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School of Law and Social Justice

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Contents

Foreword

I am honoured and excited to write this foreword for the tenth edition of the University of Liverpool Law Review. This student-led publication reflects the dedication, discipline and intellectual curiosity of those who contribute to it and those who work tirelessly to bring it to life. Its longevity stands as clear evidence of the academic ethos that characterises the Liverpool Law School and our students' commitment to engaging meaningfully with the legal questions that shape our world. The essays included in this volume demonstrate a thoughtful engagement with contemporary social justice debates, while also recognising the profound ways in which technological innovation is transforming society and the law alike. This edition shows students not only analysing current challenges, but also thinking carefully and responsibly about the legal landscape that is emerging in an increasingly digital future. It is encouraging to see such reflection from the next generation of legal professionals and scholars.

This edition covers a wide range of contemporary legal and societal challenges, including the entrenched cultural and gender-based violence in honour killings (Anfal Al-Brashdi), the evolving function and the limitations of the Coroners Court (Lycoris Bower), the ethical dilemmas raised by the increasing use of algorithms in decision-making processes (Amber Francisca Ling Yi Rong), and the pharmaceutical sector's concerns regarding regulatory barriers and delays to innovation (Agnieszka Marecka). Other contributions consider the boundaries of legal coercion through a Hartian lens (Freya Arden), examine the mechanisms through which the law continues to enable modern slavery and exploitation (Ellie Roberts), and explore the consequences of inadequate protection of prisoners' rights for broader social justice (Millie Condron). This volume also includes an analysis of why the legal framework governing prostitution fails to serve those it affects most directly (Felicia Crowle), as well as a reassessment of the often-asserted benefits attributed to decentralisation in blockchain technology (Olivia Mayne).

I am deeply grateful to all the authors for their contributions and for the dedication they have shown to their academic work over the past year, as well as to the Editorial Board for their considerable efforts in bringing this edition to fruition. This year's Board, expanded to include students from all years and cohorts, deserves particular recognition for a level of commitment that strengthened the editorial process and enabled the inclusion of a greater number of student papers in this volume. I would also like to extend my thanks to the academic colleagues who generously offered feedback and guidance to the authors, helping them refine their work to publication standards.

Dr Andreas Karapatakis

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Preface

Those unfamiliar with the University of Liverpool Law Review may not know the humble beginnings upon which the Review was founded. In 2015, the then-Head of Law, Professor Amandine Garde entrusted a student body comprised of nine undergraduate students to publish the first edition of the Law Review. Within that edition, four articles were published. On the law of Football Hooliganism, Prisoner Voting, Animal Organisations within Charity Law, and, finally, the law on anti-social behaviour. Since then, the Law review has published fifty further articles ranging from debates surrounding euthanasia to regulating AI in the legal field. The breadth of these topics is a testament to the extremely high level of research conducted by the student body over the past several years.

Some eagle-eyed readers may have spotted that as the first edition was published ten years ago, this edition marks a decade of the *University of Liverpool Law Review*, an incredible achievement both for the School of Law and Social Justice, but also for the students who have kept growing the review into what it is today. I am beyond grateful to have the honour of crafting this edition, standing on the shoulders of the giants who came before me, and hoping to inspire a long tradition of the Law Review to come. I am incredibly proud of the work that has gone into this edition, and I hope that the outcome showcases the level of dedication the editorial team has shown throughout this process.

This year, our requirements for submissions to be considered were the most stringent yet. However, the number of the submissions still surpassed that of the previous year. It is clear that not only are students producing exceptionally high levels of work, but they are also able to examine issues across a range of topics and engage fluently with the highest level of academic debate. I am sure that I can speak on behalf of the editorial board when I say that sifting through submissions was both incredibly difficult given the calibre of work, and a privilege as we were able to read work on all aspects of law, ranging from the new and innovative, to those offering worthy contributions into long-standing debates.

I would like to thank the academics who selflessly gave us their time in reviewing finalised articles, ensuring that they met the quality of editing expected of the review. I am also incredibly grateful for the authors who had the proactiveness to submit their work, and the tenacity to continue editing throughout their summer break. Similarly, I would be remiss to not mention the impact of Dr Andreas Karapatakis. Andreas joined us at Liverpool in 2024, yet without him, none of this would have been possible. I want to extend my deepest gratitude on behalf of the editorial board to Andreas for his tireless contributions to the Review.

Finally, to my editorial team who stuck with me through everything, consistently exceeding the expectations placed upon them, and producing work that I hope they can be incredibly proud of. It has been my privilege to work with you all.

Thank you for your support, and please enjoy this 10th edition of the University of Liverpool Law Review.

Fraser Palmer

(Editor-in-Chief, University of Liverpool Law Review, 2024 – 2025)

The Use of Algorithms in Decision-Making: An Ethical Conundrum

Amber Francisca Ling Yi Rong

Abstract

This essay considers the ethical complexities of using algorithms in decision-making processes in the justice system in the UK, with a focus on the principle of explainability. While algorithmic decision-making tools offer improved efficiency and consistency, their implementation within justice systems raises serious accountability, transparency, and fairness issues. The paper argues that it is fundamentally challenging to establish and measure standards of explainability because of stakeholder's varying requirements, the technical obscurity of the "black box" system, and legal issues related to proprietary rights. It also considers the ethical challenge of interpretability and completeness through case studies of COMPAS and Loomis. The essay concludes that although complete explainability remains elusive, greater inclusivity in AI design, regulatory responsibility, and user autonomy can promote ethical governance and enhance public trust in algorithmic decision-making within the justice system.

Introduction

Algorithms have become an integral part of modern life, and there appears to be a growing interest in their use within the UK justice system. Lord Chancellor Shabana Mahmood has expressed support for utilising these systems to address the mounting backlog of court cases, which has reached a record-high level of 73,000 in December 2024 from 38,000 in December 2019.[1] While the promise of enhanced efficiency is appealing, studies have also highlighted the critical importance of receiving explainability from these algorithms. This matter is reflected in the European Ethical Charter, yet the charter provides little clarity on how the standard of explainability should be met.[2] This paper thus contends that explainability is an important consideration in algorithmic decision-making in the justice system and explores the

[1] GOV.UK, 'Courts reform to see quicker justice for victims and keeps streets safe' (GOV.UK, 12 December 2024) <https://www.gov.uk/government/news/courts-reform-to-see-quicker-justice-for-victims-and-keepsstreets-safe> 16 December 2024.

[2] The European Commission for the Efficiency of Justice, 'European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment' (December 2018) <https://rm.coe.int/ethical-charteren-for-publication-4-december-2018/16808f699c> accessed 13 December 2024.

technical, practical and ethical challenges that make defining and achieving explainability particularly difficult.

The Importance of Explainability in Algorithmic Decision-Making

Explainability, defined as a human-interpretable description of how a decision-maker arrived at a particular decision after considering a set of facts,[3] has become a central focus in ethical and policy discussions worldwide. This is distinct from transparency where transparency answers "what happened" by making users aware they are dealing with AI, while explainability clarifies how the system reached its decision. [4] Jacob Turner notes that transparency is a recurring theme across various ethical codes in different areas of expertise,

reflecting widespread concerns about the risks of opaque AI systems.[5] However, this need for explainability is even more pronounced in the context of justice systems, as the ICO Report reveals that jurors overwhelmingly prioritise explanations in criminal justice scenarios over every other scenarios, such as healthcare.[6] This preference stems from the value explanations provide in challenging decisions, building trust, ensuring fairness and to prove the absence of

[3] Doshi-Velez and others, 'Accountability of AI Under the Law: The Role of Explanation' (2017) Berkmana Center Research Publication, 4.
[4] Arsen Kourinian and Mayer Brown, 'Addressing Transparency & Explainability When Using AI Under Global Standards' (Bloomberg Law 2024) <https://www.mayerbrown.com/-/media/files/perspectivesevents/publications/2024/01/addressing-transparency-and-explainability-when-using-ai-under-globalstandards.pdf%3Frev=8f001eca513240968f1aea81b4516757#:~:text=Global%20AI%20standards%20often%20 group,decision%20was%20made%20using%20AI> accessed 18 August 2025.
[5] Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan Cham 2018) [6] ICO, 'Project Explain interim report' (June 2019) <https://ico.org.uk/media/2615039/project-explain20190603.pdf> accessed 12 December 2024.

bias. [6] Burrell reinforces this by stating that explanations support individual autonomy, allowing individuals to contest decisions and maintain agency of their treatment.[7]

The issue of "machine bias" and inaccuracy further underscores the need for explainability in algorithmic decision-making in the justice system. This is problematic as these tools make morally consequential and socially significant decisions.[8] One notable example is the COMPAS algorithm, which calculates the likelihood of recidivism of prisoners for their release. To illustrate this issue, ProPublica's research revealed that COMPAS falsely flags Black defendants as future reoffenders at nearly twice the rate as White defendants (45% compared to 23%).[10] Dartmouth's finding also adds that COMPAS is no more accurate than predictions made by non-experts in the justice system.[9] These cast significant doubt on the reliability of such systems. Richard Susskind[10] emphasises that functional AI must be transparent and capable of heuristic reasoning, which means systems should be open to challenge and improvement. This reinforces why providing explanations is essential to understanding, improving and ensuring the reliability of decision-making tools, while also enabling checks and balances to prevent bias and discrimination.[11]

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[6] ibid.

[7] Jenna Burrell, 'How the machine 'thinks': Understanding opacity in machine learning algorithms' (2016) < https://dx.doi.org/10.2139/ssrn.2660674> accessed 12 December 2024.

[8] Joel Walmsley, 'Artificial intelligence and the value of transparency' (2021) 36 AI & Soc 585, 588. [10] Julia Angwin and others, 'Machine Bias' (*ProPublica*, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> accessed 3 December 2024.

[9] Julia Dressel and Hany Farid, 'The Accuracy, Fairness, and Limits of Predicting Recidivism' (2018) 4(1) Science Advances eaao5580.

[10] Richard Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49 MLR 168, 173.

[11] The Royal Society, 'Explainable AI: the basics' (November 2019) <https://royalsociety.org/newsresources/projects/explainable-ai/?utm_source=report&utm_medium=print&utm_campaign=aiinterpretability/> accessed 10 December 2024, 9-10.

Lastly, taking a broader view, Lisa Webley underscores that explainability is essential for upholding the core principles of natural justice.[12] These principles demand that decisions are to be made impartially, with fair notice and an opportunity to respond.[13] Explainability would therefore allow individuals to understand the rationale behind decisions and evaluate the system's legality and robustness. [14] Explainability is also especially important for legal professionals like lawyers and judges, whose actions influence not only individual clients but also public trust in the entire legal system.[15] This is because lawyers uphold the rule of law and must act transparently and responsibly to maintain confidence in legal processes.[16] Any breach of professional standards risks eroding public trust, triggering a chain reaction that could potentially destabilise both the legal profession and the justice system, and ultimately undermining the rule of law and societal confidence in the system.[17]

The Uncertainties in Defining 'Explainability' Standards

Despite these needs, there remains significant uncertainty about how we should define the standards for explainability due to the varied needs of different stakeholders. This is because different users require different forms of explanation tailored to their specific contexts.[18] As Doshi posits, an explanation must provide the correct type of information in

[12] Legal Services Board Podcast, 'Ethics, Technology and Regulation' (21 May 2020) <https://legalservicesboard.podbean.com/e/ethics-technology-and-regulationLinks to an external site.> accessed 14 December 2024.
[13] Committee for Privileges and Conduct, Third Report of Session 2017–19, Further report on the conduct of Lord Lester of Herne Hill, HL 252.
[14] Legal Services Board Podcast, 'Ethics, Technology and Regulation' (21 May 2020) <https://legalservicesboard.podbean.com/e/ethics-technology-and-regulationLinks to an external site.> accessed 14 December 2024.
[15] ibid.
[16] ibid.
[17] ibid.
[18] The Royal Society, 'Explainable AI: the basics' (November 2019) <https://royalsociety.org/newsresources/projects/explainable-ai/?utm_source=report&utm_medium=print&utm_campaign=aiinterpretability/> accessed 10 December 2024.

order for it to be useful.[19] A key principal for this is that they must enable the human observer to assess how much a particular input influenced the output.[20] In other words, explanations should present digestible information tailored to their specific audience. This shows that the explanations must be highly context-dependent, as it would only be meaningful if the AI-based decision can be explained at an individual level,[21] highlighting the complication in defining 'explainability' standards. Thus, for AI developers, the critical question is not merely whether a system is explainable or whether one model is more explainable than the other.[22] Instead, it is whether the system can deliver the specific type of explainability needed for a particular task or user group.[23]

For example, independent auditors or system developers would require the publishing of algorithms to know the technical and transparent details about how the system functions.[26] However, such explanations are not suitable for laypersons, who lack the expertise to interpret technical details.[24] Instead, counterfactual reasonings, which detail the specific factors leading to an individual output and explore the what if scenarios, what would need to change for AI to make a different outcome, are more helpful to help them understand and contest decisions.[28] Regulators, by contrast, might require explanations on data processing to ensure that the system operate within the bounds of established regulations.[25] This highlights that explainability cannot follow a "one-size-fits-all" approach,[26] which contributes to the

[19] Doshi-Velez and others, 'Accountability of AI Under the Law: The Role of Explanation' (2017) Berkmana Center Research Publication, 4.
[20] ibid.
[21] Hans de Brujin, Martijn Warnier and Mrijn Janssen, 'The perils and pitfalls of explainable AI: Strategies for explaining algorithmic decision-making (2022) 39 Government Information Quarterly 101666, 101669.
[22] The Royal Society (n 19) 14.
[23] ibid.
[26] ibid.
[24] Jenna Burrell, 'How the machine 'thinks': Understanding opacity in machine learning algorithms' (2016) < https://dx.doi.org/10.2139/ssrn.2660674> accessed 12 December 2024. [28] The Royal Society (n 19) 13-14.
[25] ibid 19.
[26] ibid.

challenge in defining its standards. As such, a user-centric mindset must be adopted.[27] This would consider the specific context and needs of each stakeholder to ensure that explanations are both relevant and meaningful.

Uncertainty in Achieving 'Explainability' Standards

Technical challenges

Achieving explainability in algorithmic decision-making fundamentally requires transparency, an ability to see the inner workings of the algorithm. However, this is hindered by the technical "black box" nature of AI systems.[28] This opacity arises from the complexity of machine learning models, particularly those involving techniques like deep learning.[29] This is because these systems do not follow pre-programmed rules. [30] Instead, they learn relationships and patterns through a layered structure, developing their own decisional rules.[31] These rules are typically unintelligible to humans, as they lack alignment with human concepts or symbolic reasoning. Therefore, they can even be too complicated for expert users[32] and programmers[33] to understand.

A proposed solution to mitigate is the use of post-hoc explanations[34] or proxy models[35] which analyses and interpret decision-making process after decisions are made. However, even

[27] Margaret Hagan, *Law by Design* (2021).
[28] Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond *State v Loomis*: artificial intelligence, government algorithmization and accountability' (2019) 27 IJLIT 122, 135.
[29] ibid.
[30] ibid.
[31] ibid.
[32] The Royal Society (n 19) 8.
[33] Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond *State v Loomis*: artificial intelligence, government algorithmization and accountability' (2019) 27 IJLIT 122, 135.
[34] Hans de Bruijn, Martijn Warnier and Marijn Janssen, 'The perils and pitfalls of explainable AI: Strategies for explaining algorithmic decision-making' (2022) 39(2) Government Information Quarterly <https://doi.org/10.1016/j.giq.2021.101666> accessed 19 December 2024.
[35] The Royal Society (n 19) 13.

such methods are not without challenges. One example is SHAP, a widely used method for estimating feature importance in AI systems.[36] However, research shows that SHAP's outputs can diverge from exact computations, especially when models involve more than a handful of features.[37] This highlights that SHAP is better at approximating relative importance, rather than providing precise explanations. Such limitations reinforce the Royal Society's concern that post-hoc explanations may not always be accurate or faithful and could even mislead users. [38] Similarly, Lipton[39] warned against the embracing interpretability that is optimised to satisfy subjective demands, since it can lead to explanations that are plausible but misleading. Illustrating this, Lipton drew parallels with human behaviour, where subjective rationales often conceal biases in processes like hiring and college admissions. To conclude, the technical black box remains a barrier to meaningful explainability, as alternative measures like post-hoc explanations may only provide partial transparency and risk misleading users.

Proprietary barriers

Balancing explainability with the protection of private interests presents another challenge in achieving explainability. This is also known as the legal "black box", [40] where proprietary protections such as trade secrets and intellectual property laws restrict access to the inner workings of AI algorithms.[41] This opacity often exists to maintain competitive advantage and stay ahead of adversaries. [42] The Council of Europe in European Ethical Charter

[36] XuanXiang Huang and Joao Marques-Silva, 'On the failings of Shapley values for explainability' (2024) 171 <https://doi.org/10.1016/j.ijar.2023.109112> 18 August 2025.
[37] Ibid.
[38] The Royal Society (n 19) 13.
[39] Zachary Lipton, 'The Mythos of Model Interpretability: In machine learning, the concept of interpretability is both important and slippery.' (2018) 16(3) Queue 31, 42.
[40] Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond *State v Loomis*: artificial intelligence, government algorithmization and accountability' (2019) 27 IJLIT 122, 135.
[41] ibid.
[42] Jenna Burrell, 'How the machine 'thinks': Understanding opacity in machine learning algorithms' (2016) < https://dx.doi.org/10.2139/ssrn.2660674> accessed 12 December 2024.

acknowledges this as a substantial barrier to achieving full transparency.[43] They posit that trade secret laws, in particular, limit access to the source codes of proprietary software, complicating efforts to ensure accountability and fairness.[44]

This obstacle is starkly illustrated in the *Loomis*[45] case, where the defendant contests the lack of transparency in the COMPAS risk assessment system. Despite these concerns, the Court upheld the proprietary nature of COMPAS, preventing disclosure of how risk factors were weighted or how risk scores were calculated. Similarly, Northpointe, the company behind the COMPAS, also refused to disclose its calculation methods to ProPublica, which criticised them for bias and inaccuracies in predicting recidivism among Black defendants.[46] A similar concern has been raised in the UK. The legal reform organisation JUSTICE, in its review of algorithmic tools in the justice system,[47] warned that biased and opaque systems such as COMPAS and Geolitica risk becoming an unlawful and arbitrary exercise of power. These case studies underscore the practical difficulties in meeting explainability standards, as corporate secrecy obstruct access to essential information necessary for true transparency and by extension, meaningful explainability.

[43] The European Commission for the Efficiency of Justice, 'European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment' (December 2018) <https://rm.coe.int/ethical-charteren-for-publication-4-december-2018/16808f699c> accessed 13 December 2024.
[44] ibid.
[45] *State v Loomis* 881 NW2d 749 (Wis 2016) 754 (US).
[46] Julia Angwin and others, 'Machine Bias' (*ProPublica*, 23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> accessed 3 December 2024.
[47] JUSTICE, 'AI in our Justice System' (2025) 40. <https://files.justice.org.uk/wp-content/uploads/2025/01/29201845/AI-in-our-Justice-System-final-report.pdf>

Ethical Dilemmas

Another obstacle in ensuring that context-based measures reliably uphold explainability standards is the ethical challenge of balancing the conflicting demands of completeness and interpretability. Interpretability seeks to make AI systems comprehensible to humans by simplifying their operations into concepts or terms that align with human knowledge. [48] Completeness, by contrast, aims to offer a full and accurate depiction of a system's functionalities.[49] As Gilpin posits, attaining both at the same time is fundamentally challenging because the most accurate explanations are difficult for people to understand; and conversely, the most interpretable descriptions often lack predictive power. [50] The most accurate explanations are often too complex to understand, while the most interpretable ones risks producing persuasive rather than transparent explanations.[51] As Herman points out, this tension creates grave ethical dilemmas and poses two questions: "*When is it unethical to manipulate an explanation to better persuade users? And how do we balance concerns of transparency and ethics with our desirability for interpretability?*"[56] These questions highlight the dangers of oversimplified explanations that prioritise persuasion over credibility, which can lead to deceptive explanations that erode trust and accountability. To conclude, the balancing of completeness and interpretability presents a challenge in achieving useful explainability.

[48] Leilani Gilpin and others, 'Explaining Explanations: An Overview of Interpretability of Machine Learning' (2018) Massachusetts Institute of Technology Cambridge.
[49] ibid.
[50] ibid.
[51] ibid.
[56] ibid.

Furthermore, the possibility of misguiding users is another ethical dilemma. Wachter[52] notes that counterfactual explanations can reveal when an algorithmic decision was influenced by protected characteristics such as gender or race, exposing potential discrimination. However, these explanations also carry inherent limitations.[53] Defending his stance, Wachter explains that counterfactual reasonings merely describe dependencies between a decision and external factors, but not necessarily causal links.[54] This means that while a counterfactual explanation might show that altering a certain factor leads to a different conclusion, it does not disclose the underlying causal connection or the algorithm's internal logic. This limitation arises because counterfactual explanations only lay out specific dependencies, and not the full set of circumstances influencing the decision. Wachter illustrates this by showing that, for example, if a counterfactual reasoning demonstrates that a "Black" individual's race influenced a decision, it does not imply that the race of "White" individuals was treated as irrelevant.[55] Thus, this could lead to a superficial understanding of why a decision was made and therefore may mislead user's intuitions. In conclusion, this reveals the limits of counterfactual explanations as tools for achieving explainability as it only provides partial insights into the algorithm's behaviour.

The Way Forward

Addressing these challenges of explainability in algorithmic decision-making is a complex and ongoing issue. However, a promising temporary solution lies in fostering inclusivity in the

[52] Sandra Wachter, Brent Mittelstadt and Chris Russel, 'Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR' (2018) 31(2) Harvard Journal of Law & Technology 841, 853854.
[53] Sandra Wachter, Brent Mittelstadt and Chris Russel, 'Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR' (2018) 31(2) Harvard Journal of Law & Technology 841, 853854.
[54] ibid.
[55] ibid.

process of designing these tools. Both Turner[56] and Al Olama[62] highlight the importance of involving diverse voices from governments and citizens through public consultations and online questionnaires, ensuring AI's societal impact is shaped collectively and not controlled by a technocratic elite. By involving individuals in these processes, trust in these systems can be cultivated, leading to greater confidence of their use. Building on this, decision-makers should also bear the responsibility of explaining AI-influenced outcomes, which would incentivise greater scrutiny and critical evaluation of these tools.[63] Moreover, given the current limitations in achieving full explainability, implementing an "opt-in or optout" mechanism offers a practical interim solution which allows users the autonomy to engage with such systems.[57] This approach also aligns with the European Ethical Charter, which emphasises the importance of informing in automated decision-making processes.[58] Together, these approaches can foster public trust in algorithmic decision-making and lay the groundwork for more sustainable and ethical use.[59]

Conclusion

In conclusion, the integration of algorithms into the justice system presents significant opportunities for enhanced efficiency, particularly in addressing the rising backlog cases. However, the above discussion underscores the critical importance of explainability in these

[56] Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan Cham 2018) 264-272. [62] Dom Galeon, 'An Inside Look at the First Nation With a State Minister for Artificial Intelligence' (*Futurism*, 12 November 2017) <https://futurism.com/uae-minister-artificial-intelligence> accessed 19 December 2024.
[63] Hans de Bruijn, Martijn Warnier and Marijn Janssen, 'The perils and pitfalls of explainable AI: Strategies for
explaining algorithmic decision-making' (2022) 39(2) Government Information Quarterly <https://doi.org/10.1016/j.giq.2021.101666> accessed 19 December 2024.
[57] Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond *State v Loomis*: artificial intelligence, government algorithmization and accountability' (2019) 27(2) IJLIT 122, 140.
[58] The European Commission for the Efficiency of Justice, 'European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment' (December 2018) <https://rm.coe.int/ethical-charteren-for-publication-4-december-2018/16808f699c> accessed 13 December 2024.
[59] Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan Cham 2018) 278.

systems as highlighted by ethical and policy discussions. The challenges of defining and achieving explainability standards are multifaceted, involving technical, proprietary and ethical dilemmas. Addressing these issues requires a nuanced approach that includes diverse stakeholder involvement and mechanisms for user engagement. By tackling these challenges, the justice system can move towards a more transparent and ethical use of algorithms, fostering public trust and upholding the principles of justice.

Is Fear Enough? Hart and the Limits of Legal Coercion

Freya Arden

Abstract:

When we think of law, what often comes to mind is punishment, sanctions and fear. Yet H.L.A Hart rejects this coercive view, arguing that such features are not central to the nature of modern legal systems. Hart insists that his limited emphasis on these elements is not a shortcoming, but a deliberate and compelling strength of his legal positivist theory, arguing against coercion-based accounts advanced by theorists such as Austin, Kelsen and Holmes. Hart alternatively argues that the law requires a more nuanced framework. As this paper explores, Hart's framework is grounded in social acceptance and institutional practice which transforms our understanding of legal mechanisms to better reflect society. Furthermore, this paper examines how, at the core of Hart's sociological and descriptive theory is the distinction between primary and secondary rules, respect of authority underpinned by internalised norms, and collective recognition of authority. This shifts law from a coercive tool to a system that offers a facilitative, rather than purely punitive, conception of law. Additionally, Hart also emphasises the role of judges to interpret the law and apply it to current situations ensuring the continued relevancy of the theory as times change. However, technological advancements and artificial intelligence may challenge the relevance of Hart's model, forcing the question as to whether Hart's legal positivism can adapt to systems where internal acceptance may no longer be a human trait.

Introduction:

In Hart's positivist theory the law is defined sufficiently and in a compelling manner despite the relatively little attention he pays to coercion and sanctions. His approach demonstrates that the understanding of law does not rest solely on notions of fear or compulsion. Theories that reduce legal compliance to the threat of punishment overlook the more nuanced mechanisms by which legal systems function. Hart's concepts, particularly the distinction between primary and secondary rules, the idea of social acceptance, and the centrality of the rule of recognition, provide a more robust and coherent

explanation of legal order and obligation. As Hart observes, *'If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change, and adjudication, it is plain that we have here not only the heart of a legal system but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.'* In this way, Hart shifts the focus from external pressures to the internal features of legal systems that generate normativity and stability. [60]

Coercion and Legal Obligation: Sanction-Based Perspective

Hart begins *The Concept of Law* by challenging Austin's command theory, which asserts that law is essentially the command of a sovereign, marked by a 'sign, performance, or statement by the sovereign which serves to communicate a wish and which is backed up with a sanction for failure in performance.' [61] Therefore, the role of sanctions is considered central to this theory; it is the threat of punishment that forces people to adhere to rules and laws, according to Austin. It is not the intent to bring about good, but the power to inflict harm for non-compliance, that characterises a command as law. [62] This perspective frames law as fundamentally coercive, reducing it to a system enforced by the will of a powerful sovereign. Hans Kelsen, developing a similar view, reinforces this notion by asserting that 'the law is a coercive order... and it tries to bring about certain human behaviour by rules attaching to the contrary behaviour coercive acts as sanctions.'[63] In both accounts, the essence of law lies not in its moral content or social function, but in its capacity to compel behaviour through the threat of sanction.

