x 50 per cent = ZAR10 million).⁹ As stated earlier, the importance of the bordereau was to distinguish the number of policyholders that formed part of AUL and 1Life (Geldenhuis 2019). Currently, AUL and 1Life make use of 360Administration and Systems, and we assume this system is able to issue a bordereau to both 1Life and AUL—this was never explained to the Court.¹⁰ We also do not know whether PFS had the authority to collect premiums on behalf of 1Life as well, but we may assume that such authority could have existed, although 1Life was not party to the application to dispute the latter assumption.¹¹ In addition, and taking one step back, the company (we assume it was 360Administration and Systems) that runs these debit orders also charges a fee to collect the premiums and to pay them to PFS. Keeping this in mind, we doubt whether the acknowledgment of debt agreement was a suitable contract between PFS and AUL.¹² In other words, although PFS “collected” the premiums, the actual collection company would be 360Administration and Systems which ran the debit orders and paid the collected premiums to PFS. This is made evident by a bordereau explaining the collection in great detail, as discussed earlier.¹³ The fees for collecting an actual premium could be very high per policy, for example ZAR10 per policy (keeping in mind the relevant bank charges to be paid by 360Administration and

⁹ In the FSCA Notice 20/2020, section 1, the definition of accounting for premiums indicates the requirements for a bordereau, for example premium collection processing services. This requirement indicates the ability to reconcile payments effectively on a monthly basis, among other things. As examples see [QSURE](#) for debit order collections. See also “[Brolink Has Entered The Premium Collections Market](#)” (2 June 2021).

¹⁰ Only premium collection companies or companies with similar software can issue a bordereau. See, in this regard, Fulcrum Collections, “[About Us](#)”.

¹¹ FSCA Notice 20/2020, section 2(2)(b), requires permission 30 days prior to the first collection.

¹² The 360Administration and Systems website states AUL and 1Life as its clients.

¹³ The 360Administration and Systems, “[Systems and Services](#)”.

Systems, although this falls outside our discussion) (Kruger 2014).¹⁴ The difference between ZAR20 and ZAR10 is the actual premium or payable premium received for funeral cover. To illustrate this more clearly, we will make use of the following calculation: ZAR20 times one million policyholders equals ZAR20 million less actual costs for debit orders charged by 360Administration and Systems at ZAR10 per debit order, equals ZAR10 million premium collected per month. In this regard, it is important that AUL should have explained to the Court how many policyholders were being managed by PFS in order to have the Court understand the policyholder ratio of ZAR10 million per month in context; for example, 60 per cent of the ZAR10 million premiums belonged to 1Life only or 50 per cent belonged to either AUL or 1Life. By providing such an explanation, the court would have realized the importance of a binder holder relationship with the insurer (AUL or 1Life) and of identifying PFS as a binder holder for the specific policyholders of the insurers. However, the court did not do this and therefore it would be very difficult to argue that PFS could easily reconcile monthly premium payments.

Is it possible to sign an acknowledgment of debt in South Africa when you do not owe a person any money?

In *Dube v Mbokazi*, the applicant in this matter claimed ZAR550,000 from the respondent or defendant (*Dube v Mbokazi* 2018; *Allwright v Gluck* 1962). The plaintiff paid ZAR430,000 to the respondent, and it was verbally agreed that the plaintiff's brother would repay the ZAR430,000 with interest on behalf of the respondent (*Dube v Mbokazi*: paragraph 10). The respondent and the plaintiff's brother also agreed to the terms of repayment verbally. In other words, an acknowledgment of debt or settlement was signed between the plaintiff and the respondent, but effectively the plaintiff's brother was liable for the repayment owing to the existence of a verbal agreement—the latter was not disputed. The plaintiff's brother did not comply with the terms of the verbal agreement and, consequently, claimed ZAR550,000 from the respondent. As a result of the oral agreement, the respondent did not owe the plaintiff any money. The Court held that such

¹⁴ FSCA Notice 20/2020, section 2(2)(c), states the requirements for reasonable remuneration for collecting a premium successfully, depending on the nature of the sophisticated software used by the collection company, for example the remuneration may not be based on a percentage of the aggregate premium collected: see *Profida*. Profida provides the software to manage a business as a binder holder, for example underwriting manager; FSCA Notice 20/2020, section 2(2)(c), states the requirements for reasonable remuneration for collecting a premium successfully, depending on the nature of the sophisticated software used by the intermediary, for example the remuneration may not be based on a percentage of the aggregate premium collected.

an argument for why the respondent was not liable to pay the plaintiff was, in fact, a *bona fide* defence in the law (*Dube v Mbokazi*: paragraphs 16 and 19). In the respondent's affidavit, it is clear that the plaintiff's brother verbally agreed to repay the money. The respondent was also informed by the plaintiff's brother that the necessary payments had been made when, in fact, no payments were made (*Dube v Mbokazi*: paragraph 21). In this case, the High Court took a very interesting perspective on a signed acknowledgment of debt, stating that such a contract could be set aside if evidence (verbal or oral agreements) could be given to the Court that indicated why it should be rejected (*Dube v Mbokazi*: paragraph 27; *Visser v 1Life 2014*: paragraph 28). Although the Court had to decide on the merits of a summary judgment, this case is nevertheless relevant to our discussion; that is, that a written acknowledgment of debt signed with AUL could be set aside in the event of a *bona fide* defence. In this regard, we suggest that PFS should have focused on the ratio of policyholders of 1Life and AUL and the ratio of monthly premiums collected (indicated by a bordereau) to show whether PFS had a *bona fide* defence or not with reference to 1Life's number of policyholders that were part of the ZAR10 million acknowledgment of debt.

Intermediary agreement

A binder holder is a registered financial services provider and must comply with relevant legislation, for example, the Financial Advisory and Intermediary Services Act 37/2002 of South Africa. It is not always easy to identify who an actual binder holder or intermediary is because insurance products may be sold by an insurance broker who is also a type of intermediary but not a binder holder, while an underwriting manager as a binder holder uses only brokers to sell products in South Africa (*Liberty v Illman 2020*: paragraph 4). In addition, insurance companies like Hollard and others in South Africa made use of a company called Insure Group (Van Wyk 2021). The sole purpose of Insure Group was to collect monthly premiums on behalf of Hollard and other insurers, a relationship between insurers and Insure Group that was not previously regulated by the Financial Sector Conduct Authority (FSCA) (Bechard 2022). In other words, at the time it was not required to register as a financial services provider in order to provide such services.¹⁵ One advantage of a premium collection company such as Insure Group is the fact that, if a policyholder were to dispute their premium debit orders, they would not discuss this with Insure Group, as the public would be unaware of the legal relationship between Hollard and Insure Group.

¹⁵ FSCA Communication 1/2022 and exemptions for direct collections of premiums.

For all practical purposes, the public sees Hollard as the company that collects the insurance premiums from its policyholders. The same, we assume, would apply to 360Administration and Systems—only PFS would settle premium collection disputes with individual policyholders.¹⁶ Currently, Insure Group no longer exists because of disputes relating to the amount of actual premiums collected and premiums that should have been paid over to Hollard and other insurers.¹⁷ Be that as it may, the High Court did not focus on the premiums collected by 360Administration and Systems or whether the premiums received were recorded successfully by a bordereau, nor did the High Court focus on whether the FSCA had received an application by 360Administration and Systems or PFS for permission to collect premiums on behalf of AUL or 1Life. The FSCA was also never requested to disclose the name of the actual premium collection company to the High Court.¹⁸

The High Court held the view (without reference to a bordereau) that monthly reconciliations could have easily been done for AUL by PFS, although PFS denied this for the reasons—we assume—stated above with reference to the one million policyholders (*African v Prosper* 2021: paragraph 29). This implies that PFS made use of an incomplete or ineffective bordereau for reconciling the actual premiums collected.¹⁹ An incomplete bordereau would have caused a dispute between the actual premiums collected and (total) premiums collected that should have been collected on behalf of 1Life and AUL based on the total number of policyholders for each insurer.²⁰ Although the High Court held that reconciliation was indeed possible and very easy in principle, it did so without requesting a bordereau or focusing on the importance of a bordereau (Bechard 2022). Therefore, the process of reconciliation is neither as simple as stated by the High Court, nor, in view of the one

¹⁶ Currently, it is impossible to receive interest on the premiums collected. FSCA Notice 20/2020, section 1, regarding the direct collection of premiums that the intermediary who collects the premiums cannot keep the premiums in their bank account; they should be paid over into the bank account of the insurer. See also FSCA Communication 1/2022, exemptions for direct collections of premiums.

¹⁷ [QSURE](#) is a premium collection company similar to Insure Group.

¹⁸ FSCA Notice 20/2020, section 2(2)(b), requires permission 30 days prior to the first collection.

¹⁹ FSCA Notice 20/2020, section 1, the definition of accounting for premiums, indicates the requirements for a bordereau, for example premium collection processing services. This requirement indicates the ability to reconcile payments effectively. The court in AUL did not refer to the latter requirement or whether the bordereau was sufficiently sophisticated to indicate successful premium collections for reconciliation purposes.

²⁰ FSCA Notice 20/2020, section 2(d), states the accuracy of a bordereau that is required and that it should regularly be tested for accuracy.

million policyholders, as it was made out to be by AUL in its affidavit (*African v Prosper* 2021: paragraph 32).

On the other hand, using the net premiums explained to repay the acknowledgment of debt is also problematic from a binder holder point of view. To understand this more clearly, we will quote the contract again:

- c. Sell the new African Unity Life individual product where Prosper Funeral Solutions will receive five times the net premium as upfront commission on payment of the first premium by the policyholder. Until settlement of the full debt ... only one time the *net premium* will be paid over to Prosper Funeral Solutions while the rest of the remaining upfront commission [four times the *net premium*] will be allocated towards the outstanding debt (*African v Prosper* 2021: paragraph 13; Reinecke & Ors 2013).²¹

Calculating the net premium could be confusing. For example, an intermediary agreement could specify the following calculation for a net premium (Kilian 2020; Kruger 2018):²²

Earned premium received from individual policyholder
 Less broker commission (12.5 per cent)
 Less binder fee/commission (5 per cent)
 Less insurer fee (3 per cent)
 Equals net premium of the policyholder

It should be noted that actual fees or commission for funeral policies may differ since burial societies are not regulated in the same way as life insurance companies, for example. The latter fees fall outside our current discussion. However, an intermediary agreement could also specify the following with regard to calculating a net premium or loss ratio in relation to all the insurer's expenses (Kilian 2020):²³

Total earned premiums received by policyholders
 Plus reinsurance commission per total number of policies
 Less broker commission on all policies(12.5 per cent)

²¹ My inclusion and italics: the authors do not explain a net premium.

²² Long-Term Insurance Act 1998. The amendment of regulations made under section 72 of the Government Gazette No 34877 of 23 December 2011 requires a binder contract between the binder holder and the insurer. It is also possible to duplicate the same for burial societies without complying with section 72.

²³ Long-Term Insurance Act 1998. Generally, these deductions are used to calculate the loss ratio. In this regard, see section 6(4) of the Government Gazette No 34877 of 23 December 2011 which states an underwriting manager is allowed an opportunity to share in the profits of the insurer and to receive a binder fee.

- Less binder fee/commission on all policies (5 per cent)
- Less insurer fee on all policies (3 per cent)
- Less premium collection fee on all policies (ZAR10 per policy or expressed in percentage)
- Less UPR (unearned premium reserve)
- Less IBNR (claim(s) incurred but not reported to insurer)
- Less claims received and settled
- Equals the aggregate net premium (or commonly known as the loss ratio expressed in a percentage of the total earned premium)

The actual calculation of a net premium, as referred to in clause c above in relation to PFS, remains unclear, especially as to how net premium relates to a percentage of a policyholder's total earned premiums or individually earned premiums. What is clear is the fact that the consultant did not explain the above two scenarios to the High Court. For an earned premium calculation (loss ratio calculation), we assume 5 per cent equals the binder holder's commission, 12.5 per cent equals broker commission, and premium collection costs or fees are ZAR10 per policy; finally, claims paid during the financial year should be included in order to illustrate the net premium calculation or loss ratio calculation. This could also take the form of a simple calculation (earned premium of a policy), simply deducting the broker commission, binder's fee and insurer's fee from a single premium received (or paid) by a policyholder. Subsequently, a sophisticated bordereau should be able to disclose the calculation and to calculate a correct net premium. In addition, the bordereau would also calculate the total amount resulting from the five net premiums as upfront commission, and until the debt (ZAR6 million) with only one net premium as commission would be payable to PFS. Furthermore, if we use a simple calculation (with reference to the ZAR20 premium), the following is evident and assists in understanding whether net premium is the most appropriate method for repaying the debt. The actual net premium on ZAR20 is therefore ZAR5.90 (ZAR20 – ZAR10 (collection fee) – R2.5 (broker commission at 12.5 per cent) – ZAR1 (binder holder fee 5 per cent)—60c (insurer fee 3 per cent) = ZAR5.90). Hence, ZAR5.90 times four (per new AUL policy sold) will be used to settle the ZAR6 million debt. As only new policies may be used to settle the ZAR6 million debt, the clause (as quoted earlier) that refers to the first net premium payable to PFS requires that an additional 254,237 policyholders are required in order to settle the debt (ZAR5.90 x 4 equals ZAR23.60 and ZAR6 million divided by ZAR23,60 equals 254,237 policyholders). How many new policyholders could PFS possibly acquire in a month, or in a year—100 or 1000? And

based on 1000 new policies per month, how long would it take PFS to settle the ZAR6 million debt (if we assume 1000 policyholders per month, this would be $1000 \times \text{ZAR}23.60 = \text{ZAR}23,600$ per month, and $\text{ZAR}23,600 \times 12 = \text{ZAR}283,200$ per annum and $\text{ZAR}6 \text{ million} / \text{ZAR}283,200 = 21$ years)? The following question could also be posed here: is net premium an appropriate mechanism for settling the ZAR6 million debt? While the High Court did not consider this question, we should note that loss ratio can only be calculated at the end of the financial year when all claims submitted by policyholders can be used to calculate the correct loss ratio. This may have a direct impact on the correct calculation of a net premium. Based on the foregoing argument, it is clear that it would have been very difficult to calculate an effective net premium, and the High Court was ignorant of the consequences of this.

For the reasons stated above, we believe that the Court did not focus on the complete picture of how the insurance industry works—the relationship between a binder holder and an insurer with reference to a bordereau or the importance of expressing a net premium in a bordereau, and whether the FSCA’s permission to collect premiums was in fact obtained and by whom, whether by PFS or 360Administration and Systems?²⁴ It is clear that the interpretation of net premium could have been misused to prejudice PFS;²⁵ preventing it from receiving income (or commission) if the loss ratio were extremely high (eg a 100 per cent loss ratio or higher would have indicated that the insurer was unprofitable, and, strictly speaking, there was no available net premium or perhaps a payable binder fee/commission).²⁶ We will never know the true factual circumstances of this case, but there is a possibility that the High Court and the consultant underestimated the technicalities of the insurance business.

[D] CONCLUSION

One reason why the board of directors did not file an answering affidavit—instead this was done by a consultant on behalf of PFS—could be (we assume) that the board was not educated on the technical aspects of insurance law—insurance law aspects regarding the authority to collect premiums, to accept claims and to share in the net premium of AUL.

²⁴ FSCA Notice 20/2020, section 2(d), states the accuracy of a bordereau that is required.

²⁵ We are unable to see the authority of PFS on the FSCA website—information is no longer available owing to the liquidation order granted.

²⁶ FSCA Notice 20/2020 with reference to the definition of a binder holder and the agreements a binder holder may enter into pertaining to the collection of premiums *et cetera*.

