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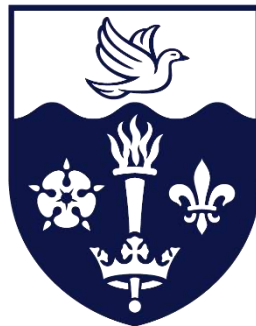
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Volume 2 (2024-25)

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Volume 2 (2024-2025)



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Foreword

It is a pleasure to foreword a collection of articles that brings together reflections, debates and interests of law students and staff in presenting the legal research and discussing current legal issues.

The articles presented here, covering a range of debates and interests, indicate the wider strands of interest in the School of Criminology, Politics and Law – the articles show interest of our students and staff in intellectual debates, concerning matters of national and international law, discussions of personal, national and international securities and the key areas of human rights, social justice and inequalities and what that looks like in twenty-first century legal discussions and discourse, nationally, internationally and globally.

The goal of the Hull Law Review is to provide a platform for young scholars to debate, present and publish their interests, and this exciting and engaging collection fully embraces this aim. My thanks go to the editorial team for all their hard work in bringing the volume together and to the contributors for their diligence and willingness to share their interests and engage with current legal discourse and the future of legal education.

Professor Helen Johnston

Head, School of Criminology, Politics and Law

Editorial

The Hull Law Review, established in 2023, serves as an academic publication wing of the School of Criminology, Law and Politics. The editorial team for 2024/2025 is excited to present the second volume of the review. The aim of the editorial team is to encourage engagement of students and academics with their work and to provide, particularly the young scholars and students, the early steppingstones for many upcoming future academics and legal scholars. The editorial team strives to provide a forum for intellectual debate and research to flourish for the benefit of legal discourse.

As a publication wing in its infancy, feedback is welcomed from all readers. In addressing any unsatisfactory elements present at this early stage, the Hull Law Review hopes to continue to grow the review and provide readers with intellectually stimulating relevant legal discourse.

Papers compiled within this review consist of submissions from PhD students, some early career scholars alongside some established academic of law within the areas of crime, human rights, humanitarian developments and questions of the future for the legal landscape involving the development of artificial intelligence and legal education.

In this volume, the first paper by Elizabeth Shaw, ‘Should Misogyny be Considered a Hate Crime?’ examines whether misogyny should be classified as a hate crime in England and Wales. It debates including sex and gender as protected characteristics and creating offences for stirring up hatred based on sex. The argument suggests current laws on violence against women are adequate but supports extending hate crime laws to address online misogyny and extremism linked to violence and terrorism. Additionally, the text examines climate change's impact on global agriculture, noting declines in crop yields due to rising temperatures, altered rainfall, and extreme weather. It advocates for adaptive strategies like crop diversification, better irrigation, and climate-resilient crops. The discussion emphasizes the need for government investment in sustainable practices and climate research to mitigate impacts and secure food supplies worldwide.

Rebecca Lamb-Busby's Paper titled, ‘The Tensions between Human Rights and National Security in the UK: A Case Study of Shamima Begum’ highlights a very important area within human rights law and the role it plays within the wider context of state authority. When can a state restrict a fundamental right? Should it be possible? How proportionate is the decision to do so? The morality of such decisions is often left behind when discussing the tension between human rights and national security, which this paper examines the morality of such decisions and the tensions of proportionately to restrict a right in the name of national security.

Emmanuel Kwegyir Arthur-Ewusie's ‘The Cross - Cultural Legitimacy of Human Rights: Can Human Rights be Relocated in Cultures different from their Origin?’ asks what does it mean to have a human right? Is it a right which all human share regardless of culture, identity or moral upbringing? Can a human right be universal when it comes from a western origin to a non-western culture? This piece aims to answer such questions, examining the cross-cultural legitimacy of human rights, the complex questions it raises surrounding the ability to introduce such fundamental rights to a culture beyond the origins. In doing so what kind of tensions arise from the universal applicability of human rights and cultural relativism? Can a middle ground be reached regarding this view?

Emilia Hinchliffe's, 'Reforming the Law on Domestic Abuse in England and Wales: A Critical Examination of 'Clare's Law' argues domestic abuse - a crime often committed behind closed doors - raises challenges of how best to deal with an offence so closely guarded. To aid individuals in making informed decisions regarding their partners the Clare's Law scheme was introduced allowing partners to seek domestic violence disclosures. This piece argues to reform the law on domestic abuse the Clare's Law scheme is unfit for purpose as it currently stands, limitations such as police resources and implementation of the scheme within police forces.

Sam Lomax's 'Critical Analysis of the Practices and Approaches to ICA, in light of the introduction of the Singapore Convention on Mediation' argues, international trade often the lifeblood of many nations, the functioning of international commerce relies on having a solid form of dispute resolution. This paper aims to provide an analysis of the practices and the approaches taken to International Commercial Arbitration following the introduction of the Singapore convention on mediation. This paper aims to review the evolving landscape following the introduction of the Singapore convention, how it alters the balance between arbitration and mediation upon the dispute resolution stage, how does it compare to other established arbitral instruments.

Oluwanifise Samuel Adeleke's paper 'Regulatory Frameworks for AI Governance: Why the Global South Must Play a Central Role' emphasizes the importance of inclusive AI governance, highlighting the dominance of the Global North in setting regulations and the marginalization of the Global South. It advocates for equitable participation, resource sharing, and the development of indigenous AI ecosystems in developing regions. The article underscores that genuine collaboration between North and South is essential to create fair, effective, and context-aware global AI policies that serve all humanity, reducing inequalities and fostering technological sovereignty.

Olawale Emmanuel Oyeboade's 'Post-9/11 Us Intervention in Afghanistan: Challenges to Unprivileged Combatants' Rights' analyzes the impact of the post-9/11 US intervention in Afghanistan on the legal rights of unprivileged combatants, highlighting challenges in balancing security with human rights under international law. It discusses legal frameworks like IHL and IHRL, US detention practices, court decisions, and international responses. The study emphasizes the need for clearer legal definitions, stronger oversight, and policies that uphold human rights while addressing security concerns, advocating reforms to prevent abuses and ensure accountability in future conflicts.

Jashim Chowdhury's concept note about the Hull Law Conference titled "*Democracy and State Building in Bangladesh after the breakdown of One-Party Dominance*" outlines the context of the conference, a brief note on Bangladesh's struggle with constitutional reform and democratic revival. Three selected papers from the Conference are then featured in this Volume. First, Abdul Halim's paper on '*Effectiveness of the National Human Rights Commission of Bangladesh: Compliance with the Paris Principles*' assesses the institution's adherence to the Paris Principles, focusing on capacity-building under the NHRC Act 2009. It examines the institution's role within the frameworks of the Paris Principles and GANHRI, analyzing selected decisions on human rights violations. The study concludes that the NHRC needs to enhance its understanding of quasi-judicial functions to improve complaint handling and meet international accreditation standards. Next, Mohammad Mohiuddin and SM Ashfaqur Rahman's '*Rohingya Influx from Myanmar and the Associated Security Challenges in Bangladesh: An Empirical Study in Kutupalong Camp, Cox's Bazar*' analyzes the multidimensional security challenges caused by the Rohingya refugee crisis in Bangladesh, highlighting humanitarian, economic, social, environmental, political, and security issues. It discusses the roots of the

crisis, including persecution in Myanmar and Bangladesh's response, alongside challenges like inflation, crime, environmental degradation, and political tensions. The study emphasizes the risks of radicalization and proposes policy solutions such as enhanced security, international cooperation, and long-term integration strategies, underscoring the crisis's impact on regional stability and security. Lastly, Nafees Ahmad and Sk. Iftesham Islam's '*Embedding AI in the Constitution of Bangladesh: A Case for the Framework for Algorithmic Constitutionalism*' advocates for embedding Artificial Intelligence principles into Bangladesh's Constitution, creating a framework called algorithmic constitutionalism. It emphasizes AI's role in governance, accountability, and digital rights, highlighting risks like bias and opacity. The paper suggests multidisciplinary approaches, international examples, and future-proofing constitutional laws to ensure justice, fairness, and democratic values in a digital society. Bangladesh's reform offers a unique opportunity to set a global precedent in digital constitutionalism.

Last piece of this Volume, the book review contribution by Emmanuel Chukwufumnaya Chukwueloke examines Rachel Ann Dunn, Paul Maharg and Victoria Roper (eds), *What Is Legal Education For? Re-Assessing the Purposes of Early Twenty-First Century Learning And Law Schools* (Routledge, 2022). The review calls for law schools to broaden their focus beyond practice, fostering civic participation and addressing inequalities, to ensure relevance in a complex, globalized world. This is based on the book's central argument that traditional doctrinal training is insufficient for modern legal education. The book calls for pedagogical innovation, diversity, and technological integration, while still preserving foundational legal knowledge.

The Editorial Team would like to express our gratitude to our Patron, Professor Helen Johnston, the time and effort provided for by our Peer Reviews, Authors and our faculty Coordinator Dr. Jashim Chowdhury for his vital support throughout the publishing process. We acknowledge with deep gratitude the invaluable contribution by our internal and external independent peer reviewers and Bangladesh Conference commentators whose input shaped the selected papers extensively. We would like to thank the wider members of the editorial team for their contributions and efforts to ensure the journal remains intellectually stimulating for the benefit of its readers.

On Behalf of the Editorial Team,
John Kaya and Briony Dodds

The Josephine Onoh Memorial Lecture 2024

Lindsay Moir*

The University of Hull has a long-standing and rich heritage in the field of international law. A key element of this particular strength – initially building upon it, and now proudly reflecting its enduring vitality – is the Josephine Onoh Memorial Lecture.

A graduate of the University, having received her LLB degree in 1982, Josephine Onoh had developed a keen interest in international law during her undergraduate studies. At the time of her death (28 November 1983, in an air accident at Enugu, Nigeria, along with 52 others), she was a PhD student in the Law School, researching questions regarding a possible right to hot pursuit on land in international law. In the aftermath of the tragedy, and with the support of the Onoh family, friends and staff in the Law School, a fund was created to honour her memory with the stated purpose of encouraging and supporting the study of international law at the University of Hull. Since its establishment in 1984, not only has the Josephine Onoh Memorial Fund facilitated an exceptional series of Annual Lectures, it has also been able to provide numerous scholarships and prizes to those undergraduate and postgraduate students excelling in international law.

The first Josephine Onoh Memorial Lecture was delivered on 29 January 1985 by HE Judge Taslim Elias, President of the International Court of Justice (also a compatriot of Josephine Onoh and the recipient of an Honorary Doctorate in Law from the University of Hull in 1980). His Lecture examined ‘New Trends in Contemporary International Law’ and, in introducing the Lecture, the Chancellor of the University, Lord Wilberforce, suggested that it would appeal to both students and experts in the subject, convincing both that ‘international law is a relevant, exacting and expanding discipline, the understanding of which is of vital importance for all who are concerned with the health of the world community’. The Lecture series has continued in a similar vein, with some of the most eminent names in international law delivering Lectures on a wide range of topics of relevance and interest to both scholars and practitioners, demonstrating not only the diversity of complex and controversial issues that international law has to grapple with, but also how it has sought to address the various challenges of the contemporary world.

An edited collection of Lectures from 1985-2000 was published in 2002 by Kluwer Law International (David Freestone, Surya Subedi and Scott Davidson (eds), *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures*), containing the Lectures of such luminaries as HE Judge Sir Robert Jennings, Sir Ian Sinclair, Philip Allott, Dame Rosalyn Higgins, Sir Ian Brownlie and Martti Koskenniemi – accurately described by the editors in their Introduction as ‘a rich and multifaceted contribution to the scholarship of international law by some of the leading scholars and practitioners in the field.’

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As Professor of International Law at the University of Hull since 2005, it has been my responsibility – and both a pleasure and a privilege – to carry the baton from that point on, arranging 18 of the 35 Lectures to date and working to continue the lasting legacy and memory of Josephine Onoh, maintaining the Law School's links with the Onoh family whilst ensuring that the quality and diversity of the Lecture series remains undiminished. Indeed, the Lecture is still an annual event of great distinction, and the University of Hull has been fortunate to continue to attract many of the most important and influential international lawyers of our time to deliver it. More recent speakers have included Vaughan Lowe, William Schabas, James Crawford, Sir Nigel Rodley, Philippe Sands, Malcolm Shaw, HE Judge Julia Sebutinde, Sir Iain Macleod, Sir Michael Wood and Phoebe Okowa, and topics discussed have included state responsibility, international criminal prosecutions, countermeasures, climate change and environmental law, maritime terrorism, peace-making and international security, several aspects of human rights, territorial disputes, the recognition and representation of governments, and the role of international law (and international lawyers) in UK foreign policy.

What follows below is the text of the most recent Josephine Onoh Memorial Lecture, delivered on 27 November 2024 by Rachel Murray, Professor of International Human Rights Law at the University of Bristol. Addressing the complex question of how best to ensure the implementation of decisions of international human rights monitoring and enforcement bodies (and specifically the African Court and Commission on Human and Peoples' Rights), Professor Murray outlines her ongoing research examining whether a model law on enabling legislation might serve as a practical tool to assist African States in this regard. The intention is to publish the text of future Lectures in subsequent issues of the Hull Law Review and, in the words of my former colleagues David Freestone, Surya Subedi and Scott Davidson, that these will represent a 'continuing and tangible monument to Josephine Onoh, whose passion for the subject of international law was so sadly curtailed.'

Implementation of African Human Rights Bodies' Decisions: Is a Model Law on Enabling Legislation a Way Forward?

Rachel Murray*

1. Introduction

Thank you very much for the invitation to speak and I am honoured to give this Lecture in memory of Josephine Onoh. I hope I can do her justice as I understand that she was hugely courageous and lost her life in re-entering the plane crash to save others.

I want this Lecture, therefore, to have a positive note, which is often not the case when speaking of international human rights law, nor of the African system. Indeed, I have seen in over two and a half decades of working with the African system that it is often perceived unfavourably when compared to others, and that the African system is presented as something that is dismissed, is developing, and needs to learn from others. In fact, I am constantly impressed by the dynamism and entrepreneurialism of the African human rights system and the lawyers who work within it, and I wanted to share an innovation with you this evening.

I am going to talk about the implementation of decisions emanating from supranational bodies such as the European Court of Human Rights, the Inter-American Court or Commission of Human Rights, UN Treaty Bodies and, what will be the focus of my talk, the African Court and Commission on Human and Peoples' Rights.

This research project arises from an ESRC-funded grant, which ran until 2019, led at Bristol University by myself in collaboration with Prof Viljoen at the Centre for Human Rights in Pretoria, as well as others at Essex and Middlesex Universities in the UK and the Open Society Justice Initiative.

The purpose of the project was to examine what happened to decisions or judgments from the African, Inter-American and European Courts and Commissions and treaties bodies of the UN once they had been adopted. We were looking to see if the reparations ordered in those decisions were actually implemented, addressing the following questions in particular:

- Who got to hear about it, both in government and beyond?
- Whose responsibility did it then become to implement it, and to coordinate the implementation of various reparations?
- What mechanisms and procedures had to be in place to ensure that the reparations were implemented, and who had to initiate these procedures?
- What influences came into play regarding whether a reparation was actually implemented or not?

* Professor of International Human Rights Law, University of Bristol. This is the transcript of the Josephine Onoh Memorial Lecture at the University of Hull, 27 November 2024.



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Our Project started from the premise that human rights 'systems' are a complex web of interaction and interdependence between various institutional actors who collectively may ensure that implementation occurs.

We selected a number of decisions from these supranational bodies and then traced the path between the decision and subsequent action by public authorities, through desk-based research, workshops, data collection and interviews.

2. What is Implementation?

Throughout our project, we took implementation to mean the process by which measures are taken – such as the adoption of legislation, or bureaucratic or administrative steps; compliance we saw as the status of the actions – whether they are in line with what the international body required, i.e. the outcome of the implementation. We also recognised, however, that these terms can be conflated and used interchangeably.

The African Commission and Court on Human and Peoples' Rights lament their implementation record. They publish statistics on the poor rate of compliance with their judgements and decisions. This, they say, goes to the heart of their legitimacy, concerned that states do not take them seriously enough to implement their findings.

The significant amount of literature and discussion on implementation and compliance sometimes attributes the failure to implement to a lack of 'political will' on the part of states which is often, rhetorically at least, used as a catch-all phrase, and one which I (and others) have not found to be particularly helpful in identifying where the real obstacles lie.

I also think that this generic term masks what are a complicated web of factors, relationships and actors affecting the domestic implementation, and ultimately compliance with, international judgments. In fact why states fail to respond to judgments or only implement in part what is required of them can be down to a whole range of factors, including: that those who are responsible for the implementation of a decision are not aware of it in the first place; that they are not clear as to what they are required to do; or that there is no system or process in place to clarify who should take the lead in implementing certain aspects of the decision (who should coordinate it, for example). As there are relatively few of these decisions or judgments, there may be no incentive to create systems to respond to them.

One of the first positives of this project (and I did not expect to find this when we began) was that there is more implementation than may at first appear. Sometimes it is simply not recorded; sometimes it goes forward and then backwards; sometimes states do not want to publicise that they have implemented an international judgment (one government official, for example, told us that this was the case for fear of a flood of compensation claims).

In addition, one of our other findings was that implementation is rarely automatic. Processes and systems will be required, whether this is to pay compensation (whose budget does this come from, which ministry is responsible, and how does it reach the victims' bank account?), to open an investigation or order a re-trial, to adopt legislation, or to engage in other action.

This then prompted us during the project to look further into what happens when bodies like the African Commission and Court on Human and Peoples' Rights adopt a decision: who hears of it?; who is passed information?; who coordinates any action at the national level?; what triggers which department to pay that compensation?; etc.

And one of the things that arose is that, actually, even with the best ‘political will’ in the world, administrative, bureaucratic and legal triggers are needed to ensure that that international decision is able to be implemented at the national level.

I am interested in talking to you this evening about the legal triggers. So, whilst the state may be bound by international law and obliged, for instance, to implement the African Court judgment to which it was a party – if not (and this is debated) the decision of the African Commission, the question is how the state authorities (i.e. the executive, legislature and judiciary) then respond to it in practical terms at the national level. What is the position of these international decisions and judgments at the national level? What legal status do they have?

Many states have foreign judgments laws, whereby the judgments of one state can be enforced by the courts of another. But these generally do not include international decisions or judgments among what are considered to be ‘foreign judgments’.

This is where ‘enabling legislation’ comes in, and a fantastic report written by Kate Fox Principi, who worked for the OHCHR, a few years back in 2017 identified a range of examples (mostly European) which provided, in various ways, international decisions with the domestic legal status to facilitate their implementation, so that the state authorities will then be able to respond to the international decision as they would a domestic court decision.

3. A model law on enabling legislation

This prompted us to consider the idea of practical tools to assist African states to implement decisions and judgments emanating from the African human rights bodies. Together with the Centre for Human Rights at the University of Pretoria, and the Pan-African Parliament, we are developing a Model Law on the Implementation of Decisions of African Human Rights Bodies. The Pan-African Parliament (PAP) is an organ of the African Union and, as part of its mandate, it has the ability to adopt model laws, which it has done on a number of occasions (for instance on disability, and a model police law).

A colleague at the PAP, Clement Phebe Mavungu, and myself presented the idea of a conference in Arusha in June 2024 and, after presentations before the Committee on Justice and Human Rights of the Pan-African Parliament, it has now authorised the adoption of this model law.

We have seen through our research that model laws can provide practical guidance for parliamentarians; that they can set a standard; and also that they can be not just a base line but also examples of good practice. For Africa, these can be home-grown, tailored to the continent’s own context, and that of its regional bodies. So, we saw this model law as providing a menu of options for states. In addition, as has been seen with other model laws, the actual process of its development is also, in and of itself, a useful advocacy tool to raise awareness of the implementation of these decisions.

We presented a policy framework with an outline of the content of the model law to the PAP Committee on Justice and Human Rights in early November 2024. The PAP then adopted a further resolution which requests the Committee on Justice and Human Rights to proceed with the development of the Model Law on Implementation of Decisions of African Human Rights Bodies. We are now in the process of considering precisely what to include in this Model Law, namely: how to assist states in determining budgetary issues when they are implementing these decisions and judgments; who will coordinate activities; who will report

to others and to the African human rights bodies; and what status it will have in domestic law. Additional provisions will focus on types of reparations, such as compensation and just satisfaction, and how to address systemic issues.

This draft will then be circulated for consultation with the three African human rights organs, and then, after the adoption of a draft by the plenary of the PAP, with states, parliamentarians, civil society and others.

This will be the first model law of its kind, and we hope it may provide not only a positive inspiration to others but also a practical tool for state authorities to better implement these international decisions and judgments.

Should Misogyny be Considered a Hate Crime?