Oliver Wendell Holmes famously asserted that 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.' [64] His conceptualisation of law focuses on its

[60] Stuart M Brown, Jr, *Reviewed Work: The Concept of Law by H. L. A. Hart* , vols 72, No. 2 (The Philosophical Review 1963) p.95 <https://doi.org/10.2307/2183110>
[61] Duncan Spiers, 'Jurisprudence Essentials' *Edinburgh University Press* (2011) p.42
[62] John Austin, '*The Province of Jurisprudence Determined*' (Fifth Edition) (1885)
[63] Hans Kelsen and Max Knight, 'Law and Nature', *Pure Theory of Law* (First Edition) (1967).
[64] Oliver Wendell Holmes, 'The Concept of Law' Cambridge University Press (2009) pp. 26-45

practical function: society, in his view, is primarily concerned with the consequences of actions, and law serves as a means of predicting whether those actions will lead to the imposition of sanctions. Thus, coercion is central to Holmes' understanding of law, not in a theoretical or moral sense, but as a system grounded in enforceable outcomes. For Holmes, 'the legal decision is described as coming before the reasoning; the boundary of the law and the appropriate rule of decision would appear surprisingly irrelevant.'[65] This reflects his broader legal realism, where common law plays a central role and the development of legal principles emerges case by case, shaped more by judicial outcomes than by abstract reasoning.

In contrast, Shapiro has criticised Holmes' theory for placing too much emphasis on the perspective of the so-called 'bad man;' someone who sees law solely as a threat. In a similar vein, Hart challenges sanction-centred theories more broadly, arguing 'that sanction centred accounts of every stripe ignore an essential feature of law.' [66] Hart argues that reducing law to mere coercion overlooks the broader social functions that rules perform in a legal system and instead highlights that many legal rules, such as those governing marriage or contract formation, do not involve sanctions or threats. These rules function more as facilitative mechanisms, enabling individuals to create legal relationships and obligations voluntarily. By pointing to such examples, Hart demonstrates that a theory overly focused on fear and coercion fails to capture the complexity and normative dimensions of law.

Obey or Else: Hart's Recognition of Coercion:

Hart presents the example of a gunman threatening a clerk, who orders them to hand over money or they will shoot; this illustrates the distinction between coercion and legal authority. While the clerk may comply out of fear, this act is one of coercion, not law. Hart argues that such threats, though effective

[65] Frederick R. Kellogg, 'Oliver Wendell Holmes, Jr. Legal Theory and Judicial Restraint' Cambridge University Press (2009), pp.28

[66] Scott J. Shapiro, 'What is the internal point of view?' (2007) 75 Fordham Law Review 1157

in securing obedience, lack the essential features of a legal command which connotes implications of a hierarchy; 'to command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm, a command is primarily an appeal not to fear but to respect for authority.'[67] Therefore, a command and a coercive statement are distinct from one another and the law is closer to that of Hart's understanding of a command, which requires respect over force. This point is further illustrated by the way most individuals follow traffic laws even in the absence of enforcement mechanisms like police or surveillance. This suggests that compliance often stems from a general recognition of legal authority, not from the fear of punishment. In Hart's view, it is respect for the rules and the system that sustains legal order, not the constant application of force. While Hart's gunman example shows that he does acknowledge the role of coercion and sanctions, he does so only to demonstrate that law cannot be reduced to coercive threats alone. A legal system requires more than isolated commands backed by force, it depends on general, publicly accessible standards such as statutes, which are designed to apply broadly rather than target specific individuals. For Hart, statutes articulate the general norms of conduct expected within a society; criminal law, for example, outlines these expectations and is followed not solely out of fear, but because it reflects accepted social standards.

Hart emphasises that law is not about compelling behaviour through threats, but about 'control by directions that are in this double sense general,' both in content and in application. [68] The gunman's threat, while effective in producing compliance, lacks the institutional features grounding law. Unlike the isolated, fear-based obedience of the clerk, legal compliance involves a broader, more stable habit of obedience to rules recognised as authoritative. Coercion cannot be central to the nature of law; therefore, the little consideration Hart gives to such notions is adequate.

The Real Foundation of the Law: Social Acceptance:

[67] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) p.20
[68] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) p.21

Sean Coyle argues that 'if law is underpinned by nothing except habit and fear, then one is obliged to say that the 'binding' force of the law is simply the fact that one who disobeys it is likely to suffer the application of a sanction. But this cannot be all there is to the notion of legal obligation.' [69] This critique underscores the view that law must possess a normative quality beyond mere deterrence. If legal obligation were rooted solely in fear, it would reduce law to a system of threats rather than a framework of recognised authority. In contrast, Hart contends that it is not fear but social acceptance that confers authority upon legal rules. According to Hart, laws are not moral imperatives but social constructs, emerging from institutional practices and collective human behaviour. He writes, 'When I say law is a social construction, I mean that it is one in the way that some things are not. Law is made up of institutional facts like orders and rules, and those are made by people thinking and acting.' [70]

Hart's approach is descriptive and sociological, focusing on how laws function as social rules whose legitimacy derives from their general acceptance within a community. The rule of recognition illustrates how legal systems rest on a shared internal point of view among officials and citizens. This interplay between law and social consensus is evident in historical examples such as the criminalisation of marital rape. Once legally permissible, it became unlawful only after shifting societal attitudes rendered it unacceptable, culminating in legal reform in 1992. This demonstrates that the authority and evolution of law are deeply intertwined with societal values and acceptance.

Therefore, Hart offers a compelling alternative to sanction-based theories. People largely follow the law not out of fear, but because of a perceived obligation rooted in shared norms and institutional legitimacy. In this sense, Hart's account is a more nuanced and comprehensive explanation of legal obligation.

[69] Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (Oxford: Hart Publishing) (Bloomsbury Collections 2022) chapter 6 <<http://dx.doi.org/10.5040/9781509948932>> accessed 19 November 2024
[70] John Searle, *The Construction of Social Reality* (Allen Lane 1995)

Hart's Two-Tier Rule System:

It is not fear of punishment which offers depth to the law, rather it is the internal meanings and effects that laws have upon those following them that offer understanding. This is rooted in the distinction between rules and habits; for Hart, a habit is something which we do regularly but don't really understand why, there is no obligation to do it and therefore no threat of punishment. Conversely, a rule explains why someone performs an action and acts as a justification for that action. Rules, then are imbued with a sense of obligation and are sustained by a shared understanding within a community. A contemporary example of this can be seen in the *Voyeurism (Offences) Act 2019*[71], introduced to address issues such as upskirting, and its relationship with the *Sexual Offences Act 2003.*[72] These laws not only codify unacceptable behaviours but also provide moral and social justification for their prohibition, reflecting evolving societal norms. They exemplify Hart's theory: the law functions not merely to deter, but to articulate shared standards and to legitimise condemnation of those who violate them.

However, it is important to acknowledge that in discussing the distinction between habits and rules, Hart does engage with elements of coercion. He observes that 'in the case of legal rules, it is very often held the crucial difference consists in the fact that deviations from certain types of behaviour will probably meet with hostile reaction and in the case of legal rules be punished by officials.' [73] This reflects the reality that legal rules often carry with them the possibility of enforcement and formal sanction, distinguishing them from mere habits, which are followed instinctively and without consequence for deviation. Hart further explores this idea in his analysis of judicial reasoning, noting that judges impose punishment not arbitrarily, but by referring to a rule that guides their decision and serves as the justification for penalising an offender: the judge uses 'the rule as his guide and the breach

[71] The Voyeurism (Offences) Act 2019
[72] The Sexual Offences Act 2003
[73] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5, p.10

of the rule as his reason and justification for punishing the offender.' [74] While this demonstrates that the law does involve mechanisms of enforcement, Hart never suggests that coercion is the central reason why rules are followed, rather he draws a conceptual distinction not to elevate coercion but to highlight the foundational features such as rule structures, which offer a deeper explanation.

'Law itself is a union of social rules: primary rules that guide behaviour by imposing duties or conferring powers on people and secondary rules that provide for the identification, alteration, and enforcement of the primary rules.' [75] Primary rules, for Hart, are those which ordinary citizens follow; there is then a second set of rules that are for those in charge.[76] Primary rules prescribe what citizens must or must not do, they are duty-imposing. Secondary rules, on the other hand, are addressed to officials and institutions; they are power conferring, establishing the procedures by which laws are created, modified, and enforced.

This dual structure explains how legal systems function in a way that goes beyond mere coercion. Law is not simply a series of commands backed by threats, as Austin suggested, but a complex framework of interrelated rules that derive their authority from social recognition and institutional practice. As Marcus G. Singer affirms, 'In the combination of these two types of rule, there lies what Austin wrongly claimed to find in the notion of coercive orders, namely, the key to the science of jurisprudence; law is presented as the union of primary and secondary rules.' [77] This insight is significant because it reveals the limitations of theories that emphasise coercion and sanction as the core of legal obligation. Such views overlook the structural dimensions of law that make it function effectively in society. Thus, although Hart engages only marginally with coercion, this is entirely well accounted for within the

[74] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5, p.12
[75] Leslie Green, *The Concept of Law Revisited*, vol 96 issue 6 (1996) <https://repository.law.umich.edu/mlr/vol94/iss6/15>.
[76] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5
[77] Marcus G Singer, '*Hart's Concept of Law'* vol. Vol. 60 No. 8 (The Journal of Philosophy 1963) pp 197-220 <https://doi.org/10.2307/2023267>

broader explanatory power of his theory, which better captures the internal logic and practical operation of legal systems.

The Rule of Recognition and Legal Validity:

Moreover, Hart explains how it is the rule of recognition that is of the utmost importance in understanding the law and how it operates in practice. Hart imagines a system where there are only primary rules; a 'regime of primary rules unsupplemented by rules of any other type would be uncertain, static, and inefficient.' [78] It would be uncertain, as there would be no method to identify the primary rules and it would also be inefficient due to the inability to adjudicate in cases where it is necessary. Therefore, it is logical to assume there must be secondary rules that work in unison with the primary to formulate a working legal system.

The rule of recognition is one of those secondary rules that is of 'special importance,' being a set of rules that officials use to identify what rules are part of the legal system, thus providing a criterion of legal validity. [79] This means that 'parliamentary enactments are law, then, not because of their moral credentials or because of any logical presupposition, but because an actually practiced customary rule recognises them as such.' [80] This illustrates how legal validity stems not from coercion or morality, but from an accepted institutional practice.

For Hart it is the combination of primary rules and secondary rules working in unison that offers a workable understanding of law that moves far beyond a simplistic theory grounded in fear and punishment. 'Hart defines law; that is, he specifies the necessary and sufficient conditions for the use of

[78] Stuart M Brown, Jr, *Reviewed Work: The Concept of Law by H. L. A. Hart* , vols 72, No. 2 (The Philosophical Review 1963) 250–253 <https://doi.org/10.2307/2183110>
[79] Leslie Green, *The Concept of Law Revisited*, vol 96 issue 6 (1996)
[80] Leslie Green, *The Concept of Law Revisited*, vol 96 issue 6 (1996)

the concept. A set of primary rules is one necessary condition. A set of secondary rules is another. These two conditions together are sufficient.'[81] The rule of recognition, then, offers a clear and logical explanation of how legal systems maintain coherence and authority. It provides a more nuanced and persuasive account of law than any model based solely on coercive enforcement.

Building on Hart's framework, Scott Shapiro conceptualises the rule of recognition not merely as a test for legal validity, but as a duty imposing norm. According to Shapiro, what Hart meant by the rule of recognition was that it 'imposes a duty on officials to apply rules that bear certain characteristics.'[82] Shapiro illustrates this with the example of officials within the British legal system who recognise and apply rules enacted by the Queen in Parliament. In this way, the rule of recognition serves as a directive, binding legal officials to recognise and uphold the norms defined by the legal system. Shapiro acknowledges, however, that this interpretation raises the question of which officials the rule applies to and resolves this by arguing that the rule of recognition is primarily directed at courts, 'while the rules of change and adjudication are directed at the official parties who are empowered by these rules.'[83] Shapiro provides a detailed account of how institutional roles and responsibilities are distributed within the legal system, enhancing our understanding of the internal logic and function of secondary rules following Hart's jurisprudential theory.

Running out of Rules: Judicial Judgement and the Open-Texture of the Law:

[81] Stuart M Brown, Jr, *Reviewed Work: The Concept of Law by H. L. A. Hart* , vols 72, No. 2 (The Philosophical Review 1963) 250–253 <https://doi.org/10.2307/2183110>.
[82] Scott J. Shapiro, 'What is the rule of recognition (and does it exist)?' (2009) Yale Law School Public Law & Legal Theory Research Paper Series Research Paper No. 181, pp. 240
[83] Scott J. Shapiro, 'What is the rule of recognition (and does it exist)?' (2009) Yale Law School Public Law & Legal Theory Research Paper Series Research Paper No. 181,pp. 241

At a first glance, Hart's theory may appear ill-equipped to cope with novel situations that the rule of recognition cannot adhere to. One could argue that because society inevitably includes elements of fear and uncertainty, a theory that pays minimal attention to sanctions may struggle to adapt to evolving social contexts. Hart successfully remedies this concern with the 'open texture of law,' whereby he acknowledges that lawmakers cannot foresee every possible future development or consequence, and therefore legal rules cannot be exhaustively precise. In these cases, Judges must exercise discretion, not by resorting to coercion, but by interpreting laws in light of their underlying purpose and the specific circumstances at hand; 'the open texture of the law means that there are, indeed, areas of conduct that must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests that vary in weight from case to case.' [84]

David Lyons draws attention to Hart's example of a local ordinance banning vehicles from a public park, raising the question of whether a bicycle qualifies as a vehicle under this rule. [85] Hart distinguishes between the *core* of determinate meaning in language and its *penumbra* of indeterminate meaning, noting that 'the rule banning vehicles from the park likewise has a core of determinate meaning and a penumbra of indeterminate meaning.' [86] This means that until the law is clarified, a bicycle falls within this penumbra, it is neither clearly banned nor allowed.

In such cases, courts must interpret the statute purposively, determining whether bicycles should be classified as vehicles in light of the law's intent. Hart's theory addresses the challenges posed by novel or unforeseen circumstances, ensuring that courts play an active role not merely in enforcing punishment but in shaping the law through reasoned interpretation. By focusing on a system of primary

[84] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5, 129-135
[85] David Lyons, *Open Texture and the Possibility of Legal Interpretation*, vols 18, No. 3 (Law and Philosophy 1999) 297–309 <https://www.jstor.org/stable/3505245>
[86] David Lyons, *Open Texture and the Possibility of Legal Interpretation*, vols 18, No. 3 (Law and Philosophy 1999) 297–309 <https://www.jstor.org/stable/3505245>

and secondary rules, Hart provides a framework that is both practical and adaptable, capturing the complexity of legal systems more effectively than theories reliant solely on coercion and sanctions. This makes Hart's account a robust and logically coherent understanding of law's nature and operation.

Legal Positivism in the Age of AI:

According to Hart's positivist theory the law is not solely coercive and has instead facilitative elements and an internal compass which forces us to adhere to the rules. How does this cope when faced with modern developments of AI? If legal authority depends on internal acceptance it is unclear whether non-human agents, regardless of their sophistication, can genuinely participate in this practice. Ulgen in their argument use Floridi's distinction of 'moral agents' and 'moral patients' to explain that AI systems cannot be moral patients since they cannot experience moral harm and consequently they cannot take in the social-acceptance aspect of Hart's theory. Ulgen further discusses how attributing legal responsibility and establishing liability requires human consciousness and freedom of action. More specifically, even if AI is eventually able to have 'functional morality' to perform these tasks it will still not amount to human moral agency. Therefore, following Ulgen's logic, an automated system without consciousness that cannot establish liability and attribute legal responsibility properly, is unlikely to be accepted by society in the same way that current law enforcement is accepted[87].

Moreover, the distinction Hart draws between officials and citizens may become blurred by increasingly autonomous systems making decisions; if AI were to replace human officials in judicial roles who would count as an 'official' for the purpose of the rule of recognition and would the concept of legal validity need to evolve? Zalnieriute analyses how AI as an 'authority' varies, from a tool to helping humans make decisions to a decision-making process with the absence of humans. This is illustrated in multiple case studies including the Robo-Debt Program in Australia which faults in the algorithm lead to serious unfairness and the COMPAS system which in Wisconsin v Looms the US Supreme Court granted

[87]Ozlem Ulgen, 'A 'human-centric and lifecycle approach' (2021) 26 CL 97.

permission for partial reliance on the system but only with human supervision as the ultimate authority[88]. These examples demonstrate that without human agents providing a deep understanding of legal context behind decisions there will still faults within the system. A human-centred approach as we currently have may be imperfect but it is still a well-respected functional system that society has 'agreed' to follow. Removing the human factor from legal authorities will undoubtedly lead to systems incapable of reaching the standard of equality under the law. This itself will inherently undermine the authority of legal decision-making, consequently society will not appreciate a non-human agent making decisions, and Hart's theory fails.

In a future where AI systems play a greater role in legal reasoning, Hart's model may require reinterpretation as it currently sits at odds with the idea that non-human agents can participate meaningfully in legal creation and interpretation. In *The Mandatory Ontology of Robot Responsibility* the author highlights that we expect legal authorities to justify their actions and mentions Shoemaker's tripartite theory of attributability, answerability and accountability. Champagne adds that such principles will eventually need to applicable to artificial agents.[89] While Hart offers a deep understanding of the law without being overly concerned with elements of force and pressure, legal positivism in the age of AI must appropriately grapple with the possibility that legal systems could function without internal acceptance, leading to questions arising about the future of legal theory entirely.

[88] Monika Zalnieriute, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82 MLR 425.
[89] Marc Champagne, 'The Mandatory Ontology of Robot Responsibility' (2021) 30 *Camb. Q. Healthc. Ethics* 448.

Conclusion:

The roles of sanction and coercion are not essential to a full understanding of the law. Theories that centre on these notions risk overlooking fundamental elements of legal systems, most notably, social acceptance and the interplay of primary and secondary rules. Approaches that reduce law to mere force are overly simplistic and fail to account for the nuanced functions of courts as interpreters and creators of law, rather than mere enforcers of punishment. Hart's theory deliberately downplays fear and coercion, emphasising instead the internal acceptance of rules and the structural role of secondary rules in defining and sustaining legal order. This invites a profound question: *Do we truly need to be afraid of the law in order to follow it?* According to Hart, the answer is a clear and resounding no, suggesting that the power of law lies not in fear, but in its social foundations and institutional legitimacy. Nevertheless, with current technological advancements within the system legal theory and mechanisms will need develop.

Beyond Legal Illusions: How the Law perpetuates modern slavery and exploitation.

Ellie Roberts

Abstract

Slavery and human trafficking are two of the most grave and inhumane violations of human rights. Although these are criminalised offences worldwide, they continue to exist and corrupt the lives of thousands of individuals annually. An estimated 50 million people were experiencing modern slavery on any given day in 2021, representing an increase of 10 million since 2016.[90] Therefore, it is evident that criminalisation is and will never be enough to tackle this issue. This article will address the UK's Modern Slavery Act (MSA),[91] and how, despite the acclamations, this piece of legislation is inherently weak. The act overlooks the significant role that big businesses play in the development of exploitation, constructing slavery as a problem, albeit a grossly horrific one. Still, it remains a singular problem and fails to provide any functional solution that addresses the systemic cause. The issue of underdeveloped legislation within this area is not only apparent in the UK. This article will touch on legislation operating in the USA jurisdiction, discussing the various issues and negative implications that the Alien Tort Statute[92] has caused for victims of exploitation. However, one of the most prevailing areas in which the law has created a precarious situation for those who are

[90] Walk Free, 'Global estimates of modern slavery' (2022) < https://www.walkfree.org/reports/global-estimates-of-modern-slavery-2022/> accessed 24 September 2025.
[91] Modern Slavery Act 2015
[92] 28 U.S.C.A § 1350

victims of slavery and exploitation is through temporary migrant worker programmes (TMWPs).

Introduction

Over the last decades, the issue of exploitation and modern slavery has become the focus of many government agendas and legislation initiatives worldwide.[93] The various attempts by the law to address these issues have borne little fruit, and in more ways than one have highlighted a lack of political will to address the systemic factors that enable exploitation.[94] This article will discuss the law's attempts to address the issue, including legislation and the errors in judgment that have been encountered. The law has struggled to track the transformations of the problem, and through their inaction, they have arguably permitted the re-emergence of these crimes. I will also discuss in detail temporary migrant worker programs, both how they perpetuate exploitation and the underlying tones of transatlantic slavery within this system. These programmes are set up, overseen, and operated in accordance with the law, yet a blind eye is willingly turned to the corruption within this system. TMWPs are manufacturing victims of forced labour and modern slavery daily, yet this remains overlooked due to the appealing facade that these programmes are helping generate a flourishing economy. Ultimately, for reasons briefly stated above, the law and legal structures are complicit in the

[93] Janie A. Chuang, 'Exploitation Creep and The Unmaking of Human Trafficking Law' (2014) 108(4) The American Journal of International Law 609.
[94] Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) MLR.

persistence of human trafficking and modern slavery, despite their attempts to remain carefully veiled. Overall, this paper will analyse, through the broader lens of social justice, whether the law is a solution or a further tool that enables injustice within the world of exploitation.

The Modern Slavery Act 2015: Inherent weaknesses and recommendations to improve

Firstly, the law poses no less of a problem due to a weak statutory framework. The UK Parliament introduced the Modern Slavery Act in 2015,[95] and it was the first piece of legislation to address 'slavery' as opposed to 'human trafficking.'[96] At the time of the enactment, Theresa May described this as a "historic milestone"; her speech was grandiose, painted this legislation as a sure force to be reckoned with and voiced a commitment to the eradication of human trafficking.[97] However, as time has progressed, we have witnessed this act coming apart at the seams. In 2017, the National Audit Office published a highly critical report of the UK response to modern slavery.[98] This report found that the strategies set out by the MSA were overall weak, incoherent, and lacking

[95] The Modern Slavery Act 2015
[96] Alien Tort Statute, 28 U.S.C.A § 1350
[97] Home Office, 'Historic Law to end Modern Slavery passed' (Gov.uk, 26 March 2015) < https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed> accessed 3 December 2024.
[98] National Audit Office, 'Reducing modern slavery'(nao.og.uk 12 December 2017) < https://www.nao.org.uk/wp-content/uploads/2017/12/Reducing-Modern-Slavery.pdf> accessed 3 December 2024.

clear direction as to how to achieve an honest reduction in slavery in the UK. A notable finding from this report was that the Home Office does not monitor compliance for how businesses report what they are doing to prevent human trafficking within their supply chains.

Under the MSA, the UK government had introduced a requirement that companies with a turnover of more than £36 million annually must produce a human trafficking statement, detailing steps taken to manage the risk of modern slavery.[99] The rationale behind this was that by 'naming and shaming' big businesses, this would have a knock-on effect on their reputation, and therefore persuade companies to put adequate measures in place to tackle the issue of exploitation within supply chains.[100] The enforcement of this has been deplorable and lacking any assertion of a 'backbone' in the face of these corporate evils.[101] This requirement of businesses is not only non-binding and completely obligatory, but there are no quality checks or scrutiny of the statements released; a statement could simply consist of a business admitting to having taken no steps in preventing modern slavery.[102] As the UK's Independent Anti-Slavery

[99] The Modern Slavery Act 2015, s 54.
[100] Gary Craig, 'The UK's Modern Slavery Legislation: An Early Assessment of Progress' (2016) 5(2) Social Inclusion < https://www.cogitatiopress.com/socialinclusion/article/view/833/545> accessed 5 December 2024.
[101] Modern Slavery Act 2015, s 54(4)(b).
[102] Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (2nd edn, Cambridge University Press 2019).

Commissioner stated in 2020, "This light-touch legislation sets a low bar for compliance."[103]

A further issue with the Modern Slavery Act is that it does not propose a solution to the inherent link between Overseas Domestic Workers visas and exploitation in the workplace. There is an apparent absence of political commitment to tackle the structural factors that underpin vulnerability to exploitation.[104] Arguably, this absence reflects the true intentions of the government, as it is this monopoly over the immigration process that strengthens political agendas. A clause was inserted into the MSA which gives domestic workers, who have been formally identified as victims of trafficking, the possibility of being granted a 6-month visa that allows them to change employers.[105] This legislation "initiative" was underwhelming at best; the clause was inserted in complete ignorance of the actual situations of exploitation experienced by those with Overseas Domestic Workers visas. It is ill-considered to assume that those domestic workers who have not yet been formally recognised as victims of trafficking will have access to change employers within the time frame of 6 months.

[103] Independent Anti-Slavery Commissioner Annual Report 2019-20.

[104] Modern Slavery Act 2015

[105] ibid, s 53.

Additionally, those who are victims of workplace abuse or exploitation will be incredibly reluctant to leave a job due to the sheer power imbalance and lack of bargaining chips against the employer. Therefore, the Modern Slavery Act is far from a commendable beacon of justice. From a legal positivist perspective, 'the existence of the law is one thing; its merit or demerit is another.'[106] However, regarding the MSA, the idea that there should be a distinct separation between law and morality should be rejected. The state should assume a degree of ethical responsibility to defend against the crimes of exploitation and human trafficking. I would align my argument with a natural law perspective; the MSA cannot be seen as a public asset, it lacks integrity and arguably any sense of a moral code.[107] Fuller emphasised the need for both an internal and external morality of the law.[108] The external morality of the law relates to how the decision-maker actually applies a law, and what outcome it yields. In this sense, the objectives of the MSA (to eliminate exploitation and modern slavery in the UK) should be inseparable from the intelligibility of the act itself.