In addition, the advocate who represented PFS only focused on the intermediary agreement with reference to a net premium, ignoring whether this was in fact a binder holder agreement and how exactly net premiums should be calculated. An insurer would, at the very least, have known the correct terminologies in insurance law in order to have informed the court of their appropriate meanings, for example, that net premium relates only to a loss ratio calculation and only an underwriting manager as a binder holder can share in the net premium (or profits). Failing this, this could be interpreted as misleading the court. On the other hand, carrying out simple monthly reconciliations (eg relating to policyholders who paid their premiums or not, commission/fees paid) could be an extremely difficult exercise and thus an effective bordereau is required for exact results or calculations.²⁷ The monthly reconciliations of commission payments to PFS could only have been done if the bordereau had accurately calculated the monthly premiums received from individual policyholders and thus an appropriate net premium—four times the upfront commission payable to the insurer or AUL (*African v Prosper* 2021: paragraph 29). While the relationship between AUL and PFS could have been a highly technical one, we will never know the true facts of this case (*ibid*).²⁸ We have merely observed a few principles of insurance law here, based on the High Court judgment, to illustrate how difficult the business of insurance may be when placing an emphasis on net premiums in relation to an acknowledgment of debt.

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²⁷ Fulcrum Collections considers its [bordereau](#) as being the best in the market.

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THE BRITISH COURTS AND COMPULSORY ADR— HOW DID *THAT* HAPPEN?

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Abstract

On 29 November 2023, the Court of Appeal held in *James Churchill v Merthyr Tydfil County Borough Council*, that the courts of England and Wales are entitled lawfully to order parties to engage in non-court-based dispute resolution processes. This important decision should not come as a surprise. This article will argue by reference to case law, judicial commentary and the Civil Procedure Rules (CPR) that this decision is the most recent expression of an impulse the courts have long maintained: that a case can be dealt with justly by moving (by various means) litigants away from the judgment seat to one of negotiated, consensual outcomes. The decision corrects an anomaly within the CPR that obliges parties to further the overriding objective by considering alternative dispute resolution but deprives the court of a particular remedy to enforce that obligation. This article will trace the roots of the Court of Appeal decision and identify to what extent it is the natural progression in judicial thinking, and it truly breaks new ground.

Keywords: ADR; justice; civil justice; court reforms; overriding objective; *Halsey*; CPR; *Churchill v Merthyr Tydfil*; Article 6; arbitration agreements.

[A] INTRODUCTION

In *James Churchill v Merthyr Tydfil County Borough Council* (2023) the Court of Appeal held that courts can lawfully stay proceedings, or order parties to engage in a non-court-based dispute resolution process.

The case shifts from the orthodoxy evident since the early days of the Civil Procedure Rules (CPR) that alternative dispute resolution (ADR) should not be compelled, which found its most influential expression in *Halsey v Milton Keynes General NHS Trust* (2004). However, this orthodoxy has been uncomfortable for some. As we shall argue, it has presented the courts with the impossible task of enforcing a duty without a power of compulsion.

This article's valuable contribution to this subject is found in its study and possible explanation of how the British Court of Appeal moved from asserting in 2004 that ADR should not be compulsory to asserting emphatically, nearly 20 years later, that it should.

This article will examine: Lord Woolf's *Final Report* (Woolf 1996); the 1996 Department Advisory Committee (DAC) *Report on Arbitration Law* (1996); sections 1 and 9 Arbitration Act 1996; the CPR requirements in relation to ADR; and the development of the case law in relation to compulsory ADR. It will conclude that even though, in the early and mid-years of the CPR, compulsory ADR was not considered acceptable, the legal and regulatory foundations to justify it were laid early on, and it was perhaps a matter of time before there would be an attitudinal shift from ordering ADR being undesirable, to the opposite.

[B] THE WOOLF REFORMS

To understand how *Churchill* came about, we must return to the mid-1990s and the civil procedure reforms of Lord Woolf.¹

In his *Access to Justice: Final Report* to the Lord Chancellor (1996), Lord Woolf described eight principles necessary for access to justice. Concerned, amongst other things, that litigation was too slow and adversarial (section I, paragraph 2), he proposed that a greater use of ADR would be a solution to the problems litigants faced. He envisaged the courts playing an active role in encouraging the use of ADR (section I, paragraph 9).

Nearly 30 years later, this seems unremarkable but at the time it was in the vanguard of modern dispute resolution. For example, organizations such as the Centre for Effective Dispute Resolution (CEDR) were gaining prominence in London at around the same time. Practitioners who had not heard of mediation six months earlier were enthusiastic about qualifying as “CEDR Accredited” mediators. While the settlement of litigious disputes was long established, ADR and mediation were, in the mid-1990s, relatively new and unfamiliar terms to many in the legal professions.

Lord Woolf envisaged that civil litigation would reside in a “new landscape” (1996: section I, paragraph 8) where the parties (including

¹ This article draws repeatedly on De Girolamo & Spenser Underhill (2022). Readers of the current article may wish to read the earlier one first (written, of course, before the *Churchill* decision was handed down). While each article speaks to a different subject, their material overlaps to a considerable degree.

their lawyers) and the courts were obliged to bring about what he coined the “overriding objective”. That phrase, still in use today, means to deal with cases “justly”, embodying as Lord Woolf said “the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice” (ibid).

One of the features of the new landscape was to avoid litigation “wherever possible” (1996: section I, paragraph 9). Litigants should be encouraged to litigate “only as a last resort”, having first used “other more appropriate means” to resolve the dispute (paragraph 9(a)). Another feature of the landscape is for litigation to be less adversarial and more co-operative (ibid).

He said :

My approach to civil justice is that disputes should, wherever possible, be resolved without litigation. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage (1996: section III, chapter 10, paragraph 2).

Significantly, however, Lord Woolf did not propose that the courts should compel the parties to engage in ADR. Rather, they should “encourage” and “assist” (eg 1996: section II, chapter 1(7)(d), 16(b)–(c)).

The *Final Report* gave rise to the Civil Procedure Act 1997. That primary legislation, in turn, gave rise to the (CPR), which first came into force in April 1999 and (subject to regular review, variation and amendment) have remained in force ever since.

[C] THE CIVIL PROCEDURE RULES AND THE OVERRIDING OBJECTIVE

This paper will not expound on the CPR in detail.² For current purposes, the CPR is a procedural code with the overriding objective of dealing with cases justly and at proportionate cost (CPR part 1.1.1). The courts and the litigants have a duty to further the overriding objective, which they discharge by applying and obeying the rules (CPR parts 1.3 and 1.4.2). In particular, the courts, litigants and their advisors have a duty to consider using ADR to achieve the overriding objective (CPR part 1.4.1.) The CPR defines ADR as a “collective description of methods of resolving disputes otherwise than through the normal trial process” (CPR part 2.2).

² Readers may wish to read [De Girolamo & Spenser Underhill](#) (2022), especially section C.

[D] DEVELOPMENTS IN ARBITRATION LAW— MID-1990S.

Before we discuss how the courts approached the new landscape from 1999, it is instructive to consider developments in the field of arbitration that were emerging at the same time as Lord Woolf's reports (1995; 1996).

In February 1996, the Departmental Advisory Committee (DAC) published its *Report on the Arbitration Bill 1996* which later became the Arbitration Act 1996. It described three general principles of arbitration. One of them was party autonomy. At paragraph 19 it stated:

An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen means. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted.

The DAC went on to observe, when discussing the extent to which the court should intervene in an arbitral process:

Nowadays, the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards ... and changing attitudes generally, have meant that the courts nowadays only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach and it seems to use that it should be enshrined as a principle in the Bill. (DAC 1996: paragraph 19)

That principle appeared in section 1(b) of the Arbitration Act 1996. Section 9(1) of the Act is also instructive. It provides that:

A party to an arbitration agreement against whom proceedings are brought ... in respect of a matter which under the agreement is to be referred to arbitration may ... apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

The importance the Act places on the supremacy of the arbitration agreement was and remains consistent with the CPR's position that arbitration is a form of ADR. As we shall see below, the courts have little difficulty perceiving an arbitration agreement as a type of ADR agreement.

[E] THE CASE LAW AND OTHER SOURCES

The first reported case on the CPR was *Sat Pal Muman v Bhikku Nagasena* (1999). Mummery LJ refused to lift a stay that had been placed on some expensive and unproductive litigation. He ordered: “No more money should be spent from the assets of this charity until ... all efforts have been made to secure mediation of this dispute in the manner suggested.” This appears to be an early example of the court exerting procedural pressure on the parties to make “all efforts” to secure a mediation. The pressure exerted was to refuse to lift a stay of proceedings until (and presumably unless) that was done.

In the same year, Arden J (as she then was) in *Kinstreet v Balmargo Corporation* (1999) (also reported as *Guinle v Kirreh* 1999) directed that a mediation should take place despite one party being concerned about its efficacy and the good intentions of their opponent. As she put it (under the heading “ADR”), “I therefore propose to direct ADR”, before directing the parties to choose a mediator, and to “take such serious steps as they may be advised to resolve their disputes by ADR procedures”. She directed that the mediation must take place before a certain date, and if the case did not settle, the parties were to tell the court, describe what steps were taken and why ADR had failed.

In the same vein, several years later, but apparently not where one party was reluctant, Smith LJ in *Uren v Corporate Leisure (UK) Ltd* (2011) stated, having remitted an action for retrial: “I would also direct that, before the action is listed for retrial, the parties should attempt mediation” (paragraph 22).

Two years after *Kinstreet*, Lord Woolf gave a judgment in *R (Frank Cowl) v Plymouth City Council* (2001). The case was brought by some residents of an old people’s home about a city council decision to close it. Lord Woolf observed that the claimants had brought the case without the parties exhausting a pre-action complaints procedure. With asperity, he said:

The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible ...

The courts should than make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum of involvement of the courts

...

[When describing what courts should do to achieve dispute resolution without the courts] ... the parties should be asked why a complaints procedure or some others form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute (*R (Frank Cowl)* 2001: paragraphs 1-3).

Lord Woolf went on to say (arguably about judicial review cases only):

The parties do not today, under the CPR, *have a right* to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. *The courts should not permit, except for good reason, proceedings* for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. (*R (Frank Cowl)* 2001: paragraph 14, emphasis added).

[F] DISPUTE RESOLUTION AGREEMENTS ANALOGOUS TO ARBITRATION AGREEMENTS—COMPELLING COMPLIANCE WITH AGREEMENTS FOR ADR

A year later, in *Cable & Wireless plc v IBM United Kingdom Ltd* (2002), IBM applied to the court for some litigation brought by Cable & Wireless to be stayed while the parties complied with ADR provisions they had agreed in their contract. They referred, in terms, to an ADR procedure to be recommended to the parties by CEDR.³

At that time, and since the mid-1970s, tiered dispute resolution clauses had been held to be unenforceable because they lacked certainty; they were no more than agreements to agree. So Cable & Wireless argued, amongst other things.

Colman J, in disagreement, said this:

the English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question. This is a firmly established, significant and growing facet of English procedure (*Cable & Wireless* 2002: analysis page 6).

³ Compare Mostyn J's findings in *Mann v Mann* (2014). For an interesting discussion on the enforceability of mediation agreements, see Suter (2014).

He went on to consider the CPR. Noting the duty of the court to further the overriding objective by actively managing cases, which included encouraging the parties to use ADR, the judge said:

For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR (2002: analysis page 7).

The judge then went on to say:

The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy. It is further a procedural tool provided for under CPR 26.4 to encourage and enable the parties to use ADR (2002: analysis page 7).

Sat Pal and *Kinstreet* are significant because they are early cases which more than hint that the courts were keen for litigation not to proceed on the grounds of disproportionate cost if they could help it. To bring that about, one judge refused to lift a stay until ADR had been explored and the other directed mediation in the teeth of one party not wanting to participate. *Frank Cowl* went further. It said that the rights and remedies of a judicial review should be denied to litigants who could resolve their dispute outside the litigation process, which includes cases where a pre-action complaints procedure had not been taken up.

Cable & Wireless endorsed this enthusiasm for staying proceedings for ADR to take place. Tellingly, it did so from the perspective not of parties who had no existing dispute resolution *agreement* (such as those in *Sat Pal*, *Kinstreet* and *Frank Cowl*) but from the sophisticated commercial parties who had.

More interesting, to fortify this position, the court in *Cable & Wireless* drew an analogy between agreements to mediate with agreements to arbitrate. Of course, those two methods of dispute resolution are remarkably and profoundly different, but they share one common characteristic: they are, to use the current language, “non-court-based”.

By 2002, the courts had put beyond doubt that they had both the power and the preference to stay proceedings in order for an agreement to engage in ADR to be enforced, even when one party does not want to. The courts had aligned their position on ADR clauses with the position they had already adopted towards arbitration agreements.

Nevertheless, absent such express agreement, in the early 2000s, the established position was that ADR was not compulsory. For example, Lightman J observed in *Hurst v Leeming* (the same year as *Cable & Wireless* and a year after *Frank Cowl*), that: “Mediation in law is not compulsory and [the professional negligence pre-action protocol] spells that out loud and clear” (2002: 12).

[G] *HALSEY* AND THE NON-COMPULSION DEBATE

The case of *Halsey v Milton Keynes General NHS Trust* (2004) arrived two years later. It became a dominant feature in Lord Woolf’s new landscape for the next 19 years.

The case is well known and needs little introduction. We shall focus on one issue arising from it. As to the facts, Mrs Halsey sued unsuccessfully in negligence the hospital where her late husband had died. She had invited the hospital to engage in ADR before trial, but it had refused. An issue before the court was whether that refusal was reasonable. It held it was. Mrs Halsey appealed, maintaining that the hospital was unreasonable in refusing to mediate. The issue before it was whether the hospital had acted reasonably. The Court of Appeal made its famous judgment which included what have become known as the *Halsey* Guidelines.

As to the issue which interests us, Dyson LJ (as he then was) said that a court cannot and should not compel a party to engage in ADR, including attending a mediation. To do so would infringe rights under Article 6 of the European Convention on Human Rights 1950 (ECHR). In a passage which has been greatly relied upon and quoted frequently, he said:

9. We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be impose an unacceptable obstruction on the right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to “particularly careful review” to ensure that the claimant is not subject to “constraint”: see *Deweert v Belgium* (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore a violation of article 6. Even if (contrary to our

view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:

“The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be sued but may merely encourage and facilitate.”

10. If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it (*Halsey* 2004: paragraphs and 10).

Whatever the procedural instincts in *Sat Pal*, *Kinstreet*, *Frank Cowl* and *Cable & Wireless*, the law (set out, for example, in the pre-action protocols) was that any court could not order a party to engage in ADR, only encourage and facilitate. That approach appeared to be put beyond doubt in *Halsey*. The Court of Appeal’s statement held sway for the next 19 years and the *Halsey* Guidelines often followed (De Girolamo & Spenser Underhill 2022: section C). But the case was not without controversy.

Halsey attracted some judicial criticism. In a lecture given at SJ Berwin on 28 June 2007, the late Sir Gavin Lightman argued that *Halsey* was wrong to state that ordering an unwilling party to mediate was a breach of article 6 (2007a).

Sir Gavin gave a speech to the Law Society in December 2007, in which he raised again his concerns about *Halsey* and its view that the court cannot compel mediation because of Article 6. Acknowledging uncertainty amongst lawyers whether *Halsey* actually decided the issue, he thought there ought to be judicial certainty because (with remarkable prescience, as *Churchill* will show):

whilst judges in London can decide for themselves what (if any) weight should be given to the observations in *Halsey*, in practice district judges in the country are naturally and understandably treating them as law, refusing to order mediation in the absence of such consent (Lightman 2007b: 16).