Elizabeth Shaw*

Abstract

The objective of this article is to address the rising call from advocates and politicians for misogyny to be considered a hate crime under English and Welsh law. Specifically, it focuses on two main issues: 1. The potential inclusion of sex and gender as a protected characteristic for the purposes of hate crime legislation (that is, for aggravated offences under the Crime and Disorder Act 1998 and enhanced sentencing for hate crimes under the Sentencing Act 2020), and; 2. The inclusion of an offence for stirring up hatred on the basis of sex. In assessing these questions, the article pays attention to the current legal framework that addresses violence against women and girls (VAWG), explores the role that misogyny plays in VAWG (particularly in terms of domestic abuse and sexual violence), and concludes that a hate crime approach to these offences would not be beneficial, and would in fact cause more harm than good. It then considers the rise of online misogyny and its correlation with extreme acts of violence, paying attention to novel cases of terrorism, mass killings, and their links with online misogynist extremism, concluding that an introduction of an offence of stirring up hatred on the basis of sex would help to tackle this rising issue.

Key Words

Misogyny, Hate Crime, Violence against Women and Girls, Protected Characteristics, Misogynist Terrorism

1. Introduction

Psychological and physical violence against women and girls (VAWG) is a prevalent issue worldwide. According to the World Health Organization in 2021, approximately 1 in 3 women have experienced physical or sexual violence¹, and men are overwhelmingly the most common perpetrators². Such violence can manifest in the form of domestic abuse, sexual offences, and harassment. Many consider the cause of this violence to emanate from patriarchal structures, and the misogynistic values that are ingrained in society³. Because of this, there is a rising argument from scholars and politicians that misogyny should be considered a hate crime⁴.

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¹ Brenda Gutierrez and Campbell Leaper, 'Linking Ambivalent Sexism to Violence-Against-Women Attitudes and Behaviours: A Three-Level Meta-analytic Review' (2024) *Sexuality & Culture* 851, 851; World Health Organization, 'Violence against Women' (2024) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> accessed 25 November 2024

² Ibid

³ Gwen Hunnicutt, 'Varieties of patriarchy and violence against women: Resurrecting "patriarchy" as a theoretical tool' (2009) *Violence against Women* 553

⁴ JaneMaree Maher, Jude McCulloch and Gail Mason, 'Punishing Gendered Violence as Hate Crime: Aggravated Sentences as a Means of Recognising Hate as Motivation for Violent Crimes against Women' (2015) *Australian Feminist Law Journal* 177

Misogyny is defined by the oxford dictionary as the ‘dislike of, contempt for, or ingrained prejudice against women’. Kate Manne states in her book *Down Girl: The Logic of Misogyny* that we should understand misogyny as ‘a property of social environments in which women are liable to encounter hostility due to the enforcement and policing of patriarchal norms and expectations⁵ – patriarchy being a system of social structures and practices in which men dominate, oppress and exploit women.’⁶

Hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people,⁷ and are defined by the Government and police forces in England and Wales as “any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice, based on a person’s disability or perceived disability; race or perceived race; or religion or perceived religion; or sexual orientation or perceived sexual orientation or transgender identity or perceived transgender identity”.⁸ A hate crime is not an offence in itself; however, crimes motivated by, or involving hostility based on these protected characteristics are considered ‘aggravated’, and this must be identified and reflected in the sentence imposed.⁹ Whilst sex and gender are protected characteristics in England and Wales under the Equality Act 2010,¹⁰ for the purposes of protection from discrimination, they are not protected characteristics under hate crime legislation – namely the Crime and Disorder Act 1998, which deals with aggravated offences, and Section 66 of the Sentencing Act 2020, which allows prosecutors to apply for an uplift in sentence for those convicted of hate crime. Therefore, crimes against women, even those that are motivated by misogyny, are not treated as hate crimes.

‘Stirring up hatred’ offences are found under Part III of the Public Order Act 1986. Stirring up racial hatred is committed when someone says or does something which is threatening, abusive or insulting, and the person either intends to stir up racial hatred or makes it likely that racial hatred will be stirred up. Stirring up religious hatred or hatred on the grounds of sexual orientation is committed if a person uses threatening words or behaviour or displays any threatening written material and intends to stir up religious hatred or hatred on the grounds of sexual orientation.

This article examines proposals to add sex as a protected characteristic in hate crime legislation, and so references to ‘women’ relate to biological sex. This does not detract from the existing protection afforded to transgender identity under current hate crime law. The reform in question is related specifically to the addition of sex and biological gender in hate crime legislation.

This article seeks to answer the question ‘Should Misogyny be Considered a Hate Crime?’. It will focus on two main arguments:

1. Sex and gender should not be added as a protected characteristic under hate crime legislation for the purposes of aggravated offences and enhanced sentencing, and

⁵ Kate Manne, *Down Girl: The Logic of Misogyny* (OUP 2017) 19

⁶ Sylvia Walby, ‘Theorising Patriarchy’ (1989) *Sociology* 213, 214

⁷ World Bank, *Equality of Opportunity Lines* (World Bank, 2021) 116

⁸ Claire Brader, ‘Misogyny: a new hate crime?’ (*UK Parliament*, 2021)

<<https://lordslibrary.parliament.uk/misogyny-a-new-hate-crime/#:~:text=Disability%2C%20race%2C%20religion%2C%20sexual%20orientation%20and%20transgender%20identity%20are,crime%20in%20England%20and%20Wales>> accessed 6 November 2024

⁹ Sentencing Act 2020, s 66

¹⁰ Equality Act 2010, s 4

2. The law on stirring up hatred should be extended to include a new offence of stirring up hatred on the basis of sex.

The article will begin by exploring the current legal landscape of violence against women in the UK, addressing in particular how, whilst not recognising VAWG as hate crimes, the UK legislates crimes which predominantly affect women. It will then move on to how misogyny manifests in violence against women, focusing majorly on domestic abuse and sexual offences, as whilst there is a plethora of crimes which women are affected by, these two are the most major crimes against women we see in the UK. The article will then discuss why the UK should not include sex as a protected characteristic under hate crime legislation, and why doing so would be counterproductive. The article will then explore the issue of the rise of ‘incel’ ideology and the increasing risk of misogynist extremism and terrorism. It will argue that extreme acts of violence motivated by incel ideology and express hatred of women should be considered to be acts of terror and explain why a law criminalising stirring up hatred on the basis of sex is necessary to tackle this issue.

The discussion of sex and gender as a general protected characteristic in hate crime law will focus more on the most common forms of abuse women face, whereas the discussion of a specific crime of stirring up hatred on the basis of sex will discuss more novel events, such as mass killings and extremism. The reason for this is because common crimes against women which are concerned with misogyny rising from inherent social issues are of a completely different nature to incel ideology and extremism, which is focused on a rising cause of express hatred for women, which cannot be dealt with in the same way as other crimes against women.

2. The Current Legal Landscape of Violence against Women and Girls

In England and Wales, whilst sex is a protected characteristic under the Equality Act 2010 for the purposes of discrimination, sex is not a protected characteristic under hate crime legislation. Although this is the case, there are a number of statutes that address the most prominent forms of VAWG that occur in the UK. Statutes which legislate common forms of VAWG include the Domestic Abuse Act 2021, Protection from Harassment Act 1997, and the Sexual Offences Act 2003. These statutes govern some of the most predominant crimes against women that we see, such as domestic violence, sexual offences, and harassment.

Domestic Abuse

The Domestic Abuse Act was introduced in 2021 to improve protections for victims of domestic abuse and ensure that abusers are held accountable. The Act provides a comprehensive list of what can constitute “abusive” behaviour, including: physical or sexual abuse; violent or threatening behaviour; controlling or coercive behaviour; economic abuse; or psychological, emotional or other abuse. It does not matter whether the behaviour consists of a single incident or a course of conduct.¹¹ The Domestic Abuse Act protects both male and female victims of domestic abuse, however because women are disproportionately affected,¹² it can be said that the Act offers protection for women who experience VAWG in the form of domestic abuse. The Act was the first piece of legislation that comprehensively addressed the full spectrum of domestic abuse, recognising all elements of the offence, including

¹¹ Domestic Abuse Act 2021, s 3

¹² Office for National Statistics, *Domestic abuse victim characteristics, England and Wales: year ending March 2024* (ONS, 2024)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2024>> accessed 25 November 2024

psychological and emotional aspects, reflecting society's growing understanding of the different ways in which both men and women experience abuse.

Sexual Offences

The Sexual Offences Act 2003 also provides protection for women against violence. It covers crimes such as rape and sexual assault, putting a focus on consent and the reasonable belief in consent as central elements of many sexual crimes. The act redefines consent, strengthens laws on child sexual abuse and exploitation, as well as criminalises abuses of positions of trust.¹³ As with the Domestic Abuse Act, women and girls are disproportionately affected by sexual crimes, so by strengthening the law on sexual offences, this act provides a stronger framework for which to protect women and girls from sexual violence.

Stalking and Harassment

The Protection from Harassment Act 1997 is designed to protect individuals from harassment, stalking, and abusive behaviour. This statute applies to anyone; however it plays an important role in protecting women, who are at a higher risk of harassment and stalking.¹⁴ The Act provides for two criminal offences: pursuing a course of conduct amounting to harassment; and a more serious offence where the conduct puts the victim in fear of violence. The Coalition Government also added two specific criminal offences of stalking to the 1997 Act.¹⁵ There are civil injunctions that can be imposed and damages which can be awarded by civil courts in these cases. It has been provided that stalking and harassment should be addressed within the overall framework of VAWG and human rights, as women can often fall victim to crimes of harassment and stalking, sometimes as an aftermath of an abusive relationship. The ability of victims to seek civil injunctions is another way in which VAWG is addressed under the existing legal framework of UK law.

Although all of these statutes are gender-neutral, in the sense that they protect people of all genders, these laws address forms of violence that disproportionately affect women and girls and so can be said to form a layer of protection over gender-based crime in England and Wales, albeit not with the specific label of hate crime.

Other Jurisdictions

Some other regions, however, take a different approach towards protecting women from VAWG. The United Nations expressed that they were deeply concerned that the global prevalence of different manifestations of the gender-related killing of women and girls (also known as femicide) is reaching alarming proportions.¹⁶ In response to this, and the general increase in VAWG, The Criminal Code of Canada made the move to include sex as a protected characteristic in hate crime legislation, making it an offence to advocate for genocide¹⁷ or incite hatred against an identifiable group,¹⁸ including on the basis of sex.¹⁹ The Canadian Criminal Code also considers hate motivation based on sex to be an aggravating factor in sentencing. Uruguay's Criminal Code criminalises the incitement to hatred or any form of violence against

¹³ Mental Health Law Online, 'Sexual Offences Act 2003' (MHLO, 2021)

<https://www.mentalhealthlaw.co.uk/Sexual_Offences_Act_2003#:~:text=It%20covers%20the%20non%2Dconsensual,and%20conclusive%20presumptions%20about%20consent.> accessed 12 November 2024

¹⁴ Office for National Statistics, *Stalking: findings from the Crime Survey for England and Wales* (ONS, 2024)

¹⁵ Pat Strickland, 'The Protection from Harassment Act 1997' (UK Parliament, 2017)

<<https://commonslibrary.parliament.uk/research-briefings/sn06648/>> accessed 25 November 2024

¹⁶ United Nations General Assembly, *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women* UNGA Res 68/191 (2013) UN Doc A/RES/68/191

¹⁷ Canadian Criminal Code of Conduct, s 318(1)

¹⁸ Ibid s 319(1)

¹⁹ Ibid s 318(4)

a person or a group based on their sexual orientation or “sexual identity” and provides enhanced penalties for crimes motivated by these characteristics.^{20,21} Kosovo’s Criminal Code also criminalises hate crimes and hate speech against sexual and gender minorities and considers crimes committed on the basis of a person’s gender identity to be an aggravating circumstance.²²

In comparison to the approaches of other countries which include sex and gender in hate crime legislation, one could argue that the UK’s approach is insufficient because it does not address the unique nature of violence against women, and the role that misogyny plays in VAWG. There were talks in parliament²³ during the House of Lords committee stage of the Police, Crime, Sentencing and Courts Bill²⁴ of an amendment that would add ‘hostility because of sex or gender’ to the protected characteristics in the sentencing code, however this was not implemented.²⁵ The Law Commission also considered the inclusion of sex and gender as a protected characteristic in their 2021 report on Hate Crime,²⁶ however came to the conclusion that such an addition would provide more drawbacks than benefits.

3. How Does Misogyny Manifest in Violence Against Women and Girls?

The United Nations defines gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”.²⁷ It is important in this discussion to identify the correlation between misogyny and VAWG, in order to properly assess its potential status as a hate crime. Although VAWG comes in many different forms, this section of the article will focus on two of the most prominent and common crimes against women, namely domestic abuse and sexual violence.

Domestic Abuse

Dom²⁸year. These figures indicate that around 69% of victims are women as opposed to 31% being men. From these statistics we can see that whilst men make up a large portion of domestic abuse victims, women are²⁹. There are important and significant differences between male violence against women and female violence against men. For example, women experience higher rates of repeated victimisation and are much more likely to be seriously hurt or killed than male victims of domestic abuse,³⁰ likely to be seriously injured and report fear that their lives are in danger.³¹ It can be said that men do not experience domestic abuse as

²⁰ Uruguay, Penal Code (as amended by Law 17.677). 2003. Art 149bis

²¹ World Bank (n 8)

²² Kosovo, Criminal Code, Law No. 06/L-074. 2019. Art 70, para. 2

²³ Claire Brader (n 9)

²⁴ Police, Crime, Sentencing and Courts Bill now Police, Crime, Sentencing and Courts Act 2022

²⁵ Ibid

²⁶ Law Commission, *Hate crime laws: Final report* (Law Commission, 2021)

²⁷ Women’s Aid, ‘Domestic abuse is a gendered crime’ <<https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/>> accessed 20 December 2024

²⁸ Office for National Statistics, *Domestic abuse victim characteristics, England and Wales: year ending March 2024* (ONS, 2024)

²⁹ Women’s Aid (n 32)

³⁰ Scott-Storey and O-Donnell et al, ‘What About the Men? A Critical Review of Men’s Experiences of Intimate Partner Violence’ (2023) *Trauma, Violence, & Abuse* 858, 864

part of embedded, structural inequalities against their sex, whereas domestic abuse perpetrated by men against women is rooted in women's unequal status in society and is part of the wider social problem of male violence against women and girls. The Women's Aid foundation found that sexism and misogyny set the scene for male abusive partners' coercive and controlling behaviours, as well as to excuse abusive behaviour by men in intimate relationships with women.³² It is important to recognise that men and women experience domestic abuse differently, and that the root cause of abuse often differs for male and female perpetrators, to help educate people and protect them from domestic abuse. However, it is also important to understand that whilst they may be different, male experiences of domestic abuse are no less serious than women's experiences.

Sexual Violence

In addition to domestic abuse, sexual violence is also a serious and major issue worldwide. Countries have varying definitions for what constitutes sexual violence, however the World Health Organization (WHO) provides a definition of sexual violence as "any sexual act or an attempt to obtain a sexual act, unwanted sexual comments, or advances, acts to traffic or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim in any setting, including but not limited to home and work".³³ According to the Office for National Statistics, 1 in 4 women have been raped or sexually assaulted since the age of 16. 1 in 2 rapes against women are carried out by a partner or ex-partner, and 6 in 7 rapes are carried out by someone they know.³⁴ The UK does not explicitly provide a legal definition of sexual violence, however the Sexual Offences Act 2003 covers a range of offences that would be considered sexual violence, for example rape and sexual assault, and causing a person to engage in sexual activity without consent. Rape can be said to be the 'psychological extension of a dominant-submissive sex-role stereotypes culture',^{35,36} and societal attitudes towards women and gender stereotypes are examples of how sexism and misogyny may be underlying motivators in cases of domestic abuse and sexual violence. Gender stereotypes are often internalised and can arise from the male dominated milieu,³⁷ and patriarchal structure of society. Hypermasculinity can also play a role in VAWG.³⁸ Hypermasculinity has been defined as engaging in activities that may be aggressive and dominating over others, especially toward women, while showing excessive masculine behaviour, valuing their own status.³⁹ Hypermasculinity often results in endorsing positions that subjugate and devalue women, engaging in violent fantasies about, and/or conducting aggressive behaviours toward women.⁴⁰ The concept of hypermasculinity suggests that the

³² Women's Aid (n 32)

³³ World Health Organization, *World report on violence and health*, Geneva, World Health Organization (WHO, 2002)

³⁴ Office for National Statistics, *Sexual offences prevalence and victim characteristics, England and Wales* (ONS, 2024)

³⁵ Martha R. Burt, 'Cultural Myths and Supports for Rape' *Journal of Personality and Social Psychology* 217, 229

³⁶ Gurvinder Kalra, Dinesh Bhugra 'Sexual violence against women: Understanding cross-cultural intersections', (2013) *Indian Journal of Psychiatry* 244, 246

³⁷ Ibid

³⁸ Bettina Rottweiler, Caitlin Clemmow and Paul Gill, 'A Common Psychology of Male Violence? Assessing the Effects of Misogyny on Intentions to Engage in Violent Extremism, Interpersonal Violence and Support for Violence against Women' (2024) *Terrorism and Political Violence* 1, 6

³⁹ Christian McGough 'The Impact of Hypermasculinity on Students' Development in Fraternity Organizations' (2019) M.A. in Higher Education Leadership: Action Research Projects 6

⁴⁰ Rottweiler, Clemmow, Gill, 'A Common Psychology of Male Violence? Assessing the Effects of Misogyny on Intentions to Engage in Violent Extremism, Interpersonal Violence and Support for Violence against

pressures of being a man or being ‘manly’ in modern society could cause a man to be inherently misogynistic or aggressive toward women, for example through domestic abuse or sexual crimes.

In addition to gender stereotypes and attitudes towards women, ‘rape culture’ and the normalisation of violence against women can contribute to VAWG.⁴¹ Rape culture is described as an environment in which rape is prevalent and in which sexual violence is normalised and excused in the media and popular culture.⁴² This environment can take shape in the form of misogynistic language, the objectification of women’s bodies, and the glamorisation of sexual violence.⁴³ The prevalence of rape culture provides for a wide acceptance of the existence of VAWG as a normal occurrence, and the inherent nature of misogyny in society. By normalising VAWG, or even glamorising it, we forget the impact that such violence has on victims, and why it is incredibly important to address and reduce the presence of VAWG in society.

Looking at these examples of how misogyny correlates with the commission of VAWG, it is clear that VAWG is caused by more of an inherent, subconscious misogynistic attitude towards women, rather than an express, active hatred of the female sex. In addition to this, it can be the case that because such structures are so deeply ingrained and normalised in society, one does not realise he is engaging in misogynistic behaviours or is being driven to act in a certain way because of hypermasculinity and societal gender roles. This is why it is incredibly important to ensure that resources are assigned to educating people about these issues and encouraging people to challenge gender roles and stereotypes.

4. Why Sex Should Not be a Protected Characteristic for the Purposes of Aggravated Offences or Enhanced Sentencing

The evidence indicates that misogyny plays an inherent and subconscious role in VAWG. However, considering VAWG to be hate crimes in all or certain incidents is not the answer. The law should not be reformed to include sex and gender as a protected characteristic for the purposes of hate crime legislation. This section will discuss the major reasons why it would not be appropriate to label violence against women (in particular domestic abuse and sexual offences) hate crimes, and why doing so would provide more drawbacks than potential benefits for women and girls. It will also address arguments and concerns provided by advocates for the reform, and counter these.

Legal Inconsistency

As discussed in the previous section, sexual offences and domestic abuse against women can be considered to be inherently misogynistic – some scholars, such as Campo-Engelstein argue that because of this, domestic abuse and sex crimes against women should be considered hate crimes, as there is always an underlying element of misogyny or hatred towards women in these crimes.⁴⁴ Their reasoning for this is that this would address the systemic nature of VAWG and

Women’ 6; Dorothy Ayers Counts, ‘Female Suicide and Wife Abuse: A Cross-Cultural Perspective’ (1987) *Suicide and Life-Threatening Behavior* 194

⁴¹ OurWatch, ‘The link between gender inequality and violence against women’ (*OurWatch*) <<https://www.ourwatch.org.au/link-between-gender-inequality-and-violence>> accessed 15 December 2024

⁴² Inside Southern, ‘Rape Culture, Victim Blaming, And The Facts’, (*Inside Southern*) <<https://inside.southernct.edu/sexual-misconduct/facts>> accessed 20 December 2024

⁴³ Amanda Kippert and Hannah Craig, ‘What is Rape Culture?’ (*domesticshelters*) <<https://www.domesticshelters.org/articles/in-the-news/what-is-rape-culture>> accessed 20 December 2024

⁴⁴ Lisa Campo-Engelstein ‘Rape as a Hate Crime: An Analysis of New York Law’ (2016) *Hypatia* 91

recognise the inherent role that misogyny plays in crimes such as rape and domestic abuse.⁴⁵ However, considering rape and domestic abuse to be ‘hate crimes’ only when committed against women poses several issues. Firstly, it could perpetuate the stereotype that sexual abuse against men is less serious than abuse against women. Whilst abuse may affect women disproportionately, punishing these cases more severely would create a legal inconsistency which sends the message that abuse against women is ‘worse’ than abuse against men. The same can be said for sexual crimes.