However, with respect to the various problems with the MSA which are mentioned above, we can witness the lack of alignment between the purpose of the law, and the

[106] John Austin, The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence (Weidenfeld & Nicolson 1954) 184-185.
[107] Trevor Allan, 'Why the law is what it ought to be' 2020 11(4) Jurisprudence < https://www.tandfonline.com/doi/full/10.1080/20403313.2020.1782596?casa_token=LKrjXXL9T-wAAAAA%3ANTrgNEpZKb558zNx4IvAsSo_7MLSPjK4zF5EgrU09wFJ9xL-UNoWtZFAkSHjA8pFBxL6EFmuE6c3#abstract> accessed 29 December 2024.
[108] Lon L. Fuller, 'The Morality of The Law' (Yale University Press 1964) 669.

contributions it actually makes to public governance.[109] The MSA affords much greater protection to corporate businesses and the ulterior motives of government than to the actual victims of exploitation and human trafficking within the UK. Therefore, there is a lack of substantive justice being served; the moral compass guiding the MSA is arguably imperceptible. As once stated by St. Augustine, "an unjust law is no law at all."[110] Despite this, there have been recommendations and initiatives made concerning strengthening the MSA and the UK response in general to modern slavery. For example, A Private Members' Bill was initiated by Baroness Young of Hornsey – The Modern Slavery (Transparency in Supply Chains) Bill.[111] Other countries have also taken steps to strengthen their legislation and protect victims against exploitation. For example, Switzerland has introduced mandatory due diligence obligations for companies, and in 2019, the Dutch Government adopted the "Child Labour Due Diligence Law."[112] However, despite these various attempts, the overall law in this area remains light touch. The means of modern slavery and exploitation do not remain static; perpetrators will continuously adapt their practices to evade the law. Therefore, by having in place reactive legislation, such as the MSA, rather than proactive legislation, minimal resolution can be achieved for victims.

[109] Modern Slavery Act 2015

[110] Padraig McCarthy, 'Unjust Law and False Truth' (2019) 70 (5) The Furrow < https://www.jstor.org/stable/45210232> accessed 31 December 2024.

[111] Modern Slavery (Transparency in Supply Chains) Bill [HL] Bill 57 (2017-19).

[112] The Child Labour Due Diligence Act 2019.

Weak legislative initiatives beyond the UK: The Alien Tort Statute

Moreover, legal frameworks beyond the UK have hindered efforts to secure justice in cases of slavery. Notably, the Alien Tort Statute (ATS) operates under USA jurisdiction.[113] The Alien Tort Statute was enacted as part of the Judiciary Act of 1789[114] to give federal district courts jurisdiction to hear "any civil action by an alien for a tort".[115] Unlike the Modern Slavery Act[116], this legislation does not directly address the issue of slavery; instead, it operates to allow foreign plaintiffs a remedy for violations of international law. This statute appears, on the face of it, as a facilitator of justice, providing individuals with a legitimate avenue to challenge human rights abuses. However, much like the MSA, the ATS is ineffective mainly at securing a remedy for victims, failing to control and scrutinise the actions of large corporations in international law.[117] The scope of this Act has become progressively curtailed over time, with restrictive judicial attitudes culminating in the landmark decision of *Nestlé v Doe.*[118] However, it was the long line of previous judgments that subtly foreshadowed and offered an early indication of the outcome of *Nestlé*. In the 2004 case of *Sosa v. Alvarez-Machain,*[119] the US Supreme Court laid down a judgment that "sounded the death

[113] Chuang (n 4).
[114] Federal Judiciary Act 1789
[115] Gisell Landrian, "Courthouse Doors Are Closed to Foreign Citizens for International Law Torts Committed by American Corporations' (2024) 55 Miami Inter-Am L Rev. 524.
[116] Alien Tort Statute, 28 U.S.C.A § 1350
[117] Beth Stephens, 'The Curious History of The Alien Tort Statute' (2013-2014) 89 Notre Dame Law Review 1467.
[118] *Nestle USA, Inc v Doe*, 141 S. Ct. 1931, 1935 (2021).
[119] *Sosa v Alvarez-Machain*, 542 U.S. 692, 697 (2004).

knell"[120] for the ATS and its purpose in defending human rights claims. Here, it was decided that the ATS does not create any new causes of action and that it is a "purely jurisdictional statute".[121] *Sosa* clarified that the limited circumstances in which the ATS could create private rights of action are three transboundary torts: violation of safe conduct, infringement of the rights of ambassadors and piracy.[122]

A further case that played a pivotal role in the development and application of the ATS was *Kiobel v Royal Dutch Petroleum Co.*[123] In this case, Nigerian citizens initiated action under the ATS, alleging that corporate activity played a complicit role in enabling the Nigerian Government to commit violations of international law. However, it was decided that a mere corporate presence in the United States did not meet the threshold for the ATS to be applied. It was agreed that relevant conduct must 'touch and concern' the US with sufficient force to override the presumption against extraterritorial application.[124] This outcome curtailed the scope of the ATS, further adding complexity and obscuring what was already an unsettled point of law. It is in the most recent case

[120] Carlos Manuel Vázquez, 'Sosa v Alvarez-Machain and Human Rights Claims against Corporations under the Alien Tort Statute' (2006) Georgetown Public Law and Legal Theory Research Paper No. 12-077 < https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1986&context=facpub> accessed 25 July 2025.
[121] Alien Tort Statute, 28 U.S.C.A § 1350
[122] Alien Tort Statute, 28 U.S.C.A § 1350
[123] *Kiobel v Royal Dutch Petroleum Co*., 569 U.S. 108, 111-12 (2013).
[124] ibid 124-25.

of *Nestle v Doe,*[125] where we ultimately witnessed the death of this statute.[126] In *Nestlé v Cargill*, plaintiffs filed an action under the ATS, alleging that they had been trafficked and enslaved to work on cocoa farms in the Ivory Coast. The plaintiff argued that the business relations between these large corporations and foreign farmers were essentially aiding and abetting child slavery.[127] Although no injury was sustained on US soil, these corporations should have been aware of the conditions on the cocoa farms, given their oversight of all operational decision-making. However, the US Supreme Court blocked this lawsuit, ruling that although Nestle USA and Cargill provided financing and resources to these farms, the food giants cannot be held accountable for the child slavery that occurred. This outcome was deeply unsatisfying from a human rights perspective, falling short of all expectations of justice and fairness.

The Supreme Court expanded upon the decision in *Kiobel,* deciding that not only is mere corporate activity insufficient to trigger domestic application of the ATS, but also that general corporate activity is sufficient. The court failed to define what would meet the threshold of 'corporate activity' to trigger this statute. It appears that as long as corporations do not commit these human rights violations domestically through tangible actions, the threshold will not be met, and they will not be held accountable by the

[125] Modern Slavery Act 2015

[126] Oona A. Hathaway, 'Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe: The Twists and Turns of The Alien Tort Statute' (2022) Yale Law School Public Law Research Paper Forthcoming < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4012698> accessed 12 August 2025.

[127] ibid

judicial branch. This decision has sparked outrage and prompted questions regarding not only the inherent design flaws of the ATS but also the judicial treatment of torts committed abroad. The Supreme Court was arguably naive in thinking that a situation could exist where these corporations would both financially aid and abet such atrocities, yet also have enough direct involvement to trigger the ATS.[128] This is a token of an inherent unawareness and ignorance of the complex nature of global supply chains. Nestlé, for example, has nearly 165,000 direct suppliers and approximately 695,000 individual farmers worldwide, spanning hundreds of transnational borders.[129] It is the systemic nature of these supply chains which allows for adequate protection of those with ultimate power. Supply chains create not only territorial distance, but also emotional distance, and, most importantly, a strong enough legal distance for businesspeople to walk away unaccountable and innocent for the atrocities committed in the name of their decision-making. Therefore, the Alien Tort Statute ultimately fails to protect those victims of human trafficking and slavery, demonstrating how both the legislature and judiciary remain idly by and withhold justice from those affected by such inhumane crimes.

[128] Lindsey Roberson & Johanna Lee, 'The Road To Recovery after Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability' (2021) 6 Columbia Human Rights Law Review 16 < https://hrlr.law.columbia.edu/files/2021/11/11_9-Nestle-HRLR-Online.pdf> accessed 12 August 2025.

[129] Nestle, 'Responsible Sourcing' < https://www.nestle.com/info/suppliers> accessed 13 August 2025.

However, the Supreme Court's restrictive approach to the ATS has turned academics' attention towards a different statute[130] which seeks retribution for victims of human trafficking in the US: the Trafficking Victims Protection Act (TVPA).[131] The TVPA was introduced as the first comprehensive piece of legislation to combat human trafficking and is an overall much better vehicle for human rights litigation than the ATS.[132] Unlike the ATS, the TVPA confers a cause of action for damages, and does not only refer to a court's jurisdiction. Congress has subsequently reauthorised this statute numerous times; however, the most recent reauthorization attempt has been awaiting approval from the Senate since 2024.[133] Despite this, each reauthorisation has proven to strengthen this legislation, for example, the Trafficking Victims Protection Reauthorization Act (TVPRA) (2008)[134] imposed criminal liability for those who knowingly defraud workers recruited from outside the US for their employment within the US.

Academics have contended that the TVPRA is the more promising statutory avenue and had the claimants in *Nestle*[135] relied on the TVPRA, rather than the ATS, that a better

[130] Adam J. Revello, 'The Trafficking Victims Protection Reauthorization Act (TVPRA) and civil liability for forced labor in global supply chains' (2024) 99 NYU Law Review 2186 < https://nyulawreview.org/wp-content/uploads/2024/12/99-NYU-L-Rev-2186.pdf> accessed 25 September 2025.
[131] Victims of Trafficking and Violence Protection Act 2000 US (TVPA)
[132] Curtis A. Bradley, 'The ATS, the TVPA, and the Future of International Human Rights Litigation' (2014) 108 AM Soc'y Int'L Proc 145 < https://heinonline.org/HOL/P?h=hein.journals/asilp108&i=159> accessed 29 September 2025.

[133] H.R. 5856. Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act 2023.
[134] William Wilberforce Trafficking Victims Protection Reauthorization Act 2008.
[135] ibid 29.

outcome would have been secured.[136] The TVPRA eliminates all ambiguity as to whether a corporation can be sued; it is widely accepted under the wording of this statute that corporations can be held both criminally and civilly liable.[137] Section 1595 allows survivors to sue not only those persons who forced them to work, but also "whoever knowingly benefits, or attempts or conspires to benefit" from that person's exploitation.[138] The broad use of "whoever" is understood by the Court to include all legal and natural persons; this would therefore include corporate entities. Moreover, the TVPRA is understood to allow for broader extraterritorial jurisdiction than the ATS. This is because, in addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts also have extra-territorial jurisdiction over any of the criminal provisions laid out in § 1581, § 1583, § 1584, § 1589, § 1590, and § 1591.[139] Therefore, as long as the offence did not occur prior to 2008 (the year the TVPA was amended to allow for extraterritorial jurisdiction), incidents of forced labour committed outside of the USA will fall within the scope of the TVPRA. Therefore, victims of exploitation and forced labour within the US are not at a complete loss when it comes to redressing their injustices, and the shortcomings identified in the ATS cannot underpin or reflect an entire legal system's attitude towards these crimes.

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[136] Lindsey Roberson and Johanna Lee, 'The road to recovery after Nestlé: Exploring the TVPA as a promising tool for corporate liability' (2021-2022) 6 Columbia Human Rights Law Review 1 < https://heinonline.org/HOL/P?h=hein.journals/hrlro6&i=1> accessed 30 September 2025.

[137] Jonathon S. Tonge, 'A Truck Stop Instead of Saint Peter's: The Trafficking Victims Protection Reauthorization Act Is Not Perfect, But It Solves Some of the Problems of Sosa and Kiobel' 44 Georgia Journal of International and Comparative Law 451 <https://digitalcommons.law.uga.edu/gjicl/vol44/iss2/7/> accessed. 30 September 2025.

[138] 18 U.S.C.A. § 1595.

[139] ibid 47.

However, despite the academic acclamations this legislation has received, the courts have ruled against plaintiffs in several TVPRA cases involving forced labour and global supply chains. These rulings raise questions as to the underlying judicial reasoning, arguably influenced by the courts' narrow interpretation of the statute.[140] One problematic area in particular would be the interpretation of the requirement of participation in a "venture" under § 1595.[141] The statutory definition of "venture" is "any group of two or more individuals associated in fact, whether or not a legal entity". However, Courts have opted to apply the more rigid "common enterprise" approach, one which interprets 'venture' literally and creates a more difficult standard for plaintiffs to meet.[142] This was seen in the case of *Doe v Apple*[143], where the Court considered a claim against technology giants - including Tesla, Dell and Apple – for the aiding and abetting of the use of children in the Democratic Republic of Congo's cobalt mining industry. Claimants alleged that Umicore played an intermediary role in the supply chain, as they would refine and supply the cobalt to the defendant companies. The Court decided that a global supply chain is not a 'venture', and there was no shared enterprise between these companies and their suppliers who facilitated child labour.[144] This outcome fell short of all expectations of the TVPA; what was believed to be a path forward is instead withholding justice from victims due to a stringent judicial approach.

[140] ibid 41.
[141] ibid 49.
[142] ibid 49.
[143] *Doe v Apple Inc, No 21-7135 (DC Cir 2024).*
[144] ibid 415.

The "common enterprise" definition was curtailed further in *Ratha v. Phatthana Seafood Co,*[145] a case brought by workers who were subjected to forced labour and exploitation in Thailand's seafood processing industry. In comparison to the case of *Apple,* there was no intermediary to create a degree of separation between the beneficiaries and the supplier. However, despite this direct contractual relationship, the district court ruled that in order to participate in a 'venture', the defendants needed to have taken "some action to operate or manage the venture". This introduces a standard used by the courts when interpreting the Racketeer Influenced and Corrupt Organisations (RICO) Act,[146] where operating or managing a venture would require the defendant to have directed or participated in recruitment, working conditions and employment practices. Such a narrow interpretation of this statutory framework has denied many claimants the justice they deserve, once again bolstering the argument that the law acts as more of a setback than a solution.

Temporary Migrant Worker Programmes: The parallels witnessed between government-supported systems and the transatlantic slave trade

A further way the law creates a problem for those victims of exploitation is through temporary migrant worker programs (TMWPs). The current system of immigration controls is a direct byproduct of the law, and in the view of many, a token of the law's inherent ignorance towards the nature of exploitation. It has been witnessed that

[145] R*atha v Phatthana Seafood Co Ltd, 35 F4th 1159 (9th Cir 2022).*
[146] Racketeer Influenced and Corrupt Organisations Act 1970.

"documented" and "undocumented" migrant workers are growing precariously vulnerable to workplace treatment that is akin to human trafficking by their employers.[147]

The law has been successful in disguising a pervasive power imbalance between migrant workers and their employers, presenting a pragmatic 'win-win' solution for the economy and providing a means of offering jobs to workers from underdeveloped countries who are often considered 'unskilled'. However, the buck evidently does not stop at the phantom employer, but rather the state, and more so, the law. An employer must harness their power from a source, and in this instance of TMWP's, this is legitimised through the doctrine of illegality.[148] The defining quality that is shared amongst contemporary migrants and those victim to the transatlantic slave trade is an intense desire for mobility.[149]

Historically, slave codes required that all white citizens police the movement of enslaved people. In the Barbados Slave Code of 1661, a system was introduced making

[147] Hila Shamir, The Paradox of "Legality", Temporary Migrant Workers Programs and Vulnerability to Trafficking 'in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

[148] Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) Work, Employment and Society 300.

[149] Julia O'Connell Davidson, 'The Right to Locomotion? Trafficking, Slavery and The State' in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

it mandatory for enslaved people to carry a pass when leaving their plantation.[150] Strong parallels can be witnessed between these archaic systems and modern temporary workers schemes. For example, the Kafala sponsorship system is operating in the Persian Gulf states. This is a system that coercively controls unskilled migrant workers and is characterised by oppressive power imbalances and human rights violations.[151] Under this regime, it is common for workers to have their travel documents and visas withheld by their employers. This effectively turns migrants into prisoners of their workplace. Lawmakers and the government are content being under the false guise that these temporary programs provide freedoms for migrant workers, when in fact, they deface the notion of equality of opportunity in every shape and form. John Schaar wrote that "Equality of opportunity is really a demand for an equal right" It is the idea that no individual should face barriers in achieving, and there should be a neutralisation of discrimination.[152]

The brute fact is that migrants tied to temporary work schemes possess so few bargaining chips that they will inherently struggle to have the same opportunities as 'regular' workers in the labour market. Due to the sheer amount of institutionalised

[150] Sally E. Hadden, 'Slave Patrols: Law and Violence in Virginia and the Carolinas' (2002) The American Historical Review 107 1.

[151] Rooja Bajracharya and Bandita Sijapti, 'The Kafala System and its Implications for Nepali Domestic Workers' The Centre for the Study of Labour and Mobility, Policy Brief No 1 (ceslam.org March 2012) < https://archive.ceslam.org/external-publication/571561115967> accessed 17 December 2024.

[152] John Schaar, 'Equality of Opportunity and Beyond' in J. Roland Pennock and J. W. Chapman (eds), *Nomos IX: Equality* (New York: Atherton press 1967), p 238.

uncertainty, workers cannot question their employer out of fear of dismissal or deportation. Specific state laws have gone even further by introducing binding arrangement schemes; these schemes only heighten the vulnerability of workers as they become entirely dependent on particular employers.[153] This perpetual cycle creates a permanently temporary working class, with so little legal personhood that they are unable to rectify their disempowerment.[154] This is especially the case for undocumented migrants who will face exclusion from labour laws and protection; thus, even if there is an employment contract, it is unlikely this can be enforced.[155]

Temporary Migrant Worker Programmes: A lack of intersectionality within our current judicial system

The issues surrounding the legal framework within this area are also pervasive within the judicial system. Various accounts of case law have demonstrated this, for example, the UK case of *Taiwo and Onu*.[156] Here, we saw two women who had entered the UK on domestic worker visas and faced inhumane treatment from their employers. These women were not provided with any written statement of the terms and conditions of

[153] Julia O'Connell Davidson, 'The Right to Locomotion? Trafficking, Slavery and The State' in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

[154] Fay Faraday, 'Made in Canada, How the Law Constructs Migrant Workers' Insecurity' (metcalffoundation.com September 2012) < https://metcalffoundation.com/wp-content/uploads/2012/09/Made-in-Canada-Full-Report.pdf> accessed 23 December 2024.

[155] Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) Work, Employment and Society 300.

[156] *Taiwo v Olaigbe; Onu v Akwiwu* (2014) UKSC 31.

their employment, and their treatment violated multiple employment regulations.[157]The Employment Appeal Tribunal characterised Ms Taiwo's situation as "systemic and callous exploitation."[158]Appeals failed in this case because discrimination could not be founded upon immigration status under the Equality Act 2010, and this was dissociable from discrimination based upon nationality.[159] Baroness Hale gave the leading judgment in this case. She criticised the current law, claiming it is not adaptable enough, and Parliament may wish to redress the MSA due to its restrictive scope.[160] However, it is evident that Parliament is not the only Entity to blame; some academic commentators have also highlighted the lack of judicial resilience in this area. The court has been criticised for not adopting a more intersectional approach in construing how race can contribute to immigration vulnerability.[161] It was very evident from this case that it was not only these individuals' immigration status that caused their discrimination, but rather an intimate blend of how social status, precarity, race and cultural differences combine.[162]

[157] National Minimum Wage Act 1998; The Working Time Regulations 1998.
[158] *Taiwo (n 67).*
[159] Equality Act 2010, s 4.
[160] Modern Slavery Act 2015, s 8.

[161] Asta Zokaitye and Will Robinson Mbioh, 'Judicial Protection of Racial Injustice in Taiwo v Olaigbe: Decolonising the incomplete Story on Race and Contracting' (journals.sagepub.com 5 October 2023) < https://journals.sagepub.com/doi/10.1177/09646639231205275> accessed 23 December 2024.
[162] Devyani Prabhat, 'Lady Hale: Rights, and Righting Wrongs, In Immigration and Nationality' in R. Hunter and E. Rackley (eds), *Justice for Everyone: The Jurisprudence and Legal Lives of Brenda Hale* (Cambridge University Press 2022).

Temporary migrant workers will commonly struggle to fuse with society or have fulfilling social outlets due to a mixture of cultural differences and language barriers. Family accompaniment restrictions only make migrant workers more vulnerable and less able to form meaningful relationships in their host country.[163] Moreover, due to debt bondage, these workers may struggle to find somewhere to live, or many worker schemes will also include strict housing arrangements.[164] This was seen in the case law, Ms Taiwo was forced to share a room with her employer's children, and was not allowed any personal space.[165] However, the courts were inherently ignorant of this fact. Rather than uncovering the complex dimensions and racial social structures that comprise vulnerability caused by TMWPs, they instead view immigration status as an isolated topic that does not warrant any further deliberation. As a society, we must question this.

Many academics would point to the critical race theory of justice to construct this reasoning. This perspective suggests that justice will never be achieved through the legal framework. This is simply because the law has an innate predisposition of prejudice, and race discrimination and xenophobia are entrenched within institutional

[163] Hila Shamir, The Paradox of "Legality", Temporary Migrant Workers Programs and Vulnerability to Trafficking 'in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).
[164] Philip Martin, 'Managing Labor Migration: Temporary Worker Programmes for the 21st Century' (UN.org 21 June 2006) https://www.un.org/en/development/desa/population/events/pdf/other/turin/P07_Martin.pdf accessed 23 December 2024.
[165] *Taiwo (n 67).*

frameworks.[166] There has been a long history of racial bias within the judicial system, and alarmingly, these systems can go unscrutinised. A recent report by the University of Manchester found that '95% of the legal-professional survey respondents said that racial bias plays some role in processes of the justice system'.[167] Relating this to the case of Taiwo and Onu, Baroness Hale firmly held that no discrimination could be founded upon nationality, as there are many non-British nationals working in the UK who do not face the same vulnerability and treatment.[168] In regard to many white migrant workers from Australia, America or New Zealand, this is more than likely the case. However, once again, the law is too short-sighted to recognise the deep-rooted intertwinement of the history of Immigration law in the UK with colonialism and slavery.[169] Therefore, by adopting a decolonialised judicial approach, it is glaringly evident that race has much to do with immigration status.

The courts had also failed to recognise instances of discrimination that were arguably based on nationality. For example, it was mentioned how Ms Taiwo was spat at and mocked for her poverty and tribal scars.[170] Historically in Nigeria, tribal scars have a

[166] Linda Alcoff, 'Critical Philosophy of Race' in Edward N. Zalta and Uri Nodelman (eds), *The Stanford Encyclopaedia of Philosophy* (Fall 2023 Edition) (2021) < https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=critical-phil-race> accessed 23 December 2024.
[167] Keir Monteith KC and others, 'Racial Bias and The Bench, a response to the Judicial Diversity and Inclusion Strategy' (documents.manchester.ac.uk November 2022) < https://documents.manchester.ac.uk/display.aspx?DocID=64125> accessed 27 December 2024.
[168] *Taiwo (n 67).*

[169] Shreya Atrey, 'Structural Racism and Race Discrimination' (academic.oup.com 11 October 2021) < https://academic.oup.com/clp/article/74/1/1/6386395> accessed 27 December 2024.
[170] *Taiwo (n 67).*

rich meaning and serve as a signifier of citizenship and a specific ethnic affiliation.[171] Therefore, the mocking of such scars is clearly indicative of a racial power imbalance between Ms Taiwo and her employers, and yet the judicial system fails to account for this. Moreover, the courts failed to question Mr Olaigbe about his underlying reasons for wishing to employ someone of the same ethnicity as him (Yoruba). Due to Nigeria's diversity, there will often be internal discrimination within the community of one ethnicity.[172] Nigerian scholar Nesbitt-Ahmed produced a case study on domestic work specific to Nigeria.[173] It was found that it is commonly the employer's stereotypes surrounding a particular ethnic group that determine who is hired for a specific job type. The Supreme Court completely overlooked the Nigerian context and any indications of underlying race discrimination. It is problematic and a complete lapse of judgment that those victims of exploitation under TMWPs will not be able to find their discrimination based on their immigration status. There is a gaping deficit in the law, which has resulted in a great miscarriage of justice for the victims of such abuse.

Conclusion

[171] Tayfour Sidahmed, Albeely PhD and others, 'Ethnicity, Tribalism and Racism and its Major Doctrines in Nigeria' (semanticscholar.org June 2018) < https://www.semanticscholar.org/search?q=Ethnicity%2C%20Tribalism%20and%20Racism%20and%20its%20Major%20Doctrines%20in%20Nigeria'&sort=relevance> accessed 27 December 2024.

[172] Tayfour Sidahmed Albeely, Ahmed Tanimu Mahmoud and Aliyu Ibrahim Yahaya, 'Ethnicity, Tribalism and Racism and its Major Doctrines in Nigeria' (semanticscholar.org June 2018) < https://www.semanticscholar.org/search?q=Ethnicity%2C%20Tribalism%20and%20Racism%20and%20its%20Major%20Doctrines%20in%20Nigeria'&sort=relevance> accessed 30 December 2024.

[173] Zahrah Nesbitt-Ahmed, 'The Same, but Different: The Everyday Lives of female and Male Domestic Workers in Lagos, Nigeria' (etheses.lse.ac.uk 2016) < http://etheses.lse.ac.uk/3359/> accessed 27 December 2024.

In conclusion, the current law may propose adaptive solutions and appeal to justice. However, when evaluating the legal 'solutions' to the contemporary issues of exploitation and human trafficking, it is merely an obstacle that is manifestly eroded by 'demerit'. There should not always be a defining separation of what the law is and what the law ought to be.[174] For the law to be welcomed as a valuable asset within society, it must garner legitimacy through respecting the dignity of all those it rules over.[175] It may well be the case that the vast majority of countries have criminalised exploitation and slavery. However, this issue was never one of legal status; rather, the problem lies within the systemic structures that the law not only created but also idly stands by, granting silent approval to. The law cannot cherry-pick which forms of exploitation it wishes to shield and which forms it will conveniently ignore. For the law to be more adaptable and live up to the pedestal we want to place it upon, it should begin to take a more holistic approach and appeal to those wider aspects of social justice.