On 29 March 2008, Lord Phillips (when he was Lord Chief Justice) discussed Sir Gavin’s criticisms in a speech. He considered that Dyson LJ’s comments on Article 6 were *obiter dicta* (Phillips 2008: 37). (He also thought that compulsory ADR might breach Article 6 rights depending on the sanction for non-compliance that flowed from any refusal to comply.)

On 8 May 2008, Sir Anthony Clarke MR (as he then was) gave a paper at the Second Civil Mediation Council National Conference. He expressed his opinion about the Article 6 point in the following terms

Mediation and ADR form part of the civil procedure process. They are not simply ancillary to court proceedings but form part of them. They do not preclude parties from entering into court proceedings in the same way that an arbitration agreement does. In fact, all a mediation does is at worst delay trial if it is unsuccessful and it need not do that if it is properly factored into the pre-trial timetable. If the mediation is successful, it does not obviate the need to continue to trial, but that is not the same as to waive the right to a fair trial ... What I think we can safely say, though, without prejudicing any future case, is that there may be grounds for suggesting that Halsey was wrong on the Article 6 point (Clarke 2008: 38).

Sir Anthony suggested (Clarke 2008: 39) that the Court of Appeal in *Halsey* may have been speaking *obiter* when saying what it did about Article 6. He argued that the CPR (as it was then formulated) bestowed on the courts a jurisdiction to require parties to mediate their disputes. He said: “despite the Halsey decision it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation” (2008: 40).

In a speech he gave at the Third Mediation Symposium of the Chartered Institute of Arbitrators in October 2010, Lord Dyson (as he had become) said that his comments in *Halsey* about Article 6 “need some modification not least because the European Court of Justice entered into this territory in March last year in the case of *Rosalba Alassini*”. He partly accepted Sir Anthony Clarke’s criticism but still maintained that compulsory ADR would in some circumstances breach Article 6. He also took the view that ADR should remain non-compulsory.

These speeches exposed a fault line which the commentary to the CPR identified. For example, the commentary of the 2015 CPR (to choose but one year) stated:

In terms of understanding how the court is likely to exercise its case management powers today, we are in the slightly unusual position of having a leading Court of Appeal decision, namely *Halsey*, which should now presumably be read in the context of the speeches of [Lords Phillips and Clarke] (CPR: Volume 2/14-9).

Nevertheless, compulsory ADR was still not finding judicial favour. For example, Jackson LJ did not favour compulsory ADR in his *Review of Civil Litigation Costs: Final Report* of 1 December 2009 (Jackson 2009: paragraph 3.4).

The courts were also wrestling with the Article 6 point. In *Swain Mason & Others v Mills & Reeve (a Firm)* (2012), the Court of Appeal stressed that parties cannot be compelled to mediate, stating in terms: “In *Halsey*, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate” (paragraph 76).

However, in the following year, the tone changed. *Colin Wright v Michael Wright (Supplies) Ltd* (2013) was a bitter dispute between two businessmen who had ignored the court’s encouragement to mediate. The matter found its way to the Court of Appeal and the bench of Ward LJ (a member of the court in *Halsey*).

The judge was dismayed at the unreasonable conduct of the parties and the parties’ ignoring the court’s attempt at encouragement to engage in ADR. He was moved to question Dyson LJ’s view on behalf of the Court of Appeal that compulsory ADR was an “unacceptable obstruction” to justice, or a breach of Article 6 and he seemed less than certain the comment was not *obiter* (*Wright* 2013: paragraph 3). He speculated that:

Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of development in this field (*ibid*).

In *Bradley v Heslin* (2014), the following year, another judge was signally unimpressed with the way two highly disputatious litigants had behaved in a dispute over whether to keep a gate of a shared driveway open or closed. Norris J said:

I think it is no longer enough to leave the parties the opportunity to mediate and warn of costs consequences if the opportunity is not taken ... The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for trial should be regarded as an acceptable obstruction on the right of access to justice (*Bradley* 2014: paragraph 24).

Notwithstanding these remarks, ADR still remained non-compulsory. For example, Briggs LJ (as he then was) appeared to support non-compulsory ADR in his *Interim Report* on civil courts (2015: eg paragraphs 2.86 and 2.87). In addition, the *Interim Report* (2017) and the *Final Report* (2018) of

the ADR Working Party of the Civil Justice Council (in broad terms) did not recommend compulsory ADR.

[H] MOVING TOWARDS COMPULSORY ADR— 2019 ONWARDS

In 2019, there was a small breakthrough for the exasperated judges in *Colin Wright* and *Bradley*. The Court of Appeal in *Lomax v Lomax* (2019) held that a court has the power under CPR part 3.1(m) to order the parties to attend a form of ADR called an early neutral evaluation. Discrete and prescriptive the case may have been, but it began to open the door onto what happened next.

A year later, Vos LC (as he then was) seriously considered the possibility that a court might compel mediation in *McParland v Whitehead* (2020). He declined to do so, but the door continued to open.

In January 2021, the same judge, in his new role as Master of the Rolls, requested the Civil Justice Council to consider the issue of compulsory ADR and report on its legality (if any) and desirability.

The Council duly reported in July 2021. We shall not parse the contents of the report at length.⁴ It is enough for our purposes to record that in the Council’s view, mandatory ADR was both lawful and desirable, subject to certain safeguards, the main one being to ensure that parties will, in the last, not be coerced and remain be “free to refuse any settlement offer and revert to the adjudicative process” (paragraph 84). It would be “potentially an extremely positive development” (paragraph 118), it opined.

At paragraph 58 it stated:

The authors of this report suggest that any form of ADR which is not disproportionately onerous and does not foreclose the parties’ effective access to the court will be compatible with the parties’ Article 6 rights. If there is no obligation on the parties to settle and they remain to choose between settlement and continuing litigation then there is not, in the words of Moylan LJ in *Lomax*, “an acceptable constraint” on the right of access to the court. We think the logic of the *Lomax* decision is capable of applying to other forms of ADR as well as ENE [Early Neutral Evaluation].

And at paragraph 60:

Subject to that important proviso [in paragraph 59], we think the balance of argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR.

⁴ The report deserves to be read in full.

And at paragraph 69:

The authors are not aware of any other legal principle [than Article 6] – whether in legislation or at common law – which may impede the introduction of compulsory ADR generally.

[I] *CHURCHILL*

The door finally opened all the way in 2023, onto the case with which we began this paper: *Churchill*.

It began with notoriously destructive and obstinate Japanese knotweed, which had infested land owned by Merthyr Tydfil County Borough Council and from there, it was alleged, had encroached and damaged the adjoining property of Mr Churchill.

With facts reminiscent of *Frank Cowl* 22 years earlier, the Council had a corporate complaints procedure. Like the residents of the old people's home, Mr Churchill did not avail himself of that, but simply instructed his solicitors to send a letter of claim threatening proceedings.

The Council warned Mr Churchill that if he commenced proceedings before using the complaints procedure, it would apply to the court for a stay. Mr Churchill ignored that warning. The Council applied to stay the proceedings.

The district judge who heard the stay application dismissed it. He considered that Mr Churchill and his lawyers had acted unreasonably by failing to use the complaints procedure which was contrary to the spirit and the letter of the relevant pre-action protocol. However, the judge also considered he was bound by *Halsey* and in particular Dyson LJ's statement (quoted in full above at paragraphs 9 and 10) that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right to access to the court".

The Council was given permission to appeal, which is how and why the case came before the Court of Appeal.

The two issues that fell to be determined by the Court of Appeal were:

1. Was the judge right to think that *Halsey* bound him to dismiss the Council's application for a stay?
2. If the judge was not right, can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

We shall not parse the Court of Appeal’s judgment. Space does not allow it, and there is no need. However, we shall set out the salient arguments and reasons.

Was *Halsey* binding?

The court began its analysis by establishing the *ratio decidendi* of *Halsey*.

It clarified what it meant by that term and adopted the reasoning of Leggatt LJ in *R (Youngsman) v The Parole Board* (2018). The judge in that case cited the usual definition (paragraph 48) of what a *ratio decidendi* is, as “any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him”. He added a proviso (at paragraph 51), which the Court of Appeal in *Churchill* adopted and quoted at:

It therefore seems to me that, when the ratio decidendi is described as a ruling or reason which is treated as “necessary” for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly indicating that the *ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached*: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were to be adopted (*Churchill* 2023: paragraph 17, emphasis in original).

The Court of Appeal in *Churchill* found four indications in paragraphs 9 and 10 of *Halsey* which were, in its view not “part of the best or preferred justification for the conclusion” Dyson LJ reached (paragraph 18). The important one for our purposes is that, as Dyson LJ said, the issue before his court was a decision about costs sanctions, not about whether to order parties to mediate. The Court of Appeal said this:

In my view, in considering Dyson LJ’s full reasoning, it is even clearer that his ruling on whether the court had power to order the parties to mediate was not expressly or impliedly a necessary step in reaching the conclusions on the costs questions decided in the two cases. The costs questions were, as I have said, as to how the court decided whether a refusal to mediate was unreasonable. The factors identified by the court as relevant to that questions were relevant whether or not the court had power to require the parties to mediate. (*Churchill* 2023: paragraph 19)

And went on to conclude (at paragraphs 20 and 21):

Accordingly, I have reached the clear conclusion that [9]-[10] of the judgment in *Halsey* was not a necessary part of the reasoning that led to the decision in that case (so was not part of the ratio decidendi and was an obiter dictum).

As a matter of law, therefore, the judge was not bound by what Dyson LJ had said in those paragraphs.

The reader will notice that the Court of Appeal agreed with the views of Sir Gavin Lightman in 2007 and Lord Clarke MR in 2008, who considered that Dyson LJ's comments were, indeed, *obiter dicta*.

Can the courts compel ADR?

The Court of Appeal considered whether it can lawfully stay proceedings for, or order, the parties to engage in ADR. In Mr Churchill's submission, it could not. He made three submissions (at paragraph 22):

1. His right to bring proceedings could not be impeded by a requirement to follow an internal complaints procedure that was not designed for his complaint.
2. Any impediment to his right of access to the courts required a "secure statutory footing" which did not exist in this case.
3. Even if there were such a footing, it should be interpreted as authorizing only such a degree of intrusion as is reasonably necessary to fulfil the objective of the statutory provision in question.

The relevant law, for this purpose, came from three separate but coinciding streams: domestic cases, ECHR cases and pre-Brexit cases from the European Court of Justice (ECJ). We shall not parse at length the Court of Appeal's reasoning as it is not necessary as readers can read it for themselves.

In summary, however:

1. It was common ground that if the court has power to stay proceedings for, or to order, ADR, it must exercise that power so that it does not impair the very essence of the client's Article 6 rights, in pursuit of a legitimate aim, and in such a way that it is proportionate to achieving that legitimate aim.
2. The issue was that Mr Churchill submitted no such power can exist because (i) of the nature of the corporate complaints procedure in this case and (ii) without express secure statutory footing, which he says did not exist (paragraph 22).
3. The Court of Appeal held there is no doubt courts have the power to adjourn hearings and trials to allow the parties to discuss settlement (paragraphs 27-31). This power is exercised regularly. The court has had the long-established right, entrenched in the Civil Procedure Act 1997, and the power, derived from the CPR, to control its own

process. That includes staying and delaying any existing proceedings whilst any other settlement process is undertaken.⁵

4. The fact that the corporate complaints procedure may or may not be fit for purpose is distinct from whether the court has the power to order a stay or to order ADR. The procedure's defects may or may not be a good reason not to grant a stay, but they are not determinative of whether there is the power to grant a stay (paragraphs 51-52).
5. The case of *Deweere v Belgium* (1980), which was cited by Dyson LJ in paragraph 9 of *Halsey*, does not compel the conclusion that directing the parties to engage in a non-court-based dispute resolution process would, in itself, be an unacceptable restraint on the right of access to the court. *Deweere* did not decide that, but something else. Mr Deweere was told either to pay a civic fine or close down his butcher's shop. That threat prevented him from defending his refusal to pay a fine if he wanted to keep trading. It was the *threat* which infringed his Article 6 rights and not, as *Halsey* seems to consider, because he had agreed to arbitrate (paragraphs 32-33 and 55).
6. The more recent cases in the ECHR and the ECJ (including *Alassini v Telecom Italia* referred to by Lord Dyson in his 2010 speech (see above) support the propositions that a court can lawfully stay proceedings for, or order, the parties to engage in non-court based dispute resolution processes (paragraphs 54-55). This is subject to the proviso that the order (i) does not impair the very essence of the claimant's right to a fair trial, (ii) is made in pursuit of a legitimate aim and (iii) is proportionate to achieving that legitimate aim (paragraph 65). Those non-court-based dispute resolution processes do not have to be exclusively statutory ones (paragraph 55).
7. The Court of Appeal's analysis (paragraph 57) is supported by the Civil Justice Council's June 2021 report on *Compulsory ADR* at paragraphs 58 and 60 (quoted above).
8. As to how the court should decide whether to stay proceedings or order the parties to engage in ADR, the Court of Appeal refused to be drawn. It said, at paragraphs 64 and 66:

The court can stay proceedings for negotiation between parties, mediation, early neutral evaluation or any others process that has a prospect of allowing the parties to resolve their dispute. The merits and demerits of the process suggested will need to be considered by the court in each case.

⁵ The Court considered CPR 1.4(1), 3.1, 3.1(5), 26.5(1) and 26.5(3). See paragraphs 27-31 of the judgment.

And:

I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining those questions. The... [Halsey Guidelines] are likely to have some relevance. But other factors too may be relevant depending on the circumstances. It would be undesirable to provide a checklist or a score sheet for judges to operate. They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.

[J] COMMENTARY

The courts had, long before the CPR, the power to stay or adjourn proceedings to enable settlement discussions to occur. Colman J observed as much in *Cable & Wireless* (2022: paragraph 7). This is not new.

The CPR created a new landscape, in which ADR would, intentionally, play a much more prevalent role in civil procedure to achieve the overriding objective. ADR was intended to be, and became, mainstream within civil process in England & Wales. Litigation was intended to be a “last resort” where ADR will have failed. Even after litigation had begun, ADR should remain in the forefront of litigants’ minds.

It is therefore not surprising that soon after the CPR came into force the courts began to discharge their duties to fulfil the overriding objective by bringing ADR to the attention of litigants and encouraging its use. *Pal Sat*, *Kinstreet* and *Frank Cowl* are early examples of this.

We consider, however, there to be a latent tension within the CPR, between the principle that parties should not be compelled to engage in ADR while being under an express *duty* to further the overriding objective by engaging in it whenever possible.

It was, we suggest, inevitable that this latent tension would become patent. It did so in *Halsey*, where the court had to grapple with, on the one hand, what constituted parties’ reasonable refusal to engage in ADR when, on the other, they could not be compelled to do so. To further the overriding objective by engaging in ADR was an obligation, in other words, that could not be enforced. It was a circle that could not be squared.

From 2004 and for the next 19 years, and despite measured judicial criticism, *Halsey* regulated and informed the way the litigants manoeuvred over Lord Woolf’s new landscape. The courts could encourage, often in strong terms, they could facilitate, but they could not compel.

Frustrations began to show as courts had to try to fulfil the overriding objective with litigants who could not be compelled to engage in ADR to do so. *Colin Wright* and *Bradley & Heslin* are examples. *Churchill* was a timely and inevitable correction. It is important in several respects.

First, it changed the paradigm which existed at the inception of the CPR, namely that a court cannot compel parties to engage in ADR, merely encourage.