Proof of Hostility

On the other hand, if we were to use the same standard as for other protected characteristics, we would need to establish an element of hostility on the basis of sex or gender in addition to the crime itself, rather than just assume that there is one because the victim is a woman. Therefore, we would need to consider in each case of sexual violence or domestic abuse whether there is express evidence of misogyny. This would risk creating a hierarchy of crimes against women which are considered to be either ‘misogynistic’ or ‘non-misogynistic’, depending on whether the perpetrator expressed hatred in that instance. This would also undermine our understanding of the way that male entitlement to women and girl's bodies is a result of cultural and societal norms, systemic oppression, and not necessarily an individual's express hatred.⁴⁶ In addition to this, due to the fact that it is already difficult to establish whether a crime is motivated by hate, in cases where the misogyny is inherent rather than explicit, it would be almost impossible to assess whether the crime was motivated by hostility towards the victim because of her sex. On the other hand, if we were to consider all violence against women to be hate crimes, this would make it incredibly difficult to navigate non-heteronormative situations, for example instances of lesbian partner violence. Lesbian partner violence is an important social problem, and women who abuse other women may do so for similar reasons as those that motivate heterosexual male batterers, for example to gain and maintain control and dominance.⁴⁷ If motivations for both men and women who abuse women can be of a similar nature, even if this motivation was internalised misogyny, it would be inconsistent to claim that if it was committed by a man, then it must have been a hate crime, for the sole fact that he was a man. As well as this, punishing male perpetrators of violence against women more severely than female perpetrators because of an assumption of a hate element, would again promote outdated stereotypes that violence or abuse committed by women is less serious than abuse committed by men.

Rape Convictions

Charities such as Rape Crisis point out the fact that in cases of sexual violence, convictions are already incredibly hard to obtain.⁴⁸ During 2021-2022, of the 70,330 rapes reported to the police, only 1,378 led to a conviction – a conviction rate of less than 2%.⁴⁹ Proving hostility or prejudice on top of consent in sexual violence cases would make convictions harder to obtain, particularly given that most offences take place in private and therefore do not have any witnesses as to the motivations of the offender.⁵⁰ Most perpetrators of VAWG are known to

⁴⁵ Ibid

⁴⁶ Rape Crisis, ‘RCEW respond to Law Commission’s recommendations around hate crime legislation’ (*Rape Crisis England and Wales*, 2021) <<https://rapecrisis.org.uk/news/rcew-respond-to-law-commission-s-recommendations-around-hate-crime-legislation/>> accessed 20 December 2024

⁴⁷ National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual and Transgender Violence in 1998*, (1999) 25

⁴⁸ Rape Crisis, ‘Hate Crime & Misogyny’ (*Rape CRISIS Tyneside and Northumberland*, 2021) <https://rctn.org.uk/hate-crime-misogyny/#_ftn2> accessed 21 December 2024

⁴⁹ Crown Prosecution Service, *CPS data summary Quarter 1, 2, 3, 4, 2023-2024* (2024)

⁵⁰ Rape Crisis (n 52)

the survivor, and this would likely make it difficult to demonstrate hostility in a complex abusive relationship.⁵¹ The reality of this is that because it would be so difficult to prove hostility based on sex in cases of most sexual violence, misogyny as a hate crime would most likely only be relevant to sexual crimes committed by strangers. This would create an inconsistency in how sexual crimes are tried, and it also runs the risk of perpetuating the harmful myth that ‘some rapes are worse than others’,⁵² by providing harsher sentences for offences committed by strangers than those committed by intimate partners or family members. In addition to this, since around 90 percent of victims of the most serious sexual offences knew the perpetrator, this application of such a process would only be relevant to a minute number of cases.

Lack of ‘interchangeability’

Gender-motivated crimes are not merely based on intense dislike of an individual woman or a sub-group of women but work to enforce social hierarchies that are biased against all women.⁵³ In other words, they are more concerned with power, control, and gender, which are inextricably linked, than with hatred.⁵⁴ It can be said that hate crimes under UK legislation differ from other crimes because the choice of victim by the perpetrator is based on their membership of a particular group, such as their race or religion, rather than their individual personality. This assertion suggests that one member of such a group is interchangeable with any other. Acts of VAWG have fallen outside of the hate crime framework partly because of the reason that most victims are known to their offender,⁵⁵ hence they are not ‘interchangeable’ in the same sense that other victims of hate crime are. The large difference in motivation between VAWG and hate crimes against the existing protected characteristics is yet another example of why it would not be appropriate to legislate all crimes against minorities in the same manner.

Lack of Real Impact

Some critics of a hate crime approach to VAWG suggest that the idea of considering misogyny to be a hate crime is overestimated and will empower women only on paper,⁵⁶ and that including sex as a protected characteristic would only serve symbolic benefits, rather than practical ones. However, supporters of a hate crime approach to VAWG argue that not protecting women under hate crime legislation is a missed opportunity to collect data on crimes motivated by sex-based hostility, which could impact policy making and resource allocation. Some police forces already report hate crimes motivated by misogyny. Although this does not criminalise any behaviour that was previously legal, it does provide an opportunity to recognise women’s experiences and challenge men for their actions. Nottinghamshire Police started treating misogyny as a hate crime as part of a pilot scheme in the hope of addressing misogynistic behaviour and attitudes towards women and girls. This included criminal offences in addition to hate incidents, which were recorded where the report failed to meet the threshold

⁵¹ Rape Crisis (n 50)

⁵² Ibid

⁵³ Aisha K. Gill and Hannah Mason-Bish, ‘Addressing violence against women as a form of hate crime: limitations and possibilities’ (2013) *Feminist Review* 1-20 10

⁵⁴ Ibid 11

⁵⁵ Vulnerability Knowledge & Practice Programme, ‘VAWG (Violence Against Women and Girls) Strategic Threat and Risk Assessment underpinning and informing the 2024 VAWG Statement’ (*Vulnerability Knowledge & Practice Programme*, 2024) <<https://www.vkpp.org.uk/vkpp-work/violence-against-women-and-girls-vawg-analysis-and-research/strategic-threat-and-risk-assessment-of-violence-against-women-and-girls/>> accessed 15 December 2025

⁵⁶ Lewis, C. ‘Misogyny as a hate crime – Is it all that it seems?’ University of South Wales, Law Research Blog <<https://business.research.southwales.ac.uk/law-research/law-research-blog/misogyny-hate-crime-it-all-it-seems/>> accessed 18 December 2024

for a criminal offence. A misogynistic hate incident was one defined as ‘incidents against women that are motivated by the attitude of men towards women and includes behaviour targeted at women by men simply because they are women’.⁵⁷ Between April 2016 and March 2018, Nottinghamshire Police Force recorded that 174 women reported misogyny related hate crimes. Of those reported, 73 were classed as crimes and 101 were recorded as hate incidents – only one report resulted in a conviction.⁵⁸ The Nottinghamshire report is an example of how data collection can take place without making complete reforms to legislation. Although such data recording of ‘hate incidents’, such as verbal abuse, offensive jokes, and abusive phone or text messages, cannot necessarily result in convictions of a criminal offence, recording incidents as being motivated by hatred of sex can be useful data to educate people about the prominence of casual sexism, and confront people who engage in such behaviour.

There have also been arguments that hate crime legislation in itself is not adequate, and so the inclusion of sex and gender would not offer any practical benefits. In a survey carried out by Aisha Gill and Hannah Mason-Bish for their paper on the limitations and possibilities, one person noted that ‘hate crime status has not led to any benefits for those victimised – whereas [the] VAW label led to funding made available to Refuges, Rape Crisis Centres, Sexual Assault Referral Centres as well as positive policing strategies’.⁵⁹ It would be more beneficial to raise awareness of these organisations and to provide resources for people who have experienced VAWG, than to make unnecessary additions to an already inadequate legal framework.

Overall, England and Wales legislation already sufficiently legislates crimes which involve violence against women. The most common crimes that women are exposed to are those of domestic abuse and sexual offences, for which the UK already legislates. Whilst the inclusion of sex as a protected characteristic may offer a symbolic reminder that violence against women is ingrained in misogyny and is unacceptable, it risks perpetuating myths and hierarchies of abuse victims, as well as pose difficulties in securing convictions for abuse cases, which are notoriously difficult to provide anyway.

Alternative Approaches

An alternative approach to VAWG would be to improve education around the issue of VAWG, including teaching men and boys how misogyny is ingrained in the way society views and treats women, and how to overcome this and treat women with respect and humanity. It is more important to try and prevent VAWG from happening in the first place, rather than focusing on making unnecessary changes to the law which serve no practical benefits. Some effective ways in which this can be done is through school-based interventions to reduce sexual violence and violence in relationships. Research has found that students who participate in intervention groups show moderate increases in knowledge about dating violence, a lower acceptance of stereotypical ‘rape myths’, and moderate improvements in appropriately resolving conflicts in interpersonal relationships.⁶⁰ The World Health Organisation (WHO) reports that safe dating interventions increase knowledge about dating violence and improve attitudes towards the issue, and that their effectiveness appears promising at reducing levels of abuse towards females.⁶¹ Reducing alcohol availability and providing treatment for alcohol-use disorders has also been known to reduce incidents of VAWG.⁶² These are some examples of

⁵⁷ Baroness Kennedy, H. *Misogyny – A Human Rights Issue* (2022) 66

⁵⁸ Lewis, C. (n 60); Louise Mullany and Loretta Trickett, *Misogyny Hate Crime Evaluation Report for Nottingham Women’s Centre* (2018) 3

⁵⁹ Aisha K. Gill and Hannah Mason-Bish (n 57)

⁶⁰ College of Policing, *Interventions to reduce violence against women and girls (VAWG) in public spaces* (2022)

⁶¹ Rebekah Miller, *What Works to Prevent Violence Against Women and Girls: A Summary of the Evidence* (2020) 59; World Health Organization, *World Report on Violence and Health* (2002)

⁶² *Ibid*

ways in which we can focus on the prevention of violence against women altogether, instead of focusing on reforms to the law which could have an overall negative impact on the way we approach VAWG.

5. The Rising Danger of Misogynistic Terrorism and Why Reform of the ‘Stirring Up Hatred’ Offence is Necessary

This section of the article will discuss the rising danger of misogynistic extremism and terrorism, and why the UK Government must address this by extending the offence of stirring up hatred to include the stirring up of hatred on the basis of sex and gender. This discussion is separate from the discussion of hate crime protected characteristics, because it addresses novelty cases of mass murder and extremism. These incidents are of a completely different nature than the most common forms of VAWG, as whilst most domestic abuse and sexual crimes have links to inherent and subconscious misogynistic attitudes caused by societal issues, cases of misogynistic extremism and terrorism involve express and acknowledged hatred of women, which has been fostered through radicalisation. It is important to address different forms of VAWG separately, as there are different ways of addressing resolutions.

Internet Misogyny

The development of technology and growing use of the internet and social media has allowed society to become more informed and connected with each other, and has also benefited the prevention of VAWG. The internet can be a useful space to spread information and educate people on the issues surrounding VAWG and can also provide a space for victims of VAWG to seek advice or discuss their experience with other victims through forums. However, the internet is also a prominent feature in contemporary experiences with misogynistic victimisation.⁶³ The internet presents us with a plethora of online habitats home to misogyny and other forms of extremism, in the forms of websites, chat rooms, and online forums. It can also act as a breeding ground for extremism and can be a useful tool for radicalising isolated individuals.

The ‘manosphere’ is a term which refers to a network of online communities that reject the empowerment of women and who promote anti-feminist and sexist beliefs. Common themes among many manosphere communities include resentment and hatred towards women and girls, and encouragement of this.⁶⁴ These kinds of attitudes can vary from anti-feminism to the actual promotion and encouragement of violence against women and girls.⁶⁵ Manosphere communities are often of the belief that Western civilisation is under threat⁶⁶, and that women are the cause of this. They rely on both the cherry-picking of evolutionary psychology, and

⁶³ Marian Duggan ‘A Socio-legal Analysis of Gender-based Victimization, Misogyny and the Hate Crime Paradigm in England and Wales’ *Studies in Law, Politics, and Society* 101, 118

⁶⁴ Jessica Aiston, ‘What is the manosphere and why is it a concern?’ (*internetmatters*, 2021) <<https://www.internetmatters.org/hub/news-blogs/what-is-the-manosphere-and-why-is-it-a-concern/>> accessed December 12 2024

⁶⁵ Institute for Strategic Dialogue, *The “Manosphere”: an overview of extreme misogyny online* (2022)

⁶⁶ Debbie Ging, Shane Murphy, ‘Tracking the Pilling Pipeline: Limitations, Challenges and a Call for New Methodological Frameworks in Incel and Manosphere Research’ (2021) Annual Conference of the Association of Internet Researchers 1

support this by false pseudoscientific frameworks to justify their sexist and misogynistic narratives.⁶⁷⁶⁸

One of the most well-known manosphere circles is that of the ‘Incel’ community. Short for ‘involuntary celibate’, incels create a sense of identity around their perceived inability to form sexual or romantic relationships.⁶⁹ Their beliefs are reminiscent of patriarchal ideologies combined with misogynistic values.⁷⁰ Not only do incels blame feminism for their inability to form relationships, but they hold the belief that modern society is ‘gynocentric’, and so blame women for the oppression of men and the supposed power imbalance.⁷¹ The incel community is responsible for the spread of misogynistic and hate-fuelled discourse in online spaces, and has been linked to real, extreme acts of violence. One of the most prominent examples of this is the Isla Vista killings in 2014.

Real-life Violence

Elliot Rodger was a 22-year-old college student who on May 23, 2014, embarked on a ‘premeditated killing spree’,⁷² stabbing three people to death inside his apartment in California, before going on to commit a series of drive-by-shootings, deliberately striking numerous people with his car. This resulted in the deaths of three additional victims and the wounding of fourteen more. After engaging in gun battles with sheriff’s deputies, Rodger was wounded before ultimately taking his own life.⁷³ Prior to carrying out the attack, Rodger wrote a 141 page manifesto, describing his experiences of being bullied at school, his anger and resentment towards women, and his plan to attack women and others as a form of retaliation.

The case of Elliot Rodger is one of the most prominent examples of a horrific crime that was rooted in misogyny, and how the acceptance of hate speech on the internet leads to real life violence. Despite the horrific nature of the Isla Vista killings, some manosphere circles, in particular the incel community, praised Rodger for his actions, referring to him as a ‘saint’.⁷⁴ There have even been further mass shootings committed by members of the community, for example Alek Minassian, who used a rental van to kill 10 people and badly injure 16 on a sidewalk in Toronto in 2018, expressed admiration for Elliot Rodger and claimed his actions were part of the ‘incel rebellion’.⁷⁵

Another case of incel-related mass killing was the UK Plymouth shooting in 2021. On 12 August 2021 Jake Davison shot and killed five people, wounded two others and took his own

⁶⁷ Louis Bachaud, Sarah E. Johns ‘The use and misuse of evolutionary psychology in online manosphere communities: The case of female mating strategies’ (2023) *Evolutionary Human Sciences* e28 4

⁶⁸ *Ibid* 11

⁶⁹ Commission for Countering Extremism, *Predicting harm among incels (involuntary celibates): the roles of mental health, ideological belief and social networking* (2024) 6

⁷⁰ Marian Duggan (n 68)

⁷¹ Radicalisation Awareness Network, *The Incel Phenomenon: Exploring Internal and External Issues Around Involuntary Celibates* (2021) p 2

⁷² Santa Barbara County Sheriff’s Office, *Isla Vista Mass Murder May 23, 2014 Investigative Summary*, (2015), ‘Introduction’, pp. 1-2

⁷³ *Ibid*

⁷⁴ Branson-Potts, H. Winston, R. ‘How Elliot Rodger went from misfit mass murderer to ‘saint’ for group of misogynists – and suspected Toronto killer’ *Los Angeles Times* (26 April 2018)

<<https://www.latimes.com/local/lanow/la-me-ln-elliott-rodger-incel-20180426-story.html>> accessed 10 December 2024

⁷⁵ Leyland Cecco, ‘Toronto van attack suspect says he was ‘radicalized’ online by ‘incels’ *The Guardian* (Toronto, 27 September 2019) <<https://www.theguardian.com/world/2019/sep/27/alek-minassian-toronto-van-attack-interview-incels>> accessed 10 December 2024

life.⁷⁶ It was reported that Davison was fascinated by mass shootings, serial killers, and violent heroes of “incel” ideology, including Elliot Rodger. He expressed strongly misogynist views online, including in YouTube videos and comments, indicating that misogyny was a strong factor in what led him to commit the mass shooting.⁷⁷

Consideration of ‘Misogynist Terrorism’

Because of the rise in extreme cases which have links to the incel community, there have been calls to consider such cases as ‘misogynistic terrorism’. Policymakers and media outlets are keen to look more closely at factors such as ethnicity, religion, and political ideology when there is a suspected terrorist case. However, even in cases where misogynistic extremism appears to be a strong ideological motivation, such incidents are treated as ‘random acts of lunatics’ rather than as terrorism or violent extremism.⁷⁸ It appears that when political or ideological motivations are linked to misogyny, there is a reluctance to classify this as terrorism.

The Terrorism Act 2000 defines terrorism as the use of threat or actions that are designed to influence a government or international organisation, or to intimidate the public.⁷⁹ These actions (or threats) must be made for the purpose of advancing a political, religious, racial or ideological cause.⁸⁰ Section 2 of the act lays out the conditions which may cause an action to fall within the scope of terrorism, including acts which: involve serious violence against a person; endangers a person’s life (other than that of the person committing the action); or creates a serious risk to the health or safety of the public.⁸¹ The cases of Elliot Rodger and Alek Minassian took place in the US and Canada, where there is no legal definition for terrorism. There is also no agreed upon international definition for terrorism, due to differing perspectives among member states on its scope and application, however the United Nations General Assembly (UNGA) has referred to terrorism as ‘criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes ... whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them’.⁸²

Whether or not Elliot Rodger’s actions should be considered terrorism is a contested issue. It can be argued that his actions would not constitute terrorism, as his actions could be considered to be fuelled by personal grievances and hatred, and the delusion of furthering the incel ideology is more a result of severe and complex mental illness.⁸³ Whilst it is important to consider the warning signs of poor mental health and the link between vulnerability and radicalisation, attributing the cause of such a brutal incident to ‘personal grievances’ or ‘madness’ is dangerous and pivots the conversation away from any potential ideological or political influence. It is important to give young men struggling with mental health the support

⁷⁶ UK Parliament, *Plymouth Shootings*, House of Lords Hansard Volume 827 <<https://hansard.parliament.uk/Lords/2023-02-22/debates/62911F88-5524-4FE5-AF53-CD4542046B34/PlymouthShootings>> accessed 11 December 2024

⁷⁷ Steven Morris, ‘Plymouth shooter fascinated by serial killers and ‘incel’ culture, inquest hears’ *The Guardian* (18 January 2023) <<https://www.theguardian.com/uk-news/2023/jan/18/plymouth-shooter-jake-davison-fascinated-by-mass-shootings-and-incel-culture-inquest-hears>> accessed 11 December 2024

⁷⁸ Pablo Castillo Díaz, Nahla Valji ‘Symbiosis of Misogyny and Violent Extremism: New Understandings and Policy Implications’ (2019) *Journal of International Affairs* 37 42

⁷⁹ Terrorism Act 2000, s1(a)

⁸⁰ *Ibid* s 1(c)

⁸¹ *Ibid* s 2

⁸² United Nations General Assembly, *Measures to eliminate international terrorism*, UNGA Res 51/210 (1996) UN Doc A/RES/51/210, para. 13

⁸³ Sophia Moskalkenko, Juncal Frenandez-Garayzabal Gonzalez, Naama Kates, Jesse Mortion ‘Incel Ideology, Radicalization and Mental Health: A Survey Study’ (2022) *The Journal of Intelligence Conflict and Warfare* 1

that they need, in order to prevent them from falling into radical subcultures. However, only focusing on this rather than punishing people who promote these extremist opinions risks an imbalance where support mechanisms focus on the perpetrators' vulnerability while insufficiently addressing harm to women.

The fact is, even if the Isla Vista killings were committed as a result of personal grievances rather than actual political or ideological motivations, the incel community interpreted it as being the latter and praised him for furthering the 'cause'. If the consequences of a mass killing result in the promotion and furthering of an ideology which seeks to harm women, then it may not be logical to categorise their hatred for women as a personal grievance. According to the UNGA definition of terrorism, the Isla Vista killings should constitute terrorism, because his acts were criminal and were intended to provoke a state of terror in women for the ideological purpose of misogyny and to further the 'incel' cause.