[174] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harv L Rev 593.

[175] Trevor Allan, 'Why the law is what it ought to be' (2020) 11(4) Jurisprudence < https://www.tandfonline.com/doi/full/10.1080/20403313.2020.1782596?casa_token=LKrjXXL9T-wAAAAA%3ANTrgNEpZKb558zNx4IvAsSo_7MLSPjK4zF5EgrU09wFJ9xL-UNoWtZFAkSHjA8pFBxL6EFmuE6c3#abstract> accessed 31 December 2024.

Prisoner rights: How the failure to enforce rights threatens to undermine social justice.

Millie Condron

Abstract

In recent years, prisoner rights have been a major point of contention amongst both the state and the public. Prisoners are entitled to several rights during their detainment, yet there is growing evidence that suggests these rights are not respected in practice, which poses a significant threat to social justice. This paper examines the current hardships and setbacks ingrained in the prison system that are preventing prisoners from enjoying their rights to the fullest potential. I will explore how prisoner disenfranchisement, IPP sentences, remand and prison conditions all come together to threaten prisoners' citizenship, equality of opportunity and their overall quality of life.

Introduction

The prison population is at the highest level it has ever been in England and Wales, with 87,334 as of June 2025, making prisoner rights a more prominent issue than ever.[176] The approach of being 'tough on crime' in attempt to deter first time offenders and re-offenders has placed strain on an already overwhelmed system. This has worsened an already dire situation such as reported poor prison conditions and prisoner education, placing more people at risk of rights being breached.[177] This article will detail how prisoner rights litigation has been limited in its pursuit of bettering the prison system and considering how the broader themes of social justice tie in with these limitations. It will consider the social justice themes of citizenship, equality of opportunity and fairness, paying particular attention

[176] Ministry of Justice, *Offender management statistics quarterly: January to March 2025*, (2025) (Accessed 9/10/2025).

[177] Ministry of Justice, *Independent Sentencing Review Final report and proposals for reform*, (2025) 13 (Accessed 23/07/2025); HM Inspector of Prisons, *HM Chief Inspector of Prisons for England and Wales Annual Report 2024-2025,* (2025) (Accessed 13/10/205) 24-30.

to citizenship and how this has been neglected for prisoners. Citizenship provides people with a 'right to have rights'.[178] This extends to prisoners as they remain citizens during their imprisonment, hence maintaining their legal rights.[179] It is important that we do not 'lose interest in their fate' because they are still entitled to their human rights and they are at risk of being neglected. [180] However prisoner rights are routinely breached when it comes to disenfranchisement, imprisonment for public protection sentences, remand and prison conditions, limiting any potential improvements litigation has attempted to make, in the process of bettering prisons. The discussion in this piece will suggest that the government's withholding of access to rights contravenes principles such as the rule of law and fundamental rights such as article 3 of the ECHR, which raises significant implications for social justice principles such as citizenship, fairness and equal opportunity.

Prisoner Disenfranchisement

Prisoner disenfranchisement is the removal of the right to vote for convicted prisoners whilst detained, which was introduced by the Representation of the People Act 1983, s.3.[181] The struggle to improve prisoner disenfranchisement is one of the many ways rights litigations has been stunted in its attempt to better prisons. Progression appeared achievable after the successful decision of *Hirst*.[182] In this case a prisoner challenged the blanket ban imposed by the Representation of the People Act 1983, s.3.[183] It was held that this was a violation of Article 3 Protocol 1 and despite the legitimate aim of the ban being to impose punishment, this was not a proportionate way of doing so. [184] This led the European Court of Human Rights to call

[178] Hannah Arendt, *The Origins of Totalitarianism* (2nd edn, Harcourt Brace Jovanovich 1973) ch9, 296.
[179] *Halsbury's Laws* (5th edn, 2024) vol 85 A, para 4.
[180] UNHRC, *'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'* (Human Rights Council, 9 February 2010) A/HRC/13/39, 7.
[181] Representation of the People Act 1983, s.3.
[182] *Hirst v UK* (No 2) (GC) (2006) 42 EHRR 41.
[183] Representation of the People Act 1983, s 3.
[184] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1954) ETS 9, art 3.

for the UK to amend its legislation and provide some prisoners with the right to vote.[185] The success of this decision was not carried forward, being met with strong resistance as the UK refused to comply with this ruling for 12 years, deliberately taking no action when holding consultations. This was because the UK Government wanted to maintain a punitive approach to punish prisoners for their 'moral failings'[186].[187] When they could resist no longer, the 'Lidington Compromise'[188] was reluctantly introduced, providing prisoners released on temporary licence with the right to vote. Whilst this may seem like further success, this is limited by the fact that this compromise would only affect approximately 100 prisoners at once.[189] When comparing this to the prison population of 87,900, this compromise seems insignificant.[190] This highlights how the UK Government has implemented minimal action whilst still complying with the *Hirst* judgement, solely to appease the European Court of Human Rights.[191]

These delays and minor changes suggest that there is a reluctance to support progression with prisoner rights. Jones and Davies debate this topic well, highlighting that despite granting the vote, there is a clear failure to follow up and ensure that prisoners are able to enforce this right.[192] This also suggests that social and political attitudes are influencing the enforcement of fundamental rights, which raises implications surrounding the neutrality of the enforcement of rights by the UK Government.

[185] Greens and MT v UK; [2010] ECHR 1826.
[186] Susan Easton, *The Politics of the Prison and the Prisoner* (Routledge 2018) 103.
[187] HC Deb 3 November 2010, vol 517, col 921.
[188] C.R.G. Murray, 'Prisoner Voting and Devolution: New Dimensions to an Old Dispute' (2021) 25 Edinburgh L. Rev. 291.
[189] HC Deb 2 November 2017, vol 630.
[190] House of Commons Library, *UK Prison Population Statistics* (8 July 2024).
[191] *Hirst* (n 5).
[192] Robert Jones and Gregory Davies, 'Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right' (2023) 86 (4) MLR 654.

Further problems have arisen for the minority of prisoners that are entitled to vote. Although cases such as *Hirst* purportedly offered an opportunity to tackle the issue Jones and Davies raise (bridging prisoner rights to social justice such as a sense of citizenship) little progress has been made.[193] Jones and Davies successfully portray these difficulties, highlighting the lack of knowledge prisoners have regarding their voting rights, the inconsistent application of rules and the poor communication and lack of support, resulting in incompetence when completing forms.[194] They also highlight how the dispersal of prisoners has caused confusion as to what address and postcode to put on applications, especially for prisoners that have been transferred to different prisons.[195] These problems discourage prisoners from voting, resulting in low participation and rendering an already limited compromise ineffective. This further highlights the reluctance to progress prisoner-rights enforcement agendas as these are issues that could be easily remedied if adequate support and guidance was made available. The UK Government providing as little leeway as possible only serves to emphasize the reluctance mentioned above. There has been an attempt to exclude prisoners from voting entirely and when this was not possible, the UK endeavoured to make voting rights accessible and effective, without legally doing so. Despite the original success of *Hirst*, no statutory change has been made and there has been minimal progression, limiting the impact.[196] As a result, disenfranchisement, whether this be legal or through barriers preventing voting, 'reinforces the exclusion' of prisoners, contributing to a loss of citizenship for prisoners and further compromising principles such neutrality and equality of state enforcement of rights. [197] The UK government has not only

[193] *Hirst* (n 5); Robert Jones and Gregory Davies, 'Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right' (2023) 86 (4) MLR 654.
[194] Robert Jones and Gregory Davies, 'Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right' (2023) 86 (4) MLR 654.
[195] Ibid.
[196] *Hirst* (n 5).
[197] Susan Easton, *The Politics of the Prison and the Prisoner* (Routledge 2018) 88.

departed from the social justice-oriented judgement of *Hirst*, but the opportunities of increased democratic engagement opened by *Hirst* have not been followed. In doing so, this suggests that the system has been manipulated to reflect the pre-*Hirst* stance and specifically designed to reinforce disenfranchisement.

Imprisonment for Public Protection Sentences

Imprisonment for Public Protection Sentences were introduced by the Criminal Justice Act 2003 and they consisted of a fixed term sentence for the original offence committed, followed by indefinite imprisonment until the prisoner was able to prove that they were no longer a threat, by completing rehabilitation courses.[198] These sentences were supposed to be reserved for 'serious offences' or for people that posed a 'significant risk' to the public. [199] However, they were used for less serious offences that do not align with the severity of the sentence.[200] Whilst imprisonment for public protection sentences can no longer be awarded, litigation regarding these sentences remains of the utmost importance for the prisoners still serving this sentence.[201] This is because there has been concern for the mental health of prisoners serving this sentence due to rising rates of self-harm and suicide, highlighting the necessity for betterment.[202] In recent years, there has been a growing trend in suicide amongst prisoners serving IPP sentences, with 2023 being the highest figure seen in the last decade. Even with the recent increase, the figures have always been significant in comparison to the population.[203] There has been an even more drastic increase in self-harm rates, with the rate increasing by 50% alone between 2017 and 2018.[204] The abolishment suggested that the situation was improving for prisoners serving

[198] Criminal Justice Act 2003, s 225.
[199] CJA 2003, s 225.
[200] House of Commons Library, *Sentences of Imprisonment for Public Protection* (SN 6086, 2024) 11.
[201] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 123.
[202] Justice Committee, *IPP Sentences: Government and Parole Board Responses to the Committee's Third Report* (HC 2022-23, 266).
[203] HM Prison & Probation Service, 'HMPPS Annual Report on the IPP Sentence 2024/25' (HC 1155 2025).
[204] Prison Reform Trust, 'The indeterminate sentence of Imprisonment for Public Protection (IPP)' (2021) <https://prisonreformtrust.org.uk/wp-content/uploads/2021/11/IPP_sentences_the_facts.pdf 2.> accessed 27 July 2025.

IPP sentences, but this abolishment was not retrospective, meaning anyone already detained would have to continue serving this sentence.[205] As of March 2025 this continues to affect over 2,000 prisoners remaining on this sentence, some of whom were released and later recalled.[206] The rehabilitative courses that are required before release can occur are not always offered, with many prisoners having difficulty accessing them.[207] A group of prisoners in the case *Jame, Wells and Lee* challenged their imprisonment after not being provided with access to courses.[208] As they had completed their original tariff and were not provided with access to rehabilitative courses, it was held that their imprisonment was unjustified and in breach of Article 5(1).[209] This was a successful ruling in that it underlined that rehabilitation courses must be provided, but it failed to answer questions about delays in access or limited access to the courses, as seen in *Haney*.[210] In this case, the courts refused to follow the above judgement, stating that Article 5(1) was not the correct legal basis of such a duty because applying this basis would result in prisoners being released when they have not been deemed safe to do so. However, in this case, the court said that there was an 'ancillary duty' to facilitate the necessary rehabilitation courses, implicit within Article 5. This would result in damages if breached and breach of Article 5 was found here, with two of the prisoners making the claim receiving damages. However, in Brown v Parole Board, the UKSC realigned its approach with the one taken in James, providing some more coherence. However, the clear contrasting rules despite the similar facts further reinforces the reluctance to provide prisoners with the rights they are entitled to, deepening social justice concerns. These concerns are reinforced because the situation remains the same, with continued detention of IPP prisoners not violating Article 5, despite an abundance of litigation. Despite the original success of *James* and *Haney'*s success on Article 5, no case since has succeeded, limiting the impact of what could have potentially been a series of progressive cases for prisoner rights.[211] The clear contrasting rulings despite the similar facts further reinforces the reluctance to provide prisoners with the rights they are entitled to, deepening social justice

[205] LASPO Act 2012, s 123.
[206] HM Prison & Probation Service, 'HMPPS Annual Report on the IPP Sentence 2024/25' (HC 1155 2025) 5.
[207] Justice Committee, *IPP Sentences: Government and Parole Board Responses to the Committee's Third Report* (HC 2022-23, 266).
[208] *James, Lee and Wales v UK* (2013) 56 EHRR 12.
[209] European Convention on Human Rights 2001, art 5 (1).
[210] *R (Haney) v Secretary of State for Justice* [2015] AC 1344.
[211] European Convention on Human Rights 2001, art 5 (1).

concerns. It can be suggested there is a consistent theme for there to be a minimal amount of success, immediately followed by setbacks. The 'high' threshold for a violation has left many IPP prisoners stuck in the same situation, still awaiting rehabilitative courses. [212] This leads to potential concerns regarding equality of opportunity and a lack of access resulting in a failure to remove 'obstacles to personal development'.[213] Failure to provide all IPP prisoners with the necessary rehabilitative course discriminates against prisoners because of their 'social circumstance'.[214] Their rights appear to be treated with less importance simply because they are in prison. In not providing all prisoners with access to these courses, prisoners are being denied the chance of equal footing, limiting any potential litigation has had. This raises the issue of whether underlying government incentives undermines the enforcement of rights, further raising questions as to the neutrality and enforcement of the rule of law. Indeed, this has been reflected in recent UK government plans to 'evolve' the ECHR's application in the UK in pursuit of 'public confidence in the rule of law'.[215]

Remand

Remand remains an important aspect of the prison system, but problems continue to plague this issue. As of June 2025, there are 17,701 prisoners on remand in England and Wales, contributing to the overcrowding problem.[216] This is the highest amount recorded of prisoners on remand. The Bail Act 1976 provides that there is a right to bail unless a serious offence has been committed.[217] However, remand is increasingly being used for less serious offences, with the Act often not being mentioned at

[212] *Brown v Parole Board for Scotland* [2018] AC 1.
[213] Andrew Heywood and Clayton Chin, *Political Theory: An Introduction* (5th edn, Macmillan 2023) 277.
[214] Ibid 275.
[215]Shabana Mahmood 'ECHR "must evolve" to restore public confidence in rule of law, says Lord Chancellor' (GOV.UK press release) < https://www.gov.uk/government/news/echr-must-evolve-to-restore-public-confidence-in-rule-of-law-says-lord-chancellor> (Accessed 10 October 2025).

[216] Ministry of Justice, *Offender management statistics quarterly: January to March 2025* (31 July 2025) < https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2025/offender-management-statistics-quarterly-january-to-march-2025> (accessed 10 October 2025).
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[217] Bail Act 1976, sch 1.

all when deciding whether to grant bail. [218] This has led to the Act not being diligently applied.[219] Everyone who is refused bail has a right to a trial 'within reasonable time'[220], but the European Court of Human Rights has been reluctant to give a definitive answer to what this means, opting to make their decision on a case-by-case basis. This allows judges to apply their discretion and leaves the area without set guidelines, meaning that people awaiting trial have no indication as to how long they will be waiting and making it that much harder for them to pursue a claim. The current custody time limit is 6 months, but this limit is being continuously breached.[221] As of September 2022, 770 people on remand faced delays exceeding 2 years.[222] These delays are caused by court backlogs, increasing arrests for serious offences and most recently, the pandemic. Even though these delays are out of the control of the prisoners awaiting trial, this is not sufficient for the court to find a violation of Article 5.[223] This leaves prisoners facing an unknown length of pre-trial detention.[224] Despite the UK's failure to properly remedy this issue, there has been success in other countries. The European Court of Human Rights held that there was an Article 5 violation after a Moldovan prisoner's pre-trial detention was exceeded multiple times, ruling that a trial must be prompt, which strengthened the protections awarded to prisoners and provided them with a stronger basis for bringing claims.[225] It is important for the UK to follow suit, but despite growing concerns, they have not yet introduced a test case.

Regardless of fault, these delays can have negative impacts on the presumption of innocence, with remand already going against innocent until proven guilty by imprisoning people before guilt is established. 1/10 people and more than 1/3 children held on remand are later acquitted and found not guilty, with the amount of people given non-custodial sentences higher again.[226] Even though there is a presumption of innocence, they have been 'deprived of their liberty' and exposed to the harsh realities

[218] Prison Reform Trust, *Bromley Briefings Prison Factfile* (February 2024), 21.
[219] Justice, *Remand Decision-Making in the Magistrates' Court: A Research Report* (November 2023).
[220] European Convention on Human Rights 2001, art 5 (3) (1) (c).
[221] Prosecution of Offences Act 1985.
[222] Prison Reform Trust, *Bromley Briefings Prison Factfile* (February 2024), 21.
[223] DPP v Tesfa Young-Williams [2020] EWHC 3243.
[224] Luke Marsh, 'The Wrong Vaccine: Custody Time Limits and Loss of Liberty During Covid-19' (2021) 41 Legal Studies 693, 1.
[225] *Buzadji v Moldova* App no 23755/07 (ECHR, 5 July 2016).
[226] Prison Reform Trust, *Bromley Briefings Prison Factfile* (February 2024), 21.

of prison and conditions. [227] Not only is prisoner rights litigation failing to better prisons for prisoners regarding remand, but it is also affecting the citizenship of innocent people and vulnerable children, raising the question about fairness. Rawls explains that fairness is about putting rights 'prior to that of the good'.[228] Refusing to grant bail in less serious offences has placed the good of protecting the public above the right to bail, going against the principle of fairness, and sometimes punishing the people the courts have set out to protect.

Prison Conditions.

'Absolute' rights are purported to hold the most protection yet are commonly breached, as a certain 'level of suffering or humiliation 'seeming to be allowed. [229] Prison conditions are protected by Article 3, which is an absolute right, meaning that there is no justification for state interference. It states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[230] Prisoners most often make a claim for a violation based on degrading treatment, however inhuman treatment (a higher threshold) has also become a claimed basis.[231] Imprisonment alone does not constitute inhuman or degrading treatment, but the conditions prisoners are subject to will if the 'minimum level of severity' is met. [232] One of the conditions raising major concern is sanitation, with 'slopping out' still being practiced in 5 UK prisons and infestations running rife.[233] In *Napier*, an Article 3 violation was found after a prisoner was forced to practice slopping out, resulting in a worsening of his eczema.[234] This led to the Scottish Government investing a large amount of resources to phase out this practice.

[227] UNHRC, *'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'* (Human Rights Council, 9 February 2010) A/HRC/13/39, 11.
[228] John Rawls, *A Theory of Justice* (2nd edn, Harvard University Press 2020) 31.
[229] Isobel Renzulli, 'Prison Abolition: International Human Rights Law Perspectives' (2022) 26 Intl J Hum Rts 100, 105.
[230] European Convention on Human Rights 2001, art 3.
[231] *Kudla v Poland (*2002) 35 EHRR 11.
[232] *Mursic v Croatia* (2017) 65 EHRR 1.
[233] Jack Sheard, ''Britain's Worst Prison' is Far from an Outlier in a 'Nasty, Cruel, Violent' System' (The Justice Gap, 26 June 2024) <'Britain's worst prison' is far from an outlier in a 'nasty, cruel, violent' system – The Justice Gap> accessed 29 November 2024.
[234] *Napier v Scottish Ministers* (2005) 1 SC 229.

Whilst this appears to be a positive change, it can be suggested that the Scottish Government's motivation was to prevent incurring more legal costs with successful claims, rather than to improve prisoner's lives. It must also be noted that of 3000 similar claims post *Napier*, only 670 were successful.[235] Vitally in comparing this case to the outcome in others, its success is not reflected. The failure to find an inherent violation of right to human dignity in *Grant* highlights the lack of success.[236] *Grant* was distinguished from *Napier* because slopping out was rare and had not caused any physical harm. There should not be inconsistencies in decisions and the frequency with which it occurs should be irrelevant when it is a practice that was supposedly abolished in the late 1970s. Wandsworth is one of the many examples of abysmal conditions in prisons, with issues such as mould and grime occurring too often to warrant comment and prisoners co-existing with vermin.[237] The vermin infestations are so out of control that 2 prisons have been relying on cats to handle the problem, despite the ECtHR's requirement to take precautions against this.[238] This is another example of how litigation has failed to better the sanitation in prisons, with the situation seemingly deteriorating. This also demonstrates the recurring issue that the lack of compliance and enforcement of prisoner rights is steered by an underlying stance that prisoners should not have access to fundamental rights such as article 3.

Combatting overcrowding issues via litigation has proven more successful, with violations of Article 3 being easier to obtain.[239] This is due to the rebuttable presumption of a violation where a prisoner has less than 3 square metres of personal space, but no rebuttable presumption is available for anything

[235] Sarah Armstrong, 'Securing Prison Through Human Rights: Unanticipated Implications of Rights-Based Penal Governance' (2018) 57(3) Howard Journal of Crime and Justice 401, 414.
[236] *Grant v Ministry of Justice* (2011) EWHC 3379.
[237] Jack Sheard, ''Britain's Worst Prison' is Far from an Outlier in a 'Nasty, Cruel, Violent' System' (The Justice Gap, 26 June 2024) <'Britain's worst prison' is far from an outlier in a 'nasty, cruel, violent' system – The Justice Gap> accessed 29 November 2024.
[238] Jack Sheard, 'Are Prisons Beyond the Reach of the Law?' (Legal Action Group, 20 June 2024) <Legal Action Group | Are prisons beyond the reach of law?> accessed 21 November 2024.
[239] *Ananyev v Russia* (2012) 55 EHRR 18.

exceeding this size.[240] However, there are mitigating factors that will be applied wherever possible, such as time out of cells and the duration spent in confined cells. These mitigating factors limit any potential success this rebuttable presumption has had. Solitary confinement is another problem plaguing prisoner life. In *AB*, the UK Government reached a friendly settlement, conceding an Article 3 violation, after a 15-year-old was held in solitary confinement for 23 hours a day for 55 days.[241] Whilst this is successful for the individual prisoner, the lack of case law and unwillingness to go to court highlights a reluctance to formally award Article 3 violations and fails to invoke widespread change throughout prisons. Despite being an absolute right, these issues prove that there is narrow opportunity for claims regarding Article 3, highlighting the limitations of this right in upholding social justice pillars such as fairness and citizenship.

Conclusion

In theory, citizenship and litigation are structured to dualistically protect prisoners however this article has demonstrated their rights are not being upheld to a sufficient standard. To say that prisoner rights litigation is any more than limited would be unfounded and unsupported by the treatment of voting, IPP sentences, remand and most prominently, prison conditions. Despite these aspects requiring review, successful litigation has not produced meaningful change. Court successes are consistently followed by further setbacks with continued attempts to strip prisoners of their 'right to have rights' and in turn, their citizenship. The discussion in this article crucially suggests that political and social attitudes affect the realization of prisoner rights, calling into question foundational legal principles such as neutrality and the rule of law. The discussed cases and state responses show that although rights such as human rights are fundamental and even 'absolute', government incentive and attitudes towards prisoners undermines the integral nature of rights. This raises crucial questions around social justice particularly citizenship, equal opportunity and fairness. It is important that these failures do not serve as a deterrent, but rather as a motivator to do better in the future. If the same amount of effort given to diminishing prisoner

[240] *Mursic* (n 50).
[241] *(R on the Application of AB) v SOS for Justice* (2021) UKSC 28.

rights was applied to strengthening them and bettering prisons, progression would move at a much faster rate.

The Law's Forgotten Profession: Why the Legal Framework on Prostitution is not fit for purpose

Felicia Crowle

Abstract

The law relating to prostitution in England and Wales is in urgent need of reform as it is not fit for purpose. One of the most crucial purposes of legislation is to protect the rights and liberties of citizens. However, the legal system fails to fulfil this objective when it comes to prostitution, instead serving to further amplify the vulnerabilities of sex workers. Increased levels of criminalisation have led to more hidden forms of prostitution that render workers at risk of violence and minimal protection from law enforcement agencies. Therefore, this article aims to highlight the necessity and strengths of more welfare-centred approaches to regulating prostitution, in contrast to criminalisation. While prostitution is lawful, various surrounding acts are criminalised creating a fragmented legal framework that regulates sex work, which treats prostitution as a nuisance. This uneven application reflects wider structural inequalities in society, with transgender and ethnic minority prostitutes often facing further vulnerabilities. Thus, the law needs to change to greater safeguard rights and reduce the risk of violence amongst sex workers. Central to this reform is the need to amplify the voices of sex workers and allow them to help shape policy making in this area, as they are who would be directly affected by the passing of legislation regarding prostitution. This article discusses New Zealand's use of a decriminalisation model that is often favoured or supported by sex workers, perhaps it is time that this approach is implemented in the UK. In comparison, some radical feminists argue for the criminalisation of the purchase of sex, overlooking how such an approach increases the vulnerability of sex workers. Ultimately, the law needs to be influenced

by the voices of sex workers directly and strive to sufficiently prioritise protecting the rights and safety of prostitutes.

Introduction

Prostitution is clearly defined in the Sexual Offences Act 2003 s.54(2), where "prostitute" means a person (A) who, on at least one occasion and whether or not compelled to do so, offers, or provides sexual services to another person in return for payment or a promise of payment to A or a third person; and "prostitution" is to be interpreted accordingly."[242] The current law in this area treats sex work as a nuisance, with a framework of illegality surrounding prostitution, and serves to amplify the vulnerability of already at-risk members of our society. Evidence shows that in countries that have adopted a decriminalisation approach in this area, such as New Zealand through the Prostitution Reform Act 2003[243], sex workers feel safer and have better control over their clients and practices. Thus, this article advocates for the adoption of a decriminalisation model in England and Wales. However, due to the gendered nature of discourse surrounding prostitution, some feminists, such as radical feminists, argue that sex work is about violence and power over women and therefore acts that surround prostitution should be criminalised, such as the purchase of sex.[244] This argument, however, is flawed as increased criminalisation often serves to exacerbate the vulnerability of sex workers. On the other hand, there are some feminists who are more concerned with the rights of workers and

[242] Sexual Offences Act 2003 s54(2)

[243] Prostitution Reform Act 2003

[244] Noah D Zatz, 'Sex Work/Sex Act: Law, Labour, and Desire in Constructions of Prostitution' (1997) 22 Signs: Journal of Women in Culture and Society 277 < https://www.proquest.com/docview/198653878?parentSessionId=eoUm%2FG3pWC4rX9sz8jTSc1o%2FMknt TS%2BlYwV1sNC%2B6TE%3D&pq-origsite=primo&accountid=12117&sourcetype=Scholarly%20Journals> accessed 6 December 2023

greater access to justice. In summary, legislation relating to prostitution in England and Wales is inherently flawed as it fails to protect and uphold the rights of workers, meaning it is in urgent need of reform.