Secondly, the decision placed beyond doubt that to stay litigation for ADR and to order the parties to engage in it would not (properly done) infringe Article 6. It is important not to mischaracterize this. The decision did not “make ADR compulsory”. It held:

(ii) The court can lawfully stay proceedings for, or order, the parties to engage in a non-court based dispute resolution process *provided that* the order does not impair the very essence of the claimant’s right to proceed to a judicial hearing, *and* is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost (*Churchill 2023*: paragraph 74, emphasis added).

Thirdly, it placed beyond doubt that Dyson LJ’s comments about Article 6 were *obiter dicta* (paragraph 74(i)). It came down on the side of Sir Gavin Lightman, Lord Phillips and Sir Anthony Clarke in that debate. It gave clarity to Sir Gavin’s hypothetical “district judges in the country”, as well as to the actual district judge in the country, in the *Churchill* case.

Fourthly, it is not desirable to prescribe how the court would exercise this power (although the *Halsey* Guidelines will be relevant when a court comes to consider this) (paragraph 74(iii)).

Fifthly, the courts no longer have impossibly to square the circle by furthering the overriding objective (by dealing with cases justly, including resolving them by ADR), while being unable to compel parties to do so when they risk not discharging their duties to do the same thing.

We consider it likely, now that the spectre of Article 6 has finally been laid to rest, that the courts will rediscover the robust confidence of the courts found in the early CPR cases such as *Pal Sat*, *Kinstreet* and *Frank Cowl*.

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IS THERE A RIGHT TO NEWSGATHERING IN HONG KONG? PUTTING THE CFA JUDGMENT OF CHOY YUK LING IN CONTEXT

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Abstract

In Hong Kong, the Court of Final Appeal in *HKSAR v Choy Yuk Ling* (CFA 2023) quashed the convictions of a journalist who was accused of knowingly making false statements in her search requests of a government-maintained vehicles register containing personal data crucial to newsgathering. The Court held that the relevant search purposes should not be narrowly construed to exclude *bona fide* journalism; regard has to be given to freedom of speech and of the press; and data protection law permits disclosures of personal data in the public interest for news activity purposes. However, this decision was soon overturned by the Government's new measures which in effect prevent any search of the register for journalistic purposes. In early 2024, the enactment of the Safeguarding National Security Ordinance by the Government has further eroded the right to newsgathering of Hong Kong journalists.

Keywords: Hong Kong; Court of Final Appeal; newsgathering; freedom of speech and of the press; protection of personal data; Safeguarding National Security Ordinance 2024.

[A] INTRODUCTION

In June 2023, the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (HKSAR or Hong Kong) handed down the judgment in *HKSAR v Choy Yuk Ling* (CFA 2023). This is the first time that a criminal case arising from newsgathering activity has reached the CFA for a full appeal hearing since the Court and the HKSAR came into being on 1 July 1997 upon the 1997 handover.¹ Choy Yuk Ling, a veteran journalist, was accused of knowingly making false statements in her

¹ On 1 July 1997, Hong Kong was returned by the UK to the People's Republic of China (PRC), becoming a special administrative region with its own legal system and local government in accordance with Article 31 of the Constitution of the PRC. This is known as the 1997 handover.

search requests in respect of a government-maintained vehicles register.² Choy's prosecution had induced a chilling effect among journalists in Hong Kong, causing them to stop performing similar searches.

The CFA unanimously allowed Choy's appeal and quashed her convictions, upholding the constitutionally protected freedoms of speech and of the press. However, this decision was in effect overturned in early 2024 by the HKSAR Government's new measures that in practice almost completely prevent any search of the vehicles register for journalistic purposes. Also, in early 2024, the enactment of the Safeguarding National Security Ordinance (NSO) by the HKSAR Government has further eroded the right to newsgathering of Hong Kong journalists.

This paper explores the importance of the right to newsgathering in the protection of media freedom and examines how determinative government policies, laws and court decisions can be in acknowledging the right to newsgathering. Indeed, from a closer examination of *Choy's* case and considering some other unfavourable factors—the recent enactment and enforcement of national security legislation in particular—it is clear that the right to newsgathering has been fragile in Hong Kong for some time now, and that it will continue to be so in the foreseeable future.

[B] FACTS OF THE CASE

In Hong Kong, most vehicles used on the road are registered with and licensed by the Transport Department. The Commissioner for Transport (Commissioner) maintains a register of vehicles (vehicles register) containing 18 particulars of each vehicle, including the name, address and identification document of the vehicle owner (Road Traffic Regulations 1984, regulation 4(1)). For many years until early 2024, any member of the public could conduct searches of the vehicles register by applying for a "Certificate of Particulars of Motor Vehicles" (certificate) (Road Traffic Regulations 1984, regulation 4(2)).

Choy was arrested and prosecuted in November 2020 after conducting two public searches of the vehicles register earlier that year in her preparation of a documentary for *Hong Kong Connection*, a flagship television programme of Radio Television Hong Kong (RTHK), the city's public broadcaster. The television episode investigated alleged collusion between the police and gangsters in a high-profile ambush on protesters and train passengers inside a subway station on the evening of 21 July

² In Chinese, the surname comes first. Choy is the last name of the accused and Yuk Ling is her first name.

2019 (the 7.21 Attack) during the height of the political unrest which occurred that year throughout Hong Kong.

To track down the gangsters of the 7.21 Attack for interview, Choy and her colleagues gathered CCTV footage from shops near the subway station showing the gangsters carrying bamboo sticks and canes arriving in private vehicles before the attack. But only one van's plate number could be seen. In the summer of 2020, Choy accessed the vehicles register twice, inputting the plate number of the van, completing an application form, and obtaining a certificate each time. The two certificates included the name and address of the registered owner of the van. It turned out that the registered owner was a company and the address given was that of another company. Choy eventually managed to get in touch with a Mr But, whom she interviewed on the phone. She asked him whether he had driven the van to the vicinity of the subway station shortly before the 7.21 Attack. The documentary, which was aired on 13 July 2020, included a clip of the interview with Mr But.

On 3 November 2020, Choy was arrested after Mr But made a complaint to the police. She was later prosecuted for two counts of knowingly making a false statement in a material particular for the purpose of obtaining a certificate, contrary to section 111(3)(a) of the Road Traffic Ordinance 1982. This legal provision generally prohibits the making of a false statement when applying for various licences and documents from the Transport Department. Choy pleaded not guilty to both counts.

[C] RELEVANT REGULATORY MEASURES AND 2019 CHANGES

To better understand the arguments presented in Choy's prosecution, the following provides an overview of the procedures for public searches of the vehicles register. In 2003, the Transport Department introduced several administrative measures relating to the application of a certificate in order to strengthen the protection of the personal data of registered car owners (HKSAR Legislative Council 2011). These included a reminder on the application form stating that personal data of the registered vehicle owners should only be used for "traffic and transport related matters". According to these measures, to indicate the purpose of the application, an applicant must select one of the three options provided on the application form: (1) for legal proceedings; (2) for sale and purchase of vehicles; and (3) for other uses ("please specify"). In addition, an applicant must confirm their understanding that making a false statement constitutes an offence.

An internal survey by the Transport Department showed that 50,400 certificates were issued in 2010 but 44 per cent of the applicants did not specify the purpose of their application. Nearly 3,000 such applications were made by news or media organizations. Moreover, the department noted in 2011 that no applicant had ever been prosecuted for making a false statement in the application process. No further statistics have been available since 2011.

Also, in 2011, the HKSAR Government announced its intention to amend the law to offer better protection of the personal data of registered vehicle owners (HKSAR Transport Department 2011). The main proposal was to issue certificates strictly according to several specified purposes. However, the public consultation on the proposed amendments was not followed up by any legal enactment.

Instead, in the wake of the 2019 political unrest, subtle revisions were made to the application form due to increasing incidents of doxxing, many of which targeted police officers and their family members (Hale 2019). Without any public consultation, the third option was changed in late 2019 from “other uses” to “other traffic and transport related matters” and the phrase “please specify” was deleted (*Ming Pao Daily News* 2023).

These 2019 changes were significant. Choy had previously applied for certificates but had never got into any trouble. When conducting her two searches in 2020, however, Choy could no longer specify her exact purpose of “newsgathering” and had to select the much narrower third option on the application form. In addition, Choy had to declare that she understood that the personal data provided in the certificate should only be used for “activities related to traffic and transport matters”.

[D] DECISIONS OF THE LOWER COURTS

At trial, there were three major issues: 1) whether Choy’s statement as to the purpose of her application was material; 2) whether the statement was false; and 3) whether Choy knew that the statement was false in a material particular.

The magistrate decided that the stated purpose by an applicant is material to the success of the application (*HKSAR v Choy Yuk Ling* 2021). The Commissioner safeguards the rights of the registered vehicle owners and does not arbitrarily disclose information for access by others. Moreover, the stated purpose should be the intended usage of the certificate by the applicant (for news reporting in *Choy’s* case) and had nothing to do with the usage of the vehicle (whether the van had been

used to transport attackers and weapons). Choy did knowingly make a false statement because she selected the third option stating her purpose was for “other traffic and transport related matters”, and she made the declaration that she would use the personal data obtained for activities relating to traffic and transport matters. But Choy knew well that the real reason for applying for the certificates was newsgathering and the making of a television episode.

The magistrate added that it is immaterial whether Choy had a good intent in seeking the information. An applicant must not make any false statement, even if the three options provided are irrelevant. Choy should try some other means, such as writing to the Transport Department, requesting the information needed for her newsgathering and reporting. The magistrate convicted Choy of the two counts of the offence charged and fined her HKD3,000 on each count, making her the first journalist to be convicted of the offence (Wong 2023).

An appeal against Choy’s convictions in the Court of First Instance was dismissed (*HKSAR v Choy Yuk Ling* CFI 2023). The High Court judge hearing the appeal agreed with the magistrate on all three disputed issues. Choy sought the information with good intent, the judge noted, but this was not a defence. The judge elaborated on the protection of personal data. As a data user, the Commissioner has a statutory duty to act in accordance with the Personal Data (Privacy) Ordinance 1995 (PDPO). Meanwhile, the judge also acknowledged the significance of the flow of information and press freedom to an open and democratic society. But he found that the PDPO provision relied on by the defence was not relevant to Choy’s appeal. The judge also declined to interpret the meaning of “other traffic and transport related matters” in a wide sense and in line with public perception. The only way to expand the right of journalists or other people to access the information on the register would be to go through public consultation and then resolve this through legislation.

[E] THE COURT OF FINAL APPEAL DECISION

Mr Justice Joseph Paul Fok delivered the judgment on behalf of the CFA. On the issue of materiality, the Court held that the courts below were correct in deciding in the prosecution’s favour. In accordance with the PDPO, Mr Justice Fok noted, the Commissioner is a data user who has an inherent duty to manage responsibly the personal data kept in the vehicles register and to minimize the risk of potential abuse of such data. Thus, the Commissioner was entitled to require Choy to state the reason for the supply of a certificate by selecting one of the three purposes

specified on the application form. That statement of purpose by Choy was material to the application. If Choy's statement of purpose was relevantly false, potential liability for the offence under section 111(3)(a) might arise.

The CFA went on to hold that the issues of falsity and knowledge were wrongly decided against Choy. Mr Justice Fok disagreed with the narrow interpretation made by the magistrate and the judge regarding "other traffic and transport related matters" (ie the third category of the stated purposes on the application form). First, the Road Traffic Ordinance governs a wide variety of activities in relation to road traffic. The overall statement of purposes on the application form also uses the phrase "activities relating to traffic and transport matters". As such, "other traffic and transport related matters" as the third category of stated purposes must be understood to be a catchall for any other activities which relate to traffic and transport matters.

Second, Mr Justice Fok preferred to read the third category of stated purposes in a wider sense so as to include serious investigative journalism undertaken by Choy in relation to the use of the vehicle. This approach sits more naturally with the catchall nature of the category. Third, such a construction also reflects the principle against doubtful penalization.

Fourth, and more importantly, the Court held, it is a constructional choice which gives effect to the constitutionally protected freedom of speech and of the press contained in Article 27 of the HKSAR Basic Law 1990 and Article 16 of the Hong Kong Bill of Rights 1991.³ Choy was exercising her freedom of speech and of the press in the investigation of the 7.21 Attack. This fact should be taken into consideration when ruling on Choy's alleged offence. The CFA further held that "whilst such rights are not absolute and may be restricted where necessary, there is no reason to proceed from a starting point that *bona fide* journalism should be excluded from the phrase 'other traffic and transport related matters'" (paragraph 62).

Fifth, Mr Justice Fok opined that the judge's interpretation of section 61 of the PDPO was unduly narrow and wrong. In fact, section 61(2) provides an exemption to Data Protection Principle 3, allowing a data user to disclose the collected personal data to another data user who is engaging in news activity if the person has reasonable ground to believe such disclosure is in the public interest.

³ Article 27 of the HKSAR Basic Law guarantees freedom of speech and of the press. Article 16 of the Hong Kong Bill of Rights, which replicates Article 19 of the ICCPR, guarantees the right to freedom of expression. As noted by UN General Comment No 34, freedom of expression includes freedom of speech and of the press.

Based on these five reasons, the Court concluded that Choy did not make a false statement by selecting the third category of “other traffic and transport matters” as her purpose when she applied for a certificate.

The Court further held that the inference of knowledge of falsity drawn by the courts below was not justified and, in convicting Choy on that inference, substantial and grave injustice was done to her. The phrase “other traffic and transport related matters” is not clear and unambiguous. Moreover, even if the phrase were objectively construed as excluding a journalistic purpose, Choy could well be honestly mistaken in thinking that her journalistic purpose was included as one “relating to traffic and transport matters”. This was particularly so given the large volume of certificates previously issued to media and news agencies.

[F] THE HKSAR GOVERNMENT’S OVERTURNING OF THE CFA DECISION

The Chief Executive of the HKSAR, John Lee, welcomed the CFA judgment saying it reflected Hong Kong’s fair judicial system and the rule of law (Lee 2023). Lee also indicated that search procedures of the vehicles register would be reviewed so as to give effect to the judgment. Nonetheless, the Transport Department soon introduced what it called “refined” arrangements which have in effect prevented any search of the register for journalistic purposes.

From 8 January 2024 onwards, the Transport Department will only issue a certificate to three categories of applicants: a) the registered owner of the vehicle; b) an applicant who has obtained written consent from the vehicle owner to acquire a certificate; or c) an applicant whose interests are directly affected by the ownership or use of the vehicle, who has a need to ascertain the particulars of the vehicle, and for whom such information would only be used for specified purposes. These include sale and purchase of the vehicle; insurance claims; compensation/claims; recovery of fines etc; removal of the trespassing vehicle; legal proceedings involving the vehicle; and safety recalls.

All other applicants, including media outlets, are required to write to the Transport Department making an application under exceptional circumstances. They should demonstrate a ground of significant public interest and prove they have no alternative ways of obtaining the information. The written submission should provide details including the purpose of obtaining the name and address of the vehicle owner, how

the data will be used and publicized, and the measures taken by the applicant to ensure the privacy of the vehicle owner will not be invaded.

The Commissioner will personally review any application from media outlets to assess whether the benefits accrued to the public interest outweigh the owner's rights to privacy. New guidelines also provide that an application will be rejected if the Commissioner reasonably believes that the issuance of a certificate will be contrary to the interests of national security or is likely to threaten public safety or prejudice the maintenance of public order. No indication has been given on how long it will take to process a written submission.

The Hong Kong Journalists Association (HKJA) criticised these "refined" arrangements because they exclude genuine news activity from public searches of the vehicles register and therefore run counter to the CFA judgment (HKJA 2024). In early April 2024, the HKJA applied for judicial review of these new restrictive arrangements (Ho 2024; *The Hong Kong Journalists Association v The Commissioner for Transport* 2024).