There is, however, evidence of countries changing their approach towards incel ideology and terrorism. For example, in Canada in 2020, an attack on a spa in Toronto by a 17-year-old incel was found by a judge to be an act of terror inspired by the incel movement.⁸⁴ This was the first time that Canada had made a ruling of this kind. However, as of 2025, the UK has not officially classified anyone identifying as an incel to be a terrorist.

There were calls for the Plymouth shooting to be reclassified as a terror attack, however these calls were unanswered. The senior national coordinator for Counter Terrorism Policing said they concluded that the shooting was not a terror attack, their reasoning being that 'incel and of itself is not a terrorist ideology'.⁸⁵ However, this assertion has been challenged by critics. Laura Bates, a feminist writer and activist argued that "this is terrorism," and that "if news reports about the shooter are accurate, we are talking about an individual radicalised online into an extremist belief system who then acted on those beliefs to massacre people", which is terrorism, extremism, and radicalisation.⁸⁶ From a doctrinal perspective, it can be argued that Jake Davison's actions should be considered terrorism under the UK Terrorism Act 2000, because his actions caused serious violence to numerous people and were for the purpose of advancing an ideological cause.

Link Between Terrorism and Misogynist Extremism

Although not explicitly recognising incel ideology as a terrorism, there have been recent terror convictions in the UK with alleged incel links, for example Gabrielle Friel in Scotland, who stated in his trial that mass shooting was a "fantasy" for him and that he had empathy for the incel mass murderer Elliot Rodger,⁸⁷ however the charge that he was motivated by incel ideology was not proven.⁸⁸ There was also Anwar Driouich from Middlesbrough, who was jailed for possessing an explosive substance. The court heard that Driouich trawled the internet reading about mass shootings, terrorist attacks, and "incels",⁸⁹ however, although he appeared

⁸⁴ Max Matza, 'Terrorism ruling first for Canada 'incel' attack' *BBC* (6 June 2023)

<<https://www.bbc.co.uk/news/world-us-canada-65829240>> accessed 11 December 2024

⁸⁵ Lizzie Dearden, 'Plymouth shootings were not terror attack, senior police officer says' *Independent* (28 September 2021) <<https://www.independent.co.uk/news/uk/crime/plymouth-shootings-incel-terror-attack-b1928366.html>> accessed 11 December 2024

⁸⁶ Jamie Grierson, 'Should the Plymouth shootings be declared an act of terror?' *The Guardian* (13 August 2021) <<https://www.theguardian.com/uk-news/2021/aug/13/should-the-plymouth-shootings-be-declared-an-act-of-terror>> accessed 11 December 2024

⁸⁷ BBC, 'Gabrielle Friel: Man guilty of weapons haul terrorism charge' *BBC* (15 December 2020) <<https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-55317874>> accessed 20 December 2024

⁸⁸ *Ibid*

⁸⁹ BBC, 'Middlesbrough fantasist Anwar Driouich jailed for explosive substance', *BBC* (27 March 2020) <<https://www.bbc.co.uk/news/uk-england-tees-52071379>> accessed 20 December 2024

to have an unhealthy interest in incels, he was ultimately found to not have a “terrorist mindset”.⁹⁰

Many believe that incel-motivated violence has quickly evolved into a public security concern.⁹¹ The UK’s Prevent programme, a programme which seeks to prevent people from becoming terrorists or support terrorism,⁹² has seen an increase in referrals of individuals who fall under the category of ‘Mixed, Unclear and Unstable’ (MUU) threats, which includes ‘inceldom’.⁹³ According to the Commission for Countering Extremism, incels have been linked to 47 deaths since 2014, with extremist hatred resulting in real-world violence.⁹⁴ The law must be updated to reflect the rising number of individuals who are being radicalised and are going on to commit acts of severe violence and terrorism in the name of misogyny.

Introduction of a ‘Stirring up Hatred’ Offence

Currently, the Public Order Act 1986 prohibits acts which are intended or likely to stir up hatred on the basis of race, religion, or sexual orientation.⁹⁵ The offence can be committed through various acts, such as: using threatening words or behaviour (or abusive or insulting in the case of race); displaying, publishing, or distributing written material, or possessing inflammatory material, which are intended to stir up hatred against a group or create a situation where it is likely that hatred will be stirred up.⁹⁶ One of the proposals that the law commission gave in their 2021 report on hate crime reforms was to extend the offence of stirring up hatred to include stirring up hatred on the basis of sex or gender.⁹⁷ This would mean that incels who go online to promote threatening and violent behaviour towards women would be committing an offence. Whilst this will not completely eradicate the ideology, it is an important step to recognising that incels and other ‘manosphere’ circles are a real threat and should be treated as such. In addition to this, where the addition of sex as a protected characteristic for purposes of aggravated offences or enhanced sentencing would only deal with matters after VAWG has taken place, the introduction of a stirring up hatred offence would criminalise actions which seek to promote VAWG, hopefully preventing serious acts of violence against women from happening in the first place.

This reform would be beneficial to the protection of women and girls in the UK and would address the ‘incel’ ideology and its potential lead to acts of serious violence. The fact that the UK are recognising links between incel ideology and terrorism in the cases mentioned previously is a good indication that this dangerous phenomenon is being addressed, however, they must be more active in recognising extreme offenders with motivations stemming from the hatred of women to be terrorists. Misogynist extremism and extreme hatred for women should be treated as a terrorist ideology, and having a stand-alone offence of stirring up hatred

⁹⁰ Jamies Grierson (n 91)

⁹¹ Eviane Leidig, ‘Why Terrorism Studies Miss the Mark When It Comes To Incels’ (*International Centre for Counter-Terrorism*, 2021) <<https://icct.nl/publication/why-terrorism-studies-miss-mark-when-it-comes-incels>> accessed 15 December 2024

⁹² Home Office, ‘Get help for radicalisation concerns’ (*GOV.UK*, 8 June 2022) <<https://www.gov.uk/guidance/get-help-if-youre-worried-about-someone-being-radicalised#about-prevent>> accessed 15 December 2024

⁹³ Eviane Leidig (n 95)

⁹⁴ End Violence Against Women, ‘Law Commission recommendations underscore need to address gendered online harms’ (*End Violence Against Women*, 2021) <<https://www.endviolenceagainstwomen.org.uk/law-commission-recommendations-underscore-need-to-address-gendered-online-harms/>> accessed 8 December 2024

⁹⁵ Public Order Act 1986, part 3

⁹⁶ Public Order Act 1986

⁹⁷ Law Commission (n31)

on the basis of sex or gender is a good way to begin to treat less severe behaviours of such extremists as hate offences, before the potential commission of extreme violence against the public.

6. Conclusion

In conclusion, there is no need to add sex or gender as a protected characteristic in England and Wales law under hate crime legislation for the purposes of aggravated offences or enhanced sentencing. As previously discussed, the inclusion of such a characteristic, and the recognition of crimes such as domestic abuse and sexual offences when committed against women does not accurately reflect the nature in which misogyny is inherently ingrained in VAWG, as opposed to the express hatred that is present in hate crimes committed against other protected groups. This reform also risks perpetuating outdated stereotypes about sexual violence and domestic abuse, as well as creating unnecessary hierarchies of sexual crime. Current laws which legislate domestic abuse and sexual offences sufficiently cover crimes that predominantly affect women, and so the addition of sex as a protected characteristic would be unnecessary and only serve a symbolic purpose, rather than a practical one. Whilst the law is not in a position to consider misogyny a hate crime for the purposes of aggravated offences or enhanced sentencing, it is still important to recognise that hate towards women is unacceptable and should not be tolerated in society. The effectiveness of interventions to educate people on the prevalence of misogyny and the avoidance of intimate partner violence are a good example of how we can address the issue of violence against women without making unnecessary and problematic changes to the law.

The offence of stirring up hatred, however, should be extended to include stirring up hatred on the basis of sex and gender. This reform would address the rising issue of incel ideology and misogynistic extremism, as well as being a declaration of the fact that spreading hatred or promoting violence against women is unacceptable and should be a punishable offence. Such an addition to the law would provide an effective stepping stone in addressing the increase of hate fuelled discourse around women, which results in violence against women – a stepping stone which would prove more effective than adding sex as a protected characteristic for the purposes of aggravated offences or enhanced sentencing.

The Tensions between Human Rights and National Security in the UK: A Case Study of Shamima Begum

Rebecca Lamb-Busby*

Abstract

When it comes to human rights and national security, sometimes it is difficult to ascertain which takes precedence. However, in situations where national security takes precedence, it is important to assess the proportionality of derogating from human rights and whether states are justified in doing so. The popular story of Shamima Begum raises crucial issues regarding the proportionality and morality of depriving her British citizenship. The research seeks to discover the tensions between human rights and national security in Shamima's case, with a focus on proportionality and morality. Whilst this paper will show the difficulties in answering such questions, the paper will demonstrate how the decision to deprive Shamima of her British citizenship was, in fact, not proportionate and not moral when considering the facts. In arriving at this conclusion, both national and international laws are explored to investigate the proportionality of the UK's actions; and for morality, the public's opinions take precedence. The research is important as Shamima is only one of the many people who fled the UK and one of many who also want to come back. Furthermore, the judgments laid out in this case set a binding precedent, which will impact other people like Shamima detrimentally later.

Key Words

Human rights, national security, Shamima Begum, proportionality, morality

1. Introduction

The challenge of balancing human rights and national security interests has only become more problematic over time. The controversial case of Shamima Begum highlights many of the delicate issues that may arise while trying to achieve this balance. In Shamima's case, there are conflicting views on what is right and wrong, both legally and morally. While there is much research on the case of Shamima and her rights, most of those reside on the extreme positions of both sides. While some emphasise Shamima's human rights, others emphasise the national security interest in the UK. There seems to be a lack of studies focusing on the morality of the case, with even less regarding the proportionality analysis involved.

Shamima's Story in Brief

Shamima Begum left the UK in 2015 with two other girls to join the Islamic State group at the age of fifteen. They left their East London homes to travel from Gatwick Airport to Turkey, and then to Syria. Only months before this, a friend of these girls (Sharmeena Begum), also travelled to Syria to join ISIL after she had 'immersed herself in a particular version of Islam

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following her mother's death'.¹ What started as just national news soon turned into international news.

After four years, Shamima caught the media's attention again after an interview with *The Times* reporter, Anthony Lord, on February 13th 2019. In the interview, Shamima states that she wants to return to the UK to give her unborn child a better life, as well as a better chance of survival. She also talks about marrying a twenty-seven-year-old Dutch national IS fighter ten days after arriving, with whom she has three children (who all pass away).²

Less than a week later, the then Home Secretary, Sajid Javid, sent Shamima's family a letter informing them that they intended to officially revoke Shamima's British citizenship. This revocation is the first of its kind: Shamima is the first British woman to have been deprived of her citizenship, and the reason behind this revocation was that it was assessed that Shamima posed a threat to the UK's national security. This decision made headline news, causing the British public to have mixed views and opinions on the case. Some feel very sympathetic towards Shamima, especially due to her age and what she has gone through, whilst others argue that it is her fault and that she does not deserve to come back to the UK, particularly as she joined a group who have detrimentally affected many innocent people around the world. Since 2019, there have been different legal trials appealing the decision of the Home Secretary, which have ultimately resulted in Shamima being left in the North-East Syrian refugee camp with no prospect of ever returning to the UK. Her latest appeal was only in February this year. Notably, Shamima was forbidden entry into the UK during all of the trials.

Challenging questions such as 'Can we trust her enough to allow her back and not commit or assist in the planning of attacks, or even radicalise others when in Britain?' have understandably been asked. Others are asking why she is not being punished according to the UK's Criminal Justice System, within the UK itself, especially because Shamima was born in Britain and left to join ISIL as a British citizen. Other questions relate to how Shamima's human rights were not considered enough in court judgements, or why and how the approach taken by Sajid Javid and the courts was very much in favour of national security but ignorant of individual rights. There has been a growing controversy around this topic since 2019. The fundamental topic of Shamima's case is about how the State and the courts balance human rights and national security in the UK. Which, as below will illustrate, is a testing task.

Research Questions

Two specific questions will be considered. First, was the deprivation decision proportionate? This question is significant and can highlight the legal problems within the case. Secondly, was the deprivation decision morally right or wrong? This question offers a different perspective, one on a deeper level. Asking these questions will provide an understanding of what the tensions are between human rights and national security, highlighting the difficulties of making these two essential things coexist in cases like Shamima's.

Initial Hypothesis

The tensions between human rights and national security are worldwide, not just in the UK. While the governments of different countries are trying to protect the national security of their country, they are also trying to uphold human rights and ensure that people are safe. (Although this does not apply to many countries.) From preliminary research, the above statement holds true. Additionally, when referring to Shamima Begum, these tensions are evident. Depriving

¹ EVAW 'Home Secretary should reverse decision on Shamima Begum's citizenship' (*End Violence Against Women*, 3 April 2019) <<https://www.endviolenceagainstwomen.org.uk/evaw-ask-home-secretary-to-reverse-decision-on-shamima-begums-citizenship/>> accessed 24 October 2024.

² 'Shamima Begum: Ex-Bethnal Green schoolgirl who joined IS 'wants to come home'' (*BBC*, 14 February 2019) <<https://www.bbc.com/news/uk-47229181>> accessed 24 October 2024.

Shamima of her British citizenship was done to protect the national security of the UK, but in doing so, they also largely limit her human rights. Thereby, there is a conflict between national security and human rights. Ultimately, it seems that the decision was not proportionate, although the courts involved in Shamima's legal battles held otherwise. Deciding on the morality of the decision is also complex; nonetheless, likely to be immoral, mainly due to Shamima's age, vulnerability and her son. These hypothesis's will be discussed in the following chapters.

Research Methodology

The research used secondary materials, including news articles and Non-Governmental Organisations' websites. Primary materials include UK and international cases; legislation will also be largely referred to in Chapter 2.

Significance and Contribution of the Study

Shamima's case highlights the importance of maintaining a steady balance between human rights and national security, or at least with this as the primary aim. Whilst ensuring that the safety of the British public must be prioritised, pushing human rights aside may leave more challenging issues, resulting in the human rights significance, diminishing. In an already complex world, hopefully, research on topics like this can provide ways to improve it for individuals who have unfortunately found themselves in similar shoes to Shamima.

Structure of the Article

This article argues that the Home Secretary's decision to deprive Shamima of her British Citizenship was neither proportionate nor morally right. The article is split into two main Parts. The next Chapter, Chapter 2, deals with the proportionality of the deprivation decision vis-à-vis the alleged threat the national security that she potentially poses. Chapter 3 deals with the moral decisions attached to the citizenship deprivation decision. Finally, Chapter 4 summarises the article and arrives at its conclusion.

2. Was the deprivation decision proportionate?

This chapter will explore the first research question, considering the proportionality of the deprivation decision.

When considering proportionate responses, we tend to resort to questioning whether the response was fair. For example, punishments must reflect the offences committed.³ It would be disproportionate to sentence a serial killer to 5 years, as more severe consequences are deserved for the lives affected. Proportionality requires a fair balance to be struck between the individual's rights and the interests and rights of the public, thereby putting an obligation on those who act to assess the context and all of the relevant factors of the situation before taking legal action.

When two or more rights conflict, the Court of Justice of the European Union held in *Azienda Agro-Zootecnica Franchini Sarl v Regione Puglia* that:

Measures adopted by Member States in this field do not exceed the limits of what is appropriate and necessary to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued⁴

³ Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' [2015] *The Yale Law Journal* 3094.

⁴ Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl v Regione Puglia* [2011] ECR I-6561, para 73

From this, assessing proportionality includes four questions:

- 1- Is the objective sufficiently important enough to restrict fundamental rights?
- 2- Are the measures adopted rationally connected to the objective?
- 3- Were the least restrictive option chosen?
- 4- Were the disadvantages proportionate to the aims pursued?

Asking these questions should determine whether there was a fair balance. Before engaging with each of these four questions, it is worthwhile to briefly narrate the procedural History of Shamima's cases in various UK courts.

The Procedural History of the Shamima Begum Cases

Under the Human Rights Act 1998, this principle aims to protect people. Generally, absolute rights cannot be interfered with, but, in certain circumstances, the state can restrict or limit these rights. However, the proportionality test must be applied.

On the 19th of February 2019, the then Home Secretary, Sajid Javid, stated in the letter:

As the Secretary of State, I hereby give notice following section 40(5) of the British Nationality Act 1981 that I intend to have an order made to deprive you, Shamima Begum of your British citizenship under section 40(2) of the Act. This is because it would be conducive to the public good to do so. The reason for the decision is that you are a British/Bangladeshi dual national who it is assessed has previously travelled to Syria and aligned with ISIL. It is assessed that your return to the UK would present a risk to the national security of the United Kingdom. In accordance with section 40(4) of the British Nationality Act 1981, I am satisfied that such an order will not make you stateless.⁵

There have been several rounds of litigation following the decision of the Home Secretary.

[Begum v the Secretary of State for the Home Department \(SSHD\) 2020.6](#)

In the appeal, the Special Immigration Appeals Commission (SIAC) took the approach that they are not deciding the merits of a decision, but simply 'applying the principles of judicial review'.⁷ The court deferred to the discretion of the Home Secretary on national security concerns.

[Begum v SIAC 2020.8](#)

However, in the appeal of SIAC's decision, the Court of Appeal (CoA) found that 'SIAC took the wrong approach ... appeals under s.2 and 2B of the 1897 Act are full merits appeals' and that SIAC should have decided 'for itself' whether the deprivation decision was justified. Further, SIAC should not have just questioned the rationality and reasonability of the decision, as in judicial reviews.⁹

[Begum v SSHD 2021.10](#)

The matter reached the Supreme Court (SC), where it was ruled that the CoA erred in its approach by not giving the Home Secretary's assessment the deserved respect 'for reasons

⁵ Letter to Shamima Begum from the Home Secretary.

⁶ [2020] UKSIAC 163.

⁷ *ibid* [138].

⁸ [2020] EWCA Civ 918.

⁹ *ibid* [123].

¹⁰ [2021] UKSC 7.

both of institutional capacity ... and democratic accountability'.¹¹ The SC held that Shamima was unable to return to the UK to appeal the deprivation decision.

[Begum v SSHD 2023.12](#)

Although she could not be present, Shamima appealed the deprivation decision to SIAC. SIAC acknowledged that national security 'does not trump everything else. It must be weighed against fundamental rights and entitlements'. Although SIAC accepted that there was 'credible suspicion' that Shamima was trafficked, following the SC ruling, they respected the Home Secretary's national security assessment, meaning that proportionality was only to be done by him in this case. Whilst SIAC found that Shamima being left *de facto* stateless was a relevant consideration in the proportionality equation, they held that the Home Secretary was aware and therefore considered it. Due to the SC ruling, SIAC's only job was to assess whether the Home Secretary had considered it. SIAC also held that even though Shamima was not given the opportunity to make representations, the outcome would have been the same.¹³ Overall, Shamima was unsuccessful in this appeal, too.

[Begum v SSHD 2024.14](#)

The CoA, on appeal from SIAC, upheld SIAC's decision favouring the Home Secretary. The CoA held that the deprivation decision was not unlawful, stating that: 'It could be argued that the decision in Ms Begum's case was harsh; it could also be argued that Ms Begum is the author of her own misfortune' and their only task was to decide if the decision was unlawful.¹⁵

[Supreme Court Appeal 2024.16](#)

The matter travelled back to the SC, where Shamima's deprivation decision appeal was refused because 'the grounds of appeal' did 'not raise an arguable point of law'.¹⁷ The SC refused to hear her appeal essentially because it accepted the previous judgements, especially that the Home Secretary was entitled to set aside concerns regarding Shamima being a potential trafficking victim.

It should be noted that Shamima's lawyers have said that following the SC's ruling, they are going to try and take the case to the European Court of Human Rights (ECHR). More information is available to present date, but it is not essential for this article. At this stage, we may proceed to consider each of the four questions of proportionality devised at the beginning of this chapter and see how those could be answered in the light of the facts and circumstances surrounding Shamima Begum.

The Proportionality Test Applied.

[Is the objective sufficiently important enough to justify restricting fundamental rights?](#)

UK national security generally refers to the protection of its population, infrastructure, institutions and government system. It can cover many different things, but for this article, the above will be referred to. The Security Service assessed the threat that Shamima was alleged to pose to national security. This assessment must be considered due to the importance of

¹¹ *ibid* [70].

¹² [2023] UKSIAC 163.

¹³ *ibid* [5], [164], [211], [303], [349].

¹⁴ [2024] EWCA Civ 152.

¹⁵ *ibid* [138].

¹⁶ [2024] UKSC 0096.

¹⁷ *ibid*.

national security. The national security assessment by the Security Services were noted in detail in the Supreme Court 2021.¹⁸

In paragraph 16, SS noted that Shamima ‘possessed both UK and Bangladeshi citizenship’, which will be discussed below. They claimed that anyone who had travelled to Syria to align with ISIL posed a threat to the UK’s NS. They did consider that anyone radicalised as minors were possibly considered victims, but this did not stop her from posing a threat to NS.