Current law

To debate reform of legislation regarding prostitution, it is important to discuss the current legal framework in this area. There are three possible perspectives or approaches to prostitution: nuisance, work, and abuse.[245] The law in England and Wales on sex work is largely liberal and is predominantly shaped by the treatment of prostitution as a public nuisance.[246] This is further discussed by Feis-Bryce[247] who uses the Wolfenden Report 1957[248] to discuss how legislation is an attempt to reduce sex work and minimise its impact on the community, through the management of nuisance. While it is not illegal to sell sex in this country, there is a large framework of illegality surrounding the topic of sex work. For instance, the Street Offences Act 1959, s1(1)[249] says that it is an offence to "persistently loiter or solicit in a street or a public place for the purposes of prostitution", this clearly demonstrates the nuisance-based approach of the law as the act has to be persistent, which could potentially become annoying for residents, for it to be illegal. Another example is the Sexual Offences Act 2003, s53A[250] which lays out

[245] Nicole Westmarland, 'From the personal to the political: shifting perspectives on street prostitution in England and Wales' in Geetanjali Gangoli and Nicole Westmarland (eds), *International Approaches to Prostitution* (Policy Press, 2006)

[246] Joanna Pheonix, *Making Sense of Prostitution* (Palgrave MacMillan London, 1999)

[247] Alex Feis-Bryce, 'Policing sex work in Britain' in Teela Sanders and Mary Laing (eds), *Policing the Sex Industry* (Routledge, 2017)

[248] John Wolfenden, (1957) Report of the Departmental Committee on homosexual offences and prostitution, Cmnd 247. London: HMSO.

[249] Street Offences Act 1959, s1(1)

[250] Sexual Offences Act 2003, s53A

the legislation regarding purchasers of sex; it is an offence for a person to purchase the services of a prostitute if the sex worker has been exploited by a third party, regardless of whether or not the purchaser was aware of the exploitation.[251] This statute was designed to be a deterrent for purchasers of sex, in an attempt to reduce the rate of prostitution, as liability falls on the buyer. Therefore, while there is a significant volume of legislation in this area, the criminal law is being used to tackle the issue of sex crime without giving rights to workers,[252] unless they have been exploited. According to radical feminist MacKinnon, "criminal prostitution laws collaborate elaborately in women's social inequality".[253] This demonstrates that the limitation of the nuisance approach is that it fails to provide welfare provisions for workers and does not address wider structural issues, such as gender inequality. As a result, the law relating to the regulation of prostitution in England and Wales is in urgent need of reform as it is primarily concerned with deterrence and nuisance over the rights of individuals involved in the industry.

Welfare-centred approaches

The criminal justice-focused response to sex work is challenged by Graham,[254] who compellingly argues that welfare-centred methods should be the primary focus concerning

[251] Sexual Offences Act 2003, s53A(2)

[252] Laura Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81 Journal of Criminal Law 201 < https://heinonline-org.liverpool.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jcriml2017&men_hide=false&men_tab=toc&kind=&page=201 > accessed 27 November 2023

[253] Catherine A. MacKinnon, 'Prostitution and Civil Rights' in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory* (Temple University Press 1999) (pg 225)

[254] Laura Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81 Journal of Criminal Law 201 < https://heinonline-org.liverpool.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jcriml2017&men_hide=false&men_tab=toc&kind=&page=201 > accessed 27 November 2023

prostitution. She posits that by treating sex work as a crime issue, society sees sex workers as simultaneously criminals and victims. This analysis demonstrates the high levels of stigmatisation regarding prostitution in Britain which places sex workers at a greater risk of violence or harassment than other professions.[255] Some feminists, such as Carol Pateman, argue that prostitution is a job like any other and so should have trade unions and worker's rights.[256] This would more greatly protect sex workers from certain vulnerabilities (such as targeted violence), as they would have easy, unobstructed access to justice. The fact that this is not the case currently in England and Wales further demonstrates that the law is not fit for its purpose as it fails to award these workers their rights and it is used to separate or differentiate the common sex workers from the rest of society and other citizens.[257] Furthermore, access to justice for sex workers is minimal and violence against prostitutes often goes unreported because they are reluctant to go to the police for fear of being prosecuted.[258] MacKinnon[259] argues that women in sex work do not have civil rights, though disagrees with the premise sex work is work. Those who are concerned with the rights of sex workers support this point arguing that they should receive labour and social safeguarding.[260] As a result, the current law

[255] Rosie Campbell, 'Not Getting Away With It: Linking Sex Work and Hate Crime in Merseyside' in Neil Chakraborti and Jon Garland (eds), *Responding to Hate Crime: The Case for Connecting Policy and Research* (Bristol University Press, Policy Press 2014)

[256] Carol Pateman, *The Sexual Contract* (Cambridge, U.K.: Polity, 1988)

[257] Laura Graham, 'Governing Sex Work Through Crime: Creating the Context for Violence and Exploitation' (2017) 81 Journal of Criminal Law 201 < https://heinonline-org.liverpool.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jcriml2017&men_hide=false&men_tab=toc&kind=&page=201 > accessed 27 November 2023

[258] Samantha Pegg and Anne Davies, *Sexual Offences: Law and Context* (1st edn, 2016)

[259] Catherine A MacKinnon, 'Prostitution and Civil Rights' in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory* (Temple University Press 1999)

[260] UN HRC Eliminating Discrimination Against Sex Workers and Securing Their Human Rights (7 December 2023) A/HRC/WG.11/39/1

in this area is not sufficient in providing safety measures and welfare provisions for those engaged in sex work, to promote fairness and justice more efficiently. Some of those who sell sex had difficult childhoods which makes them even more vulnerable,[261] thus if the law in this area is strictly deterrence focused then the vulnerability of at-risk members of society is amplified. This is because there is little formal safeguarding in place. Furthermore, the Crown Prosecution Service (CPS)[262] argues that the emphasis should not be on the prosecution of those who sell sex but on providing services that support them exiting prostitution. There needs to be more help and support for those in the sex work industry (both those choosing to remain and those attempting to leave this line of work) and greater access to justice for sex workers. Consequently, there is an urgent need for reform in this area to better protect people and create a clear set of provisions allowing a direct route to justice.

The need for amplification of sex workers' voices

In England and Wales, the existing approach to regulating sex work is inherently flawed as policymakers often neglect the voices of sex workers themselves.[263] This is incredibly damaging as there is no one experience of being a prostitute[264] and the law should reflect this.

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[261] Samantha Pegg and Anne Davies, *Sexual Offences: Law and Context* (1st edn, 2016)

[262] CPS, 'Prostitution and Exploitation of Prostitution' (*CPS*, 04 January 2019) <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution > accessed 27 November 2023

[263] Cecilia Benoit, Roisin Unsworth, Priscilla Healey, Michaela Smith, and Mikael Janson, 'Centring Sex Workers' Voices in Law and Social Policy' (2021) 18(4) Sexuality Research and Social Policy, 897 < doi:10.1007/s13178-021-00576-9> Accessed 21 December 2023

[264] Noah D Zatz, 'Sex Work/Sex Act: Law, Labour, and Desire in Constructions of Prostitution' (1997) 22 Signs: Journal of Women in Culture and Society 277 < https://www.proquest.com/docview/198653878?parentSessionId=eoUm%2FG3pWC4rX9sz8jTSc1o%2FMknt TS%2BlYwV1sNC%2B6TE%3D&pq-origsite=primo&accountid=12117&sourcetype=Scholarly%20Journals > accessed 6 December 2023

The easiest way to create a legislative framework that improves the lives of those in the prostitution industry is by listening to those whom the laws would impact the most. Campbell discussed the effects of the Armstead Street Project 2005, which amplified the voices of sex workers.[265] This project led to greater support for workers and those wanting to exit prostitution, created community-based services, and addressed welfare needs. This further supports the claim for greater representation of sex workers' voices, as it demonstrates that when their experiences are heard, there is greater access to justice. In addition to the law excluding the voices of sex workers, the general public often does too due to the high levels of stigma surrounding the industry. This further perpetuates the vulnerability of sex workers as they are often looked down upon and treated as the 'other'.[266] Therefore, to promote fairness and equality of opportunity for those engaged in sex work, their voices need to be further amplified, to provide people with a better understanding of prostitution and eradicate stigmatisation. Consequently, the law in this area needs to be reformed to properly encapsulate the lives of those in the industry so that it can more effectively protect and safeguard them.

Proposed reform: New Zealand model

When discussing legislative reform, it can be beneficial to look at the models adopted by other jurisdictions. New Zealand was the first country to decriminalise sex work fully.[267] This was

[265] Rosie Campbell, 'Not Getting Away With It: Linking Sex Work and Hate Crime in Merseyside' in Neil Chakraborti and Jon Garland (eds*), Responding to Hate Crime: The Case for Connecting Policy and Research* (Bristol University Press, Policy Press 2014)

[266] Maggie O'Neill and Rosie Campbell, 'Street sex work and local communities: creating discursive spaces for genuine consultation and inclusion' in Maggie O'Neill and Rosie Campbell (eds), *Sex Work Now* (1st edition, 2006)

[267] Chris Bruckert and Stacey Hannem, 'Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work' (2013) 28 (1) Canadian Journal of Law and Society, 43 < DOI: 10.1017/cls.2012.2> accessed 12 December 2023

achieved through the Prostitution Reform Act 2003 (PRA) s3, which clearly states that the purpose of the statute is to decriminalise prostitution while also creating a human rights framework for workers, welfare provisions and promoting safe sex practices.[268] There is a clear contrast between this approach and that of the legislation in England and Wales; the decriminalisation model in New Zealand strives to protect/ensure the rights of prostitutes and creates a safe space for those in sex work, rather than treating them as a nuisance. The change in legislation arguably created more access to justice and allowed for violence against sex workers to be taken more seriously,[269] which supports the claim that the law in England and Wales is in urgent need of reform to protect vulnerable members of society, as these provisions are severely lacking in Britain. Furthermore, evidence suggests that due to the PRA[270] sex workers now feel safer and the relationships between the police and prostitutes have improved.[271] Therefore, it is clear that decriminalisation has the potential to improve the lived experiences of sex workers and the law in Britain needs to be reformed to protect the rights of the vulnerable as it is currently not fit for purpose. However, the New Zealand model has not gone far enough and has not managed to completely combat the stigma,[272] therefore sex workers still face some limitations to fairness in New Zealand, as they often face stigmatisation from the public. Additionally, despite sex workers, in general, feeling safer since the change in

[268] Prostitution Reform Act 2003 s3

[269] Dame Catherine Healy, Annah Pickering, and Chanel Hati, 'Stepping Forward into the Light of Decriminalisation' in Lynzi Armstrong and Gillian Abel (eds), *Sex Work and the New Zealand Model* (Bristol University Press 2021)

[270] Prostitution Reform Act 2003

[271] NSWP, 'Case Studies: How Sex Work Laws are Implemented on the Ground and Their Impact on Sex Workers' (*NSWP Global Network of Sex Work Projects*, 12 December 2019) < https://www.nswp.org/resource/nswp-briefing-papers/case-studies-how-sex-work-laws-are-implemented-the-ground-and-their> accessed 27 November 2023

[272] Chris Bruckert and Stacey Hannem, 'Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work' (2013) 28 (1) Canadian Journal of Law and Society, 43 < DOI: 10.1017/cls.2012.2> accessed 12 December 2023

the law, there are differences between the accounts of cisgender and transgender workers,[273] with prostitutes who are transgender feeling less safe and less respected by the police than their cisgender counterparts. Despite the efforts made in New Zealand to safeguard the rights of workers, this model is not perfect and there is arguably not equal access to opportunities for all sex workers. Therefore, while it is useful to draw inspiration from the decriminalisation model in New Zealand, reform in England and Wales needs to be taken even further to ensure that there is equal treatment among all workers in the sex industry and protect their rights.

Structural inequalities

As aforementioned, not all sex workers have the same experiences, with transgender people, ethnic minorities and street-based workers often facing harsher treatment as a consequence of the industry frequently reflecting the structural inequalities of wider society, such as racism, classism, and within the patriarchy.[274] This is further amplified by what Pegg and Davies call a "hierarchy" within prostitution, with those who say they chose sex work tending to work at the higher end of the industry,[275] which implies that those who work at the bottom of the trade are highly vulnerable. As previously discussed, the law fails to provide safeguarding provisions, which only serves to further amplify this vulnerability as they have very limited access to justice. The inequalities within prostitution are additionally heightened by individuals' financial situations, with a lack of money limiting women's ability to exit sex work

[273] NSWP, 'Case Studies: How Sex Work Laws are Implemented on the Ground and Their Impact on Sex Workers' (*NSWP Global Network of Sex Work Projects*, 12 December 2019) < https://www.nswp.org/resource/nswp-briefing-papers/case-studies-how-sex-work-laws-are-implemented-the-ground-and-their> accessed 27 November 2023

[274] UN HRC Eliminating Discrimination Against Sex Workers and Securing Their Human Rights (7 December 2023) A/HRC/WG.11/39/1

[275] Samantha Pegg and Anne Davies, *Sexual Offences: Law and Context* (1st edn, 2016)

and fines placed upon sellers of sex keeping them in a cycle of poverty.[276] As a result, it is important to not treat sex work as a simple, clear-cut issue. However, people's perspectives on sex work are largely influenced by the media, which often create a very simplistic, and thus unrealistic, representation of prostitution.[277] Again, this highlights the urgent need for reform to the law relating to the regulation of prostitution in England and Wales, as it demonstrates the need for the law to address structural inequalities both in wider society and within the sex work industry, to better protect those most at risk or most vulnerable.

Safer when not hidden

Finally, the discussion surrounding prostitution largely refers to sellers as women and buyers as men, due to the incredibly gendered nature of discourse in this area.[278] This has resulted in the CPS saying prostitution falls within the CPS Violence against Women and Girls (VAWG) portfolio.[279] Radical feminists adopt the idea that this is an issue predominately affecting women, thus arguing for the abolition of sex work, due to the idea that prostitution is more about power and subordination over women rather than simply sex or money.[280] The gendered

[276] Catherine A MacKinnon, 'Prostitution and Civil Rights' in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory* (Temple University Press 1999)

[277] Maggie O'Neill and Rosie Campbell, 'Street sex work and local communities: creating discursive spaces for genuine consultation and inclusion' in Maggie O'Neill and Rosie Campbell (eds*), Sex Work Now* (1st edition, 2006)

[278] Lenore Kuo, *Prostitution Policy: Revolutionizing Practice Through a Gendered Perspective* (New York University Press, 2002)

[279] CPS, 'Prostitution and Exploitation of Prostitution' (CPS, 04 January 2019) <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution > accessed 27 November 2023

[280] Noah D Zatz, 'Sex Work/Sex Act: Law, Labour, and Desire in Constructions of Prostitution' (1997) 22 Signs: Journal of Women in Culture and Society 277 < https://www.proquest.com/docview/198653878?parentSessionId=eoUm%2FG3pWC4rX9sz8jTSc1o%2FMknt

discussion of sex work is perhaps most obvious in academic study, where the primary focus is on women who sell sex and the majority of people who comprise the sex industry are disregarded.[281] This means that much of the stigma falls onto the women in the industry, not the men paying for services or even those who may be controlling the workers. As aforementioned, this represents wider structural issues in society regarding the patriarchy and demonstrates how the law overlaps with certain power dynamics that make up society.[282] Therefore, from a radical feminist perspective, the law relating to the regulation of prostitution should be reverted to full criminalisation/illegalisation of the industry to prevent violence against women. A serious limitation of this argument, however, is that evidence suggests that women in the industry feel safer when their work is decriminalised or at least regulated. For instance, when interviewed, a sex worker who had worked in a Managed Zone in Leeds said that she felt safer and more respected by the police so "people aren't getting away with as much as they were getting away with".[283] Therefore, to criminalise prostitution is to make it more hidden, meaning that there can be no framework or intervention to maintain human rights. Those engaged in prostitution deserve to be protected from harm in the same way as other more conventional professions. As a result, though reform to prostitution legislation is needed, it

[281] Laura Maria Augustin, 'New Research Directions: The Cultural Study of Commercial Sex' (2005) 8(5) Sexualities, 618 < https://doi-org.liverpool.idm.oclc.org/10.1177/1363460705058400> accessed 06 December 2023

[282] Jane Scoular, 'What's Law Got to Do with It? How and Why Law Matters in the Regulation of Sex Work' (2010) 37(1) Journal of Law and Society, 12 < https://doi-org.liverpool.idm.oclc.org/10.1111/j.1467-6478.2010.00493.x> accessed 06 December 2023

[283] Jason Roach, Kate Wood, Ashley Cartwright, Barry Percy-Smith, Michelle Rogerson and Rachel Armitage, 'An Independent Review of the Managed Approach to On-Street Sex Working In Leeds 2014-2020' (Commissioned by Safer Leeds, University of Huddersfield, June 2020) <https://democracy.leeds.gov.uk/documents/s208220/Managed%20Approach%20Independent%20Review%20Report%20Appendix%20080720.pdf > accessed 22 November 2023

should be changed to create safe spaces for workers not to push sex work into the shadows, through increased criminalisation and heightened stigmatisation.

Conclusion

In conclusion, evidently, the law relating to prostitution in England and Wales is in urgent need of reform as it is not fit for purpose. It fails to adequately safeguard those engaged in sex work and does not provide provisions for those attempting to leave the industry. Furthermore, the voices of sex workers are often neglected in both policy-making and academic study, this means that intersectionality and the real experiences of prostitutes are left unheard or under-researched, thus they cannot freely express their concerns. Feminist perspectives are often in disagreement regarding prostitution, with some in favour of decriminalisation and others calling for the full abolition of the sex work industry. However, from looking at New Zealand's decriminalisation approach to prostitution, it is clear that sex workers experience greater safeguarding and access to justice than in Britain as they have a voice and better relationships with law enforcement. Therefore, Britain should adopt a similar decriminalisation model to ensure a safer experience for sex workers. It is imperative that England and Wales go further to promote fairness for those engaged in prostitution through reform of the legal framework in this area to promote the rights of workers.

When Murder Becomes Tradition: The Brutal Reality of Honour Killings

Anfal Al-Brashdi

Abstract

In a time where many women live in constant fear of violence, especially from strangers, some face an even more terrifying reality: the threat of death at the hands of their own families. What kind of values encourage a father to kill his daughter, a brother to kill his sister, or a husband to kill his wife? More importantly, how can a society not only turn a blind eye, but actively allow, and in some cases even encourage, the perpetuation of this practice?

These questions form the foundation of this paper, which explores a tradition known as honour-based violence (HBV) and the systems that enable it. This article examines the socio-cultural and legal structures that allow such acts to persist. It further investigates the patriarchal values and community codes that underpin these crimes, and critiques the failure of legal systems - both nationally and internationally - to adequately protect individuals vulnerable to HBV, and hold perpetrators accountable. However, to fully understand HBV, it is important to consider the universal reality of gender-based violence (GBV). While it is typical that honour killings are discussed through cultural or religious contexts, feminist scholars, such as Chandra Talpade Mohanty, caution that viewing violence against women in non-Western contexts purely through a cultural lens can risk reinforcing colonial ideas of Western superiority. While HBV is undeniably shaped by culturally specific concepts such as 'ird' and 'sharaf', this paper resists simple culturalist explanations. Instead, it approaches HBV as a culturally specific manifestation of global patriarchal violence, one that reflects universal structures of gender inequality and violence against women, even as its expressions differ across societies.

Finally, this report highlights the tension between cultural relativism and universal human rights, especially in the context of women's rights. It argues that HBV cannot be justified under the guise of cultural practices and calls for a more consistent, rights-based approach to prevent and prosecute these crimes effectively.

Introduction

Every year around the world an increasing number of women fall victim to murder by their families in the name of 'honour'. The United Nations Population Fund (UNFPA) estimates that "as many as 5,000 women and girls" are killed each year worldwide in the name of 'honour.'[284] Honour killings, as defined by Human Rights Watch, are "acts of violence, usually murder, committed by male family members against female family members who are perceived to have brought dishonour upon the

[284] Tanya D'Lima, Jennifer L.Solotaroff and Rohini P Pande, ' *For the Sake of Family and Tradition: Honour Killings in India and Pakistan'* (2020) 5(1) ANTYAJAA: Indian Journal of Women and Social Change 22.

family." [285] Embedded in age-old traditions and often perpetuated through patriarchal structures, honour killings represent a troubling response to perceived breaches of societal norms. Motivations behind such acts are diverse, ranging from talking to an unrelated male to being victims of rape.[286] Anything that is considered taboo by prevailing cultural standards is typically enough, and any allegation of dishonour against a woman usually suffices.

While there have been several attempts by human rights organisations to diminish the practice, the record for achieving this goal has been disappointing. This paper aims to critically analyse honour killings, emphasising the specific dimensions that contribute to their persistence within a global context. By dissecting the layers surrounding these acts, the paper aims to shed light on the intricate interplay of cultural norms and legal frameworks, particularly impacting women. To achieve this aim, the first subsection of this paper will delve into the misogynistic double standards, exploring how women deviating from prescribed gender roles become targets of violence. This article further examines the societal norms that provoke honour killings, ranging from pre-marital relations to the refusal of arranged marriages. In the second subsection, the argument shifts to the broader cultural and religious context, focusing on how honour killings are concentrated in specific regions and how religion and traditions are exploited as smokescreens to justify acts within these societies, even among the youth. The analysis focuses on HBV as both a product of specific cultural logics and a reflection of broader, universal patriarchal systems. Finally, this paper examines the reality within legal systems, where perpetrators often escape punishment, contributing to the perpetuation of this practice.

Women are - nearly - always the victims

Across diverse cultural contexts, a disconcerting pattern emerges: honour killings predominantly target women. Statistics and case studies consistently reveal that women bear the brunt of this violent practice, with some reports estimating that a staggering 93% of victims are women,[287] thus emphasising the gendered nature of this phenomenon. To understand why women are overwhelmingly targeted in honour killings, one must scrutinise the misogynistic underpinnings within cultural foundations. In this section, evidence will be presented to expose the misogynistic elements that perpetuate honour killings.

In many societies, the concept of familial honour is closely tied to the perceived virtue and modesty of women.[288] Women are often regarded as 'vessels' of their family's reputation,[289] becoming central to

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[285] Human Rights Watch,'*Violence Against Women*' (*Women's Human Rights*, 2001) <https://www.hrw.org/legacy/wr2k1/women/women2.html> accessed 18 January 2024.

[286] Hillary Mayell, *'Thousands of Women Killed for Family "Honor"'* (*National Geographic*, 2002) <https://www.nationalgeographic.com/culture/article/thousands-of-women-killed-for-family-honor> accessed 20 January 2024.

[287] Cynthia Helba and others, '*Report on Exploratory Study into Honor Violence Measurement Methods*' (*Bureau of Justice Statistics*, 2014) <https://www.ojp.gov/pdffiles1/bjs/grants/248879.pdf > accessed 20 January 2024.

[288] James Brandon and Salam Hafez, *Crimes of the Community: Honour-Based Violence in the UK* (Centre for Social Cohesion 2008).

[289] Andrzej Kulczycki and Sarah Windle,'*Honor Killings in the Middle East and North Africa: A Systematic Review of the Literature'* (2012) 17(11) Violence Against Women 1442.

the preservation or tarnishing of familial honour.[290] This gendered perspective is rooted in a patriarchal worldview where women are considered legal minors, transitioning from being viewed as the possession of their father's family to being regarded as the possession of their husband's.[291] Additionally, it is often emphasised that women are considered subordinates who should be protected by males. Such perceptions contribute to the objectification of women, allowing their identities to be reduced to vessels through which familial honor is either upheld or tarnished.[292]

Building on this, misogyny also reveals itself in the normalisation, and even encouragement, of certain behaviours for men. For example, misogyny is manifested in the strict policing of women's behaviour and choices, as any lack of control over women is linked to shame amongst men, compromising their sense of honour.[293] As a result, women who deviate from prescribed gender roles or challenge societal expectations become targets of violence.[294] An example illustrating this is the case of Israa Ghareeb, a 21-year-old woman who faced a brutal death for going out to dinner with her fiancé. This act was deemed dishonourable by her family, as it deviated from societal norms dictating that women should not go out with men before marriage.[295] In such contexts, violating these norms not only harms the woman's reputation, but also stains the image of her family and community,[296] a transgression regarded as rectifiable only through punitive measures imposed on women.[297]

There are many instances in which a woman might compromise her or her family's honour that are evident in various scenarios in honour killings. The most common offence notably emerges as pre-marital relations and marital infidelity.[298] Women accused of adultery are rarely given the chance to prove their innocence,[299] as gossip and community pressure are considered justifiable reasons "as good as proven adultery." [300] In cases such as these, the intense community pressure isolates and mocks the dishonoured family, making the killing of the blamed woman the only resource for the

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[290] Shaina Greiff, '*No Justice in Justifications: Violence Against Women in the Name of Culture, Religion, and Tradition'* (The Global Campaign to Stop Killing and Stoning Women and Women Living Under Muslim Laws 2010).

[291] Sadaf Ayubi and Brenda J Honsinger, '*Violence and Women's Human Rights Violations: The Case of Honor Killings, Wartime Sexual Violence Against Women and Sex Trafficking in Parts of Asia, Africa and the Middle East*' (Forum on Pulic Policy preprint, 2015).

[292] Anahid D Kulwicki, '*The Practice of Honor Crimes: A Glimpse of Domestic Violence in the Arab World*' (2002) 23(1) Issues in Mental Health Nursing 77.

[293] Amber Baker and others, '*A Qualitative Assessment of Girls Gaining Ground: Working Towards Female Empowerment in Maharashtra, India*' (Bhavishya Alliance 2009).

[294] D'Lima, Solotaroff and Pande, *'For the Sake of Family and Tradition*' (n 1).

[295] T Abueish, '*Israa Ghareeb: A Palestinian Woman Who Lost Her Life in the Name of "Honor*' (*Al Arabiya English*, 2019) <https://english.alarabiya.net/features/2019/09/04/-We-are-all-Israa-Ghareeb-Death-of-Palestinian-woman-sparks-public-outrage-> accessed 10 January 2024.

[296] D'Lima, Solotaroff and Pande, '*For the Sake of Family and Tradition*' (n 1).

[297] Baker and others, '*A Qualitative Assessment of Girls Gaining Ground'* (n 10).

[298] Kulczycki and Windle, '*Honor Killings in the Middle East and North Africa*' (n 6).

[299] Mayell, '*Thousands of Women Killed*' (n 3).