[G] ARE THERE ANY PROTECTIONS OF THE RIGHT TO NEWSGATHERING IN HONG KONG?

Access to information and the United Nations reminders

The HKSAR Basic Law stipulates the constitutional arrangements and the protection of human rights in Hong Kong after the 1997 handover. Article 39 guarantees that provisions of the International Covenant on Civil and Political Rights 1966 (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the HKSAR laws. Article 19 of the ICCPR requires states parties to guarantee the right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. But neither media freedom nor the right to newsgathering is explicitly protected by the ICCPR. A similar deficiency also exists in Article 10 of the European Convention on Human Rights 1950 (ECHR). Meanwhile, constitutions of many states parties duly recognize freedom of the press but without mentioning the right to newsgathering.

As such, journalistic bodies around the world have for years been lobbying for better protection of the right to newsgathering. This includes adequate access to public records and venues of news events, and the

protection of journalistic sources (International Federation of Journalists 2021; Reporters Committee for Freedom of the Press 2023). In particular, the police should not hinder journalists on assignments, not to mention attack or arrest them (International Press Institute 2020). Overall, journalists should be facilitated in their daily newsgathering and should never become criminals simply because they are doing their job.

In 2011, the Human Rights Committee of the United Nations (UN) issued General Comment No 34, which expounds on various aspects of Article 19 ICCPR protection (UN 2011). The document stipulates that “The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function” and Article 19(2) embraces a right of access to information held by public bodies. Moreover, the processing of requests for information should be in a timely manner according to clear rules. Appeals should be available in cases of refusals to provide access to information and failures to respond to requests.

The UN Special Rapporteur on Freedom of Expression in her 2023 annual report again highlighted the importance of access to information, which is at the heart of freedom of expression, serving as a vital tool to expose and counter corruption and other illegal activities (UN 2023). Investigative journalism plays a vital watchdog role. States parties should enact or revise laws on access to information so as to ensure compliance with international and regional standards and to avoid overly broad or vaguely framed exemptions based on national security or official secrecy.

The Special Rapporteur also noted that access to information, even in some Western democracies, is excluded and requests are denied regularly on the pretext that disclosures of personal information would violate the right to privacy and obligations regarding data protection. She agreed that the relationship between data protection, the right to privacy and the right to information is complex and requires a careful balancing of interests. Laws and policies should therefore be clearly defined so as to facilitate the maximum disclosure of information whenever the public interest in the release of personal data is more important than the privacy interest.

Choy’s case: harms done to journalism and the public’s right to know

Clearly, Choy enjoyed very little Article 19 protection. Queries were raised whether she had fallen victim to selective prosecution, possibly due to her investigations into the 7.21 Attack (BBC 2020; Kwan 2023). Furthermore,

deviating from the usual practice of issuing a summons to the accused, the authorities arrested Choy at home and detained her for hours before she was granted police bail. Such an intimidating and frightening experience induces a chilling effect. It adversely impacts not only public searches by journalists of the vehicles register but also investigative journalism of politically sensitive topics such as the 7.21 Attack.

Choy's mishap reflected how vulnerable a Hong Kong journalist can be. She worked for RTHK for nearly a decade and left on her own accord in 2016 (Yan 2023; 2024). She rejoined RTHK as a freelancer in 2019 and worked on the documentary investigating the 7.21 Attack. After her arrest, RTHK terminated her contract. The public broadcaster also refused to provide her with any legal assistance. Choy finally won the case mostly because of her own resilience. However, harm had already been done, not only to Choy personally but also to the public's right to know (Chan 2023).

On a closer examination of the CFA judgment, one can detect the usual judicial restraint. The Court did not address the two chronic issues facing journalism in Hong Kong: namely, that the right to newsgathering has never been explicitly protected and that there is a lack of access to information legislation. Moreover, the Court apparently agreed to a possible future tightening of access to the vehicles register. It noted "if reform were required, the application process and regulatory framework for that process should be strengthened", referring to the proposed amendments made by the HKSAR administration in 2011 (paragraph 66).

Meanwhile, the restrictive measures introduced for the vehicles register in early 2024 by the HKSAR administration are largely in line with a new practice adopted in recent years. Public searches of company, land, marriage, voter registers, etc have either been much restricted or even stopped by the HKSAR authorities on the pretext of protecting privacy and preventing doxxing (*Ming Pao Daily News* 2023; HKJA 2021). Unfortunately, the joy over Choy's victory was short-lived.

Hong Kong does not have any legislation facilitating access to information, despite years of lobbying by the HKJA and some civil society bodies (HKJA 2019a). Shortly before the 1997 handover, the colonial Government issued a code on access to information (The Code 1995). In late 2018, a subcommittee of the Hong Kong Law Reform Commission published a consultation paper on access to information, stating that, even though the existing code is effective and cost-efficient, legislation should be introduced to implement an access to information regime with statutory backing (Hong Kong Law Reform Commission 2018). As

of 31 March 2024, the Commission has not published a final report on this topic.

Recent ECHR developments

In Choy's judgment, the CFA did not mention any decisions of the European Court of Human Rights (ECtHR). Nonetheless, over the years, the CFA has quite often referred to ECtHR decisions when dealing with appeals arising from human rights issues, including the right to freedom of expression (*HKSAR v Fong Kwok Shan Christine* 2017).

In the past decade or two, the ECtHR has heard cases concerning the right to newsgathering (ECtHR 2022: 54-57). For example, in 2018, the ECtHR held that Russia had violated Article 10 of the ECHR when arresting and convicting a Ukrainian journalist covering protests in St Petersburg during the 2006 G8 Summit. The ECtHR reiterated that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom (*Butkevich v Russia* 2018: paragraph 123).

This was again stressed in 2019 in another ECtHR judgment. The court held that Hungary had violated Article 10 of the ECHR when refusing access by a journalist to a refugee reception centre. The court opined that obstacles created in order to hinder access to information which is of public interest may prevent journalists from performing their vital role as "public watchdogs", and their ability to provide accurate and reliable information may be adversely affected (*Szurovecz v Hungary* 2016: paragraph 52).

Meanwhile, the Council of Europe issued guidelines in 2016 on the protection of journalism, noting that the participation of journalists in public debate on matters of legitimate concern must not be discouraged by measures that make access to information more cumbersome or by arbitrary restrictions and the like because they may become a form of indirect censorship (Council of Europe 2016).

The guidelines also ask the authorities to show restraint in resorting to criminal proceedings:

A chilling effect on freedom of expression can arise not only from any sanction, disproportionate or not, but also the fear of sanction, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future (Council of Europe 2016: paragraph 34).

The guidelines further remind that:

a chilling effect also results from the arbitrary use of administrative measures such as registration and accreditation schemes for journalists, bloggers, Internet users, foreign correspondents, NGOs, etc., and tax schemes, in order to harass journalists and other media actors, or to frustrate their ability to contribute effectively to public debate (Council of Europe 2016: paragraph 37).

The wider picture in Hong Kong

For decades, there has in practice been little protection for the right to newsgathering in Hong Kong despite the incorporation of Article 19 of the ICCPR into the Hong Kong Bill of Rights and the HKSAR Basic Law (Yan 2003). Reporters have at times been badly treated and even assaulted by the police when covering public demonstrations (Yan 2014). Situations have obviously worsened in the past decade and came to a head during the 2019 political unrest. When covering peaceful demonstrations or conflicts between protestors and the police that year, journalists were often subjected to obstruction, verbal abuse, tear gas, or some other physical attacks by the police (International Federation of Journalists 2020). The relationship between the police and the press has remained strained ever since.

In September 2022, the incumbent HKJA Chair, Ronson Chan, was arrested whilst on his way to an assignment for refusing to show his HKSAR identity card to a plain-clothed police officer. He was later convicted of obstructing a police officer and sentenced to five days' imprisonment (Leung 2023). As of 31 March 2024, Chan was still on bail, awaiting an appeal hearing. Chan was also subjected to smear campaigns conducted by pro-Beijing local media soon after he became HKJA Chair in mid-2021 (Davidson 2022).

Meanwhile, the HKJA has also been targeted and attacked by pro-Beijing groups and media (Leung 2023). In addition, the HKSAR authorities and top officials openly found fault with the HKJA (Ni 2022). In late 2023, the Inland Revenue Department demanded that the union pay a backdated profit tax amounting to HKD400,000. The HKJA raised an objection, maintaining it had completed auditing and tax returns properly (*The Standard* 2024). In early 2024, Chris Tang, the Secretary for Security, again criticized the HKJA and, this time, for being unrepresentative because it had only a few hundred members (Tse 2024).

Like most other trade unions in Hong Kong, the HKJA does not enjoy collective bargaining status and its membership is entirely voluntary.

Nonetheless, the union has been lobbying for press freedom since its inception more than 50 years ago. More recently, for example, the HKJA had repeatedly urged the police to treat journalists properly during the 2019 political unrest (HKJA 2019b). Other HKJA efforts in the past decade include seeking judicial review of the accreditation of journalists by the HKSAR authorities (*Re Hong Kong Journalists Association* 2017) and attempting to intervene in injunction applications sought by The University of Hong Kong to prevent disclosure of confidential meeting minutes (*The University of Hong Kong v Hong Kong Commercial Broadcasting Co* 2016).

Weaponization of the law in the aftermath of the 2019 political unrest

From the 1980s onwards, Hong Kong was noted for being a modern city enjoying a high respect for the rule of law, despite not being a democracy. In the first two decades after the 1997 handover, Hong Kong apparently still enjoyed the rule of law but its common law system was based on an increasingly shaky foundation as Beijing was getting tougher on Hong Kong (*The Economist* 2017).⁴ The most drastic transformation occurred soon after the 2019 political unrest, which resulted in frequent international criticism that the law and the justice system in the HKSAR had been weaponized (Chan 2021; Georgetown University Center for Asian Law 2023; Columbia Journalism School & Ors 2023).

The 2019 political unrest was labelled by Beijing as a “colour revolution” instigated by hostile foreign forces (Cheong 2019). The central authorities in Beijing swiftly enacted the HKSAR National Security Law (NSL) in mid-2020, imposing on Hong Kong various vague and far-fetched offences prohibiting subversion, secession, terrorist activities and collusion with foreign powers (Articles 20-30) (Chopra & Pils 2022).

The NSL also introduced new procedures and practices such as trial by designated judges without a jury (Articles 44, 46), making presumptions against the granting of bail (Article 42) and conferring on the police increased investigative powers (Article 43; Implementation Rules for Article 43 2020). Meanwhile, Beijing set up an NSL office in Hong Kong supervising the implementation of this new legislation, advising top HKSAR officials, and directly handling NSL cases, which are considered too complex for the HKSAR law enforcement and judiciary to deal with (Articles 48-61).

⁴ Beijing or the central authorities refers to the central Government of the PRC in Beijing.

Locally, the HKSAR Legislative Council enacted a law in mid-2020 to protect the national anthem (National Anthem Ordinance 2020). The legislation punishes any disrespectful acts towards the national anthem and indirectly prohibits any songs that are considered to be advocating Hong Kong independence (Amnesty International 2020).

Since the 2019 political unrest, leading activists and politicians, ordinary protestors and netizens, and professional journalists have been arrested under the NSL or for the offences of riots or sedition, etc (Georgetown University, Center for Asian Law 2023). As of 31 March 2024, some of the accused have been detained without bail for more than three years while waiting for trial or sentencing (Chan 2024). For those whose court trials have been completed, most were convicted and given lengthy prison sentences. Many trial and appeal hearings are still in progress.

Against this background of weaponization of the law and the justice system, freedom of expression has been among the most obvious casualties. Soon after the implementation of the NSL, the police raided *Apple Daily*, a Chinese newspaper that enjoyed the second largest circulation in Hong Kong and which had taken a leading role in advocating the city's democratization (Grundy 2020). Its owner, Jimmy Lai, was arrested but granted bail. A second raid took place in mid-2021, when Lai and several editors were arrested and detained without bail. All of them were prosecuted for violating the NSL and for committing sedition (Sum 2022). This soon led to the closure of *Apple Daily*.

The offence of sedition dating back to the colonial era has been revived, resulting in frequent prosecutions and convictions. Two editors from *Stand News*, an online news portal that rose to prominence during the 2019 political unrest, were first arrested under the NSL and later prosecuted for the offence of sedition. Their arrests in late 2021 soon led to the closure of *Stand News* and some other news outlets for fear of possible prosecutions.

Some ordinary Hong Kong people have also been convicted of sedition for expressing views allegedly hostile to the HKSAR or Beijing (AFP 2023). Demonstrations and protests have literally disappeared from Hong Kong streets. The UN, Western governments and legislatures, and overseas concerned groups have repeatedly requested the HKSAR Government to stop these human rights violations originating from the weaponization of the law, but to no avail (UN 2024a).

The enactment of the Safeguarding National Security Ordinance in March 2024

In early 2024, freedom of expression and other human rights conditions further deteriorated in Hong Kong. Article 23 of the HKSAR Basic Law stipulates that the HKSAR shall enact local legislation to protect national security (Hutton 2024). An attempt to enact such legislation was made in 2003 but was soon aborted after mass street protests broke out in Hong Kong (Petersen 2005). In March 2024, the HKSAR authorities finally completed the long-delayed task of legislating on Article 23 by a speedy enactment of the Safeguarding National Security Ordinance (NSO) in less than two weeks (HKSAR Government 2024).

The NSO aims to prevent, suppress and punish acts and activities endangering national security (The Preamble, NSO). Replicating the definition contained in Article 2 of the nationwide National Security Law (NSL 2015), section 4 of the NSO stipulates an extremely broad definition of “national security”:

a reference to national security is a reference to the status in which the state’s political regime, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the state are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security.⁵

The NSO covers a wide range of prohibited activities, and thus not only supplements but also expands the NSL that was imposed on the HKSAR by Beijing in 2020. This new local legislation bans and punishes treason, insurrection, incitement to mutiny, acts with seditious intention, theft of state secrets, espionage and collaboration with external forces to exert interference using improper means, etc.

Previously, the offence of treason inherited from the British colonial era, which carried a maximum sentence of life imprisonment, punished the levy of war against the monarch, assisting foreign enemies to invade the United Kingdom (UK) or any British territory, or the use of force against the monarch. Since the 1997 handover, these punishable acts referred to those committed against the central authorities and the Chinese territories. In other words, the definition of “treason” encompassed an element of the use of force. However, the NSO has much widened the

⁵ This journal article has mentioned three pieces of legislation on national security. They are: a) the HKSAR NSL, which was enacted by the central authorities in Beijing for Hong Kong in 2020; b) the NSO, which is a local legislation enacted by the HKSAR Government in early 2024; and c) the nationwide NSL, which was enacted by the central authorities in Beijing in 2015 for the whole of China except Hong Kong and Macau.

scope of “treason” so that a Chinese citizen who uses force or threatens to use force “with intent to endanger the sovereignty, unity or territorial integrity of China” will also be liable (section 10).

Meanwhile, the definition of “state secret” given in the NSO goes beyond the usual scope of national defence and foreign affairs. State secrets have been expanded to include secrets of economic, social and technological development of China or the HKSAR, or secrets in the relationship between the central authorities and the HKSAR, etc (section 29).

In the NSO, the offence of espionage, which carries a maximum prison sentence of 20 years, is widely defined so as to punish a variety of acts alleged to have been committed with an intent to endanger national security. Such acts include approaching, inspecting, passing over or under, entering or accessing a prohibited place, or being in the neighbourhood of a prohibited place (section 43(2)). Again, prohibited places are broadly defined (section 41). Also considered as espionage are many other acts such as obtaining, collecting, recording or communicating to any other person, any information or document, etc that is calculated to be, or is intended to be, directly or indirectly useful to an external force. The list of external forces is long, including entities such as a government of a foreign country, a political party in an external place, an international organization, or an individual related to any such entities (section 6).