Paragraph 17 comments on an SS statement from 2017. SS had assessed that anyone who voluntarily travelled to ISIL-controlled territory, since the 2014 caliphate was declared, knew of the aims, ideology and attacks by ISIL. Therefore, it was said that a ‘deliberate decision’ was made for them to support terrorist activity. SS acknowledged how, for most women who went, they were the wives of fighters and raised the next generation of supporters; the women, although not always fighting, were still actively supporting a terrorist organisation which is responsible for atrocities which have affected many lives.

Paragraphs 18 and 19 discuss the potential risks of allowing individuals back. It was first noted that the UK ‘was a priority target for ISIL terrorists’; secondly, ISIL ‘encouraged women to carry out attacks’ and that anyone who spent a prolonged period there was ‘likely capable’ of doing so. Thirdly, there was a risk that those who returned might ‘inspire, encourage or provide support to those who had not travelled there to carry out attacks’. Fourthly, there was a possibility that those who returned would assist in the planning of attacks, especially because they were ‘likely to have developed contacts in ISIL, who might direct them to undertake support activities’.

Paragraph 20 included a 2018 statement from SS, which had assessed that ‘the national security threat from the UK-linked ISIL-aligned individuals would increase significantly if they returned to the UK’.

Further, the Home Secretary was also reminded of the Secretary of State’s policy:

[T]he Secretary of State has a practice of not depriving individuals of British citizenship when they are not within the UK’s jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of article 2 or 3 if they were within the UK’s jurisdiction and those articles were engaged.

Regarding the policy, paragraph 22 stated that the Home Secretary was advised that ‘there are no substantial grounds to believe that a real risk of mistreatment contrary to articles 2 (right to life) or 3 (prohibition of torture) will arise as a result of Begum being deprived of her British citizenship while in Syria’. It also claimed that it was not ‘foreseeable as a consequence of the deprivation decision’ that outside of Syria, Shamima would be exposed to these risks.

In addition, a Mistreatment Risk Statement from February 18th 2019, relating specifically to Shamima was given, as well as a cross-Government Mistreatment Risk Statement. It was assessed that Shamima would ‘broadly’ face the same treatment with or without her citizenship. Importantly, the SS concluded that entering Bangladesh was not a foreseeable outcome, meaning that there was likely no risk of mistreatment if she went there.

[Are these possible threats assessed by SS enough to justify depriving Shamima of her citizenship?](#)

For this question, national security and the potential threats to it can arguably be considered as a justifiable reason to restrict someone of their rights. As the SS highlighted, although

¹⁸ [2021] UKSC 7, [16] – [24].

Shamima was likely a victim, it did not prevent her from also being capable of carrying out attacks.

However, whilst national security is undeniably important for everyone in the UK; can it really be considered that Shamima actually posed such threats? This will be discussed below. In addition, was the deprivation decision the only way to protect NS, this will also be discussed below.

Are the measures adopted rationally connected to the objective?

Depriving Shamima of her citizenship can be argued to have been rationally connected to the objective of protecting NS. Preventing someone from returning to a country certainly helps in stopping them from planning potential ISIL attacks, getting involved in the attacks, radicalising and recruiting others in the UK, and providing support to ISIL operatives. Therefore, it is easily argued that depriving someone of their citizenship is an effective way of protecting NS.

However, Shamima claimed that she was just a housewife and mother and never took part in any terrorist activity.¹⁹ If Shamima were a housewife and were not involved in any terrorist activity, then the likelihood of her taking part in the attacks in any way is very slim.

Additionally, whether Shamima ‘voluntarily’ travelled to Syria should be addressed; whether this should be given considerable consideration is controversial. SIAC, in 2023, noted how the national security assessment by the SS decided that Shamima was ‘self-motivated’.²⁰ Although Shamima chose to leave, her age and vulnerability must be considered. Shamima was 15, and her friend, Sharmeena, who had already joined ISIL, was encouraging her through social media to go too. Many teenagers at this age make questionable decisions and are very much influenced by their peers. Hence why this question has been asked so much within schools and at family homes: If your friend jumped off a bridge, would you? Highlighting the often irrational and naïve decisions teenagers make. Sharmeena encouraging Shamima was likely a very big factor pushing her to leave. Dr. Korzinski argued that Shamima was likely ‘yearning for love and attention’ and was susceptible to ‘peer pressure’.²¹

Moreover, the Home Secretary considered her high grades in the assessment, a witness claiming that ‘it was inconceivable that’ she would not have known what ISIL were doing as a terrorist organisation’.²² However, individuals can be academically intelligent, but they can also be gullible and lack common sense. This non-existent correlation was noted by SIAC.²³ Additionally, a Joint report claimed that people ‘travelled to join the caliphate who had no interest or real ... awareness of – the uncompromising brutality of ISIS’, but SIAC held that this was for the Home Secretary to decide.²⁴

It can also be argued that whilst the general national security assessment might deem those who return as a threat to NS, but when properly considering that she was groomed and trafficked for sexual exploitation, this changes. For someone who was neither, it is reasonable to assess them as being dangerous and likely to support ISIL from the UK, as they truly did voluntarily go. However, Shamima was groomed and trafficked; therefore, these external factors need to be given weight. Just like in criminal cases, the circumstances must be considered to ensure a fair balance. Because Shamima was a victim, the chances of her

¹⁹ ‘IS bride Shamima Begum full transcript: It was nice at first, like in the videos’ (*Sky News*, 20 February 2019) <<https://news.sky.com/story/is-bride-shamima-begum-full-transcript-i-did-have-a-good-time-there-11640278>> accessed 6 January 2025.

²⁰ [2023] UKSIAC 163 [285].

²¹ *ibid* [166].

²² *ibid* [163].

²³ *ibid* [173].

²⁴ *ibid* [168].

encouraging others to travel there are very slim. The chances of her actively attacking in the UK are even slimmer.

Furthermore, the fact that Shamima wanted to come back and has gone through these complicated legal proceedings shows her determination to get away from there. In support of this, Shamima's children's deaths will have likely significantly affected her and made her regret leaving the UK even more.

Another factor that needs to be considered is whether the UK failed Shamima before she left. In December 2014, Shamima was interviewed by police at her school, where they failed to identify her as being at risk of leaving for Syria. In early February 2015, the police visited Shamima in school again, where they handed her a letter intended for her parents. This letter never made it to her parents.²⁵ If it had, then Shamima's parents would have been aware that Sharmeena had left to join ISIL, which in turn could have helped them to stop Shamima from leaving too.

Overall, it proves difficult to answer this question when you consider all relevant factors. On one hand, it is a way to protect NS. On the other hand, it seems to be an extreme method.

The following question will better determine whether this was irrational due to the extremity.

Was the least restrictive option adopted?

To answer this, it is crucial to consider the alternatives that were available (and possibly still are). For this article, two different measures will be discussed: the one that was adopted and the alternative.

Impact of the Deprivation Decision.

Depriving someone of their citizenship can leave a person with very limited options for their short and long-term future, and breach many basic and fundamental rights.

Section 6 of the Human Rights Act (HRA) (1998).- It is important to note that S.6(1) puts a legal obligation on public bodies to act compatibly with Convention rights.²⁶ S.6(2) allows (1) if (a) 'the authority could not have acted differently'.²⁷ So in Shamima's case, only if the Home Secretary could not have acted differently, are violations of Conventional rights lawful.

Article 2 of the HRA.- Article 2 ensures that 'everyone's right to life shall be protected by law'.²⁸ It also obliges States to sometimes take reasonable steps to protect individuals when their lives are at risk. However, if it is 'necessary' to prevent 'unlawful violence' it is acceptable.²⁹ Whether this was violated is difficult to answer with the evidence at hand.

Article 3 of the HRA.- The decision left Shamima in a camp with very poor conditions (discussed further below), said to be breaching Article 3. Article 3 protects people from torture (mental or physical) and inhuman or degrading treatment.³⁰ If the authorities are aware of this violation, they are obliged to prevent it. Under this article, inhuman or degrading treatment includes 'severe detention conditions or restraints' and 'serious physical and psychological abuse'.³¹ For a breach, the sex, age, vulnerability, health and psychological and physical effects

²⁵ *ibid* [84].

²⁶ Human Rights Act 1998 (HRA 1998), s 6(1).

²⁷ HRA 1998, s 6(2)(a).

²⁸ HRA 1998, Article 2, s 1.

²⁹ HRA 1998, Article 2, s 2(a).

³⁰ HRA 1998, Article 3.

³¹ 'Article 3: Freedom from Torture and Inhuman or Degrading Treatment' (*Equality and Human Rights Commission*, 4 May 2016) <<https://www.equalityhumanrights.com/human-rights/human-rights-act/article-3-freedom-torture-and-inhuman-or-degrading-treatment>> accessed 6 January 2025.

need to be considered.³² The European Court of Human Rights held that exposing someone to these forbidden harms in this article is never allowed.³³ In another case where women were illegally trafficked into England and forced to work in conditions of servitude, police were held to have failed their duty under Article 3³⁴. It can be reasonably said that Article 3 was breached by the deprivation decision.

Article 4 of the HRA.- Slavery, servitude and forced labour are prohibited.³⁵ It can also include sexual exploitation, which it has been argued that Shamima unfortunately experienced due to being trafficked to Syria. Additionally, Shamima was only 15 when she married an IS fighter and gave birth, which is statutory rape in England under the Sexual Offences Act 2003.³⁶ Article 4 has, evidently, been breached.

Article 5 of the European Charter of Fundamental Rights.- S.3 specifically states: 'Trafficking in human beings is prohibited'.³⁷ There is evidence which shows Mohammed Al-Rashed assisting Shamima and the two other girls into the car to help them get to ISIL-controlled territory.³⁸ Further, there is evidence that Shamima was groomed and radicalised, and once she got to Syria, 'there was no realistic prospect of her getting away'.³⁹ Therefore, there seems to be evidence that the 15-year-old was trafficked for sexual exploitation, which breaches this article.

Article 26 of the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT) 2005.- Article 26 contains the 'non-punishment' principle, which should have been applied. The Home Secretary argued that it was not applicable as it was not a criminal case; SIAC held that s.40 BNA 'is not a punitive power'.⁴⁰ Further stating that s.40 power is 'to protect the public, not punish persons who may also be victims'.⁴¹

Modern Slavery Act 2015.- S.45 of this act states the 'defence for slavery or trafficking victims who commit an offence'.⁴² S.45(4) forbids punishment for individuals who committed offences 18 and under if committed as a 'direct consequence of the person being, or having been, a victim of ... relevant-exploitation' and a 'reasonable person in the same situation as the person and having the person's relevant characteristics would do that act'.⁴³

Article 6 of the HRA.- Everyone has a right to a fair trial. Shamima was not given the chance to have a fair trial as she was unable to be present and because she could not prepare a representation for the trial.

Article 3 of the UN Convention on the Rights of the Child.- This article means that 'the best interests of the child' are in 'all actions concerning children'.⁴⁴ Shamima gave birth to her child before being deprived, thereby he was a British citizen, and the Home Secretary should not have left him in such conditions as it was not in his best interest. Her son's death supports this.

³² *ibid*.

³³ *Chahal v United Kingdom* (1996) 23 EHRR 413

³⁴ *OOO (and others) v Commissioner of Police for the Metropolis* (2011) EWHC 1246 (QBD)

³⁵ HRA 1998, Article 4, s 1, s 2.

³⁶ Sexual Offences Act 2003, s 9.

³⁷ European Charter of Fundamental Rights, Article 5, s 3.

³⁸ [2023] UKSIAC 163 [88].

³⁹ *ibid* [281].

⁴⁰ *ibid* [241].

⁴¹ *ibid* [226].

⁴² Modern Slavery Act 2015, s 45.

⁴³ *ibid* s 45(4).

⁴⁴ UNCRC 1992, Article 3, s 1.

As illustrated, the deprivation decision led to many violations of rights.

What Alternatives might there have been?

The alternative option was to bring Shamima and her son back to the UK to face a full investigation into her terrorism activity claims. This may have resulted in her facing sentencing, but in this process, both her son and herself would have been better off. Shamima would have had the possibility of rehabilitation, which can be said to be in the public interest. In SIAC,⁴⁵ Shamima relied upon Lord Kerr's dissenting judgement in *Ali v SSHD*,⁴⁶ where he said that 'there is a public interest in families being kept together, in the welfare of children being given primacy, and in encouraging and respecting the rehabilitation of offenders' and that these factors 'should be part of the proportionality equation'.⁴⁷ Dr. Green also argued that Shamima could have been successfully rehabilitated if she had returned before the decision.⁴⁸

The least restrictive measure was not adopted by the Home Secretary. Shamima should have been given the chance to prove her innocence.

Were the disadvantages proportionate to the aims pursued?

When aligning this question with Shamima, we are asking: Is leaving her, essentially stateless, in warzone territory an appropriate response to protect NS?

To answer this, it is important to thoroughly consider the consequential disadvantages for Shamima due to the deprivation decision, which includes being left in al-Hawl (refugee camp) and being left stateless.

Shamima's disadvantages.

There is no doubt that Shamima Begum and her newborn were left in dangerous territories. This, in itself, is very morally challenging and unethical (which will be discussed in more detail in the following chapter). Shamima was only 19 when she was deprived of her British Citizenship; grown adults would not want to be left in such areas.

The conditions of the camp have continually deteriorated since 2019. Al-Hawl, where Shamima was when deprived, is controlled by the Syrian Democratic Forces (SDF); at the start of 2019, it was said to be home to 10,000 people, which quickly turned into approximately 74,000 the same year. Further, it was estimated that for 240 people, there was only 1 guard.⁴⁹

At the time, 85% of the camp had connections with the Islamic State (IS), and as a result, the camp had its own religious police, which enforced the ideology of IS.⁵⁰ Shockingly, due to refusing to wear a niqab outside the tent, a grandmother killed her granddaughter.⁵¹ Also, it is important to consider that Shamima was facing death threats in al-Hawl by other ISIS wives since having interviews with journalists, signifying the poor security there.⁵²

⁴⁵ [2023] UKSIAC 163 [31].

⁴⁶ *Ali v SSHD* [2016] UKSC 60; [2016] 1 WLR 4799.

⁴⁷ *ibid* [169].

⁴⁸ [2023] UKSIAC 163 [169].

⁴⁹ Zack McGuinness, 'Inside Syria's al-Hawl Refugee Camp' (*Pivot Mias*, 30 July 2020)

<<https://pivot.mias.org.au/2020/07/30/inside-syrias-al-hawl-refugee-camp/#:~:text=The%20camp%20is%20overcrowded%2C%20malnutrition%20is%20rampant%2C%20water,371%20children%20died%20at%20Al-Hawl%20in%202019%20alone>> accessed 14 November.

⁵⁰ *ibid*.

⁵¹ Tim Dowling, 'Inside al-Hawl camp, the incubator for Islamic State's resurgence' (*The Guardian*, 31 August 2019) <<https://www.theguardian.com/world/2019/aug/31/inside-al-hawl-camp-the-incubator-for-islamic-states-resurgence>> accessed 21 November 2024.

⁵² Anthony Blair, 'ISI bride Shamima Begum 'on the run' after DEATH THREATS from other jihad wives' (*Daily Star*, 2 March 2019) <<https://www.dailystar.co.uk/news/latest-news/shamima-begum-isis-bride-escape-18866082>> accessed 12 December 2024.

Additionally, a report found that in al-Hawl and al-Roj (Shamima's current camp), over 500 people died, and 371 were children.⁵³ These facts highlight the poor conditions in these, evidently, overcrowded camps. It is also important to note that Shamima's son, Jarrah, died due to these poor conditions, not long after she was deprived, which is another consequence of being deprived, as there is a chance that he could have survived, provided he had UK healthcare. (Her son's safety and well-being were the most important to her when seeking to return to the UK). Whilst there have always been vast amounts of diseases and illnesses around these camps, the healthcare is minimal.

As illustrated, one major disadvantage for Shamima was that she was left in these concerning conditions, said to be as bad as torture.

Potential Statelessness.

To be stateless is to not be a 'national by any State under the operation of its law'.⁵⁴ Having no nationality can take away an individual's sense of identity and severely limit their most basic rights. For example, access to education and health care is unavailable for those without nationality. Being left stateless can significantly damage one's mental health, possibly making them feel very depressed and hopeless.⁵⁵ When there are gaps in nationality laws, the risk of becoming stateless increases.

In the UK, s.40(2) British Nationality Act (BNA) (1981) allows the Government to revoke citizenship if 'satisfied that deprivation is conducive to the public good'.⁵⁶ However, s.40(4) forbids deprivation 'if he is satisfied that the order would make a person stateless'. From this, it seems evident that the decision was illegally made. The Home Secretary's decision to deprive was because she had British/Bangladeshi dual citizenship, and he was satisfied that it would not leave her stateless. Shamima, at the time, having British/Bangladeshi dual nationality is questionable and was given great amounts of weight in the decision along with NS.

In Bangladesh, s.5 of the Bangladeshi Citizenship Act (1951) states that a person born after 1951 'shall be a citizen of Bangladesh by descent if his [father or mother] is a citizen of Bangladesh at the time of his birth'.⁵⁷ However, s.14(1) prohibits dual-nationality for s.5, but this does not apply to Shamima due to s.14(1A) allowing dual-nationality if you are under 21.⁵⁸ Thereby, legally, Shamima was eligible for Bangladeshi Citizenship as her father is of Bangladeshi origin, and she was 19 at the time of the deprivation decision. However, being eligible did not mean that she had citizenship. Moreover, many people can apply for citizenship and be rejected. The Bangladeshi Foreign Minister stated 'Bangladesh asserts that Shamima Begum is not a Bangladeshi citizen. She is a British citizen by birth and has never applied for dual nationality with Bangladesh'.⁵⁹ Abdul Momen, former Foreign Minister, also told ITV News that Bangladesh has 'nothing to do with Shamima' and that she would face 'capital punishment' if 'found to be involved with terrorism'.⁶⁰

⁵³ 'Urgent need' to repatriate, rehabilitate ISIL children in Syria' (*Al Jazeera*, 18 June 2020) <<https://www.aljazeera.com/news/2020/6/18/urgent-need-to-repatriate-rehabilitate-isil-children-in-syria>> accessed 28 December 2024.

⁵⁴ UNHCR '1954 Convention relating to the Status of Stateless Persons', Article 1.

⁵⁵ UNHCR Staff, 'Five things to know about statelessness' (*UNHCR*, 15 August 2024) <<https://www.unhcr.org/news/stories/five-things-know-about-statelessness>> accessed 29 December 2024.

⁵⁶ British Nationality Act 1981, s 40(2).

⁵⁷ Citizenship Act 1951, s 5 (Bangladesh).

⁵⁸ *ibid* s 14(1), 14(1A).

⁵⁹ Ministry of Foreign Affairs (Bangladesh), 'Press Release' (*MOFA GOV BD*, 24 February 2019) <https://mofa.gov.bd/site/press_release/a5530623-ad80-4996-b0b4-f60f39927005> accessed 4 January 2025.

⁶⁰ Bangladesh's Foreign Minister tells ITV News Islamic State Bride Shamima Begum is 'not our problem' (ITV News, 2 May 2019) <<https://www.itv.com/news/2019-05-02/bangladeshs-foreign-minister-tells-itv-news-islamic-state-bride-shamima-begum-is-not-their-problem>> accessed 12 December 2024.

Although Bangladeshi law allows Shamima to apply for citizenship, she likely would have been rejected due to Bangladeshi courts favouring their government. Therefore, s.40(4) BNA has been breached overall, because just the eligibility of applying for it does not mean that you have, thereby leaving Shamima Stateless. However, it can be said that Shamima was a Bangladeshi citizen, but only in a technical sense.

At the international level, Article 8(3)(ii) of the 1961 Convention on the Reduction of Statelessness deals with the cumulative impact of conflicting national laws. It allows the States to deprive someone of their citizenship if the individual was ‘seriously prejudicial to the vital interests of the State’,⁶¹ which is arguably what Sajid did. But Article 8(4) states that deprivation must follow the law, giving them the right to a fair hearing.⁶² Shamima was refused leave to enter to appeal the deprivation decision and therefore was not given a fair trial. However, Article 15 of the Universal Declaration of Human Rights (1948) gives everyone a right to nationality and protection from its arbitrary deprivation.⁶³ Shamima was left Stateless, which went against both UK and international law. As discussed, being left stateless has detrimental impacts on a person. SIAC found that Shamima was not *de jure* stateless but was unable to travel to Bangladesh due to the risk of torture.⁶⁴

Overall, the disadvantages were disproportionate to the aims pursued. Compared to the threat Shamima posed to NS, it seems like she was severely impacted by the decision.

Was the deprivation decision proportionate?