[300] Federica Caffaro, Federico Ferraris and Susanna Schmidt, '*Gender Differences in the Perception of Honour Killing in Individualist Versus Collectivistic Cultures: Comparison Between Italy and Turkey*' (2014) 71 Sex Roles 296.

family to regain acceptance within the community.[301] Even victims of rape are susceptible to honour killings, as they are "constant reminders of the disgrace." [302] Statistically, in Egypt, 47% of women were killed after they had been raped.[303] Another unacceptable behaviour that challenges traditional norms is when girls refuse arranged marriages, as it is viewed as a major act of defiance that damages the honour of the man who arranged the marriage.[304] In conservative societies, even chatting with strangers on social media could lead to the woman facing death.[305] Overall, patriarchy reinforces the expectation that women should "strictly obey", and any acts of defiance are considered disgraceful and shameful.[306]

Hiding behind the mask of culture and religion

The prevalence of HBV is notably concentrated in specific regions, particularly within conservative societies in the Middle East, South Asia, and parts of North Africa. While these regions span across a large geographical area with different levels of socio-economic development, they generally share many common traits in language, religion, and socio-cultural contexts.[307] Some scholars have attempted to draw parallels between intimate partner killing in western countries and honour killings. However, while both are rooted in patriarchal structures that legitimise male control over the women in their life, the key distinction lies in the motive, as most perpetrators of intimate partner crimes do not cite 'preservation of honour' as their motive,[308] which makes honour killings a phenomenon that is only existent in the regions mentioned above.

This section examines the perception and justification of honour killings, addresses misconceptions regarding Islamic teachings, and highlights the endorsement and acceptance of honour killings within these societies.Within the cultural context, it is evident that the root cause of honour killings is traced to patriarchal societies and the unjust double standards imposed on women, as noted previously. Despite notable strides in academic and economic progress in many of the countries mentioned, patriarchal family structures persist, and violence emerges as a means of control amid rapid societal changes.[309]

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[301] ibid.

[302] Dawn Perlmutter, '*The Semiotics of Honor Killings and Ritual Murder*' (*Anthropoetics: The Journal Generative Anthropology*, 2011) <https://anthropoetics.ucla.edu/ap1701/1701perlmutter/> accessed 12 March 2024.

[303] Mayell, '*Thousands of Women Killed*' (n 3).

[304] ibid.

[305] Ayubi and Honsinger, '*Violence and Women's Human Rights Violations*' (n 8).

[306] ibid.

[307] Kulczycki and Windle, '*Honor Killings in the Middle East and North Africa*' (n 6).

[308] Krysten B Hartman, '*The Shame of Preserving Honor: Why Honor Killings Still Plague the Hashemite Kingdom of Jordan in the 21st Century*' (Senior Theses, Claremont McKenna College 2010) <https://core.ac.uk/download/pdf/70967755.pdf> accessed 20 February 2024.

[309] D'Lima, Solotaroff and Pande, '*For the Sake of Family and Tradition*' (n 1).

This need to preserve control is further reinforced by how honour killings are framed. Perpetrators perceive honour killings as "heroic" and/or "a fulfillment of a religious obligation."[310] Using religion and traditions as a smokescreen for said acts not only allows it to continue, but also makes it look justifiable in the eyes of the community. The significance of honour in these cultures, deemed worth resorting to violence, is explained by Perlmutter; the Arab concept of honour does not equate to the Western concept, the Arabic word for male honour "*Sharaf*" and the term face "*wajh*" are so closely intertwined to the point of near interchangeability. In the Arab mindset, preserving one's honour equates to preserving one's face, in which individuals strive to preserve it, even if it means resorting to violence, as "shame, humiliation, and dishonour are to be avoided at all costs." [311] Within this context, it is crucial to distinguish between the terms '*Sharaf*' and '*ird'.* While both relate to honour, they are assigned different meanings. The term *'Sharaf'* dictates that men embody qualities like courage, bravery, heroism, power, and strength; any display of weakness compromises their honour. In contrast, the term '*ird'* is associated with women's modesty and faithfulness. Straying from these virtues is seen as a loss of honour, bringing shame upon the men responsible for safeguarding the honour within the family.[312]

However, it is important to examine these interpretations through a critical lens. Feminist scholar, Chandra Talpade Mohanty, warns that viewing violence against women in non-Western societies solely through cultural or religious explanations,[313] risks reinforcing colonialist binaries that depict Western societies as progressive and others as inherently oppressive. While cultural and religious contexts undeniably shape how honour is constructed and weaponised, such framings must be situated within global systems of patriarchy, power, and inequality. An overreliance on culturalist interpretations can obscure how patriarchal power structures, conservative gender norms, and misinterpretations of religion interact to sustain HBV.

While over half of honour killings occur in Muslim-majority countries, it is wrong to assume Islam is to blame. The Qur'an, the book of teachings for Muslims, contains no verses supporting violence against women, and many Muslim scholars unequivocally denounce honour killings as un-Islamic.[314] Despite this, some still rationalise this practice as 'Islamic' and, furthermore, as an inherent 'cultural' tradition.[315] This is due to wrong and conservative interpretations of the Qur'an.[316] As a result, perpetrators often show no remorse for their actions. Instead, they take pride in reclaiming their honour and masculinity, referring to Islamic law and traditions as justification.[317]

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[310] Justin J Gengler, Mariam F Alkazemi and AlAnound Alsharekh, '*Who Supports Honor-Based Violence in the Middle East? Findings From a National Survey of Kuwait*' (2021) 36(11–12) Journal of Interpersonal Violence NP6013.

[311] Perlmutter, '*The Semiotics of Honor Killings*' (n 19).

[312] ibid.

[313] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1984) Boundary 2 333.

[314] Hartman, '*The Shame of Preserving Honor*' (n 25); Greiff, '*No Justice in Justifications'* (n 7).

[315] ibid.

[316] Minoo Alinia, *Honor and Violence against Women in Iraqi Kurdistan,* (1st Edition, Palgrave Macmillan 2013) 61.

[317] ibid.

In addition, the endorsement of honour killings by individuals within said societies adds to the challenge of abolishing this practice. Surveys conducted in Kuwait and Jordan reveal alarming levels of approval for physical violence as a punishment for female adultery. Notably, significant percentages of the population, including young adolescents, express support for honour killings, with males being more than twice as likely to support honour killings.[318] This widespread acceptance underscores the substantial distance that must be covered to achieve even modest progress in challenging the deeply ingrained cultural norms surrounding honour killings.

Flaws in the system

The widespread nature of honour killings is further compounded by the difficulty in accurately reporting and tracking these crimes. As women subjected to such violence are often buried in unidentified graves, erasing any official record of their existence.[319] Consequently, accurately determining the number of victims becomes exceedingly challenging. As noted previously, the number of victims per year is estimated to surpass 5,000 women; this figure equates to around 13 women being killed in the name of honour per day.[320] However, some non-governmental organisations estimate as many as 20,000 annual victims,[321] increasing figures to 54 women per day. This is more likely, as in Pakistan alone, it is approximated that at least three women fall victim to this practice every day.[322] Adding to the horror of these killings is the unsettling reality that many perpetrators have been able to evade legal consequences, often escaping punishment entirely.[323] This systemic failure to hold individuals accountable becomes a critical aspect of the broader narrative surrounding honour killings, warranting thorough exploration in this final subsection of the paper.

While religious and cultural beliefs significantly contribute to the establishment of norms supporting HBV, legal systems in honour-based countries serve to reinforce these crimes.[324] Despite the horrible nature of these crimes, legal systems in certain regions fail to hold the guilty accountable, allowing them to escape justice and continuing the cycle of violence. This section examines the legal aspects of honour killings, focusing on the existing laws, inconsistencies within the legal system, and biases that hinder the protection of victims.

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[318] Gengler, Alkazemi and Alsharekh, '*Who Supports Honor-Based Violence*' (n 27); C Eisner and H Ghuneim, '*Gender Differences in Attitudes Toward Honor-Based Violence in Palestine*' (2013) Violence and Victims.

[319] Mayell, '*Thousands of Women Killed*' (n 3).

[320] Hartman, '*The Shame of Preserving Honor*' (n 25).

[321] D'Lima, Solotaroff and Pande, '*For the Sake of Family and Tradition*' (n 1).

[322] Mayell, '*Thousands of Women Killed*' (n 3).

[323] ibid.

[324] ibid.

The first issue with legal frameworks in patriarchal societies is the classification of women as minors and their legal designation as the property of their fathers or husbands.[325] This, coupled with significant flaws in legal systems within regions plagued by honour killings, compounds the challenge of obtaining justice for victims. One notable challenge is the leniency or loopholes within legal frameworks that enable perpetrators to evade severe consequences. Numerous legal provisions and prior case decisions draw a clear distinction between honour killings and other forms of homicides, granting judges considerable flexibility to impose extremely lenient sentences.[326] An illustrative example is Jordan's penal code, Article 340, which excuses and provides exemption from penalty to a man who catches his wife or a female relative committing adultery.[327] Similar clauses persist in the penal codes of Lebanon, Syria, Oman, and Kuwait, granting protection to perpetrators.[328] For instance, Kuwait's penal code, Article 153, grants substantial impunity to a man involved in an honour-related murder.[329] Additional elements within Middle Eastern and North African (MENA) penal codes inadvertently legitimise HBV by linking punishments to the perceived level of 'honour' at risk for the victim, as seen in Lebanon, where a harsher sentence is mandated if the victim is identified as a virgin.[330] This reinforces the idea that the value of a woman, and the gravity of the crime against her, depends on her perceived sexual conduct rather than her fundamental rights. Notably, these laws uniformly identify the male as the beneficiary of the exemption, whether husband, father, or brother. The only exception being the Algerian code, which stands out as it extends the exemption for both husband and wife, making it the only law that gives power to women falling into the same situation, however, this is restricted to instances involving adultery.[331]

Additionally, the existence of broad unspecific laws in said regions, that can be applicable to honour killings, may result in inconsistencies in legal responses. For instance, in the Jordan code, Article 98 grants a mitigating excuse to anyone committing a crime in a state of extreme rage due to an unjust and dangerous act by the victim.[332] This lack of specificity has allowed broad application in various honour crime cases, granting judges the freedom to sentence perpetrators however they see fit, enabling numerous perpetrators to evade serious consequences, and, in many cases, walk free.[333]

Furthermore, women who face threats of HBV rarely receive legal protection,[334] making them hesitant to seek assistance from authorities. The police often fail to maintain impartiality in honour killings,

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[325] Ayubi and Honsinger, '*Violence and Women's Human Rights Violations*' (n 8).

[326] Kulczycki and Windle, '*Honor Killings in the Middle East and North Africa* ' (n 6).

[327] Lama Abu Odeh, '*Honor Killings and the Construction of Gender in Arab Societies*'(2010) 58(4) The American Journal of Comparative law, 911.

[328] Gengler, Alkazemi and Alsharekh, '*Who Supports Honor-Based Violence*' (n 27).

[329] ibid.

[330] ibid.

[331] Odeh, '*Honor Killings and the Construction of Gender*' (n 43).

[332] Hartman, '*The Shame of Preserving Honor*' (n 25); Greiff, '*No Justice in Justifications'* (n 7).

[333] ibid.

[334] Kulcycki and Windle, '*Honor Killings in the Middle East and North Africa*' (n 6).

reflecting prevalent gender expectations and biases.[335] In certain regions, the police may even show approval toward a perpetrator, offering special treatment during detention or imprisonment.[336] In cases where women facing threats seek help from authorities, they may find themselves detained in a local prison for protection, but they are unable to leave or check themselves out, even if the threat no longer exists. Ironically, the only person authorised to secure their release is a male relative, who is often the person who poses the threat.[337] This complex web of legal inadequacies further entrenches the challenges of achieving justice and protecting potential victims of HBV.

Conclusion

In conclusion, the issue of honour killings reveals a distressing intersection of cultural norms, legal shortcomings, and societal expectations. The analysis highlights a troubling gender bias, where women bear the brunt of violence in the name of family honour. Honour killings persist as practices shielded by tradition and exist within a legal void. These acts of violence are not driven by allegations of adultery but rather by a desire to exert control and assert dominance over women. The focus is on the perpetrators and the patriarchal society that not only permits but also enables them to act with impunity, instilling little apprehension of accountability. Honour killings demand not only acknowledgment of their existence but also proactive measures to eradicate them. This includes exploring the effectiveness of educational initiatives aimed at altering societal attitudes and dismantling harmful cultural norms that perpetuate these acts, especially within the younger generation, as well as evaluating the impact of legal reforms that are equally essential to ensure accountability and justice. More broadly, HBV should be understood as one expression of the global epidemic of GBV. Recognising its commonalities with other forms of GBV helps to avoid cultural 'othering' and instead directs the criticism on the patriarchal structures that sustain the violence. Honour-based violence cannot be challenged effectively without addressing the global and structural systems that allow it to persist under the guise of culture or religion. Additionally, there is a need to examine the establishment of support systems for at-risk individuals, including the accessibility of avenues for victims to seek assistance and the trustworthiness of authorities. By internationally acknowledging honour killings as acts of violence and criminal conduct against women's human rights, future research can pave the way for proactive steps to eradicate this harmful practice.

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[335] ibid.

[336] ibid.

[337] Mayell, '*Thousands of Women Killed*' (n 3); Hartman, '*The Shame of Preserving Honor'* (n 25).

Ashes to Ashes; and the Dust on the Coroners Court:

Lycoris Bower

Abstract:

This short report first outlines the current legislation surrounding the function of the Coroners' Court before launching into four key recommendations to address these failures: implementing standardised bereavement care and training for coroners; expanding legal education and accessible guidance on the inquest process; strengthening the use of narrative conclusions and Prevention of Future Death reports to drive systemic change. Throughout the report also weaving personal experience from time spent volunteering with citizens advice and drawing comparisons between systems of grief and humanity.

Introduction:

"Whilst the Coroner services had improved substantially… bereaved people are not yet sufficiently at its heart". This was the main takeaway from the 2021 House of Commons Justice Report on reforms to the Coronial system[338]. There has been a fundamental failure to include and accommodate bereaved people during the inquest process, which this policy report seeks to address through recommendations on legal education, the provision of standardised care, encouraging new inquest outcomes such as greater use of narrative conclusions, and giving increased weight to Regulation 28 reports.

The Coroners' Court's main purpose is set out in The Coroners and Justice Act 2009. Section 1 sets out that "A senior coroner … (must) conduct an investigation into the person's death if subsection (2) applies". This results in an inquest in which the coroner will rule on the cause

[338] C Fairbairn, "Reforms to the Coroner Service in England and Wales" (*House of Commons Library*, September 24, 2021) <https://commonslibrary.parliament.uk/research-briefings/cbp-9328/> accessed December 16, 2024

of death based on the information provided by post-mortems, pathology reports and sometimes reports from the people involved. Some inquests will require the families to read through their witness statements in person, and questions can be asked by the coroner or other interested parties. This can be an incredibly emotionally charged process which has provoked the creation of services like the Coroners' Courts Support Services (CCSS)[339]. The organisation trains volunteers to offer emotional support to the bereaved families as grief can operate as a major barrier to accessing justice.

Throughout my placement at Citizens Advice Liverpool (Garston), we were often faced with clients experiencing grief which had a severe impact on their ability to interact with Citizens Advice Services. One example that stayed with me was an individual who lost both her brother and mother within the same year and subsequently developed traumatic depression. In the process of applying for Personal Independence Payments[340] (PIP), they struggled to keep appointments and engage in phone conversations, and showed little willingness to discuss the impact of grief on their mental health. Failing to discuss certain parts of your condition can have a detrimental effect on the amount of financial aid you receive and is important in maximising the chances of a fair PIP Form decision.

Grief and Mental Health issues are rampant among users of Citizens Advice Services. Interacting with the welfare system brings about poor mental health[341] and the same can be said for a person's dealings with the Coroners' Court. Key Findings from a report by the Bereavement Commission found that 61% of adults had difficulties with at least one practical

[339] Coroners Courts Support Service, "Support at Court" (*Coroners Courts Support Service*, July 19, 2017) <https://coronerscourtssupportservice.org.uk/support-at-court/> accessed December 17, 2024
[340] Citizens Advice, "How Much PIP You Can Get and for How Long" (*Citizens Advice*, March 2, 2022) <https://www.citizensadvice.org.uk/benefits/sick-or-disabled-people-and-carers/pip/before-claiming/how-much-you-get-and-how-long/> accessed December 16, 2024
[341] SL Senior,W Caan and M Gamsu, "Welfare and Well-Being: Towards Mental Health-Promoting Welfare Systems" (2020) 216 The British Journal of Psychiatry 4

or administrative task following bereavement[342]. Preparing for an inquest is a new administrative process for many people and most struggle with it to the point where inquests are viewed as less 'relieving' and 'cathartic' but rather 'alienating' and 'daunting'[343]. The Research Project 'Voicing Loss'[344] explores the participation of bereaved people within Coroners' investigations and inquests through interviews. It is the largest empirical study on the Coronial Process and the failings uncovered within the system must be worked upon as a matter of utmost importance.

Personal Recommendation 1: Standardised Care Within the Coroners Court System.

There is difficulty in implementing a standardised level of care within the Coroners' Court, just as there is difficulty in providing a standard of care within Citizens Advice. It can be down to the Coroner's personality, experience, and even the funding of the coroner's area. The 2021/2022 Coroner Service report from the House of Commons Justice Committee[345] provided a lot of evidence to support their finding of inconsistent and conflicting services. Deborah Coles, Director at INQUEST (The only Charity providing expertise on state involved deaths) found that whilst some people had extremely positive experiences, others were treated "with a lack of dignity, respect and empathy"[346]. There are guidelines for Coroners[347] on proceedings,

[342] The UK Commission on Bereavement, "Bereavement Is Everyone's Business" (*Bereavement commission*, 2022) <https://bereavementcommission.org.uk/media/o5obuive/ukbc-england_briefing.pdf> accessed November 10, 2024

[343] J Jacobson, L Templeton and A Murray, "'I Feel like I've Been Swept along on a Tsunami': Bereaved People's Experiences of Coroners' Investigations and Inquest" (*Voicing Loss*, May 2024) Page 5

[344] J Jacobson, L Templeton and A Murray, "'I Feel like I've Been Swept along on a Tsunami': Bereaved People's Experiences of Coroners' Investigations and Inquest" (*Voicing Loss*, May 2024) <https://voicing-loss.icpr.org.uk/research> accessed December 11, 2024

[345] House of Commons Justice Committee, "The Coroner Service First Report of Session 2021–22" (May 18, 2021) <https://committees.parliament.uk/publications/6079/documents/75085/default/> accessed December 12, 2024

[346] House of Commons Justice Committee, "The Coroner Service First Report of Session 2021–22" (May 18, 2021) <https://committees.parliament.uk/publications/6079/documents/75085/default/> accessed December 12, 2024 Page 15, Section 42.

[347] The Chief Coroner's Guide to the Coroners and Justice Act 2009

including on niche kinds of inquests like Railway cases, where individuals die in railway yards and yet there may be benefits to providing a guidelines sheet directly based on the coroner's behaviour or manner. The way they handle interested parties and provide bereavement support may be best done through the Chief Coroners Guidance.

Another option would be to implement a mandatory session of bereavement training – simply to ensure that Coroners are on an equal playing field when handling inquests. Charities such as Cruse, which provide bereavement support to people across the UK, also offer training to organisations to help them deliver compassionate support to customers and employees, thereby enhancing well-being and performance[348]. These courses cover areas such as suicide bereavement, supporting families and children, and a range of other scenarios. The government should explore the viability of commissioning a training course specialised for the coroner's role that is created by bereavement counsellors and has bereaved people at its heart. This could also be done through the UK Commission on Bereavement, as then it could include various charities and receive Government funding from the Commission. The training course could include various techniques when talking to interested parties, including the deceased within the inquest process and specific wording which may be needed when dealing with suicide bereavement. The benefits would include interested parties gaining more out of their experience with the Coroners' Court as they will have incorporated the deceased's life and memory into the inquest and will feel more comfortable with the process since they are treated with respect and empathy. It could also be argued that it could reduce the load of The Coroners' Courts Support Service as the Coroner would be able to provide very baseline support and understanding to bereaved families.

[348] Cruse Bereavement Support, 'Managers' Guide to Grief' (Cruse Bereavement Support, [no date]) https://www.cruse.org.uk/organisations/grief-awareness-training-for-hr-and-managers/ accessed 19 September 2025

Personal Recommendation 2: Increased legal education surrounding Inquests and Coroners Court.

Whilst on placement at Citizens Advice, I observed that the organisation is a well-established and trusted source of guidance, covering issues such as benefits, housing, and workers' rights. These are recurring problems that people face throughout their lives and are increasingly being discussed more openly. By contrast, individuals only encounter the Coroners' Court system when faced with death. Despite death being one of the few certainties of life, it often remains a taboo subject, meaning that many approach the system without prior knowledge or understanding of the coronial process.

This recommendation proposes placing information stalls in settings where people are likely to encounter bereavement. One example is Hospital Bereavement Services, which provide vital support by working with doctors to complete necessary legal documents and advising on local funeral directors. If these services also explained the inquest process, clarified the role of the coroner, and set out in simple terms why a loved one must go through the system, families would be better prepared. In addition, a specialist lawyer could be made available to offer advice in cases where an institution such as the NHS is involved in the inquest and there is a potential claim of negligence. The National Pro Bono Centre, which connects lawyers with specialist pro bono organisations, could facilitate this, with groups such as Action Against Medical Accidents (AVMA) and Advocate offering free legal assistance and representation. Strengthening education in this way would help to reduce the power imbalance between litigants in person (LIPs) and institutions like the NHS. As bereaved families often find themselves opposing government bodies, this imbalance can place them at a significant disadvantage. A report by Professor Grainne McKeever[349] sets out that a system that

[349] G McKeever, "Litigants in Person in Civil and Family Courts in Northern Ireland: Overview of Research & Policy Developments"

disadvantages LIPs' is a system in need of reform which is why legal education is increasingly important.

Other areas that may benefit from legal education are charities that are at an increased likelihood that their service users will need education on being a LIP. One example would be Charities supporting prisoners and their families. Since 2013, on average 300[350] people die in custody each year and these cases will go through an Inquest due to Section 1 Subsection 2C of The Coroners and Justice Act 2009[351] stating that a Coroner has a duty to investigate if "the deceased died while in custody or otherwise in state detention". A charity like Prisoners' Families Helpline, would benefit from offering advice, providing education and engaging with LIP. Currently, the website[352] offers information on families going to the Crown, Magistrates and even youth court and provides information on what they can expect. However, at around 300 cases a year, these families will have to attend Coroners Court with no understanding of what to expect, especially if expected to represent their loved one against the prison services.

Furthermore, by targeting specific services and charities where people are most likely to encounter bereavement, there is a greater opportunity for both litigants in person (LIPs) and those who can afford representation to engage more effectively with the Coroners Service. However, a wider societal issue persists: education about death and the coronial process is hindered by the fact that death remains a taboo subject that people actively avoid discussing. To create an effective education system – the way we view death has to change. One way this could be done is by commissioning documentaries on the subject matter. The BBC has often commissioned documentaries[353] using public funds from TV licensing and its commercial

[350] INQUEST, "Deaths in Prison" (*Inquest*) <https://www.inquest.org.uk/deaths-in-prison> accessed January 9, 2025
[351] The Coroners and Justice Act 2009 ((S1) SS2C)
[352] "Prisoners' Families Helpline" (*Prisoners' Families Helpline*) <https://www.prisonersfamilies.org/> accessed January 2, 2025
[353] E Kessler, "BBC Commissioning Process Framework"

limbs. This can be extremely effective in educating and opening up discussion around the systems in our society surrounding death. Compelling media coverage could be used to empower people for a potential future in which they attend an inquest.

Recommendation 3: Making Legal Changes to the Conclusions of an Inquest (i.e. Encouraging more Narrative Conclusions and PFDS).

When at the placement and even in my public lawyering module, there has always been a negative view of the Department of Work and Pensions (DWP). The application process for benefits as previously mentioned is negatively impacting the mental health of those engaged with the system. Many clients had depression and anxiety as a result of dealing with the lengthy application forms, the rejections and the lack of empathy they had received from the DWP[354]. The deterioration of mental health by claimants observed by sectors like Citizens Advice is further solidified by the suicide of Kevin Gale. Mr Gale was suffering from severe depression and anxiety and was constantly set back in his Universal Credit applications due to failings within the DWP. The Coroner Kirsty Gomersal of Cumbria made a Prevention of Future Death (PFD) report[355] to the DWP voicing concerns over systemic failings, however, the DWP dismissed this call to action.

Following an inquest or investigation into a death, a Coroner may issue a PFD report to an organisation, individual or service provider. Under paragraph 7, Schedule 5 of The Coroners and Justice Act 2009[356], and Regulations 28 and 29 of The Coroners (Investigations) Regulations 2013[357], where an investigation gives rise to concern that future deaths will occur,

[354] R Dunne, "Regulation 28 Reflections: The Unseen Mental Health Impact on Inspected Entities" (*Hill Dickinson*, March 11, 2024) <https://www.hilldickinson.com/insights/articles/regulation-28-reflections-unseen-mental-health-impact-inspected-entities> accessed December 15, 2024

[355] K Gomersal, "Kevin Gale: Prevention of Future Deaths Report" (*Courts and Tribunals Judiciary*, November 8, 2023) <https://www.judiciary.uk/prevention-of-future-death-reports/kevin-gale-prevention-of-future-deaths-report/> accessed December 20, 2024

[356] The Coroners and Justice Act 2009, Paragraph 7, schedule 5.

[357] The coroners (Investigations) Regulations 2013, Regulation 28 and 29

and the investigating coroner believes that action should be taken to prevent future deaths, the coroner must make a report to somebody they believe may have the power to take such action. Furthermore, as it is the statutory duty of the coroner to make these reports, it's understandable to believe that there should be more weight put on PFDs. The 2021/22 statistical data on Suicide-based PFDs showed that there were 25 concerns related to "Improvements not being implemented" from 20 PFD reports (12% of all reports)[358] meaning that there isn't enough power within the PFD to make change. By encouraging Coroners to make more PFDs from inquests with Narrative Conclusions, there would be more areas of society where the coroner could provide guidance and advice on actions to be taken. Narrative conclusions are an outcome where a short-form conclusion on the cause of death is not enough and a small paragraph with details of the death is allowed. It can also be the preferred conclusion for some people as it allows for a bit more of the deceased's story to be involved in the conclusion which puts "Bereaved People at the heart". It takes into account the bereaved families' need for the deceased person's story to be told at their inquest and still allows data to be drawn out from the narrative conclusion. These two methods have a positive impact on the coronial process,providing the most supportive environment to those it serves whilst being able to guide on preventing deaths in every sector.