In addition, collusion with an external force to publish a statement of fact that is false or misleading is also considered as espionage (section 43(3)). If convicted, the maximum sentence would be imprisonment for 10 years. To become liable for the offence, the accused had the intent to endanger national security or was reckless as to whether national security would be endangered when publishing the statement, and that the individual knew that the statement was false or misleading. It would also be considered as an act of espionage should the accused be found to have the intent to endanger national security, while publishing a statement that person had reasonable grounds to believe that the statement was false or misleading.

The NSO also toughens some existing punishments. Notably, the maximum jail term for the offence of carrying out an act with “seditious intention” is increased from two years to seven years, and further increased to 10 years if collusion with an external force is involved (section 24). This toughening of penalties is particularly alarming given that the meaning of “seditious intention” has remained broad and vague (section 23) and new provisions have been introduced clarifying that in convicting an accused it is not necessary to prove that person had an intention to incite public

disorder or to incite violence in the commission of acts with a seditious intention (section 25).

Moreover, the NSO equips the police with new investigatory powers, allowing for detention of suspects without charge for up to 16 days and denial of their access to legal advice for the first 48 hours (sections 78 and 80(3)(b)). Unprecedented restrictions have also been placed on lawyers in their offering of legal assistance to the accused (sections 79-80). Meanwhile, the Secretary for Security is equipped with direct power to ban any organizations endangering national security, foregoing any judicial oversight (section 60).

Many Western governments and international organizations strongly criticized the passage of the NSO, fearing it would result in a continuing systemic erosion of autonomy, freedoms and rights in Hong Kong (Amnesty International 2024; Pomfret 2024). The UN Special Rapporteur on the Protection of Freedom of Expression together with five other special rapporteurs jointly sent an 18-page communication to the HKSAR Government voicing their deep concerns about the NSO (UN 2024b). These human rights experts pointed out in their communication that the NSO “includes numerous measures that would significantly and unduly limit the exercise of human rights and fundamental freedoms” and would be incompatible with the Universal Declaration of Human Rights 1948, the ICCPR and the International Covenant on Economic, Social and Cultural Rights.

These UN experts noted that definitions of “national security” and some other crucial terms are overly broad and vague. Moreover, the NSO set low thresholds for commission of offences and exercise of executive powers. They worried that the constitutional and legal framework of the HKSAR would fail to give effect to the primacy of international human rights law. The ordinance would then be interpreted and applied so as to override international human rights law in the event of any inconsistency between the two (UN 2024b: 5).

They urged the HKSAR Government to carry out a full review and reconsideration of the Ordinance to ensure that it complies with international human rights norms and standards which are binding on the HKSAR. They also requested that the HKSAR Government inform the UN about how to bring into line with the international human rights standards the definitions of national security, collusion with external forces, political ends, international organizations, etc to ensure compatibility with the principle of legal certainty established under the ICCPR (UN 2024b: 17).

Also, these six UN experts asked the HKSAR Government to clarify that the offence of “colluding with external forces” excludes instances of cooperations with the UN, in particular its human rights bodies and mechanisms. They also reminded in their communication that the UN Human Rights Committee had requested in 2022 that the HKSAR Government should take concrete steps to repeal the NSL and to refrain from applying the legislation in the meantime (UN 2024b: 2).

The possible adverse impact of the NSO on freedom of expression

The six special rapporteurs remarked that the broad categories of speech-based offences in the NSO together with the broad definitions contained in the NSL “may unnecessarily and disproportionately limit the exercise of freedom of expression, including the work of journalists, civil society actors, human rights defenders and anyone seeking to exercise her/his rights and freedoms”. The communication reminded the HKSAR authorities that: “Media plays a crucial role in society by informing the public on issues of public interest, while civil society can make valuable inputs and recommendations to State entities on a number of policy areas” (UN 2024b: 9).

The UN experts also observed the lack of clarity in the basic concepts stipulated in the NSO such as what is sufficient to bring persons into “hatred”, “contempt” or “disaffection against” their governments for the purposes of sedition. They recalled that the UN Human Rights Committee had raised concerns about the use of sedition charges in the HKSAR against academics, journalists and representatives of civil society for having legitimately exercised their right to freedom of speech. The experts further argued that seditious intention, an antiquated concept inherited from the British colonial era and which did not require the incitement of any violence or physical harm, is in fact aimed at suppressing political dissent (UN 2024b: 11).

The UN experts also noted that the term “state secret” is so widely defined that state secrets potentially include information about ordinary matters of public interest in social, economic, political, scientific and foreign affairs and that they may already be in the public arena in forms such as media reports. They referred to the “Global Principles on National Security and the Right to Information”, which states that “it is not sufficient for a public authority simply to assert that there is a risk of harm; the authority is under a duty to provide specific, substantive reasons to support its assertions” (UN 2024b: 12).

Indeed, many NSO provisions can have a possible adverse impact on freedom of expression. Espionage offences and what constitutes a “state secret” are broadly defined. As such, newsgathering and reporting may easily be mistaken as acts of espionage or unauthorized disclosure of state secrets. Media outlets and journalists may also be prosecuted for espionage if their stories are perceived as false or misleading. Furthermore, acts with a “seditious intent” have now become strictly “word crimes”, punishable under the NSO even though there is no intention to incite violence or disorder. This is against the trend of abolition of the political offence of sedition that has taken place amongst many common law jurisdictions (Smith & Ors 2022).

Also, notably, the NSO codifies the archaic common law offence of “misprision of treason”, which carries a maximum sentence of 14 years’ imprisonment (section 12). This provision punishes a Chinese citizen who, knowing someone else has committed, is committing, or about to commit the offence of treason under the NSO, does not report to the police as soon as reasonably practicable. Criminal liability will only not be incurred if the act of treason has already been in the public domain. The codification of the offence of “misprision of treason” represents an about-turn by the HKSAR Government that proposed the abolition of this common law offence in 2003 (National Security (Legislative Provisions) Bill 2003).

Until now, journalists in Hong Kong have not enjoyed the privilege of protecting their news sources (Yan 2014: 185-193). At common law, journalists do not have an immunity to preserve the confidentiality of their sources, and it is up to the judge to decide whether to force journalists to disclose them. As such, journalists’ refusal to give evidence can amount to contempt of court. This is despite the recommendation made by the Hong Kong Law Reform Commission in the mid-1980s that statutory protection against a general disclosure of sources of published information should be introduced to Hong Kong along the lines of section 10 of the UK’s Contempt of Court Act 1981 (Hong Kong Law Reform Commission 1986: paragraph 5.49). In recent years, journalists have at times been summoned to give evidence in the HKSAR courts, involving either the disclosure of their news sources or their witness accounts of protests and demonstrations (Chan 2013).

Section 12 of the NSO has made the position of Hong Kong journalists even more difficult. Given the offence of treason is so vaguely defined, journalists in their daily newsgathering may come across interviewees whose remarks can be considered by the HKSAR police as a threat to use

force “with intent to endanger the sovereignty, unity or territorial integrity of China”. In other words, a journalist will be liable for the offence of misprision of treason if they do not report their interviewee to the police as soon as possible.

Overall, many of the above-mentioned NSO provisions have presented immense difficulties for journalists working in Hong Kong. Their right to newsgathering and reporting will be severely hampered because of the new legislation. A terrifying chilling effect has been created in Hong Kong and the right to freedom of expression has largely been deprived.

[H] CONCLUSION: IN THE FORESEEABLE FUTURE?

To conclude, over the years, the right to newsgathering has not been adequately protected in Hong Kong. Journalists have never enjoyed any legislation guaranteeing access to information in their daily newsgathering activities. Moreover, they have sometimes been hindered or even attacked by the police when covering public demonstrations and other news events.

As far as *Choy’s* case is concerned, there are suspicions of selective prosecution and police harassment. The eventual CFA finding in favour of Choy was perceived by many as proof that judicial independence remained intact, at least in the highest appellate court. But any protection offered by the CFA to the right of newsgathering has proved to be minimal. By introducing restrictive new measures that preclude journalists from conducting searches of the vehicles register, the HKSAR Government has shown a blatant disrespect for the Court’s decision. As such, any optimism about the rule of law and freedom of expression in the HKSAR has largely been shattered.

In sum, given the current political situation in Hong Kong, the vigorous implementation of the NSL, and the introduction of numerous draconian offences by the newly enacted NSO, the prospects for protection of the right to freedom of expression, which incorporates the right to newsgathering, are certainly bleak for the foreseeable future.

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- National Anthem Ordinance 2020 (HKSAR Instrument A405)
- National Security Law of the People's Republic of China 2015
- National Security (Legislative Provisions) Bill 2003 (Gazetted on 14 February 2003, but lapsed on 22 July 2003)
- Personal Data (Privacy) Ordinance 1995 (HKSAR Ordinance Chapter 486) (PDPO)
- Promulgation of National Law 2020—The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special

Administrative Region 2020 (HKSAR Instrument A302) (HKSAR National Security Law, NSL)

Road Traffic Ordinance 1982 (HKSAR Ordinance Chapter 374)

Road Traffic (Registration and Licensing of Vehicles) Regulations 1984 (HKSAR Ordinance Chapter 374E)

Safeguarding National Security Ordinance 2024 (HKSAR Instrument A305) (NSO)

Universal Declaration of Human Rights 1948

Cases

Butkevich v Russia Application No 5865/07 (13 February 2018)

HKSAR v Choy Yuk Ling (2023) 26 HKCFAR 185, CFA; [2023] 3 HKLRD 768, CFI; [2021] HKMagC 5 (unreported)

HKSAR v Fong Kwok Shan Christine (2017) 20 HKCFAR 425

Re Hong Kong Journalists Association [2017] 2 HKLRD 756

Szurovecz v Hungary Application No 15428/16 (12 March 2016)

The Hong Kong Journalists Association v The Commissioner for Transport (2024) HCAL 559/2024 (issuance of a writ on 5 April 2024)

The University of Hong Kong v Hong Kong Commercial Broadcasting Co Ltd and Another [2016] 1 HKLRD 536

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

MountCrest University College and IALS Sign MoU to Develop Doctoral Studies Collaboration

The Director of the Institute of Advanced Legal Studies, Professor Carl Stychin, travelled to Ghana to attend a ceremony marking the signing of a memorandum of understanding (MoU) with MountCrest University College in Accra. This marked a significant moment in the development of an ongoing collaboration between the two institutions. Under the agreement, legal academics in Ghana—beginning with those at MountCrest—will be able to enrol on the Institute’s Distance Learning Research Degrees Programme. This will allow them to obtain doctoral qualifications from the University of London while based in their home institution. Support for their studies will be offered at MountCrest in addition to University of London supervisors.

At the signing ceremony on 14 February 2024, Professor Stychin was joined by Ms Irene Ansa-Asare, the Rector of MountCrest University College, as well as academics, staff and students.

While at MountCrest, Professor Stychin also held a series of meetings with lecturers to discuss the programme and to offer support in the development of their research proposals.

The trip included the opportunity to visit the site of the new MountCrest campus in Larteh, which is currently in development. Ms Ansa-Asare and Professor Stychin also visited former President of Ghana, His Excellency John Agyekum Kufour, who offered his strong support for the programme and best wishes for its success.

Professor Stychin explained:

The Institute of Advanced Legal Studies welcomes the opportunity to deepen our relationship with MountCrest University College, a young and dynamic institution which is expanding opportunities for education in Ghana. We look forward to working with MountCrest to develop a new generation of Ghanaian legal scholars and to support their ambitions for university charter status. This agreement is the cornerstone of the Institute’s international agenda, building on our

long tradition of engagement in Ghana.

Ms Ansa-Asare said:

As MountCrest moves towards achieving charter status, it is our avowed commitment to shape the future of legal education in Ghana through international collaborations such as this one with the Institute of Advanced Legal Studies. We are proud of our shared commitment towards the promotion of scholarship in law and of the role of the Institute in particular in achieving our goals.

IALS Library Exhibitions

As part of the Library's continued work and focus on equity, inclusivity and social justice, there have been a series of exhibitions throughout 2023 highlighting key diversity and inclusion dates.

The theme of Black History Month was "Saluting our Sisters". The Library's exhibition highlighted the achievements of Black women in the field of law, showcasing items from the library and archive collections that illustrate their important contributions. It celebrated the careers of legal professionals whose success in the field has led the way for black women lawyers in future generations. Additionally, it highlighted the work of black women activists and campaigners who have fought

tirelessly for racial equality in the law: Gloria Cumper, Stella Thomas, Linda Dobbs, Barbara Mills, Jocelyn Barrow, Marta Osamer, Olive Morris, Mavis Best, Annie Ruth Jiagge and many more.

The LGBTQ+ History Month exhibition recognized 20 years since the repeal of section 28. Section 28 of the Local Government Act 1988 had banned local authorities and schools from "promoting homosexuality".

For International Women's Day, a display of selected books and journals focused on women and the law and covered topics including Black women and international law, Islamic family law, United States property law cases, women in the legal profession and the history of women's status under English law.

The World Refugee Day exhibition highlighted the establishment of the 50th anniversary of the 1951 Convention Relating to the Status of Refugees, first established on 20 June 2001. The Library has a large collection of United Nations (UN) documents and publications of legal interest and scholarly commentary relating to the work of the UN. The library also provides electronic access to HeinOnline's United Nations Law Collection.

National Windrush Day on 22 June 2023 marked 75 years since the HMT *Empire Windrush* arrived

in the United Kingdom (UK). The so-called “Windrush Generation” arrived in the UK between 1948 and 1971, and successive governments encouraged immigration from Commonwealth countries to address labour shortages in the wake of the Second World War. Nearly half a million people moved from the Caribbean to Britain. Named after the ship HMT *Empire Windrush* which brought one of the first large groups of Caribbean migrants to the UK in 1948, many of the Windrush Generation were returning to the UK having previously served in the British armed forces and worked for the war effort. The exhibition covered legislative acts from the Alien Act 1793 through to the Immigration Act 2014, and the Windrush Scandal. Under the 1948 British Nationality Act, as Commonwealth citizens, those who arrived were automatically British subjects, free to live and work permanently in the UK. However, many were never given formal documentation and, in subsequent years, were wrongly classified as illegal immigrants, were detained, deported and denied their legal rights to benefits, healthcare and social housing.

The final exhibition of 2023 was a School of Advanced Study collaboration celebrating 400 years of Shakespeare’s First Folio: 8 November 2023 marked the 400th anniversary of the day that the

First Folio of Shakespeare’s plays was entered into the Stationers’ Register and became available for purchase. To celebrate this important anniversary, the School of Advanced Study partnered with Senate House Library for a programme of First Folio-related activity. David Percik, Information Resources Manager, wrote a [blog](#) on the legal context of the time in which Shakespeare was writing. The publication of the First Folio coincided with that of several influential legal treatises in England. One particularly noteworthy example is the *Institutes of the Lawes of England* by Sir Edward Coke (1552-1634), who was an English barrister, judge and politician living in the same era as Shakespeare and who is regarded as one of the greatest jurists of Elizabethan and Jacobean times. Written in the late 1620s, Sir Edward Coke’s *Institutes* was widely recognized as a foundational document of the common law, and its impact extended far beyond England. The edition in the display, held by the IALS Library, is the fourth edition of the *Institutes*, published between 1639 and 1648.

In April 2024 there was an exhibition of Women Judges, celebrating 10 March which was designated as the international day of women judges by the UN General Assembly in 2021, with the first

official celebration happening a year later.