Ultimately, whether the Home Secretary considered all of the above factors properly, as required in domestic and international law, is hard to answer. To answer the first question, yes, protecting NS is a sufficiently important reason to restrict fundamental rights. Regarding the second question, yes, the deprivation decision was connected; whether it was rational is unlikely due to the extremity. For the third question, no, the deprivation decision does not appear to have been the least restrictive measure available. Finally, to answer the fourth, it can certainly be argued that Shamima’s disadvantages were disproportionate compared to the aims pursued.

Anyone who would have deprived Shamima, with her unfortunate circumstances of how she got there and how she has since been, did not truly apply the proportionality assessment. The courts were restricted to how they assessed proportionality after the SC judgement in 2021 and, therefore, were unable to. Consequently, a fair balance was not struck.

3. Was the deprivation decision morally right or wrong?

When faced with a decision, an individual's moral compass comes into action. Morals generally refer to what someone perceives as right and wrong, and to decide this, an individual's personal experiences, family and religion (amongst others) are largely considered. Determining the morality of Shamima’s case is an essential part of the article, as it evaluates the sociology of the decision and how society has reacted.

There is little research regarding this. Discussing the morality of this decision may provide better reasoning, for and against the decision, and what could have been done to make it ‘more moral’. Shamima’s case has proved to be complex, causing great controversy within the public and political parties since 2015, especially since 2019.

⁶¹ UNHCR ‘1961 Convention on the Reduction of Statelessness’, Article 8(3)(ii).

⁶² *ibid* Article 8(4).

⁶³ UNUDHR 1948, Article 15.

⁶⁴ [2023] UKSIAC 163 [301].

Whilst the previous chapter addressed that the deprivation was not proportionate, this chapter further signifies the problems with the case by highlighting how they are morally wrong too. It will be argued that Shamima and her son were detrimentally affected by the deprivation decision, thereby questioning the morality of the decision. To do this, news articles, political debates and non-governmental organisations' opinions will be cited.

This chapter will specifically explore the debate regarding the unfortunate death of Shamima's son, Shamima's safety, and political ambitions.

Shamima's son.

It has been argued that Shamima's son, Jarrah, was failed by the UK by not allowing them to return.⁶⁵ Jarrah was born on February 17th, 2019, two days before Shamima's British citizenship was revoked.⁶⁶ On March 7th, 2019, Jarrah passed away from pneumonia due to the poor living conditions in al-Hawl camp.⁶⁷ Before Jarrah died, on February 21st, Shamima's family had written to Sajid asking him for assistance in bringing back their 'one true innocent' nephew, Jarrah, who should have been 'raised in the safety of' the UK.⁶⁸ In response, the Home Office stated that the Foreign and Commonwealth Office (FCO) considered 'requests for consular assistance', not them.⁶⁹ In an interview, the then Foreign Secretary Jeremy Hunt said that no attempts were made to rescue Jarrah, as sending British officials to a warzone was too dangerous.⁷⁰ However, given that Shamima was interviewed several times, Daniel Sandford argued that rescuing Jarrah was possible; another comment was made that 'this was an entirely avoidable death'.⁷¹ Furthermore, the deprivation decision seemed to be the main cause for Jarrah not surviving, first because it is likely he would have had better medical treatment and also because he might never have fallen ill in the first place. Thereby, the reason why the UK did not rescue Jarrah proves invalid, and Sajid failed to protect Jarrah, especially by leaving him and Shamima in a dangerous camp.

Camp conditions and Shamima's safety.

Diane Abbott pointed out that 'to leave a vulnerable young woman and an innocent child in a refugee camp, where we know infant mortality to be high, is morally reprehensible'.⁷² The camp conditions have been said to 'amount to inhumane treatment and even torture';⁷³ leaving

⁶⁵ Ashley Cowburn, 'Shamima Begum: Sajid Javid facing outrage as death of Isis bride's son labelled 'stain on the conscience' of government' (*Independent*, 9 March 2019) <<https://www.independent.co.uk/news/uk/politics/shamima-begum-dead-son-sajid-javid-uk-citizen-isis-bride-passport-a8815096.html>> accessed 11 November 2024.

⁶⁶ Tom Pilgrim, 'Shamima Begum timeline: From flight to Syria to citizenship legal battle' (*Independent*, 23 February 2024) <<https://www.independent.co.uk/news/uk/crime/shamima-begum-sajid-javid-syria-british-kadiza-sultana-b2501308.html>> accessed 18 November 2024.

⁶⁷ Martin Chulov, Nazia Parveen and Mohammed Rasool, 'Shamima Begum: baby son dies in Syria refugee camp' (*The Guardian*, 9 March 2019) <<https://www.theguardian.com/uk-news/2019/mar/08/shamima-begum-confusion-after-reports-newborn-son-may-have-died>> accessed 15 November 2024.

⁶⁸ 'Shamima Begum: Letter from family to the Home Secretary' (*BBC*, 21 February 2019) <<https://www.bbc.co.uk/news/uk-england-47326715>> accessed 13 November 2024.

⁶⁹ 'Shamima Begum: IS teenager's baby son has died, SDF confirms' (*BBC*, 8 March 2019) <<https://www.bbc.co.uk/news/uk-47500387>> accessed 13 November 2024.

⁷⁰ 'Shamima Begum: 'Not safe' to rescue IS bride's baby, says Hunt' (*BBC*, 10 March 2019) <<https://www.bbc.co.uk/news/uk-47512659#:~:text=The%20child%20died%20in%20a,brides%22%20and%20get%20them%20out>> accessed 14 November 2024.

⁷¹ text to n 69.

⁷² text to n 65.

⁷³ Yasmine Ahmed, 'The UK Supreme Court Has Failed Shamima Begum' (*Human Rights Watch*) <<https://www.hrw.org/news/2021/03/02/uk-supreme-court-has-failed-shamima-begum#:~:text=Leaving%20them%20in%20detention%20camps,served%20by%20undermining%20human%20rights>> accessed 26 December 2024.

vulnerable young people there cannot be considered moral. Knowing that three of Shamima's children had now died proved how bad the camp was. Although Jarrah died in al-Hawl camp, the camp which Shamima is currently in, al-Roj has been said to be the 'most dangerous' in Syria.⁷⁴ Therefore, leaving Shamima and Jarrah in such conditions cannot be considered moral, further suggesting that the deprivation decision was not based on moral grounds but was driven by Sajid's 'own personal political objective'.⁷⁵

"Political Ambitions" of the Home Secretary?

Tasnime Akunjee, Shamima's lawyer in 2019, claimed that the decision was made to enhance Sajid's ambitions of becoming Prime Minister.⁷⁶ This was supported by Lord Macdonald: 'so intent on apparently furthering his leadership ambitions that he lost sight of sovereignty, ... incapable of regulating' his citizens.⁷⁷ Moral behaviours have been described as 'the actions of a person who takes into account in a sympathetic way the impact the actions have on others'.⁷⁸ From this definition, one may conclude that not bringing back Shamima and Jarrah was immoral behaviour, as Sajid might be said to have not considered how revoking Shamima's citizenship left, not only her but also her son, incredibly vulnerable because he was more concerned with his personal advantage. Critics have also said that Sajid simply 'washed his hands' with Shamima and Jarrah to avoid the responsibility.⁷⁹

However, Sajid argued that he was putting national security over Shamima and her son,⁸⁰ which, in turn, can be considered moral as he was essentially protecting the British people. In an extreme sense, the infamous moral dilemma known as the 'trolley problem' can be referred to, concerning the difficult question of: would you allow five people to die in order to save one, or would you allow one person to die to save five? There's no easy answer to this. For this case, it could be translated to: would you rather leave Shamima in another country, which is claimed to be safer for the UK's NS, or would you be willing to risk allowing her back so that she can face trial, which would also help protect her newborn? As mentioned, many different factors will influence the way a person answers this question. Morally wise, it depends on the individual.

A Morally Wrong Decision.

From the above arguments, the deprivation decision can be concluded to be morally wrong for three reasons. First, the decision led to the death of an innocent child, when the child could have been rescued instead, especially if the deprivation had never happened. Secondly, the decision also left Shamima in very dangerous conditions and, morally, no one should be left there, especially a mother and her child. Finally, on a trickier level, there were likely personal motivations which led Sajid to the decision and is, therefore, not morally considering the impact, but selfishly making the decision. It is important to note that there are many other questions to consider in morality here, especially on the motivations behind the decision, but

⁷⁴ Aya Ezz, 'Al-Roj: Syria's most dangerous camp' (*The Portal*, 24 October 2021) <<https://www.theportal-center.com/2021/10/al-roj-syrias-most-dangerous-camp/>> accessed 21 December 2024.

⁷⁵ Hanna Yusuf and Steve Swann, 'Shamima Begum: Lawyer says teen was groomed' (*BBC*, 31 May 2019) <<https://www.bbc.co.uk/news/uk-48444604>> accessed 4 December 2024.

⁷⁶ *ibid.*

⁷⁷ Jamie Doward, Mark Townsend and Nosheen Iqbal, 'Shamima Begum Sajid Javid labelled 'moral coward' over baby death' (*The Guardian*, 10 March 2019) <<https://www.theguardian.com/uk-news/2019/mar/09/sajid-javid-moral-coward-death-begum-baby>> accessed 19 December.

⁷⁸ <https://www.ncbi.nlm.nih.gov/books/NBK210003/>

⁷⁹ 'The Difference of Being Human: Morality' in John C. Avise and Francisco J. Ayala (ed), *In the Light of Evolution*, vol 4 (National Academic Press (US) 2010).

⁷⁹ text to n 77.

⁸⁰ *ibid.*

for this article, they are not required. When considering what the right thing would have been, bringing Shamima back for investigation is likely the answer. However, this is just a possibility.

4. Conclusion

The above research illustrates the tensions between human rights and national security; these tensions are particularly high in Shamima Begum's case. These tensions have, and will, continuously appear, especially where national security, human rights or terrorism (or all) are involved.

Striking a steady balance may seem easy at first glance; however, as Chapter One has demonstrated, it is far from easy. The principle of proportionality is crucial for cases like Shamima's. Although the courts were limited in the way they could apply the principle, especially after the Supreme Court's ruling in 2021, when applying the assessment independently from the courts and Security Services, the fundamental objective is achieved: a fair balance. As discussed, the deprivation decision is not proportionate as there is no fair balance between Shamima's rights and disadvantages compared to the risk she was assessed the pose. Especially considering that there was an alternative option, which is what was done many times before Shamima: investigating her in the UK and, if needed, prosecuting her as well as providing rehabilitation.

Regarding the morality of Shamima's case, there are a lot of different views which could have been discussed. However, to further support Chapter 2's findings, Chapter 3's argument was that the deprivation case was immoral. The unfortunate death of Shamima's third child, Jarrah, caused a nationwide debate regarding whether the deprivation decision was fair and right. It was found that the UK government had let down Shamima and Jarrah, especially by leaving them in such conditions, which consequently led to the death of Jarrah. Furthermore, over the years, many different perspectives have been shared, not only from the UK but worldwide, signifying the importance of this case.

This research is important for future cases; public bodies should address the findings of this article and consider alternative ways for dealing with individuals like Shamima.

For the purpose of this article, it is worth noting the limitations faced when conducting this research. First, Bangladeshi laws are not 100% accessible, nor are Bangladeshi media reports; and secondly, the reasons behind some judgements within Shamima's legal battles are not always clear; and finally, the limited word count of 7500 does not allow going into detail as much as one would have liked. Besides this, the topic has proven to be very interesting, although complex.

It is important to make future recommendations after this thorough research. Further research on the motivations behind Sajid's motivations could be carried out to determine whether this was more politically driven than acceptable. Research on the other alternatives in this case is recommended to gain greater insights into what can be done to avoid these tragic cases.

On a final note, this research should have filled a significant gap in the existing literature on this case and topics of law and morality. Two very different perspectives have been given, both of which have provided similar outcomes.

Cross - Cultural Legitimacy of Human Rights: Can Human Rights be Relocated in Cultures different from their Origin?

Emmanuel Kwegyir Arthur-Ewusie*

Abstract

This article critically examines the cross-cultural legitimacy of human rights, delving into the complex question of whether these fundamental rights can be relocated into cultures different from their origin. The discourse surrounding human rights often assumes their universal applicability. However, the diversity of cultural contexts raises important questions about the extent to which these rights can be embraced and implemented across different societies. Through an exploration of cultural relativism, ethical pluralism, and the challenges of cultural adaptation, this article analyses the dynamic interplay between human rights and diverse cultural landscapes.

Key Words

Human Rights, Cultural Relativism, Universalism, Cross-Cultural Legitimacy, Ethical Pluralism, Global Justice.

1. Introduction

Human rights, as articulated in international declarations and treaties, are often regarded as the bedrock of a just and equitable global society.¹ However, as societies become more interconnected, the question of whether these rights possess cross-cultural legitimacy emerges as a crucial and contested issue. The belief in the universality of human rights presupposes that certain fundamental principles are inherent to all human beings, transcending cultural, geographical, and historical differences.² This assumption, however, prompts a critical examination of the potential clash between the universality of human rights and the diversity of cultural values and practices.

Cultural relativism, a perspective emphasizing the importance of understanding cultural norms within their own context, challenges the notion of universal human rights by asserting that each culture should determine its own ethical framework. This article seeks to navigate the tensions between cultural relativism and the universality of human rights, investigating whether a middle ground can be reached to reconcile these seemingly opposing perspectives. Additionally, ethical pluralism introduces the idea that diverse cultural values can coexist within a framework of shared ethical principles, fostering a more inclusive understanding of human rights.

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¹ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) Human Rights Quarterly 415

² *Ibid*

As we explore the possibility of relocating human rights into cultures different from their origin, we encounter practical challenges and ethical dilemmas. How can human rights be adapted to accommodate cultural variations without compromising their core principles? Can a balance be struck between preserving cultural autonomy and upholding a global standard of human dignity? These questions underscore the need for a nuanced examination of the intersection between human rights and cultural diversity, urging us to reconsider the universality of these rights in the face of diverse and evolving cultural landscapes. This article seeks to contribute to the ongoing discourse surrounding human rights by critically evaluating their cross-cultural legitimacy and the potential for their relocation into diverse cultural contexts.

2. Universalism vs. Cultural Relativism of Human Rights

Universalists consider human rights a set of standards that all nations and cultures should universally accept and respect.³ However, some critics—cultural relativists like myself—argue that the concept of human rights is not truly universal because it is rooted in Western values and beliefs, which cannot be easily transferred to or reconciled with other cultures, especially in different jurisdictions. The issue of whether a set of values based on traditional Judeo-Christian values and philosophy can be relocated into cultures different from that of the West, where they were created, is a complex one.

On one hand, there is some degree of universality, at least in connection to some fundamental human rights ideas and precepts, notably those that touch on the rule of law, the sanctity of human life,⁴ and dignity,⁵ regardless of cultural influence and background.⁶ Articles 3 and 5 of the Universal Declaration of Human Rights, for example, safeguard the right to life, liberty, and security of a person, and further prohibit torture and cruel, inhuman, or degrading treatment or punishment.⁷ These rights embody fundamental, generally shared principles in the modern form of rights held against the state; they provide a minimal modern consensus on certain nearly universal protections against the state.⁸ These rights, in my view, could be construed to be universal, having cross-cultural viability.

On the other hand, however, there is a danger of imposing one's own values and beliefs onto others, which can lead to cultural imperialism and suppression of local traditions and customs.⁹ From my perspective, 'reality' or 'truth' can be understood as a social construct, influenced by various social and contextual factors.¹⁰ As a result, human rights cannot be considered to be absolutely universal because their veracity may be contingent on several factors. If implemented, a universal regime of human rights would tend to create a favourable environment for cultural divergence to spread into homogeneity.¹¹ This position, however, runs counter to the principles and goals of organizations like the United Nations Educational, Scientific, and Cultural Organization (UNESCO), which serve as counterpoints in highlighting

³ Nhina Le, 'Are Human Rights Universal or Culturally Relative?' (2016) 28(2) *Peace Review: A Journal of Social Justice* 203

⁴ Universal Declaration of Human Rights, article 3

⁵ *Ibid* article 1

⁶ Bonny Ibhawoh, 'Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse' (2001) 19(1) *Netherlands Quarterly of Human Rights* 43

⁷ Universal Declaration of Human Rights, articles 3, 5

⁸ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 415

⁹ *Ibid* 400

¹⁰ James R Scarritt and Claude E Welch, 'Human Rights in Africa: Present Realities, Future Prospects' (1985) 32(2) *Africa Today* 105

¹¹ *Ibid*

the crucial value of cultural diversity as a means of successful cooperation and coexistence of international human rights.¹² It is posited that some leeway needs to be left to accommodate cultural variations and adaptations of human rights norms. In other words, I am of the view that context is a necessary component of the legitimacy of various human rights and the claims made on their relative importance.¹³

This article explores this issue (transcultural legitimacy of international human rights) in different human rights contexts and argues that while there are certain values or rights that can be universally applied, others cannot or at least, will take time. Even with the former, the implementation of those values must be done with sensitivity and respect for cultural diversity. Thus, the idea of absolute universality of human rights, in my view, remains a myth.¹⁴ Some aspects of international human rights are universal and consequently have transcultural legitimacy, whilst others are primarily influenced and determined by culture, with the universality of human rights and human nature acting as a check on any potential excesses of relativism.¹⁵

Thus, while the critique of the universal nature of human rights to a large extent has some merit, its justification is not absolute, in that, despite cultural differences influencing the understanding of the concept of human rights by a people, some aspects of human rights are universal, capturing cross-cultural legitimacy. Human rights are both universal (some can be relocated into other cultures different from those of their origin without friction) and culturally relative (an attempt to relocate certain rights into cultures different from that of the West could be problematic).

It's more of a need to know where to draw the balance than to forcefully seek to make all human rights universal.

What at all are "human rights"? Is the meaning associated with the phrase definite, or can it be legitimately subjected to a range of interpretations without losing its core essence or meaning? Who or what institution determines what constitutes human rights? To what extent is it morally and ethically acceptable to enforce human rights laws in societies and cultures that do not recognize them? How do human rights work? Are human rights influenced by the peculiar customs and traditions of a people or place, or are they the same or viable everywhere? How much cultural diversity can the new global human rights system accept in order to give it cultural validity in different societies? Does the Universal Declaration of Human Rights (UDHR) represent the cultural imperialism of the West? And if it does, can it be reconciled with the cultural atmosphere of foreign jurisdictions like Africa, Asia, and others?