Recommendation 4: Prevent the Digitalisation of the Coroners' Court.

Another thing that I noticed with my placement at Citizens Advice was how digitalised all communications with clients were. Each session would comprise one or two phone calls to clients in distress and a few times, the connections were cut or the audio would cut out and the

[358] Office for National Statistics , "Prevention of Future Death Reports for Suicide Submitted to Coroners in England and Wales: January 2021 to October 2022" (*Office for National Statistics* , October 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/mentalhealth/articles/preventionoffuturedeathreportsforsuicidesubmittedtocoronersinenglandandwales/january2021tooctober2022> accessed December 12, 2024

whole point of the call would be lost to "Can you hear me?" back and forth. The only in-person form-filling session was the one I remember most because I was able to form a genuine connection with the people I was trying to help. Unfortunately, I felt like I was able to offer them a better service simply from the fact they came in person and could talk to me about the struggles surrounding the PIP form. They had access to all their documents, and I was able to access what I needed – something that can be difficult when over the phone, especially when the issue concerned medication.

The Judicial Review and Courts Bill introduced by the House of Commons in 2021[359] suggested that Coroners' should enable rules to allow all participants to participate remotely in pre-inquest interviews and inquests. Some may argue that this is the best-case scenario for bereaved families as remote participation prevents the inquest from disrupting the families' lives severely; they would not have to disrupt their grief, or worry about travelling to the courts. On the other hand, some may argue that framing the inquest as a disruption to grief is oxymoronic. Inquests have often been seen as vessels for closure[360] and an empathetic coroner can assist families in navigating their journey in grief by providing answers. As previously discussed, in-person communication can provide a richer rapport between clients which can enhance understanding and trust in the system – all of which can be lost with remote communication. There is also a higher reliance on technology, which can be incredibly difficult for older generations. In 2023, 39% of all deaths reported to the coroner concerned those aged between 25-65,[361] meaning the older generation is responsible for handling that percentage of

[359] Ministry of Justice, Judicial Review and Courts Bill 2021

[360] J Waldman, "Through The Looking Glass: Curiosity v Closure in Inquests and Research - Frontiers of Socio-Legal Studies" (*Centre for Socio-Legal Studies, University of Oxford*, June 25, 2025) <https://frontiers.csls.ox.ac.uk/curiosity-v-closure-in-inquests-and-research/#continue> accessed September 17, 2025

[361] Ministry of Justice, "Coroners Statistics 2023: England and Wales" (*Gov.uk*, May 9, 2024) <https://www.gov.uk/government/statistics/coroners-statistics-2023/coroners-statistics-2023-england-and-wales> accessed December 17, 2024

inquests and will struggle with remote inquests. Evaluating the impact of technology on the ability to provide better care almost takes away the ability for families to tailor their experience. Is the goal of putting bereaved people at the heart of the Coroners Court system taken back by assuming that the system will understand their grief better than themselves? As noted earlier, I found the service I provided was more effective and compassionate in person than over the phone. Nevertheless, for some clients—particularly those experiencing anxiety—remote communication offered greater comfort. The most appropriate approach, therefore, is to preserve in-person attendance at court as the default option, while also allowing digital participation where it better serves the needs of the bereaved. Bereaved families will always understand their grief and circumstances better than the Government and often, providing the best level of care means tailoring the experience so that every individual receives the best care for them.

Conclusion:

The coroner service, despite its statutory foundation in ensuring accountability and truth surrounding death, continues to fall short in placing bereaved families at its core. The reforms proposed are not merely administrative improvements but essential measures for restoring trust and dignity in coronial processes. At its heart, the coroner's role is not only investigative but also relational as it involves guiding families through one of the most difficult times of their lives. By embedding compassion, transparency, and empowerment into practice, the coronial system can transform from a process often described as alienating into one that truly delivers justice for the deceased and meaningful closure for the bereaved.

Innovation on Prescription: A Critical Analysis of the Pharmaceutical Industry's Concerns Over Drug Regulation and Delays

Agnieszka Marecka

Abstract

The pharmaceutical industry's concerns about excessive regulation and slow approvals hindering innovation are overstated. This essay argues that regulation is not inherently antagonistic to progress but functions as a mechanism of optimisation, balancing the protection of public health with the need for scientific advancement. While industry concerns often reflect frustrations with rising costs and lengthy timelines, the obstacles lie in systematic inefficiencies and regulatory capture, which distort incentives as well as hinder competition. The analysis draws on theories of regulatory capitalism and biopolitics to show how clear, predictable governance frameworks can cultivate public trust and encourage radical breakthroughs and innovation. Legal disputes, such as *R v Medicines Control Agency ex parte Pharma Nord Ltd* and *Merck Sharp & Dohme v Licensing Authority*, highlight how definitional ambiguities and extended exclusivity periods have slowed market access, supporting the argument that the procedural inefficiencies are at fault rather than regulation itself. Proposals such as risk-based regulation, adaptive licensing, and global harmonisation are identified as ways to streamline approval processes without compromising safety. Ultimately, regulation acts as a catalyst not a constraint for pharmaceutical progress.

Introduction

The pharmaceutical industry has long expressed concerns that excessive drug regulation and slow approval procedures hinder drug innovation[362]. Nevertheless, regulatory frameworks are not merely constraints, they are essential mechanisms that safeguard public health, uphold market integrity, and

[362] Health Committee*, The Influence of the Pharmaceutical Industry* (HC) 2004-05, 4th Report, Vol 1

foster public trust[363]. Arguments such as Braithwaite's[364] concept of Regulatory Capitalism illustrates how governance structures can promote innovation through predictable and transparent regulations. Similarly, Rose's[365] analysis of biopolitics highlights how managing health risks can actually stimulate biotechnological progress.

While some scholars argue that excessive drug regulation can burden innovators with significant costs and delays, deterring innovators and investors[366], this essay will argue that drug regulation is not inherently an obstacle to innovation, it is a necessary framework that requires optimisation, not reduction. In addition, this essay will critically analyse the interplay between regulation and the pharmaceutical market dynamics that shape innovation[367], exploring how misaligned incentives and procedural inefficiencies create barriers, undermining both safety and innovation[368], whilst also examining how legal disputes over data exclusivity impact generic competition[369]. Finally, it proposes a reformed regulatory model grounded in risk-based strategies and nodal governance[370] to accelerate approval procedures while maintaining high safety standards[371]. These reforms will create an environment where innovation and regulation are harmonious, ensuring that public health and pharmaceutical progress remain complementary objectives.

Regulation: Enabler or Obstacle?

[363] John Abraham, 'The pharmaceutical industry as a political player' [2002] 360(11) The Lancet (British Edition) pp 1498
[364] John Braithwaite, 'Neoliberalism or Regulatory Capitalism' [2005] 1(5) Regulatory Institutions Network pp 25-29
[365] Nikolas Rose, 'The Politics of Life Itself' [2001] 18(6) Theory, Culture & Society pp 3, 7
[366] R (on the application of Merck Sharp and Dohme Ltd) v Licensing Authority [2005] EWHC 710 (Admin)
[367] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Pjjoost-Regulatory' World' [2001] 54(1) Current Legal Problems pp 139
[368] *ibid 2* pp 1501
[369] *ibid 5*
[370] Scott Burris and others, 'Nodal Governance' [2005] 01(30) Australian Journal of Legal Philosophy pp 37
[371] David Levi-faur, 'The Welfare State: A Regulatory Perspective' [2014] 92(3) Public Administration pp 601

Regulation is often portrayed as either the catalyst for life-saving innovation or the barrier that supresses progress. However, in reality, its role is far more nuanced. A well-designed regulatory system provides the foundation for public safety, scientific advancement, and market credibility. Regulation in the pharmaceutical industry consists of a crucial dual role. A well-implemented regulatory framework establishes the trust and credibility essential for market acceptance of new drugs. Over time, regulatory bodies have adapted to align with rapid biomedical advances, increasingly acting as facilitators of innovation rather than its adversaries[372].

Proposals such as Early Access Programmes exemplify how modern approval processes can introduce innovative treatments and accelerate the entry of new drugs into the market without compromising safety[373]. Furthermore, stringent regulations often push companies to pursue more radical innovations, as well as shift resources towards groundbreaking innovations as the pharmaceutical industry and companies strive to meet high standards[374]. This dynamic allows for pioneering breakthroughs rather than incremental improvement, driving progress in addressing unmet medical needs.

Similarly, the concept of value-based pricing illustrates how regulatory frameworks can align economic incentives with life changing innovation, ensuring that resources are directed towards developing treatments with the greatest social impact[375]. Regulatory frameworks have historically been effective in balancing public safety with fostering competition[376], as evidenced by the introduction of measures that protect smaller innovators and prioritise patient outcomes[377].

[372] Peter Honig and Lei Zhang, 'Regulation and Innovation: Role of Regulatory Science in Facilitating Pharmaceutical Innovation ' [2019] 105(4) Clinical Pharmacology and Therapeutics pp 780
[373] Anna Bastone and others, 'How to shorten the market entry innovation in a highly regulated market the case of Early access programs in the pharmaceutical industry' [2023] 19(4) International Entrepreneurship and Management Journal pp 1571
[374] D Bardey and others, 'Retail price regulation and innovation: Reference pricing in the pharmaceutical industry' [2010] 29(2) Journal of Health Economics pp 304
[375] Rena M Conti and others, 'Regulating Drug Prices while Increasing Innovation' [2021] 385(21) The New England Journal of Medicine pp 1921
[376] *ibid 11 pp 779*
[377] *ibid 12 pp 1574*

While industry frustrations about lengthy delays in approval processes and rising costs are valid, they often arise from outdated bureaucratic procedures rather than from the existence of regulation itself. Scholars such as Bastne[378] and Epstein[379] emphasise that targeted reforms, such as risk-based assessments and adaptive licencing[380], can address delays and inefficiencies in the drug approval process, which are often criticised by pharmaceutical companies for hindering timely market entry, whilst still maintaining rigorous safety standards. This nuanced approach to regulation, when optimised, does not stifle innovation, but rather functions as a mechanism to ensure that new drugs meet high standards, protecting both public health and the integrity of the pharmaceutical market. Establishing clear pathways for compliance and incentivising radical innovation, regulation can serve as a cornerstone of pharmaceutical advancements.

Are We Regulating Poorly- Or Just Wrongly?

The notion that excessive regulation stifles innovation is a weak argument if it fails to consider the inefficiencies within the regulatory system itself. Miller[381] emphasises the importance of consultative oversight, suggesting that regulators should guide pharmaceutical firms toward quality improvement rather than impose rigid sanctions. Miller's approach maintains public trust whilst minimszing inefficiencies, addressing the key industry complaint about regulatory delays.

Similarly, Japan's reliance on non-binding 'soft regulations' provides a cautionary tale. Although intended to be flexible, frequent changes and vague guidelines have created confusion and inefficiency

[378] *ibid 12 pp 1576*
[379] R A Epstein, 'The Pharmaceutical Industry at Risk: How Excessive Government Regulation Stifles Innovation' [2007] 82(2) Clinical Pharmacology and Therapeutics pp 132
[380] Adaptive licensing is a prospective process for authorizing and developing medicines that allows for early market access in a restricted patient population, followed by iterative evidence gathering and expansion of the authorisation to broader groups as more data is collected over the drug's lifecycle.
[381] Edward Alan Miller and Vincent Mor, 'Balancing Regulatory Controls and Incentives: Toward Smarter and More Transparent Oversight in Long-Term Care' [2008] 33(2) Journal of Health Politics, Policy and Law pp 253

due to frequent revisions and inconsistent standards[382]. These inefficiencies highlight that it is the structure and implementation of regulations, rather than their existence, that results in the creation of barriers to innovation. Moreover, these non-binding rules often exert quasi-binding influence via informal sanctions, such as funding restrictions, ultimately undermining both innovation and public confidence[383].

Additionally, Deshmukh[384] argues that the way pharmaceutical innovation is measured contributes to misplaced criticism. An overemphasis on Food and Drug Administration (FDA) approval numbers in the US, fails to capture broader societal benefits such as therapeutic value and health outcomes. A redefined regulatory success metric would shift the focus from speed to impact, more successfully aligning with public interest and industry goals. This perspective challenges the notion that regulation inherently stifles innovation, emphasising the need to redefine success in pharmaceutical development.

Likewise, Shaw and Whitney[385] highlight the complementary role of self-regulation in improving efficiency and transparency within the pharmaceutical industry. The International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) Code of Practice demonstrates how industry led ethical standards can evolve quickly to fill gaps in formal legislation, particularly in areas such as marketing and compliance. This collaborative approach between regulators and the industry itself, ensures that innovation is not only supported but also aligned with ethical practices and public safety.

[382] Shimon Tashiro, 'Unintended Consequences of "Soft" Regulations: The Social Control of Human Biomedical Research in Japan' [2010] 19(1) International Journal of Japanese Sociology pp 11
[383] *ibid 20 pp 4*
[384] Anjali D Deshmukh, 'Redefining Innovation for Pharmaceutical Regulation' [2024] 104(2) Boston University Law Review pp 583
[385] Brendan Shaw and Paige Whitney, 'Ethics and compliance in global pharmaceutical industry marketing and promotion: The role of the IFPMA and self-regulation' [2016] 18(1-4) Pharmaceuticals Policy and Law pp 199

Furthermore, systematic inefficiencies within regulatory bodies play a significant role in the delays that are often blamed on excessive regulation. For example, outdated processes and fragmented global frameworks can prolong approval timelines unnecessarily. Miller emphasises that more forward and transparent regulation can mitigate these inefficiencies, fostering an environment conducive to innovation[386]. Reforms such as adaptive licensing and value-based pricing, as Deshmukh[387] and Shaw[388] observe, have the potential to accelerate processes whilst maintaining high safety standards.

Regulatory Capture and Its Consequences

A significant impediment to innovation lies not in regulation per se, but in regulatory capture, when oversight bodies become influenced by the very industries they regulate[389]. Miller characterises regulatory capture as a misalignment of incentives, where regulatory decisions favour corporate interests over public welfare[390]. The "revolving door" phenomenon[391] exemplifies how close relationships between regulators and firms can compromise impartiality[392]. Instead of creating a fair and balanced system, regulatory capture enables established pharmaceutical companies to consolidate their market power at the expense of smaller innovators and public health.

The case of *R v Medicines Control Agency Ex Parte Pharma Nord Ltd*[393] underscores the limitations of regulatory frameworks, particularly concerning definitional ambiguities and procedural inefficiencies. The case concerned the classification of Melatonin under Directive 65/65/EEC, with the Medicines Control Agency designating it as a medical product requiring pre-market authorisation. The primary purpose of pharmaceutical regulation is to ensure the safety of the drug and efficacy validation before

[386] *ibid* 19
[387] *ibid* 22 pp 591
[388] *ibid* 23 pp 204
[389] *ibid* 2 pp 1498
[390] *ibid* 19 pp 252
[391] David Oliver, 'The revolving door to the NHS lobby' [2019] 365(04) British Medical Journal pp 1
[392] *ibid 23 pp 202*
[393] R. v Medicines Control Agency, Ex parte Pharma Nord (U.K.) Ltd [1998] 3 C.M.L.R. 109

public distribution. However, this case exposed significant inefficiencies in the regulatory processes such as criticisms surrounding the pace of approval procedures and legal uncertainties within the system. For example, the extended legal proceedings surrounding the definition of a medical product created unnecessary delays[394].

Regulatory capture also negatively affects competition within the market. Large pharmaceutical companies can leverage their influence to shape regulations that create barriers for generic manufacturers or emerging firms. For instance, the *Marck Sharp & Dohme*[395] case illustrates how extended data exclusivity periods delay the introduction of affordable generics, limiting competition and keeping drug prices high. This strategic manipulation of the regulatory framework does not stifle innovation in the traditional sense but redirects its benefits towards maintaining monopolies rather than promoting equitable access or groundbreaking research[396]. Regulatory capture creates an uneven playing field that disproportionately harms smaller firms and patients.

Moreover, regulatory capture erodes public trust in oversight mechanisms. The reliance on agencies like the FDA on industry funding, through mechanisms such as the Prescription Drug User Fee Act, raises concerns about the objectivity of regulatory decisions[397]. A similar concern exists for the MHRA (Medicines and Healthcare Products Regulatory Agency) in the UK. The public trust and confidence in the effectiveness of new drugs diminishes when the public believes that regulators are closely aligned with corporate interests, discouraging the acceptance of new treatments and, paradoxically, stifling innovation.

[394] *ibid*
[395] *ibid 5*
[396] *ibid* 22 pp 579
[397] *ibid* 22 pp 587

To counter regulatory capture, systematic reform is essential. For example, increasing the independence of regulatory bodies through public funding can mitigate conflicts of interest and restore balance to decision making[398]. In addition, implementing more transparency and ethical self-regulation as well as stricter conflict-of-interest policies into the pharmaceutical industry, would hold companies accountable whilst complementing a more excessive drug regulation control[399]. The reform would not only protect the public, restore independence and trust, but would also ensure a level playing field for all innovators.

Harmonising Innovation with Regulation

The idea that regulation and innovation are inherently incompatible reflects a limited understanding of modern regulatory science. However, when correctly designed and strictly implemented, regulation can serve as a catalyst for innovation rather than a barrier. Risk-based regulation focuses resources on high-risk areas, whilst at the same time efficiently approving pathways for lower-risk products, ensuring an efficient process without compromising safety[400]. For example, the European Medicines Agency (EMA) utilises a risk-based approach when it conducts inspections of manufacturing facilities, prioritizing those with higher likelihood of non-compliance, thereby allowing faster and more efficient regulatory oversight for companies with established safety. This targeted approach illustrates how regulatory systems can accommodate safety, pharmaceutical industry concerns and the everchanging nature of biomedical innovation[401].

Adaptive licensing is another promising model. By allowing conditional early approval while collecting real-world data post-launch, regulators can fast-track access to transformative treatments[402]. This model has been particularly impactful in the development of treatments for rare diseases, where patient populations are small, and traditional clinical trial designs may be impractical. For example, the FDA's

[398] *ibid* 19 pp 266
[399] *ibid* 23 pp 203, 204
[400] *ibid 19 pp 275*
[401] *Ibid 11 pp 779*
[402] *ibid 12 pp 1564*

‘Breakthrough Therapy Designation’ has successfully expedited the approval of therapies like Kymriah, the first CAR-T cell therapy, which addresses unmet needs in certain cancers. This demonstrates that consistent and well organised regulatory frameworks can accelerate access to groundbreaking treatments without sacrificing the rigorous regulations necessary to protect public health[403].

In addition, collaboration between public institutions, regulators, and private companies fosters knowledge spillovers and enhances research and development efficiency[404], further achieving a balance between rigid regulation and innovation. Similarly to Shaw and Whitney, Francer[405] also emphasises the role of self-regulation in complementing formal regulatory systems, particularly in addressing emerging challenges like marketing transparency[406] and data integrity[407]. Ethical codes, such as the IFPMA Code of Practice, enable companies to self-regulate more efficiently, thereby reducing the pressure on regulators while ensuring that corporate conduct aligns with public health objectives. This approach reduces conflict between stakeholders and cultivates an environment where innovation can flourish within a well-regulated framework.

Global regulatory harmonisation further exemplifies the synergy between innovation and oversight. Hoing and Zhang point to initiatives like the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH), which aligns regulatory standards across regions, simplifying approval processes for multinational companies. For example, the harmonisation of clinical trial data submission requirements across the United States, Europe or Japan has reduced

[403] *ibid 22 pp 591*
[404] Luigi Aldieri and Others, 'The future of pharmaceuticals industry within the triad: The role of knowledge spillovers in innovation process' (2020) 122(9) *Futures: The Journal of Policy, Planning and Futures Studies* pp 2.
[405] Jeffrey Francer and Others, 'Ethical Pharmaceutical Promotion and Communications Worldwide: Codes and Regulations' [2014] 9(1) Philosophy, Ethics and Humanities in Medicine pp 15
[406] Halid Kayhan, ' Ensuring Trust in Pharmaceutical Supply Chains by Data Protection by Design Approach to Blockchains' [2022] 5(1) Blockchain in Healthcare Today pp 14,15
[407] *ibid 23 pp 201, 202*

duplication of efforts, allowing companies to focus resources on research and development[408]. This not only lowers costs but also ensures equitable global access to cutting-edge treatments.

On a fundamental level, balancing regulation and innovation requires a change in basic assumptions of how success is measured in pharmaceutical drug development. By prioritising outcomes that address public health challenges, such as improving survival rates for rare diseases or reducing treatment disparities, regulatory systems can accelerate the development of groundbreaking treatments that deliver meaningful benefits. The introduction of value-based pricing, where the cost of a drug is linked to its healing benefits, exemplifies how aligning regulatory goals with public health priorities can drive both innovation and access.

Human Impact: Societal and Psychological Consequences

Whilst much of the discourse surrounding pharmaceutical regulation centres on economic and industrial concerns, the human cost of slow approval processes and excessive regulation cannot be overlooked. Delays in accessing critical medications and treatments, particularly for individuals with life-threatening conditions, have profound psychological and emotional implications. These delays can exacerbate feelings of anxiety, fear, and helplessness, as well as negatively impacting a person's overall well-being and quality of life.

Delayed access to medicines and societal consequences that ensue, can also contribute to a sense of injustice and erode public trust in both pharmaceutical companies and regulatory bodies. As Nussbaum[409] argues, the experience of injustice in healthcare, whether it be through delayed treatment, discrimination, or inequity, can lead to long-term psychological harm, which manifests as feelings of a

[408] *ibid 11*
[409] Martha Nussbaum, 'Frontiers of justice: Disability, Nationality, Species Membership' (2006) Havard University Press

loss of faith in societal structures that are meant to protect. When patients witness the slow pace of regulatory approvals for drugs that could improve or even save their lives, they may experience a profound sense of disenchantment with the system, leading to a lack of confidence in public health institutions.

Proposed Reforms

The psychological and social toll of regulatory delays underscores the urgent need for reform in the pharmaceutical approval process. To address these legitimate concerns, reforms must focus on optimising regulatory frameworks that balance public safety with innovation[410]. This essay argues that a risk-based regulation approach is the optimal reform proposal. Risk-based regulation allocates resources by focusing on high-risk areas while accelerating approval processes for lower risk products. The risk-based EMA approach would prioritise inspections based on risk records, reducing delays, and maintaining high levels of safety.

Likewise, the Independent Medicines and Medical Devices Safety (IMMDS) Review[411], emphasised in relation to pelvic mesh implants, the severe repercussions of inadequate regulatory care and the necessity for proactive reform. The recommendations included establishing a risk-based classification system similar to that used in Europe. In addition, the recommendation for a centralised database would enable long term monitoring and enhance the ability to track negative outcomes[412]. Furthermore, the IMMDS report supported reforms that promoted transparency, such as the compulsory disclosure of financial ties between manufacturers and healthcare providers including pharmaceutical companies. It would amplify public trust and guarantee accountability within the regulatory framework. This essay

[410] *ibid 43 pp 7*
[411] Sonia Macleod, 'The Independent Medicines and Medical Devices Safety Review: Regulatory Reform and Remedies' (2023) 5 Law, Tech & Hum 5 pp 9
[412] *ibid 47 pp 15*

argues that it is essential to address inefficiencies within the systems, instead of abolishing them, to preserve and maintain safety while encouraging innovation.

In addition to the risk-based approach, adaptive licensing should also be implemented in England and Wales. Gradual approval for high-potential therapies- especially for rare or urgent conditions- allows the pharmaceutical drugs to reach the market sooner while gathering post-market safety data. Examples that were provided earlier in this essay, like the FDA'S Breakthrough Therapy Designation for Kymriah treatments for cancer or the pelvic mesh implant case, demonstrates that adaptive licensing can address new medical needs without sacrificing public health safety[413]. Moreover, by establishing a long-term safety data collection, the reform would maintain public trust and stimulate innovation.

In the same way, global regulatory harmonisation is an urgent complimentary reform[414]. Aligning international standards through ICH initiatives reduces redundancy, speeds up approvals, and facilitates broader access, lowering costs for multinational companies and accelerating patient access to innovative treatments. The reform also embraced technologies such as blockchain to improve transparency and efficiency, particularly when tracking regulatory compliance and ensuring data integrity[415].

Finally, the proposed reforms should aim to eliminate or reduce regulatory capture. Ensuring independence through increased public funding and strong conflict-of-interest rules would restore balance to regulatory decision-making and improve trust in institutions. Additionally, it would reduce reliance on industry funding, such as that provided through the FDA's Prescription Drug User Fee Act (PDUFA), therefore mitigating the biases that may appear within the pharmaceutical industry as a whole[416]. Promoting increased cooperation among regulators, public research institutions and private companies has the potential to improve knowledge transfers, ensuring that innovation within the

[413] *ibid 31*
[414] *ibid 44 pp 2,3, 6*
[415] *ibid 42 pp* 2
[416] *ibid 2 pp 1498*

pharmaceutical world is fair and significant[417]. This essay has argued that collectively, these proposed changes addresses inefficiencies whilst preserving the protective function of regulation, encouraging drug innovation and public safety.

Conclusions

While the pharmaceutical industry frequently raises concerns about excessive regulation and delayed approvals, the real issue stems from inefficient implementation rather than the existence of regulation itself. Historical cases and present research demonstrate the necessity of strong oversight through regulations. The Thalidomide tragedy serves as a souvenir of what happens when speed is prioritised over drug and public safety, while legal disputes such as *Pharma Nord Ltd* reveal the costs of procedural inefficiencies. This essay has argued that optimizing, rather than minimizing, regulation is the key to fostering innovation. Reforms such as risk- based regulation, global harmonisation and adaptive licensing can accelerate access to new treatments without compromising safety. Furthermore, addressing regulatory capture by increasing transparency, public funding and collaborative governance models may restore public trust and ensure a level playing field.

Ultimately, regulation and innovation need not be mutually exclusive. When harmonised, they serve the dual objectives of safeguarding public health and advancing pharmaceutical progress- ensuring that society is better equipped to meet emerging medical challenges with timely, effective, and safe solutions.