Redressing gender inequalities is at the core of the UN Office on Drugs and Crime's Strategy for the [Gender Equality and the Empowerment of Women](#), and is a goal shared by the Global Programme for the implementation of the Doha Declaration, as it works to promote a culture of lawfulness around the world, providing education and training and support-

ing the full participation of women in every professional sphere.

The current exhibition on Trans Rights celebrates June 2024 Pride Month.

The Library exhibitions can be found at the entrance to the Library on the second floor of the Institute. Work is being undertaken to promote the library displays online so that they can be enjoyed more widely.

Selected Upcoming Events

2024 Course on Post-Legislative Scrutiny in the Context of the Climate and Environmental Emergency

Dates: 2 to 30 September 2024

Venue: Online Workshop via Zoom

Parliaments make and change laws. They also have a role in checking the implementation of laws and evaluating whether they achieve their intended outcomes. Implementation of legislation is complex and does not happen automatically. What is more, parliaments and elected representatives often have little information on what happens after a law is adopted. So, parliaments need mechanisms for effective *ex post* evaluation of legislation.

The systematic process of monitoring whether the laws parliament has passed are implemented as intended and evaluating if the laws have the expected impact is called post-legislative scrutiny (PLS). When conducted properly, PLS can reveal achievements and errors in the design of legislation, gaps in implementation and enforcement, and the positive and negative impacts that hinder or contribute to achieving policy goals and service delivery for citizens, as well as rule of law and democratic governance.

This makes PLS a critical lynchpin connecting parliaments with the national commitments signed off by governments in the framework of global multilateral processes such as the Paris Agreement on Climate Change. The success of such multilateral agreements rests to a large extent on the ability of parliaments to

exert oversight and democratically enhance the quality of the legislation aimed at delivering these commitments.

Following the adoption of the Paris Agreement in December 2015, the first global stocktake of climate action concluded at COP28 in Dubai in December 2023. It has revealed substantial implementation gaps in the climate commitments of countries, putting the world on track to miss the objective of limiting global warming below the safer threshold of +1.5 to 2°C.

As parliaments are the main enforcement mechanism of multilateral climate and environmental objectives, PLS emerges as a vital instrument for the effective scrutiny of the legislation related to the pledges made under the Rio Conventions and its instruments, which are aimed at protecting biodiversity and combating desertification and climate change—eg the Paris Agreement.

During 2024 PLS on climate legislation will be vital to address the reasons for the implementation gap in climate actions. PLS on climate legislation also ought to inform multi-annual climate planning of governments as they design their second Nationally Determined Contributions (NDCs) under the Paris Agreement, due in November. PLS can input into preparing the legal instruments

required to deliver the NDCs, across various policy areas including agriculture, water and sanitation, infrastructure, energy, trade, taxation, transport, public health, etc. See [website](#) for details.

Corruption and Good Governance in Sports

Date: 25 September 2024

Venue: Online Workshop via Zoom

Speakers: Professor Dimitris Ziouvas, Panteion University of Athens; Professor Ilias Bantekas, Hamad bin Khalifa University; Professor Marko Begovic, American University in the Emirates; Sophie Kwasny, Executive Secretary of EPAS/ Head of Sport Division, Council of Europe; Ronan O’Laoire, Officer, United Nations Office on Drugs and Crime; Dr Christos Anagnostopoulos, UNESCO Chair in Governance and Social Responsibility in Sport.

The webinar will address mechanisms of fighting corruption and promoting good governance in sports, exploring how organized crime infiltrates sports through match-fixing and betting fraud and how international sports governance bodies promote ethical governance and best integrity practices in sports. International legal frameworks and practitioners’ views will be presented.

See [website](#) for details.

Podcasts

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

See [website](#) for details.

SAS IALS YouTube Channel

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

See [website](#) for details.

PARTICIPATION OF “WALLED” CHILDREN BEGINS WHEN ADULTS LISTEN—THE RIGHT TO PARTICIPATION OF CHILDREN IN CONFLICT WITH THE LAW IN INDIA

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Abstract

This paper presents the art series “*Walled*”, in which I depict my reflections on the experiences of children in conflict with the law in state-run facilities—how and why they might feel *walled*. The walls in the six paintings symbolize barriers to children’s participation. They are dark and seemingly insurmountable, yet make way for windows and light that represent children’s agency. In doing so, I draw on my experience of working with children in conflict with the law as a practitioner in India, my artistic construction of them feeling “walled” and my qualitative research on their right to participation.

To situate my work experience and reflections in theory and academic literature, I conducted research to identify challenges to participation rights that these children face. The key finding from my research is that children are viewed by adult practitioners as *future becomings*, hence, incapable and incompetent to participate. However, when adult practitioners *listen* to children, their knowledge and practice is informed by children’s views and perspectives. Listened-to children feel empowered and more able to participate. Thus, the onus is on adult practitioners to create safe spaces for children to share and contribute to decision making.

Keywords: children in conflict with the law; right to participation; Article 12 UNCRC; juvenile justice; India.

¹ I wish to thank my interview participants for sparing their precious time in supporting this research. I acknowledge the support and guidance provided by my tutors at the Institute of Education, University College London, in conducting this research project. I am grateful to my family for their immense patience and unconditional love for me while I was doing this research, and ever after.

[A] INTRODUCTION

Globally, there is increasing recognition of children’s right to participation, in theory and in policy. However, evidence suggests that participation continues to elude children, especially those in care (Holland & Ors 2010; Gallagher & Gallacher 2012). Within the larger category of “children in care” or “looked after childhoods” (Goodyer 2013: 394), children in conflict with the law remain largely invisible and their participation rights under-researched (Abebe 2009), particularly in the Global South.

As a practitioner in child protection in India, I witnessed children in conflict with the law reduced to *numbers* and *files*, with no *real* say in decisions that impacted their lives. I discerned that children felt “walled”, unable to make sense of the legal processes, to express what they thought or felt, or to have any influence over what was happening to them. I used art to express what I observed and thought, and how I felt. In this paper I present the art series “*Walled*”, comprising six watercolour paintings that represent *my construction* of the experiences, feelings and emotions of children in conflict with law. In the series I represent children as individual human beings with unique life experiences, and not as numbers listed in files.

The first four paintings (*Walled I-IV*) in the series depict how children might find themselves in state-managed residential facilities—lonely, afraid, uncertain, *walled*. The blue/grey colours are used to signify the darkness in the children’s circumstances of being deprived of liberty. The walls in the paintings symbolize not just physical barriers, but also the legal and systemic barriers that children face in sharing their knowledge, creativity and ideas. The walls also symbolize cognitive barriers that might stand in the way of children’s positive self-image and dreams of better futures.

Being and feeling *walled* may manifest in interactions of children with adult practitioners in different ways—for example, children going silent or overtly vocal. I represent some of these manifestations in the paintings, as signposted in the respective captions. However, despite being walled, children do have agency, and I depict this with a window of light (even if tiny), or open blue sky. I portray children as *beings* in the present, competent to participate and contribute meaningfully to decisions (as in *Walled-V*). And when children are listened to, the walls start giving way to light, melting away the darkness (as in *Walled-VI*).

To situate my experience as a practitioner in theory and empirical evidence, during my postgraduate degree at University College London,

I conducted qualitative research on the right to participation of children in conflict with the law in India. The aim of my research was to identify challenges to realization of the right to participation of children in conflict with the law. My research question was: how do adult practitioners in juvenile justice construct the right to participation of children in conflict with the law? I conducted six semi-structured interviews, using a combination of experience/behaviour questions and opinion/value questions (King & Ors 2019). Each of the six participants represented a different statutory role in the juvenile justice system and diversity in ages, years of experience, gender and education. I used thematic analysis to evaluate the research data.

I found that the adult practitioners whom I interviewed construct children in conflict with law as future *becomings*—incapable of and incompetent to participate in making decisions about their lives. They assumed the position of knowers, disregarding and, on occasions, falsifying children’s testimonies. Most interestingly, adult practitioners constructed children’s participation as the children’s duty rather than as their right.

It is pertinent to report that during data analysis, *listening* emerged as a cross-cutting theme across different interviews. Synthesizing those findings, this

paper argues that, when adult practitioners listen to children in conflict with the law, it enables the children to participate in statutory processes. Listening also empowers the practitioners in many ways, including strengthening their professional practice. These research findings resonated with my practitioner experience and reflections on children being and feeling “walled”. The art series is therefore woven throughout the project and complements the research findings.

In the following sections, I first lay down the background of this research—including the theoretical framework and the legal context relevant to India. I then consider my reflections on the art series *Walled*. Finally, I discuss key research findings and analysis, drawing on the larger body of literature and quotations from the research participants, weaving into the findings the six paintings comprising *Walled*.

[B] BACKGROUND

Children as human “beings” or “becomings”

Childhood has been theorized as a social construction (James 2007; Rosen 2020), where a distinction is often drawn between adult “human beings” and child “human becomings” (Lee 2001: 7). As adults, we envisage children’s lives and activities as a preparation for

adulthood, viewing them as full and complete human beings in the future and human becomings in the here and now (Lee 2001: 8).

Construction of children as human becomings pre-supposes innocence, vulnerability and incompetence (Hanson 2012). When viewed as becomings, children are assumed to lack the “stability and completeness” of adults and hence are incompetent to “participate independently in serious activities like work and politics” (Lee 2001: 8).

The tension arising out of the construction of children as human becomings versus beings impacts how adults construct children’s rights and the practical realization of their rights (Hanson 2012). This theorization is useful for this paper in unpacking the construction of children who experience conflict with the law and the limiting of their participation rights by adult practitioners.

Children’s right to participation

The right to participation of children, enshrined in Article 12 of United Nations Convention on the Rights of the Child 1989 (UNCRC), has been called the “linchpin” of the Convention as it “recognises the child as a full human being with integrity and personality and the ability to participate freely

in society” (Freeman 1996: 37). According to Laura Lundy, Article 12 has a “transformative potential” in enabling children to exercise the entire spectrum of their protection and provision rights (Lundy 2007: 928). For her, the strongest argument in favour of the right to participation of children is its potential to “harness the wisdom, authenticity and currency of children’s lived experience in order to effect change” (Lundy 2007: 940). However, the onus is on adult practitioners to create a favourable environment for this to happen (Freeman 1996: 38; Kitzinger 2015).

Adult counterparts in children’s justice systems are professionals who have statutory power to make potentially life-changing decisions for children in conflict with the law (Dalrymple 2003; Kallio & Häkli 2011; Liebel & Saadi 2012: 168). Adult practitioners with their legal knowledge and expertise may not consider legal decision-making to be a domain legitimate for children to participate in (Dalrymple 2003). Often adults may lack confidence in children’s abilities to understand the legal procedures or take wise decisions for themselves. Practitioners may also be concerned about potential harm that may be caused to children when participating in official meetings. Moreover, children’s participation may result in putting excessive

pressure of decision-making on children and then holding them accountable for those decisions (van Bijleveld & Ors 2015).

Ample evidence exists to support the ideas that “children are more capable than adults give them credit for” and also that children’s “capacity for decision making increases in direct proportion to the opportunities offered to them” (Alanen & Mayall 2001: 13; Lundy 2007: 937). Studies have shown that children in conflict with the law are “authorities” on their own lives (Dalrymple 2003). Yet, “the child continues to be represented as the object of children’s rights discourse, rather than as an agent in the process of interpreting rights” (Daiute 2008: 711). To leverage children’s knowledge and expertise, it is incumbent on the adult practitioners to create real and effective opportunities for the participation of children in decision-making (Lundy 2007; Kitzinger 2015).

Children in conflict with the law

It is estimated that there are nearly 3 million children worldwide in state detention (Walmsley 2005; UNICEF 2021). Yet, the figure may only be the tip of the iceberg, due to various practices of unlawful and unaccounted detentions prevalent across numerous countries (Martin & Parry-Williams 2005;

UNICEF 2006; Hamilton & Ors 2011; UNICEF 2021). Over 90 per cent of these children are accused of petty offences, which may be merely children’s survival and coping strategies (Martin & Parry-Williams 2005: 17). An over-whelming majority of children in conflict with the law come from “particularly deprived communities and families, often from discriminated minorities” (Martin & Parry-Williams 2005: 3; UNICEF 2006). In the absence of access to justice and legal representation, 90 per cent of them continue to languish in detention pending trial, “for no fault of theirs” (Advocasey 2003: 10).

While a large body of international law on juvenile justice seeks to promote alternatives (McDiarmid 2007) to the formal justice system, national legislations and legal practices continue to rely on criminalization and detention (Advocasey 2003; Amnesty International 2003; UNICEF 2021). Criminal incarceration exposes children to “a system that is often violent and frequently arbitrary” (Martin & Parry-Williams 2005: 4).

Convictions and legal penalties may be followed by social stigma, trauma, the loss of education, health and employment opportunities and, often, subjection to “various forms of violence like mental, physical and sexual” (Martin & Parry-Williams 2005: 4).

Children in conflict with the law in India

India is home to more than 400 million children (UNICEF 2022), many of them vulnerable to intersectional disadvantages imposed by gender, caste, class, *etc* (Kannabiran & Kannabiran 2005; UNICEF 2006; Gorringer & Rafanell 2007; UNICEF 2021; UNICEF 2022). While it may be difficult to estimate the number of children in conflict with the law in India, official figures of 35,000-40,000 children apprehended by police across the country are available in the public domain (National Crime Records Bureau 2022). However, amidst reports of alleged practices of illegal detentions of children in police lockups and prisons (eg Sharma 2023), in 2024, the National Legal Services Authority in India launched a national campaign to “find and assist children illegally held in prisons” (Verma & Sharma 2024: 1).

When in detention, children face further violence and subhuman living conditions that often have irreversible impact on their physical and mental health and future opportunities (Teltumbde 2017; Kumari 2020). They also face severely negative media publicity as individuals and as a cohort (Alamu 2017; Teltumbde 2017). Consistent with trends internationally (Martin & Parry-Williams 2005; UNICEF 2006), children in

conflict with the law in India are more likely to come from poor and marginalized communities and religious minorities (Teltumbde 2017; Parackal & Panicker 2019; Sharma 2023; Verma & Sharma 2024).

India has created a separate justice system for children by enacting the Juvenile Justice (Care and Protection of Children) Act 2000 (UNICEF 2006). However, following the 2013 rape and murder case of a young woman in the capital city of New Delhi (Business Standard 2020), the legal protections accorded to children in conflict with the law came under severe pushback (Raha 2019), in view of the fact that one of the six accused persons was still a child (under 18 years old). The law was subsequently re-enacted as the Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act) paving the way for the potential diversion of children (16-18 years) to the adult criminal justice system. The move has been considered violative of the rights of children in conflict with the law and the UNCRC (Raha 2019; Kumari 2020).

[C] REFLECTIONS ON WALLED

I started my professional journey as a practitioner in the juvenile justice system in India in 2008. It was an inspection visit to a children’s shelter home that changed the course of my professional practice

and continues to shape my research interests. I found that the “bachcha barrack”,² located within the premises of a huge jail, housed more than a hundred children (all boys) in conflict with the law. For the inspection, children were made to stand in two long files, facing each other. Each child held a card in their hands which bore their name, case number, sections of the Indian Penal Code 1860, and the status of their case in the court. They were all undertrials waiting for the next hearing of their cases.

Nearly 15 years later, the image of a hundred young people lined up in front of me remains imprinted in my mind. This scene inspired the first painting in the series *Walled (Walled-I)*. What stood out for me that day was that the juvenile justice system, which I was a part of, had reduced *real* children to files and statistics. That day I also observed that children would talk to each other, whisper, exchange glances and smiles (occasionally), but would not say a word when an adult practitioner asked a question. The questions would usually require the answers which were available on the placard the child held, so, to any question they could simply point to the placard, rather than talk. The presence of a wall between “us” and “them” was palpable.