The many international human rights treaties, especially the United Nations instruments on human rights, which declare their contents to be universal, inalienable, and cross-culturally legitimate despite clearly having been influenced by the West in their formulation, serve as a starting point for these discussions.¹⁶ These questions and issues, among others, have been the focus of many political and academic discussions since the 1948 creation of the UDHR between "universalists" and "cultural relativists."¹⁷ While there may be contentions regarding the ideological presumption of the universality of human rights principles, there seems to be

¹² Nsama Jonathan Simuziyya, 'Universal Human Rights vs Cultural and Religious Variations: An African Perspective' (2021) 8(1) Cogent Arts and Humanities 38

¹³ *Ibid* (n4) 49

¹⁴ Ronald Cohen, Goran Hyden and Winston P Nagan (eds), *Human Rights and Governance in Africa* (University Press of Florida 1993) 13

¹⁵ Onuma Yasuaki, 'In Quest of Intercivilizational Human Rights: "Universal" vs "Relative" Human Rights Viewed from an Asian Perspective' (2000) 1(1) *Asia-Pacific Journal on Human Rights and the Law* 54

¹⁶ *Ibid* (n2)

¹⁷ *Ibid*

more consensus regarding the idea that with the introduction of the UDHR in 1948, some human rights concepts have assumed universal validity.¹⁸ However, even this supposition has its detractors.¹⁹ The American Anthropological Association is perhaps the most well-known of these, having stated in its frequently quoted response to the draft proposal for the Universal Declaration of Human Rights in 1947 that:

“Standards and values are relative to the culture from which they derive ... such that what is held to be a human right in one society may be regarded as antisocial by another people ... If the Universal Declaration must be of worldwide applicability, it must embrace and recognize the validity of many different ways of life... The rights of man ... cannot be circumscribed by the standard of any single culture or be dictated by the aspirations of any single people.²⁰

The conflict between "individualist" theorists, who place the individual above the community in their understanding of human rights, and "collectivist" theorists, who position the community above the individual, is also implicit in this discussion.²¹

By definition, "human rights" are founded on the equality of all people in their inherent dignity. "Dignity" refers to the universal ideal that all people have the right to be treated with respect, seen as ends rather than means, acknowledged as having equal worth, and given the opportunity to develop their talents.²² These viewpoints serve as the basis for human rights claims.²³ Although this definition seems universally applicable, it is not safe to assume that the international human rights regime is stable and uncontentious because certain aspects of these rights are irreconcilable with the cultural climate of other jurisdictions.²⁴ Many people who disagree with arguments for the cultural relativism of human rights are concerned that such a position condones or even endorses practices such as female genital mutilation, the subjection of women and minority groups, random deaths, torture, and trials by torture.²⁵

Furthermore, it is feared that accepting the cultural relativity of human rights will weaken the entire movement for universal human rights.²⁶ The conflict between the theory of cultural relativism and international human rights has mostly been influenced by these anxieties. However, this article suggests that universalism and cultural relativism can coexist without causing harm and lead to fresh perspectives, bolstering international and local initiatives to advance human rights.²⁷

According to some authors, a distinction must be drawn between the moral standards of human dignity, which all cultures share, and human rights, which are enforceable by individuals against the state, even though the broadly defined humanistic values that the concept of human rights is founded upon may be universally shared.²⁸

¹⁸ Albert Tevoedjre, *Human Rights and Democracy in Africa* (United Nations University Press 1986) 8

¹⁹ *Ibid*

²⁰ Executive Board of the American Anthropological Association, 'Statement on Human Rights' (1947) 49(4) *American Anthropologist* 539

²¹ *Ibid* (n6)

²² Bonny Ibhawoh, 'Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse' (2001) 19(1) *Netherlands Quarterly of Human Rights* 48

²³ *Ibid* (n1)

²⁴ *Ibid*

²⁵ Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Rights and Duties' (1995) 35(2) *Virginia Journal of International Law* 341

²⁶ *Ibid* (n16)

²⁷ *Ibid* (n1)

²⁸ Rhoda E Howard-Hassmann, *Human Rights in Commonwealth Africa* (Rowman & Littlefield 1986) 19

This article concurs with Bassam Tibi's perspective that many scholars tend to conflate "human rights" and "human dignity."²⁹ He claims that if one is talking about the latter, there is no question that many traditional non-Western civilizations have fully formed ideas of human dignity, and in that sense, it will not be wrong to say that human rights are universal or cross-culturally legitimate. However, the modern understanding of human rights, which derives from the contemporary articulation of legal entitlements that people hold in relation to the state, is, to a high extent, influenced by the customs, culture, and traditional setting of a people.³⁰ James Nickel also comes to a similar conclusion in his theoretical investigation of the idea of human rights, namely that, while the assertions of human rights' universality and inalienability are feasible for some particular rights, they are not true for a large number of other rights.³¹

And to this end, it can be argued that different civilizations and societies within diverse social and historical contexts have developed distinctive perspectives toward the idea of human worth, human dignity, or human rights. Thus, the conception of human rights by Third World or non-Western societies and that of the West do not only differ philosophically but also conflict with each other.³² While Western conceptions are based on the idea of the autonomous individual, many non-Western conceptions are not aware of such individualism. The community-based nature of human rights and obligations, as well as economic and social rights and the relative nature of human rights, are all, given more weight in Third World traditions, like Africa and Asia.³³

When information about a proposed UDHR reached the American Anthropological Association in June 1947, the executive board of that organization issued a letter to the Human Rights Commission asserting that the UDHR document could not be a statement of rights conceived solely in terms of values prevalent in Western European and American countries.³⁴ The Declaration's universality was challenged on several grounds.

First, as Jack Donnelly and Mary Glendon have pointed out, many involved in the creation of the UDHR were cosmopolitans with international experiences and certain unique social privileges.³⁵ Their perspectives did not resonate with the concerns and problems of common people and because cosmopolitans and ordinary people do not live in the same world, their perception and implementation of human rights are thus radically different.³⁶

Second, national governments oppose international norms that they view to be incompatible with local cultural and social values or domestic political goals.³⁷ As a result, the international human rights regime cannot compel countries to change their human rights practices.³⁸ In fact, the international human rights framework includes two human rights covenants: The International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.³⁹ During the Cold War, the Soviets and non-Western groups had a predilection for the first covenant, while the US subscribed to the second.⁴⁰ The

²⁹ *Ibid*

³⁰ *Ibid*

³¹ James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987) 44

³² *Ibid* (n8) 46

³³ *Ibid*

³⁴ *Ibid* (n1) 203

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ *Ibid*

³⁹ Albert Tevoedjre, *Human Rights and Democracy in Africa* (United Nations University Press 1986) 8

⁴⁰ *Ibid* (n1) 203

divide between non-Western and Western views on human rights remains in today's world politics. Governments around the world continue to utilize this contradiction to justify focusing on only a subset of globally recognized human rights.⁴¹ East Asian policymakers, for example, say that the right to development takes precedence over other rights and is the most culturally appropriate means to further all human rights in their own countries.⁴² As a result, the best approach for the region to meet its human rights obligations is to prioritize development, even if that involves curbing political and civil rights.⁴³ In contrast, the United States emphasizes political and civil rights while opposing socioeconomic rights out of concern that these rights will undermine commercial rivalry, impose on autonomy, and limit freedom of speech.⁴⁴

Third, a cluster of the rights recognized by the UDHR, such as the right to private ownership of the means of production, equality, marriage, and religious freedoms, contradict customary practices and customs in non-Western communities.⁴⁵ These societies have clearly not adopted rights, instruments or the language of rights as defined in the UDHR. As a result, non-Western rule-makers may regard certain rights as an intrusion or imposition of Western culture in their domestic setting.⁴⁶ A right to private ownership of the means of production, for example, is incompatible with the preservation of a village society in which families have merely rights of use to communally owned property; permitting people to opt-out and fully own their land would destroy the traditional system.⁴⁷ Similarly, but less dramatically, full religious freedom, including the right to apostasy, is irreconcilable with many well-established traditional Islamic doctrines.⁴⁸

Fourth, the human rights narrative and practice reflect Western ideas that prioritize the individual over everything else. Consequently, non-western belief and value systems that see the person as a member of something larger than oneself, such as families and social or communal groups, are lacking.⁴⁹ The emphasis on equality and non-discrimination, for example, especially in articles 1 and 2 of the UDHR represents a fundamentally individualistic modern vision of man, state, and society.⁵⁰ Individuals with autonomy are easily perceived as essentially equal. However, in a traditional non-western society, basic equality is likely to be an inconsistent or confusing concept in which people are defined by ascriptive attributes such as birth, age, or sex.⁵¹

Furthermore, article 12 of the UDHR is particularly modern in that it recognizes a limited right to privacy.⁵² Privacy is very important to the reasonably autonomous individual since it helps to protect his individuality. It is, however, inherently foreign to ancient, communitarian societies, as seen by the etymological relationship between privacy and privation in English.⁵³

⁴¹ Kofi Oteng Kuffuor, 'The Origin of the African Human Rights System' in Kofi Oteng Kuffuor (ed), *The African Human Rights System* (Palgrave Macmillan 2010) 32

⁴² *Ibid* (n1) 204

⁴³ *Ibid*

⁴⁴ *Ibid* (n1) 204

⁴⁵ *Ibid* (n40)

⁴⁶ *Ibid*

⁴⁷ Victor T Levine, 'African Patrimonial Regimes in Comparative Perspective' (1980) 18 *Journal of Modern African Studies* 672

⁴⁸ *Ibid*

⁴⁹ Virginia A Leary, 'The Asian Region and the International Human Rights Movement' in Claude E Welch and Virginia A Leary (eds), *Asian Perspectives on Human Rights* (Boulder 1990) 13

⁵⁰ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 415

⁵¹ *Ibid*

⁵² UDHR article 12

⁵³ *Ibid* (n48)

Again, articles 13, 14, and 15, which recognize rights to freedom of movement, asylum, and nationality, are also fundamental in the rather fluid, individualistic modern world, but would likely appear strange, at least as fundamental rights, in most traditional civilizations.⁵⁴ Article 16 of the UDHR, which deals with the right to marry and start a family, is somewhat universally applicable.⁵⁵ However, the condition of "free and full consent of the intending spouses" shows a particularly modern view of marriage as a union of individuals rather than a connection of lineages.⁵⁶ Some customary practices, such as bride price, provide alternative protections for women as well as a kind of indirect conditionality to marriage that meets at least some of the fundamental concerns of Article 16(2).⁵⁷ Such considerations make it much easier to accept cultural relativity in this regard.

Several of the mentioned rights resemble specifications at the level of form when we look at the considerably more comprehensive International Human Rights Covenants.⁵⁸ For instance, the International Covenant on Civil and Political Rights, article 10(2)(b) mandates the isolation of juvenile offenders.⁵⁹ Nonetheless, the idea of a minor criminal defendant does not exist in many cultures.⁶⁰ Penitentiary systems, which are also culturally distinctive institutions, are referenced in Article 10(3).⁶¹ Also, virtually all societies permit individual ownership of at least some goods, so the right to private property, as articulated in article 17, has some universal validity. However, in the modern sense of a right to individual ownership of the means of production, it is evidently only appropriate in economies with a significant capitalist sector and would not resonate with strictly socialist and communist societies like Cuba, China, Vietnam, and North Korea.

Again, in powerful traditional societies, founded on community, the applicability of civil rights like freedom of conscience, speech, and association may not be a priority because these rights presuppose the existence and favourable assessment of relatively autonomous individuals.⁶² Regardless, there would hardly ever be a problem in such societies; members of such a community simply won't have the need or want to assert such civil rights if traditional practices are really founded on and preserve culturally accepted notions of human dignity.⁶³ Interestingly, by making human rights more socially focused and by challenging the individualism that has typified Western human rights rhetoric, the developing world left its mark on human rights theory in the 1990s.⁶⁴ This movement has been largely driven by the claims that the idea and interpretation of human rights are culturally relative to "Asian values," and more recently, "African values."⁶⁵

It appears self-defeating and contradictory for a liberal ideology—the universal doctrine of human rights—to champion self-determination and freedom of choice while simultaneously justifying pressure on states to adopt liberal values. This contradiction is particularly evident in instances such as Western nations threatening to cut aid to developing countries that refuse to implement certain democratic reforms or human rights protections.⁶⁶ There is a prevailing

⁵⁴ *Ibid* (34) 416

⁵⁵ *Ibid* (36) article 16

⁵⁶ *Ibid* article 16(2)

⁵⁷ *Ibid* (34) 418

⁵⁸ *Ibid*

⁵⁹ ICCPR article 10(2)(b)

⁶⁰ *Ibid* (n49)

⁶¹ ICCPR article 10(3)

⁶² Rhoda E Howard-Hassman, *Human Rights in Commonwealth Africa* (Rowman & Littlefield 1986) 19

⁶³ *Ibid*

⁶⁴ *Ibid* (n18) 49

⁶⁵ Bilahari Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 24

⁶⁶ John-Jean B Barya, 'The New Political Conditionalities of Aid: An Independent View from Africa' (1993) 24(1) *IDS Bulletin* 16

argument among universalists that, looking back in history, all human communities have changed their cultures, religions, or other value systems throughout time and that, if one chooses a specific religion or culture of a nation at a specific period and claims that it must be respected at all costs, one is putting a certain relativity on an absolute perspective, ignoring historical changes that occur in any nation.⁶⁷ While it is important to reject discriminatory views, it must be acknowledged that a society may not be prepared to adopt certain human rights practices until such values are considered culturally and socially imperative. In such cases, attempts to impose foreign values or a specific way of life in the name of universal human rights can be perceived as a form of cultural imperialism. Prematurely implementing these rights in jurisdictions where the societal framework is not yet ready for their acceptance can lead to confusion, instability, and potential identity crises. It should be recognized that many human rights, once controversial or even illegal in Western societies, have only been recognized through shifts in social circumstances. Given the diverse customs and traditions across societies, jurisdictions should be afforded autonomy to determine what constitutes human rights within their cultural contexts. External intervention should be considered only when there are violations such as abuse of power or torture, or when actions have a demonstrably harmful impact on the population.

Most Africans, for instance, believe that the human rights movement promotes a rationalist universalism that is firmly rooted in Enlightenment philosophy.⁶⁸ Due to this, the endeavour now looks to be a type of European ethnocentrism, and as a result, it serves as a form of dominance rather than emancipation.⁶⁹ It is assumed that people can only fully develop when they are concerned about how their actions may affect other people. The predominant African understanding of human rights thus incorporates a system of rights and obligations that offers social cohesion and viability, in contrast to the Western conception of rights, which conceptualizes rights in terms of abstract individualism without accompanying duties; this is what Makau Wa Mutua describes as the 'African cultural fingerprint'.⁷⁰ He argues that a general definition of human rights that are universally accepted may not be realistic or even desirable because it might neglect the particular interests of some communities, whose concerns might not support a universal approach.⁷¹ African values are distinct in character, not in degree; they are based on reciprocal obligation rather than the strict text of the law; they are independent yet communitarian rather than individualistic.⁷² In this context, rights are defined to include, but not be limited to, the right to political representation, which is frequently secured by the family, generational groups, and clan. The society evolves a few key social characteristics that tend to encourage the promotion of both individual and community rights. These include respect for elders, dedication to one's family and community, and cooperation with other community members.⁷³ In addition to emphasizing groupness, sameness, and commonality, the prevalent social orientations towards rights also placed an emphasis on a sense of cooperation, interdependence, and communal responsibility.⁷⁴ Although cultural relativism has

⁶⁷ Onuma Yasuaki, 'In Quest of Intercivilizational Human Rights: Universal vs Relative Human Rights Viewed from an Asian Perspective' (2000) 1(1) *Asia-Pacific Journal on Human Rights and the Law* 72

⁶⁸ John Kampfner, *Freedom for Sale: How We Made Money and Lost Our Liberty* (Simon and Schuster 2009) 12

⁶⁹ *Ibid*

⁷⁰ El-Olaïd Ahmed El-Obaid and Kwadwo Appiagyei-Atua, 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' (1996) 41 *McGill Law Journal* 819

⁷¹ Nsama Jonathan Simuziya, 'Universal Human Rights vs Cultural and Religious Variations: An African Perspective' (2021) 8(1) *Cogent Arts and Humanities* 37

⁷² Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18(2) *Human Rights Quarterly* 321

⁷³ Makau Wa Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1999) 5 *Buffalo Human Rights Law Review* 75

⁷⁴ *Ibid*

potential issues that could lead to the violation of human rights under the guise of conserving cultural values, universalism also has a tendency to favour hegemonic politics, whereby Western powers undermine the legitimacy of traditional systems of law.⁷⁵

Again, for another example, many families in Asia and Africa have the legal right to use communally owned land but do not have the right to own it, unlike in the West.⁷⁶ These regions' policymakers and industrialists utilize the land for Urbanization projects and implement the right of private ownership. However, they fail to recognize that communally owned lands serve as places where people cultivate a sense of community.⁷⁷ Politics and future development are not possible without social ties. In other words, fast urbanization and carelessly enforcing the right to private property ownership could erode current cultural norms and lead to confrontations between communities, the government, and the market.⁷⁸

3. Conclusion

In conclusion, Kofi Quashigah's viewpoint is compelling, and this analysis supports his argument that some fundamental needs are "indisputably universally ascribable to persons of every historical, geographical, and cultural background."⁷⁹ However, cultural relativism is also a fact and reality in human rights discourse, and differences in cultural and ethical perspectives inevitably affect how people view their rights and obligations.⁸⁰ Arguments for cultural relativism in human rights are thus valuable to the extent that they draw attention to the importance of cross-cultural understanding and tolerance of diversity.⁸¹ For this reason, cultural variations may allow for some exceptions to the principles of universal human rights. But rather than serving as a justification for arbitrary authority, despotism and oppression, cultural relativism must serve as an expression of and guarantee of local self-determination.⁸² Cultural deviation from universal human rights standards must be established on a legitimate cultural basis with suitable alternative constitutional and other legal provisions to safeguard basic human dignity, where cultural orientations themselves fall short of these standards.⁸³ There is still an urgent need to acquire a broader perspective on human rights that incorporates different concepts and moral experiences. Once the presence of human plurality is recognized, understood, and accepted, it will be simpler to achieve some harmony around the world under a certain human rights framework.⁸⁴ Greater cross-cultural understanding, it is hoped, will throw light on a common core of globally acceptable rights. Societies should culturally and socially evolve into accepting rights in their domestic system; Human rights shouldn't be imposed on them, because that could collapse an entire civilization.⁸⁵ Exceptions can only be made when this allowance is used as an avenue to abuse power or foster arbitrary or despotic rule.

⁷⁵ JJosiah A M Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) Human Rights Quarterly 309

⁷⁶ Vine VTL, 'African Patrimonial Régimes in Comparative Perspective' (1980) 18 Journal of Modern African Studies 657

⁷⁷ Keba M'Baye, 'Organisation de l'Unité Africaine' in Les Dimensions Internationales des Droits de l'Homme (Societe de Legislation Companece 1987) 651

⁷⁸ *Ibid*

⁷⁹ Kofi Quashigah, 'The Philosophical Basis of Human Rights and its Relation to Africa' (1991) 1(3) Journal of Human Rights Law and Practice 7

⁸⁰ *Ibid* (n40) 61

⁸¹ *Ibid*

⁸² *Ibid*

⁸³ Julius Nyerere, 'Stability and Change in Africa' (1969) 2 Africa Contemporary Record 31

⁸⁴ Raimundo Panakker, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 Diogenes 75

⁸⁵ Alison Dundes Renteln, 'The Unanswered Challenge of Relativism and the Consequences for Human Rights' (1985) 7(4) Human Rights Quarterly 540

Reforming the Law on Domestic Abuse in England and Wales: A Critical Examination of 'Clare's Law.'

Emilia Hinchliffe*

Abstract

The purpose of this journal is to demonstrate that 'Clare's Law', also known as the Domestic Violence Disclosure Scheme, is not fit for purpose in its current framework. This study seeks to highlight the theoretical and practical limitations of 'Clare's Law' which prevent it from providing an adequate means of protection from perpetrators of domestic abuse. The theoretical limitations raised in the main findings of this study are the promotion of victim-blaming as opposed to victim-empowerment and the risk of creating a false sense of security through non-disclosure. The main findings in this article are supported by a case study based on women's experiences using 'Clare's Law', conducted by Charlotte Barlow, Sandra Walklate and Nicole Renehan in 2024. The practical challenges of 'Clare's Law' which limit its scope are focused on the role of the police force in England and Wales. The effectiveness of 'Clare's Law' rests on its implementation by police forces in handling and responding to all applications made under the law. The main findings in this study reflect the limitations in training and resources which has resulted in safety risks due to time delays, and lack of knowledge. These findings are supported by the Urgent Review launched by Wiltshire Police and case study of Damien Bendall. This journal concludes by raising recommendations to improve 'Clare's Law' through Law Reform, in line with the College of Policing. When evaluating the effectiveness of 'Clare's Law', there is a lack of evidence that suggests this scheme acts as a preventative strategy in practice. While 'Clare's Law' has the potential to be vital to aid the reduction of domestic abuse, there have been significant barriers to its success in practice.

Key Words

Clare's Law, Domestic Abuse, The Domestic Violence Disclosure Scheme, Perpetrators, Reform

1. Introduction

It is estimated that 2.3 million people experienced domestic abuse in the year ending March 2024.¹ The National Policing Statement outlined the rate of Violence against Women and Girls (VAWG) has reached an 'epidemic level,' as reflected by a '37% increase in related crimes

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¹ ONS Centre for Crime and Justice, *Domestic abuse in England and Wales: Overview* (Office for National Statistics 2024).

recorded.² Domestic abuse is a largely hidden crime, therefore the estimated figures produced from recorded data are a cautious reflection of the extent of this crime, recognising that crime often goes unreported to the police. In 2024, 1.4 million domestic abuse-related crimes were recorded by the police, but only 49,046 were escalated to a charge by the Crown Prosecution Service (CPS).³ While the CPS maintains that offences relating to domestic abuse are “amongst the highest priority in the criminal justice system.”⁴ There is a continuous pattern of serious failures to protect victims as reflected in the trend of decreasing prosecutions and convictions of domestic abuse-related crimes, evident in figures annually since 2017.⁵ In spite of domestic-abuse crime rates rising, the number of resulting prosecutions continues to fall, highlighted by a reported 43.2% decrease in prosecutions over the span of March 2017 to March 2022.⁶ The adequacy of the current legal response to domestic abuse in holding perpetrators to account and protect victims must be questioned.

An increased awareness of the nature and extent of domestic abuse in England and Wales has been pivotal to law and public policy reform in the twenty-first century. The past decade has witnessed revolutionary change within the conceptualisation of domestic abuse within law. Significant legal reforms include The Domestic Abuse Act 2021⁷, and the Home Office Strategy, ‘Call to end Violence against Women and Girls’⁸, which reflect a marked change in approach to domestic abuse through legal reform offering increased protection to victims of abuse. The tragic murder of Clare Wood by her partner in 2009 and the subsequent campaign led by Clare’s father urged for ‘greater information sharing about histories of abuse among potential victims.’⁹ Clare’s story changed the conversational discourse on the protection of individuals in their domestic lives from abuse. The public policy implementation in March 2014 of the first Domestic Violence Disclosure Scheme in England and Wales was a unique measure intended to better protect individuals at risk of domestic abuse.