[417] *ibid 50*

The Illusion of Freedom: Reassessing Decentralisation in Blockchain Technology

Olivia Mayne

Abstract

Blockchain technology is more than a public, digital ledger, it is a disruptive force that challenges governments, economies, and legal systems globally. This paper explores the dual nature of blockchain as a symbol of individual freedom and a tool of control. Blockchain technology represents a transformative yet contradicting innovation, often referred to as a pathway to decentralisation and freedom, yet increasingly associated with systems of control. This paper reassesses blockchain not just as a foundation for cryptocurrencies, but as a broader technological system with social, environmental, and regulatory implications. It explores how blockchain's decentralised design challenges traditional power structures while simultaneously enabling new forms of concentration through mining pools, corporate influence, and state surveillance. The analysis contrasts blockchain's potential for transparency, financial inclusion, and empowerment, particularly through innovations such as smart contracts, with its risks of exploitation and inequality. It also examines the environmental toll of crypto-mining, the tension between immutability and data protection under frameworks like the GDPR, and the vulnerabilities of smart contracts. Using examples such as the EU's Markets in Crypto-Assets Regulation (MiCAR) and global responses to crypto-based activities, this paper argues that effective governance must strike a balance between innovation, accountability, and social justice.

1 Introduction

Before delving into the complexities of blockchain's decentralising potential, it's important to establish the basic concepts that underpin its disruptive nature. This section defines the idea of disruptive innovation, includes key terminology that will be used throughout the paper and situates blockchain within the broader political and regulatory debates that it continues to provoke.

1.1 Defining Disruptive Technology

Clayton Christensen initially coined the term disruptive technology, or disruptive innovation, in Harvard Business Review. He defined it as 'an innovation that significantly alters established industries and markets, creating new sectors and business models.'[418] Blockchain technology has idiosyncratic qualities that fulfil this definition through facilitating transparent transactions, which have transformed financial industries and created new markets, in the form of cryptocurrency, tokenised assets and decentralised finance, thus reshaping how value is exchanged and managed globally.

1.2 Distinguishing Blockchain from Crypto Assets and Bitcoin

[418] Repsol, 'Disruptive Technologies' (Repsol, 2025) <https://www.repsol.com/en/energy-and-the-future/technology-and-innovation/disruptive-technologies/index.cshtml#:~:text=What%20are%20disruptive%20technologies%3F,products%20and%20services%20are%20consumed> accessed 15 December 2024.

A common misconception within public discourse is the merging of blockchain technology with cryptocurrencies such as Bitcoin. While interconnected, they are not synonymous. Blockchain is an underlying technology, as described above, which crypto assets build upon by using cryptographic mechanisms to represent and transfer value. Bitcoin, the most prominent example, merely illustrates one financial use of blockchain technology. Cryptocurrencies rely on a process called mining, which involves high-powered computers solving complex mathematical puzzles to validate and record transactions on a blockchain, earning the miner cryptocurrency as a reward. Mining is covered in greater detail in Section 4.

While this paper acknowledges cryptocurrencies as a major driver of blockchain adoption, its analysis focuses on the broader implications of blockchain as a technological foundation with social, environmental and legal significance beyond the realm of crypto assets.

1.3 Blockchain as a Litmus Test for Governments

Antonopoulos, Bitcoin advocate, has repeatedly used this analogy that blockchains and 'cryptocurrencies act as a litmus test.'[419] The test's results reveal whether a government values individual freedom and human rights, or whether a government fears these principles. Upon failing this test, governments will attempt to ban cryptocurrencies, which exposes a "lack of trust in their own citizens to have control about their own money."[420] This distrust often stems from a broader fear of losing control over the state's economic system, as cryptocurrencies undermine traditional monetary policies and central banking structures. For example, in countries where governments heavily regulate their legal tender, cryptocurrencies can provide a lifeline to citizens and offer a stable alternative. This essay will explore the tension between the regulation of blockchain technology, its transformative potential, and its ability to empower marginalised communities.

2 Technical Foundations of Blockchain

2.1 Blockchain as a Public Ledger

As defined in a 2018 National Seminar glossary, blockchain is 'a general ledger, keeping track of all the transactions that happen in the network,'.[421] This public ledger ensures accountability and transparency, as every transaction is recorded in an immutable, unalterable database, while mimicking centralised systems by allowing pseudonymous transactions through the use of public and private keys.[422] These idiosyncratic qualities could potentially challenge the status of centralised institutions, as blockchain provides a level of trust that is unparalleled in

[419] Andreas Antonopoulos, 'Hodling, Buidling, Spedning: Andreas Antonopoulos About Anonymity, Privacy, and Sentiment Changes in Cryptocurrencies' (*Medium*, 17 October 2018) <https://medium.com/riat-institute-for-future-cryptoeconomics/hodling-buidling-spedning-andreas-antonopoulos-about-anonymity-privacy-and-sentiment-changes-in-3baa22c96f5e> accessed 8 December 2024.

[420] Torsten Hoffman, 'Cryptopia: Bitcoin, Blockchains and the Future of the Internet' (Netflix, 10 Decmber 2020) <https://www.netflix.com/title/81508426> accessed 29 December 2024.

[421] United States Sentencing Commission, Emerging Technologies: Glossary of Terms for Cryptocurrency and Blockchain (2018) <https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018-materials/emerging-tech_glossary-crypto.pdf> accessed 20 November 2024.

[422] Blockchain.com, 'What Are Public and Private Keys and How Do They Work?' (*Blockchain.com*, September 2024) <https://support.blockchain.com/hc/en-us/articles/4417082520724-What-are-public-and-private-keys-and-how-do-they-work> accessed 12 December 2024.

traditional systems, ensuring that, once data is recorded, it cannot be erased without consensus from the network.

2.2 Strengths and Weaknesses of Immutability

While a strength in terms of preventing fraud, immutability can become problematic in cases of errors or malicious entries, as it limits the ability to reverse transactions once they are confirmed. The Decentralized Autonomous Organization (DAO) attack shows immutability's flaw, as 'an anonymous hacker stole over $50M USD worth of Ethers.'[423] Immutability restricts corrective measures, so the funds could not be reversed on the blockchain. However, it is important to note that the Ethereum community conducted a controversial 'hard fork to return the stolen funds'[6], effectively demonstrating that decentralisation, in practice, may not be as robust as it is in theory. It is clear, in this case, that blockchain's challenges to centralised institutions are not absolute and can be overridden, when necessary.

2.3 Immutability Creating Compliance Challenges

Blockchain's idiosyncratic quality of immutability also poses compliance challenges with regulations such as the General Data Protection Rights (GDPR) in Europe, which provides Article 17, the right to be forgotten and the deletion of personal data.[424] As previously discussed, blockchain is designed to maintain transparency, which directly conflicts with GDPR. It should be emphasised that 'privacy is a human right, and it should not be jeopardized in the pursuit of technological development,'[425] as immutability is dangerous for vulnerable groups, including refugees or political dissidents, whose data security can be a matter of life and death. It is clearly necessary to limit blockchain's potential through regulations like GDPR, as its immutability puts vulnerable citizens at a greater risk of harm.

3 Decentralisation: Pros vs Cons

The most attractive quality of blockchain is its potential to challenge centralised institutions, as blockchain technology enables distributed trust and decentralised platforms.[426] But how much of a strength is decentralisation? Can it grant an unchecked freedom that empowers individuals to the point of enabling harm? The case of *Ulbricht*[427] is a clear example of a decentralised platform leading to malicious activity. In this case, blockchain technology was exploited to create a criminal marketplace that facilitated drug trafficking, theft, and other illicit activities. The lack of clear regulations around blockchain threatens the very freedom that decentralisation promises by facilitating abuse, which disregards the positive aspects of a decentralised system.

However, decentralisation also offers benefits that directly counter some of these risks, particularly in its ability to enhance transparency and reduce fraud. A leading example is IBM's Food Trust, a blockchain-based supply chain system that tracks food products from origin to

[423] Mehar M, Shier C, Giambattista A, Gong E, Fletcher G, Sanayhie R, Kim HM, Laskowski M, 'Understanding a Revolutionary and Flawed Grand Experiment in Blockchain: The DAO Attack' (2017) 21(1) *Journal of Cases on Information Technology* 19-32.

[424] NPLP, 'Blockchain vs Data Protection' (INPLP, 2025) <https://inplp.com/latest-news/article/blockchain-vs-data-protection/> accessed 3 January 2025.

[425] Shoaib, Bisma, 'The Immutable Blockchain Confronts the Unstoppable GDPR' (2023) 14 Seattle Journal of Technology, Environmental, & Innovation Law 1.

[426] Yan Chen and Cristiano Bellavitis, 'Blockchain Disruption and Decentralized Finance: The Rise of Decentralized Business Models' (2020) 13 Journal of Business Venturing Insights <https://doi.org/10.1016/j.jbvi.2019.e00151> accessed 12 December 2024.

[427] United States v Ulbricht 858 F.3d 71 (2d Cir 2017).

shelf[428]. Each stage of production, transport, and sale is recorded on a decentralised ledger accessible to all verified participants. This creates a permanent and tamper-proof record of origin, making it virtually impossible for any single actor to falsify data or conceal contamination. By distributing verification across multiple nodes rather than relying on one central authority, IBM's system prevents fraudulent relabelling and helps identify compromised batches within seconds. This demonstrates how decentralisation can be harnessed to protect consumers, strengthen accountability, and build trust. When properly regulated, blockchain's transparency can be an asset rather than a liability.

The extent of decentralisation within the blockchain system remains a contentious issue. Mining pools, namely Foundry USA and Antpool dominate the field[429], receiving transaction fees and rewards for mining on behalf of their users. As leaders in the industry, they attract a larger customer base, which raises questions about whether this concentration of power makes blockchain appear more centralised. This evidences that blockchain isn't significantly challenging the status of centralised institutions, as databases show that specific mining pool companies have taken control of the industry, therefore concentrating the power that blockchain was initially designed to decentralise.

Elon Musk's capitalisation on the blockchain market can also serve as an example of how blockchain technology can be manipulated for financial gain, as he often reinforced centralised power structures, rather than promoting decentralisation. In a lawsuit, investors claimed that Musk's conduct constituted a 'deliberate course of carnival barking, market manipulation and insider trading,' [430] enabling him to defraud investors. His actions have led to significant price fluctuations in cryptocurrencies, which clearly highlights the impact that prominent figures can have on decentralised financial systems. Musk was recently appointed co-head of the Department of Government Efficiency (DOGE), which is a new advisory group that aims to reduce regulatory excess, particularly within the cryptocurrency sector. While some perceive Musk's involvement as a shift toward deregulation, others believe Musk will disproportionately benefit affluent individuals and large corporations, at the expense of the broader public, one critic even stated that Musk's appointment to the role is 'the ultimate corporate corruption.' [431]

Balancing these competing viewpoints requires legal intervention that preserves decentralisation's advantages without encouraging its liabilities. Regulatory measures such as mandatory transparency standards, accountability requirements for mining pools, and anti-manipulation rules for market actors could strengthen the integrity of decentralised systems while maintaining their core principle of autonomy. Policies like the EU's Markets in Crypto-Assets Regulation (see section 6) demonstrate how law can recognise blockchain's potential while introducing safeguards against abuse. A regulatory model that is focused on preventing fraud, ensuring data integrity, and promoting fair access, could transform decentralisation from

[428] IBM Newsroom, 'The Food on Your Holiday Table May Have Been Verified by Blockchain' (IBM, 23 December 2019) <https://newsroom.ibm.com/2019-12-23-The-Food-on-Your-Holiday-Table-May-Have-Been-Verified-by-Blockchain> accessed 19 October 2025

[429] Hashrate Distribution by Pool' (*Hashrate Index*, 2025) <https://hashrateindex.com/hashrate/pools> accessed 1 January 2025.

[430] Jonathan Stempel, 'Elon Musk Is Accused of Insider Trading by Investors in Dogecoin Lawsuit' (Reuters, 1 June 2023) <https://www.reuters.com/legal/elon-musk-is-accused-insider-trading-by-investors-dogecoin-lawsuit-2023-06-01/> accessed 9 December 2024.

[431] Daniel Trotta and Eric Beech, 'Trump Says Elon Musk, Vivek Ramaswamy Will Lead Department of Government Efficiency' (Reuters, 13 November 2024) <https://www.reuters.com/world/us/trump-says-elon-musk-vivek-ramaswamy-will-lead-department-government-efficiency-2024-11-13/> accessed 15 December 2024.

a disruptive risk into a regulated innovation. Ultimately, effective governance will legitimise decentralisation and therefore turn distributed trust into accountable trust.

4 Environmental and Social Impacts

While blockchain's architecture offers transparency and innovation, its environmental consequences, particularly through crypto asset mining, are profound. "Each bitcoin transaction generates carbon emissions roughly equivalent to driving a gasoline-powered car between 1,600 and 2,600 kilometres,"[432] these 'significant air pollution emissions,'[433] attribute to around '4.2 million premature deaths worldwide per year.'[434] Mining takes places in countries where healthcare systems are overburdened, so the added stress of pollution-related diseases are disproportionately affecting the most vulnerable members of society (e.g., children, the elderly, and low-income families). This global health crisis emphasises the urgent need for global cooperation and regulations to mitigate the environmental toll of cryptocurrency mining.

One solution is to incentivise mining hubs to rely on clean energy sources (e.g., "mining operations powered by renewable energy, such as solar or wind, could drastically reduce emissions"[8]). This would directly reduce the carbon footprint of cryptocurrency mining, and the resulting improvement in air quality in mining regions would benefit human health. Moreover, with proper tax frameworks, blockchain can address environmental and social impacts effectively. Strategies like tiered taxation, based on energy consumption and fiscal tools, can encourage behavioural changes among blockchain developers or persuade Proof of Work miners to adopt measures that significantly reduce energy consumption.[435]

Ethereum's recent transition from Proof of Work (PoW) to Proof of Stake (PoS) exemplifies how adopting greener technologies can dramatically lower energy usage while maintaining blockchain functionality[436]. This transition has 'achieved a stunning 99.992% reduction in energy consumption, setting a new standard for sustainable blockchain technology.'[437] In contrast to mining, PoS involves participants locking up cryptocurrency as collateral in order to become validators within the network. This process removes the need for energy-intensive computational work that is typically associated with mining, where complex mathematical calculations are required. This shift, from mining to staking, highlights that there is room for the benefits of blockchain to extend to poorer communities, without exacerbating environmental or social challenges.

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[432] Nuri Onat and Murat Kucukvar, 'The Large Environmental Consequences of Bitcoin Mining' (*LSE Business Review,* 8 November 2024) <https://blogs.lse.ac.uk/businessreview/2024/11/08/the-large-environmental-consequences-of-bitcoin-mining/#:~:text=The%20findings%20reveal%20that%20approximately,metric%20tons%20of%20CO%E2%82%82%20annually> accessed 12 Dec 2024.

[433] Shali Tayebi and Heresh Amini, 'The Flip Side of the Coin: Exploring the Environmental and Health Impacts of Proof-of-Work Cryptocurrency Mining' (2024) 252 Environmental Research Part 1.

[434] World Health Organization, 'Air Pollution' (*WHO*, 24 October 2024) <https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health> accessed 31 December 2024.

[435] Jon Truby, 'Decarbonizing Bitcoin: Law and Policy Choices for Reducing the Energy Consumption of Blockchain Technologies and Digital Currencies' (2018) 44 *Energy Research & Social Science* 399.

[436] Mayukh Mukhopadhyay, 'Ethereum's Green Leap to PoS: From PoW – Will Bitcoin Ever Follow?' (*Medium*, 13 July 2024) <https://mayukhdifferent.medium.com/ethereums-green-leap-to-pos-from-pow-will-bitcoin-ever-follow-a3a172338333> accessed 4 December 2024.

[437] Jordan Cole, 'Staking in Crypto: How PoS Reduces Energy Consumption' (*BlockApps*, 21 October 2022) <https://blockapps.net/blog/staking-in-crypto-how-pos-reduces-energy-consumption/> accessed 12 December 2024.

Despite its potential to empower citizens, the environmental impact of mining operations minimises the progress governments have achieved in advancing effective environmental legislation. While regulation through taxation could mitigate some of these issues, it also raises concerns about the irrevocable environmental consequences of blockchain. Howson's paper concludes that a 'global coordinated ban'[438] may be the most effective policy approach, a sobering assertion to reflect the irreparable damage caused by blockchain.

5 Smart Contracts

Blockchain also introduces the innovation of smart contracts (SCs). Unlike traditional contracts, SCs are self-executing agreements where contract terms are written into code, eliminating the need for a third party. For marginalised communities, SCs could provide access to services like loans or insurance, which are often inaccessible due to the need for traditional intermediaries. For example, in a leasing scenario, a smart contract can automatically unlock a vehicle once payment is confirmed, eliminating the need for manual intervention.[439] Several jurisdictions have enacted specific statutes dedicated to smart contracts, providing a legal framework for their use; Italy stands as a pioneer in legally equating smart contracts to traditional contracts.[440] Under the Italian Civil Code, a smart contract can now be legally equated to a traditional contract, provided that the contract adheres to general legal requirements particularly consent, object, and cause, all of which are necessary to form a valid contract.

In contrast, as illustrated by the hack of Crema Finance, the unregulated use of smart contracts can expose vulnerabilities, which may lead to fraudulent activities and financial losses. Crema Finance functioned upon a smart contract basis, which was manipulated by a hacker, who exploited a vulnerability in Crema's protocols and stole approximately $8.8 million.[441] This weakness of SCs demonstrates a critical need for regulation to ensure their security and functionality. As noted by CertiK co-founder Ronghui Gu, such incidents highlight 'the constantly shifting frontier of crypto security,'[23] but this could potentially undermine blockchain's promise of trust and efficiency

In an academic paper, Raskin[442] states that 'smart contracts exist in preexisting legal structures,' and that 'courts need not upend extant jurisprudence to accommodate smart contracts,' this suggests that global regulation would not be so difficult to enforce. Yet, this opinion faces backlash, as another academic paper questions whether SCs represent progress or a regression in the balance between justice and efficiency.[443] This discourse raises concerns about the future of blockchain and its authority, as the absence of clear regulation

[438] Peter Howson and Alex de Vries, 'Preying on the Poor? Opportunities and Challenges for Tackling the Social and Environmental Threats of Cryptocurrencies for Vulnerable and Low-Income Communities' (2022) 84 Energy Research & Social Science.

[439] Andreas Furrer, 'The Embedding of Smart Contracts into Swiss Private Law' (trans. from German) (1 March 2018) Anwaltsrevue 103-115 <https://www.mme.ch/en/magazine/publications/the-embedding-of-smart-contracts-into-swiss-private-law.> accessed 30 December 2024.

[440] Italy, Law No. 12/2019, Article 8-ter, para 2.

[441] CertiK, 'Crema Finance Exploit' (*CertiK,* 4 July 2022) <https://www.certik.com/resources/blog/4XzSJEeWC2bRppR9CeBckw-crema-finance-exploit?> accessed 30 December 2024.

[442] Max Raskin, 'The Law and Legality of Smart Contracts' (22 September 2016) 1 Georgetown Law Technology Review 304 (2017).

[443] Kilian Bosson, *Smart Contracts and Swiss Obligation Law: The Conclusion "On the Chain" of the Contract* (Faculty of Law, University of Neuchâtel 2019).

could hinder its ability to realise its full potential. The lack of effective global regulatory frameworks could setback blockchain technology from its intended goal of decentralisation.

6 Regulatory Frameworks

6.1 The Markets in Crypto-Assets Regulation (MiCAR)

MiCAR represents a significant step towards establishing a regulatory framework for blockchain technology, as it aims to create a unified regulatory environment across EU member states.[444] While blockchain provides the underlying infrastructure that enables crypto assets to exist, MiCAR's focus lies in governing how those assets (stablecoins, tokens, and crypto lending products) are issued, traded, and safeguarded across EU member states. An example of this is the regulation of stablecoins and asset-referenced tokens under MiCAR could provide a safer means for individuals to transact and store value, which in turn could enhance financial inclusion globally,[445] beyond traditional banking systems.

Although the regulation aims to protect consumers, the strict focus on regulatory compliance could lead to a scenario where blockchain becomes a barrier to entry, ultimately monopolising power amongst the wealthiest stakeholders and dismissing the democratisation that blockchain technology intends to promote. Therefore, to enhance MiCAR's effectiveness, regulators could consider a more nuanced approach that allows for interest payments under specific conditions[446]. For example, tiered permissions based on the type of stablecoin (asset vs e-money tokens) could be introduced. Interest-bearing stablecoins could be allowed where issuers meet capital requirements and conduct regular audits. By incorporating flexibility into the framework, MiCAR could encourage the growth of crypto lending, while still safeguarding financial stability.

6.2 The Exploitation of Blockchain

It is crucial to consider how regulatory frameworks might negatively impact blockchain. Instead of merely limiting its potential, such frameworks could be deliberately weaponised by authorities with malicious intent. Blockchain's appeal lies in its immutability and transparency, but these very features can just as easily be used by states to fuel surveillance capitalism. As previously discussed, regulations often permit the collection and reporting of private data, namely through schemes including KYC (Know Your Customer) and AMS (Anti-Money Laundering Standards), with claims of protecting citizens, yet still exposing private data. Still, as Zuboff notes, the 'unilateral claiming of private human experience'[29] can also be used as 'free raw material for translation into behavioral data.'[447]

Blockchain's transparent nature makes it easily monitored and scrutinised, potentially opening 'a new paradigm of surveillance capitalism,'[30]. Echoing previous discussions of the global adoption of smart contracts; the automation of these contracts, combined with surveillance

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[444] European Securities and Markets Authority, Markets in Crypto-Assets Regulation (MiCAR) (*ESMA*, 2024) <https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica> accessed 20 December 2024.

[445] Chainalysis, MiCA's Stablecoin Regime: Challenges Part 1 (Chainalysis, 28 November 2022) < https://www.chainalysis.com/blog/mica-stablecoin-regime-challenges-part-1/ > accessed 1 December 2024.

[446] Freshfields, 'MiCAR Perimeter Issues: Tokenized Deposits and Payment Services' (*Freshfields*, 2 January 2025) < https://technologyquotient.freshfields.com/post/102js80/micar-perimeter-issues-tokenized-deposits-and-payment-services > accessed 2 January 2025.

[447] Shoshana Zuboff, 'Harvard Professor Says Surveillance Capitalism Is Undermining Democracy' (Harvard University, 28 March 2019) https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/ accessed 15 December 2024.

capitalism, could allow states to exert significant control. It is further argued that 'states enjoy an undeniably superior position in their ability to control citizen behavior by making access to public goods and services conditional.'[448] This suggests that regulations could demand compliance with government rules as a prerequisite for accessing blockchain services, escalating the harmful effects of centralisation on vulnerable communities. For instance, smart contracts could be programmed to deny access to welfare benefits, healthcare, or even financial systems unless individuals meet state-imposed criteria.

Another example of the exploitation of blockchain is the technology's legalisation in Russia to evade sanctions.[449] This strategic decision has enabled companies in Russia to bypass traditional financial systems, effectively evading the accountability enforced by international restrictions under Western sanctions. While Ukraine's use of blockchain-based donations has been transparent in supporting the safeguarding of civilians[450], Russia's use of cryptocurrency has been to prolong a conflict that exacerbates human suffering. This distinction highlights how regulation can limit blockchain's decentralising potential, instead reinforcing dictatorial state control over financial systems, while using blockchain for unethical and malicious activities that harm the innocent.

7 Accessibility and Social Justice

Finally, the statement that 'blockchain could empower citizens,' fails to consider the significant barriers that exclude the most vulnerable populations. The technical complexities of the technology, including the need to understand its language and mechanisms, act as a barrier for those without access to adequate education or the expensive hardware required for running the technology. Unless significant regulatory efforts are made to provide access through education, such as a mandatory secondary school course on blockchain[451], this technology will remain a tool for the privileged, rather than a means of empowerment for the world's most vulnerable populations.

8 Conclusions

In conclusion, blockchain is a disruptive technology whose idiosyncrasies empower citizens in a social context, by "combatting disinformation through blockchain's supply-chain record for facts,"[452] and in economic contexts, as "anyone with an internet connection can participate in the global economy."[453] However, blockchain's potential is highly influenced by regulation,

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[448] Firat Cengiz, 'Blockchain Governance and Governance via Blockchain: Decentralized Utopia or Centralized Dystopia?' (2023) 6(4) *Policy Design and Practice* 446 <https://doi.org/10.1080/25741292.2023.2247203> accessed 19 December 2024.

[449] Chainalysis, 'Russia's Cryptocurrency-Legislated Sanctions Evasion' (*Chainalysis Team*, 7 December 2022) < https://www.chainalysis.com/blog/russias-cryptocurrency-legislated-sanctions-evasion/ > accessed 11 December 2024.

[450] Spencer Feingold, 'The Role of Cryptocurrency in the Ukraine War: How Crypto Is Helping to Fund the Fight Against Russia' (*World Economic Forum*, 21 March 2023) <https://www.weforum.org/stories/2023/03/the-role-cryptocurrency-crypto-huge-in-ukraine-war-russia/> accessed 30 December 2024.

[451] Blockchains.com, 'Education Initiative' (*Blockchains.com*, 2025) <https://www.blockchains.com/education-initiative/> accessed 3 Jan 2025.

[452] Kathryn Harrison and Amelia Leopold, 'How Blockchain Can Help Combat Disinformation' (*Harvard Business Review,* 19 July 2021) <https://hbr.org/2021/07/how-blockchain-can-help-combat-disinformation> accessed 12 December 2024.

[453] BingX, 'The Social Impact of Cryptocurrencies: What Does It Affect?' (*Medium*, 14 October 2022) <https://bingxofficial.medium.com/the-social-impact-of-cryptocurrencies-what-does-it-affect-3cbe12457cf2> accessed 30 December 2024.

which depends on whether authorities perceive the technology as a threat or an innovation. While the immutable nature of blockchain ensures accountability, it can also be weaponised through regulation, as seen in surveillance capitalism and by figures like Elon Musk seeking to capitalise on the market. For blockchain to remain a positive force for social justice, regulation must seek an equilibrium in ensuring blockchain achieves decentralisation and empowers citizens, while containing its impact to prevent misuse.

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SHAPING SOCIAL JUSTICE

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