Reflecting on this visit, I visualized what a child might feel like in a facility, away from family, among strangers, deprived of their liberty. What was easily discernible was that the children were physically constrained—by boundary walls, gates, locks and guards. It was also evident that the children were constrained in their daily choices—what to eat, wear, how to stand and walk, and what to say. These disguised boundaries, no less potent than the physical ones, must also constrain them in their life choices, including education and employment. However, something that I fathomed later, was the wall of self-deprecation, building inside the children’s own minds, constraining their self-image, potentialities and life possibilities. I believe that they felt walled—from outside, as well as from inside.

What was this wall—invisible, yet persistent and seemingly insurmountable? How might this wall be dismantled? How to even create a small opening, or etch a small crevice? A crevice which might then become a window, that might grow bigger, and bigger, to eventually crumble the whole wall! In that way the children would be able to talk, share, communicate, and participate and attain their potential despite the experience of coming into conflict with the law.

² A “bachcha barrack” is a barrack intended for children.



WALLED (Walled-I): In this painting, I juxtapose the silhouette of a young person with long rows of cells in a state-run facility, highlighting the power differential between the state and the child. The walls portray physical barriers as well as those imposed by law and legal practice. The row of young people in the background (added digitally) represents the positioning of children in conflict with the law as objects of law and policy, merely files and numbers. Using scale and perspective, I depict the walls as insurmountable for the walled children.

[D] PRESENTING FINDINGS THROUGH “WALLED”

In my quest to understand the wall that “walled” children in conflict with the law, I pursued academic study and research. As part of my MA in Sociology of Childhood and Children’s Rights at University College London (2021-2022), I studied challenges that children in conflict with the law in India face in their right to participation. My research drew upon the

new sociology of childhood as a theoretical framework, and children’s rights with a focus on Article 12 UNCRC and the Indian JJ Act.

The key research finding from this study is that the law and legal practice in India construct children as future becomings and as objects of law and policy. Children in conflict with law are seen as deserving protection, and not so much deserving participation. However, my findings also show

that, when practitioners listen to children, children feel safe in sharing their views.

I move now to present some of the research findings by linking them to *Walled*.

Children’s participation rights are merely a theoretical concept in the law

I found that the JJ Act 2015 in principle recognizes the right to participation of children in conflict with the law. However, the statute does not lay down the procedures for implementing children’s participation. To quote a research participant:

I think the law does recognise the right to participation of children in conflict with the law but does the bare minimum. For example, in section 8(3) [of the JJ Act], it is the duty of the Juvenile Justice Board to ensure child’s participation throughout the legal proceedings. But this section means nothing ... it’s just theory. It has not been developed into [a] process ... so, children are heard out of kindness and concern, not as a right (Participant 2).

During interviews I asked all the participants to enumerate children’s rights that they considered significant. Five of the six participants listed the protection

and provision rights and did not even mention participation rights. I found that practitioners were aware of their duty to ensure that children had access to water, food, toilet, rest and a safe place, but mostly unaware of their duty to implement children’s participation rights, for example providing access to their parents, lawyer, translator or by sharing relevant information or documents.

My analysis suggests that there are two reasons for overlooking participation. First, the law prioritizes survival rights—these are urgent—and so practitioners feared for consequences following a mishap with a child in their custody. Second, practitioners view children as incompetent to participate in key legal decisions.

Participation is constructed as children’s duty rather than their right

This research suggests that participation of children in conflict with the law has different meanings for different practitioners. For example, the frontline police officers often constructed the child’s participation as the child’s duty to answer their questions and to provide the information or evidence that the police needed. During their respective interviews, two participants stated:



SILENCED (Walled-II): In this painting I represent children's silence, and what it might say. I depict the emotions of helplessness in not being able to make sense of what is happening, not being heard, and not being believed, further extenuating the experience of being "walled".

I feel, yes, participation is very important, because it helps us connect with the child. If the child participates and discloses whatever he knows, then it helps us unravel the mystery ... and to rehabilitate him. Suppose the child hails from a far-off place, then we can get him back to his hometown (Participant 5).

Sometimes [a] child might have committed a heinous offence. If the child participates, it'll also help the child in changing or correcting himself from

what he has done and to make him realise that he did a wrong thing (Participant 6).

Here participation is not seen as a right of the child that casts a duty on adult practitioners to create the right atmosphere for children to be able to trust and share. Participation is rather constructed as a duty imposed on the child to aid in investigation and/or their own correction or rehabilitation. I found that such a duty is subjectively imposed on the child irrespective of their

trauma, mental status, readiness and consent. And a child’s inability or unwillingness to answer or talk is considered as the child’s non-cooperation, refusal to participate, disobedience or even misbehaviour.

Second, the child must not only speak, but speak the truth. At least three participants reported that children are often viewed as “lying” and/or being “manipulative” (Participants 1, 2, 4, 5), and they are seen to be doing so for the purpose of getting away from the “clutches of law” (Participant 6) or avoiding the penalty that is due to them. One of the participants reported:

It is a very common experience with children in conflict with the law aged 16 or 17 years, that police reported them as 18 or above. So, I would ask the children, why didn’t they inform the police about their age at the time of apprehension. And children told me that they did inform the police officer on duty, but the officer did not believe them. Even when they produced documents as proof of age, the police questioned the veracity of the document (Participant 1).

Thematic analysis across the data set revealed frequent denial of children’s right to participation by disbelieving them, what Baxi calls “falsification of testimony” (2013: 273). I found that such

falsification of a child’s testimony is more likely to occur when the adult practitioners expect the child to confirm to their narrative or script. If the child contradicts the version of the practitioners, then the child is seen as lying and what they say is discredited. This is reflective of the underlying subordinate status of the child vis-à-vis the adult practitioners making their own purpose and objective more significant than the child’s needs, ability and consent. Here the child is positioned as an instrument to achieve the “high and mighty ends of legal processes” (Participant 2).

Third, practitioners whom I interviewed did not see it as their duty to make sure that the children participate. Also they seemed to do little to enable children to be involved in decision-making, for example by sharing information, documents, or explaining the processes.

Children’s participation begins when adults listen

When asked for a specific example of listening to a child in conflict with the law, four participants could not recollect one. They said that children generally did not speak in their presence. They also informed me that listening to children was often constrained by time, workload, legal procedures and a predetermined official



VIOLENT CHILDREN ARE SAYING SOMETHING (Walled-III): *When “walled”, often the only alternative available to communicate with the system, may be violence, or other such behaviours considered disruptive and unacceptable by adult practitioners.*

agenda of meetings with children. However, one participant narrated a courtroom scene, which he qualified as a “rare” occurrence:

what happened next was so unusual. This child was probably angry. As soon as he arrived in the court, he started shouting, really loudly! He started abusing the magistrate. He uttered such offensive statements about the magistrate herself, [that] the court staff pounced on him ...

what happened next was *even more unusual*. The magistrate just raised her hand and said, nobody will touch him. Everyone

backed off. And this child went on abusing her for another 15 minutes. And then he was done and exhausted. The magistrate showed no anger, absolutely nothing ... and then a beautiful process unfolded from there on ... the boy started talking sense, she listened intently. He cried, apologised, and continued to share his story. She listened to him and recorded his statement in his words (Participant 2, original emphasis).

For Participant 2, when “magist-erial arrogance gives way” to humility, listening begins. I found

that children communicate in various forms, however, adults are likely to view their communication as immature, demeaning and disrespectful. They respond to children’s communication with ridicule, aggression, or retaliation (Participant 2). “Violent children are saying something”, but are the practitioners listening? (Participant 2).

Yet, on rare occasions, when adult practitioners create a space for children to talk freely and openly, “a beautiful process unfolds” (Participant 2). Children’s

participation begins when adults listen to them.

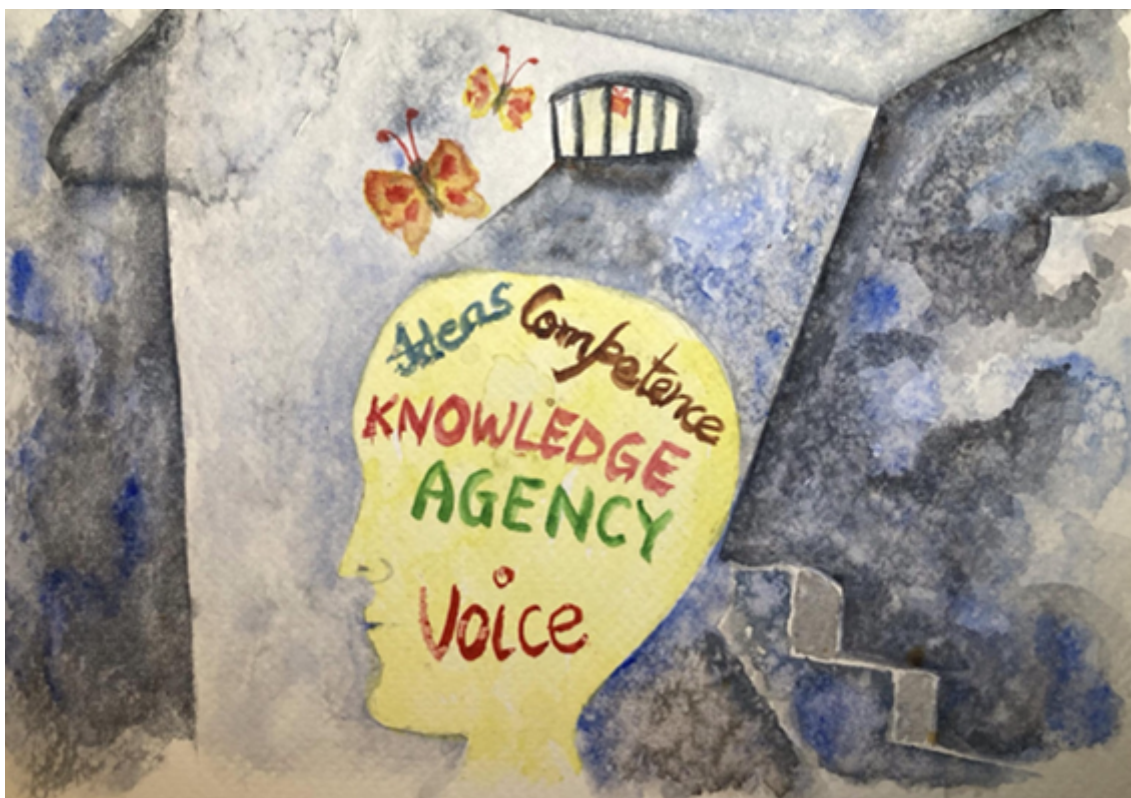
Listening gives a sense of safety and confidence to children, enabling them to participate

Two participants who had extensive experience of listening to children in conflict with the law believed that adults listening to children restores children’s confidence and sense of safety.

listening to a child’s story ... for 2-3 hours, on [the] phone. Of course, I



THE RIGHT TO PARTICIPATION OF “WALLED” CHILDREN BEGINS WHEN ADULTS LISTEN TO THEM (Walled-IV): *To etch a crevice in the wall, all it may take, is to listen to children in conflict with the law. Listening may enable children to regain their confidence that they lose due to their past experiences of neglect, abuse and violence.*



CHILDREN AS HUMAN BEINGS IN THE PRESENT (Walled-V): *In this painting I rely on the theoretical premise that children, even when “walled”, are agents in the construction of their lives and those of others whom they share their lives with. Children in conflict with the law are experts on their own lives and competent to provide valuable insights for decision-making, as well as for law and legal practice with their positional knowledge, should practical and reasonable opportunities to do so be available.*

wasn't giving legal advice ... the child did not want anything from me. But just that the child probably [felt] safe ... validated or heard. When a person in authority, at least in the mind of the child ... listens to the child, that gives them a sense of safety and assurance (Participant 2).

I met a boy who was caught for stealing INR 10,000 [£100]. He would use abusive language towards everyone. When I first attempted to speak

to him, he abused me as well ... I could finally gain his trust, only because I listened and listened to him, meeting after meeting. And then his behaviour completely changed ... and I got to know of the hard life he had had till that point in time ... Much later, he said to me ... that when he felt that he was being listened to, he felt his dignity returning, that he was someone worth listening to. And he liked the feeling (Participant 1).

Listening to children strengthens professional practice and policy

I found that listening to children has a profound impact on the listener and not only on children. Participants in my research shared that listening to children’s stories opened a whole new world of knowledge and information for them. They had to learn about the various strategies that children deploy in dealing with their difficult circumstances. They also learnt about children’s views and perspectives, of which they had been completely ignorant.

Participant 2 shared in his interview that a young person confessed before him to committing a murder. The young person had to protect his sister from sexual assault by the person he murdered. According to his notion of masculinity and being the only *man* in the family, he was confident that he did the right thing. By listening to this boy, the practitioner said that he learnt to view children’s experiences through an intersectional lens, and from the children’s standpoint. He found this learning useful for his future legal practice.

Participant 2 also said that his legal practice, including courtroom arguments and legal paperwork, became stronger because of the knowledge he gained from listening

to children, including significant clues, bits of information and evidence, as well as thinking about alternative interpretations of their legal rights.

Participant 5 believed that child-friendly approaches are often understood as designated spaces decorated with balloons and cartoons. He recommended a national consultation and review of law and legal practice by children with experience of conflict with the law. From his four decades of experience of adjudication in children’s rights, including policy issues, he said that policy that does not take into account the perspectives of children, is incomplete at best and “oppressive at times” (Participant 5).

[E] CONCLUSION

To briefly summarize the key findings of my research, listening is the foundation of the right to participation of children in conflict with the law. When listened to by adult practitioners, the agency of children in conflict with the law may be restored and they may feel empowered to exercise participation rights. Listening also helps adult practitioners understand the nuances of children’s lives, experiences and views—thus enriching their professional practice and decision-making.



ADULT PRACTITIONERS MUST ALLOW THE SPACE TO BE TAKEN OVER BY CHILDREN (Walled-VI): *In this painting I depict a scenario where a child feels empowered to speak, express, talk and share what they think, feel and value. And adult practitioners and key adults in the child's life give up their power pedestals, acknowledge the child's knowledge and expertise alongside their own, and embrace the humility of being a listener. This could potentially allow light to expel the darkness in the walled lives of children in conflict with the law. The onus is on them to create real and effective opportunities for children to participate.*

However, I found that listening to children by adult practitioners in the juvenile justice system in India is predominantly structured, and practitioners faced multiple systemic and socio-psychological barriers in listening to children. The front-end practitioners at police stations, courts and care institutions tended to frame children as lying or unreliable. Practitioners viewed children's

participation as the children's duty rather than their right. No listening or minimal listening just to tick certain boxes precludes the "rich human dialogue" that the "welfare" approach to juvenile justice requires (McDiarmid 2007: 264).

As a practical method of strengthening children's participation rights in the juvenile justice

system, I recommend that various measures should be taken to strengthen the capacity of adult practitioners to listen to children in conflict with the law. The practitioners must be supported in listening through a review of their workload and time use, capacity-building and creating more opportunities for them to interact with children. Such interactions must be in a place, time and format that make children feel safe and enable them to trust and share.

If the juvenile justice system is to realize its objective of working in the best interests of the child, it must allow “the space to be taken over by children” (Participant 2). The real and long-term solutions to realization of rights of children in conflict with the law must be the ones “that children themselves have identified and can recognise as their own ... as key stakeholders in their own future” (Martin & Parry-Williams 2005: 24).

About the author

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Legislation, Regulations and Rules

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