‘Clare’s Law’ was introduced to prevent the escalation of intimate partner abuse, by increasing accessibility of a person’s previous history of violence to those concerned about a current or previous partner, enabling individuals to make informed decisions. The implementation of ‘Clare’s law’ has been subject to critical scepticism and scrutiny in its efficacy to prevent the perpetration and escalation of domestic abuse. Whilst ‘Clare’s Law’ is a progressive legal innovation, recognising that undoubtedly ‘there is a pressing need for a disclosure scheme of its kind in order to prevent further crime.’¹⁰ The scope of ‘Clare’s Law’ to prevent the escalation of domestic abuse through ending a ‘risky’ relationship is limited.¹¹ If only a decision to disclose

²National Police Chief’s Council, ‘National Policing Statement 2024 for Violence Against Women and Girls (VAWG)’ <<https://cdn.prgloo.com/media/034ed60aa6564c1fbdcfb03fd8e6a210.pdf>> accessed November 16, 2024. 4.

³ ONS Centre for Crime and Justice, Domestic abuse in England and Wales: Overview (n 1).

⁴ Crown Prosecution Service, Domestic Abuse: Policy Statement, (December 2022) <<https://www.cps.gov.uk/publication/domestic-abuse-policy-statement>> accessed 16 November 2024.

⁵ ONS Centre for Crime and Justice, Domestic abuse prevalence and trends, England and Wales: year ending March 2022 (Office for National Statistics 2022).

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2022>> accessed 16 November 2024.

⁶ ONS Centre for Crime and Justice, *ibid*.

⁷ The Domestic Abuse Act 2021 (DAA 2021).

⁸ The Home Office, *Call to End Violence Against Women and Girls: Strategic vision*’ (Policy paper, Home Office, 2010).

⁹ Kate Fitz-Gibbon, Sandra Walklate, ‘The Efficacy of Clare’s Law in Domestic Violence Law Reform in England and Wales’ (2017)17(3) *Journal of Criminology & Criminal Justice* 285 1-17.

¹⁰ Home Office, *Domestic Violence Disclosure Scheme: Factsheet*, (Policy paper, Home Office 2024).

¹¹ Fitz-Gibbon, Walklate, ‘The Efficacy of Clare’s Law in Domestic Violence Law Reform in England and Wales’, (n 9).

can be made under the Domestic Violence Disclosure Scheme, ‘merely making disclosures of offenders’ histories of violence will not keep women safe, particularly, from violent men.’¹²

This journal will provide a critical examination of ‘Clare’s Law’, exploring the limitations within its scope and delivery that prevent the scheme in its current form from providing a consistent and effective role to response to domestic abuse. To highlight the failures of ‘Clare’s Law’ in its current approach, this study will explore the scepticisms raised within literature and the practical limitations highlighted through the police force operation and data. The operation of the scheme raises questions to whether ‘Clare’s Law’ works as intended to prevent domestic abuse. The effectiveness of ‘Clare’s Law’ rests heavily on the ability to empower women to make informed choices regarding the information disclosed and the future of their relationship. Whilst empowerment is considered as a “major goal within the mainstream domestic violence movement.”¹³ This is often presumptive and a narrow approach to diffusing an abusive relationship, failing to recognise that a disclosure does not necessarily mean the ending of a relationship. Alternatively, where applications under the scheme result in ‘no disclosure, ‘Clare’s Law’ inhibits a false sense of security onto victims.

When critically examining ‘Clare’s Law’ in terms of its operation, empirical research examining women’s experiences of accessing ‘Clare’s Law’ provides a reflection on the police force operation of the scheme. Police response is central to the successful delivery of disclosures made under ‘Clare’s Law.’ It is evident that there has been an inconsistent operation across police forces when implementing the scheme, fundamentally undermining its adequacy as a protective measure. This study will explore the limitations of ‘Clare’s law’ in its current approach, suggesting potential reforms to improve the implementation of the law to be comprehensive and consistent.

2. Understanding Domestic Abuse

Many of the previous legislation to tackle domestic abuse and violence in the United Kingdom shadow the obligations created by the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979), and the latter UN Declaration on the Elimination of Violence against Women.¹⁴ Legislation in the 1970s and 1980s introduced special injunctions such as non-molestation orders in relation to matrimonial homes. Part IV of the Family Law Act 1996 replaced much of this legislation, and widened the category to include ‘associated persons’, such as former or current partners to seek out civil remedies.¹⁵ Former legislation focused explicitly on acts of violence, and protection for victims of abuse was extended only to adults in an intimate relationship with the perpetrator. This narrow perception is reflected in Section 13 of The Domestic Violence, Crime and Victims Act 2004 which requires ‘parties to the proceeding may be ‘associated’ by virtue of: marriage, cohabitation, relation, an agreement to marry, being parents.’¹⁶ Although the Serious Crime Act 2015 made provisions for coercive and controlling behaviour¹⁷, former legislation did not afford protection for victims suffering abusive behaviour outside of cohabitation, or beyond physical violence.

¹² Jamie Grace, ‘Whatever happened to ‘Clare’s Law’? Reviewing the evidence’ (2019) Sheffield Hallam University. 10

¹³ Aarati Kasturirangan, ‘Empowerment and Programs Designed to Address Domestic Violence’, (2008) 14(12) Violence Against Women 1465 1.

¹⁴ The Family Law Act 1993, Part IV.

¹⁵ Marian Duggan, Jamie Grace, ‘Assessing Vulnerabilities in the Domestic Violence Disclosure Scheme,’ (2018) 30(2) Child and Family Law Quarterly, 145-166, 150.

¹⁶ Domestic Violence, Crime and Victims Act 2004, Part 1 S 13.

¹⁷ Serious Crime Act 2015, S 76(1).

Fundamental progress has been made through legislation to provide a timely response to the perpetration of domestic abuse. However, "it is only in the last ten years that domestic violence has been taken seriously as a criminal justice issue."¹⁸ The Domestic Abuse Act 2021 (The DAA) is a recent legislative measure, considered groundbreaking for widening the definition of domestic abuse and subsequently the scope of people who would be considered as victims of abuse under the Act. The DAA provides the first cross-government statutory definition of domestic abuse. The Act also placed 'Clare's Law' guidance on a statutory footing within Section 77¹⁹, therefore 'imposing a duty on the Home Secretary to issue guidance on the DVDS to chief officers in police.'²⁰ This does not affect police's disclosure powers to disclose but imposes a duty to refer to the guidance outlined within the Act. The DAA "ensures that domestic abuse is properly understood, considered unacceptable and actively challenged across statutory agencies and in public attitudes."²¹ Furthermore, it emphasises that domestic abuse is not limited to physical violence, and subsists in the forms of emotional, controlling, coercive and economic abuse, attempting to address previous failures.²² The DAA recognises the wide scope that abusive behaviour exists within. Domestic abuse can affect anyone from any background, and of any gender or age. In most domestic abuse cases, they involve women, as reflected in the 2024 National Crime Survey which estimated that 72.5% of all victims of domestic abuse-related incidents and crimes were female.²³ Domestic abuse is often portrayed as a gendered crime, perpetrated by men against women, which is a valid viewpoint considering the crisis of Violence against Women in England and Wales.²⁴ However, male victims of domestic abuse are a frequently neglected demographic, it is important to not discredit male victims of domestic abuse. North Yorkshire Police Inspector Clare Crossan accurately highlighted that "domestic abuse against men isn't often talked about and whilst there are fewer reported incidents where the victim is male, this doesn't mean it's not happening."²⁵ Male domestic violence and abuse victims are subject to great levels of stigma and "are often disregarded by society and professionals alike."²⁶ Every instance of domestic abuse should be taken seriously and given the support needed. Awareness and knowledge surrounding male domestic abuse are lacking, providing difficulty for male victims to speak out and access support. In relation to male use and access of 'Clare's Law', it could be argued that campaigns have been targeted at females. The female orientated marketing of 'Clare's Law' highlights that it does not address the full picture of domestic abuse. The idea behind 'Clare's Law' has the potential to shift the narrative of domestic abuse, however it requires further awareness and improved understanding to both users and police forces handling applications made under the Scheme.

Although a broader understanding of what domestic abuse can be is recognised legally in the Act, this poses uncertainty to how Clare's Law fits in as an appropriate response to the different types of behaviour that subsists within domestic abuse. Does 'Clare's Law' fit into

¹⁸ The Police Foundation, 'The Briefing', (The Police Foundation, 2014) <https://www.police-foundation.org.uk/wp-content/uploads/2017/08/domestic_abuse_briefing_final.pdf> ice Foundation Domestic Violence Briefing.qxd>

¹⁹ DAA 2021, S77.

²⁰ Home Office, *Domestic Violence Disclosure Scheme (DVDS) Statutory Guidance* (Home Office, 2023) 3.

²¹ Home Office (n 9).

²² The DAA 2021.

²³ ONS Centre (n 1).

²⁴ Rita Broberg, 'Why Are Men Often Overlooked as Victims of Domestic Abuse' The Centre for Social Justice (14 June 2022) <<https://www.centreforsocialjustice.org.uk/newsroom/why-are-men-often-overlooked-as-victims-of-domestic-abuse>> accessed January 4, 2025.

²⁵ North Yorkshire Police News, 'We must speak up about male domestic abuse', (North Yorkshire Police, 21 April 2022) <<https://www.northyorkshire.police.uk/news/northyorkshire/news/news/2022/04-april/we-must-speak-up-about-male-domestic-abuse/>> accessed 10 December 2024.

²⁶ C.F Barber, 'Domestic Violence against Men', (2008) 22(51) *Nursing standard* 35.

the understanding of what domestic abuse is?²⁷ There is uncertainty surrounding who is considered as a victim under ‘Clare’s Law.’ Moreover, the scheme enables the disclosure of information of a partner’s history, but only of perpetrators with a previous criminal record. An example of this is coercive and controlling behaviour, as is it possible to ‘check’ if someone has been coercive in a previous relationship without a conviction or record to ‘prove’ this. Domestic abuse is a hidden crime; reflected through domestic abuse statistics which ‘estimates that less than 24% of domestic violence crime is reported to the police.’²⁷ It is likely that a vast majority of perpetrators do not have a record reflecting the extent of their abusive behaviour. Subsequently, leading to the question of whether ‘Clare’s law’ can act to prevent domestic abuse.

3. The history of ‘Clare’s Law’

‘Clare’s Law’ received its name following the high-profile murder of Clare Wood in February 2009 by her abusive and violent former partner.²⁸ George Appleton murdered and set fire to Clare Wood following a five month stretch of threatening behaviour disregarded by the police when made aware.²⁹ Multiple reports were made by Clare to Greater Manchester police, including acts of sexual assault, criminal damage, threats to kill and harassment prior to her death and a restraining order placed on Appleton. Despite the police’s awareness of his previous criminal history of violence inflicted on women, the police did not use their discretionary powers to inform Clare of their knowledge of previous violence. It is important to note that ‘at the time, data protection laws had created a legal loophole which meant that former abusers were able to keep their criminal records confidential.’³⁰ The failure of the police service to intervene and appropriately respond to her reports of abusive behaviour exasperated the circumstances which resulted in her murder. The family of Clare Wood campaigned to challenge the loophole within the Data Protection Act.³¹ Subsequently, ‘Clare’s Law’ or formally known as The Domestic Violence Disclosure Scheme (the DVDS) was implemented across all police forces in England and Wales in March 2014, following a trial operation in 2013.

Clare’s father, Michael Brown’s aim in his widely successful campaign was to ultimately ‘change the law (Data Protection Act) to allow police to both disclose and proactively inform people of their partners’ criminal records and relevant past convictions.’³² The DVDS was enacted to provide policing services with a ‘clear framework, with recognised and consistent processes, for the exercise of these powers in the context of domestic abuse.’³³ This is reflected through the two elements which comprises the DVDS, ‘The Right to Ask’, and the ‘Right to Know.’

The Domestic Violence Disclosure Scheme; the “Right to Know” and the “Right to Ask”.

Prior to the introduction of ‘Clare’s Law’, the need to disclose information of this kind was determined on a case-by-case basis or where a successful request was made by a member of the public.³⁴ In order to prevent further offending, information could be released about a

²⁷ Refuge, “What is Domestic Abuse?” (Refuge, March 18 2022) <<https://refuge.org.uk/what-is-domestic-abuse/>> accessed 18 November 2024.

²⁸ “Why is it called Clare’s Law” (Clare’s Law, January 2022) <<https://clares-law.com/why-is-it-called-clares-law/>> Accessed 28 November 2024.

²⁹ “Why is it called Clare’s Law” (n 25).

³⁰ Ibid.

³¹ The Data Protection Act 1998.

³² (n 25).

³³ Home Office (n 10).

³⁴ Fitz-Gibbon, Walklate (n 9).

person's previous criminal offending under these conditions. The Criminal Justice Act³⁵ established Multi-Agency Public Protection Arrangements (MAPPA) across England and Wales. MAPPA is a statutory mechanism which permits the disclosure of an offender's criminal history to provide protection to potential victims. MAPPA was designed to protect the public from serious harm, providing guidance to the police to assess and manage the risks posed by sexual and violent offenders.³⁶

'Clare's Law' was implemented to 'enable the police to disclose information to a victim or potential victim of domestic abuse about their partner's previous abusive or violent offending.'³⁷ It provides a structure and processes to exercise common law powers retained by the police to disclose information where necessary to prevent crime. There are two pathways to make an application for information under Clare's law: the 'Right to Ask' and the 'Right to Know.' Applications are handled by local police forces who have the responsibility to conduct background checks on the partner in question.³⁸ After a request is made under either element, the police assess the information and decide based on the appropriateness of disclosure. The 'Right to Ask' refers to applications made by an individual, or relevant third party to make an application to the police to check the records of a current or ex-partner.

The latter element, the 'Right to Know' varies because it allows the police to make a disclosure based on their own initiative 'if they receive information about the violent or abusive behaviour of a person that may impact on the safety of that person's current or ex-partner.'³⁹ Examples of this include information arisen from a criminal investigation, sources of police intelligence, or through statutory or agency involvement. A lawful disclosure can be made by the police, 'if the disclosure is based on the police's common law powers to disclose information where it is necessary to prevent crime.'⁴⁰ There must be a pressing need for the disclosure, ensuring that 'the interference with the perpetrator's rights is necessary and proportionate for the prevention of the crime.'⁴¹

Disclosures made under the DVDS risk undermining the right to privacy, through the proportionality of information disclosed as enshrined in Article 8 of the European Convention of Human Rights.⁴² The Human Rights Act 1998 defines the 'Right to respect for private and family life.'⁴³ This right is afforded under Article 8 to ensure that 'everyone has the right to respect for his private and family life, his home and his correspondence.'⁴⁴ This is with the exception 'for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.'⁴⁵ The legalities of information sharing are another significant limitation. From a legal perspective, courts and legal authorities must balance the need for protection against potential infringement of an individual's right to privacy afforded under Article 8t. The principle of proportionality under Article 8 is fundamental in the police's decision-making process to disclose information. As emphasised within the DVDS guidance that any disclosure

³⁵ The Criminal Justice Act 2003 (CJA 2003).

³⁶ Ministry for Justice and HM Prison and probation service, "Multi Agency Public Protection Arrangements: MAPPA Guidance" <<https://www.gov.uk/government/publications/multi-agency-public-protection-arrangements-mappa-guidance>> accessed 12 December 2024.

³⁷ Ministry for Justice, *ibid.*

³⁸ Home Office (n 7).

³⁹ (n 10).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² European Convention of Human Rights, Article 8.

⁴³ Human Rights Act 1998 (HRA 1998) Article 8.

⁴⁴ HRA 1998 Article 8.

⁴⁵ HRA 1998 8(2).

made by the police under the scheme must be proportionate and necessary, and ‘in accordance with other relevant over-arching primary legislation.’⁴⁶

‘Clare’s Law’ has shifted the cultural perspective of domestic abuse and violence to be considered a matter of public concern, bringing domestic abuse to the forefront of public debate. Similar schemes have been rolled out in the rest of the United Kingdom, and have reached Canada, New Zealand, various parts of Australia.⁴⁷ However, the ‘Right to Ask’ and ‘Right to Know’ elements that underpin ‘Clare’s Law’ provide limited scope of application. This could limit access to potential vital information, for those who may not recognise the warning signs of abusive behaviour. A disclosure is provided on a subjective judgment of officers, only if there is an established risk. There is divided opinion on ‘Clare’s Law’, where supporters of the DVDS ‘argue that knowledge of this could help new partners understand better the risks they face.’⁴⁸ The year-on-year increase in the rate of applications reflect that ‘Clare’s Law’ has been embraced and used to improve the safety of potential victims of abuse, with 45,344 applications to the DVDS made in the year ending March 2023.⁴⁹ However, there is still a clear lack of awareness and understanding among the public of ‘Clare’s Law’ which undermines the schemes ability as an effective response to domestic abuse.

4. Theoretical limitations of Clare’s Law

The promotion of victim-blaming as opposed to victim-empowerment.

The empowerment of victims is a key strategy to reduce domestic abuse within the operation of ‘Clare’s Law.’ Whilst ‘empowerment’ is “a major goal within the mainstream domestic violence movement,”⁵⁰ there is little regard for ‘aspiration-reality gap’ when relying on empowering victims as a fundamental strategy in practice.⁵¹ ‘Clare’s Law’ relies on the strategy of providing empowerment in order to reduce domestic abuse, provided through the application of the ‘Right to Ask’ element which has shifted responsibility away from public bodies and services, onto the duty of a private citizen to take it upon themselves to seek out information relating to the risk of abuse. The impact of ‘Clare’s Law’ relies on the individual to assume the position of responsibility to protect themselves. When placing such responsibility onto the victim, concerns are raised that ‘Clare’s Law’ unintentionally promotes ‘victim blaming’ through its approach.⁵²

‘Clare’s Law’ has been praised as a strategy that empowers women, by enabling them “to make ‘informed choices’ about whether they continue their relationship.”⁵³ However, there are clear risks associated through the act of ‘transferring responsibility to the victim themselves, the scheme detracts from the accountability and responsibility of the perpetrator.’⁵⁴ There is potential for this strategy to promote a harmful social attitude by shifting the blame from the perpetrator to the victim. Applications under the ‘Right to Ask’ element of the scheme, the individual themselves who is at risk of violent behaviour to assume the position of

⁴⁶ Home Office, Domestic Violence Disclosure Scheme (DVDS) Statutory Guidance (Home Office, 2023) 20.

⁴⁷ Fitz-Gibbon (n 9) 10.

⁴⁸ Katerina Hadjimatheou, ‘Social care told me I had to’: Empowerment and responsabilisation in the Domestic Violence Disclosure Scheme’ (2022) 62(2) *The British Journal of Criminology*. 320.

⁴⁹ Clark, ‘Number of applications and disclosures to Clare’s Law in England and Wales 2018-2024, (November 2023) <<https://www.statista.com/statistics/1440566/uk-clare-s-law-figures/>> accessed 12/12/2024.

⁵⁰ Aarati Kasturirangan, ‘Empowerment and Programs Designed to Address Domestic Violence’, 2008 14(1) 1.

⁵¹ Charlotte Barlow, ‘Criminal Justice Policy and Victim-Survivor Empowerment: A Case Study of Domestic Violence Disclosure Schemes in England and Wales’, 2.

⁵² Fitz-Gibbon (n 9) 11.

⁵³ Clare Bessant, ‘Protecting Victims of Domestic Violence – Have We Got the Balance Right?’ (2015) 79(2) *The Journal of Criminal Law* 102.

⁵⁴ Fitz-Gibbon (n 9) 11.

responsibility to protect themselves. Instead of perceiving this from the lens of empowerment, this instead is a deflection from the responsibility of the individual to refrain from inflicting abusive and violent behaviour in the first instance. Responsibility should remain always with the perpetrator.

The gap between the aspiration of ‘Clare’s Law’ and the reality reported by individuals who have used the scheme raises concerns that the scheme provides a presumptive approach to the barriers of leaving a violent partner. When considering the complexity of abusive relationships, ‘Clare’s Law’ is problematic in its strategy. This is highlighted in instances where blame is transferred onto the victim for “failing to protect her children if she chooses not to leave her partner following disclosure.”⁵⁵ For Clare’s law to have a positive influence on the prevention of domestic abuse, the Law heavily leans on the individual’s ability to leave the relationship and remove themselves from the situation. Furthermore, instead, does ‘Clare’s law’ provide for the responsibilities of women as opposed to empowerment? In support of Hadjimatheou’s observation⁵⁶, women are often perceived within the domestic relationship to be held responsible for protecting their children. An example of ‘Clare’s Law’ to responsabilise women as opposed to empowering them is highlighted through a reported experience of using the DVDS. It was reported within a case study conducted on the practical experiences of using ‘Clare’s Law’, was told to “get rid of this man or we will get involved with you.”⁵⁷ This was the police’s response after being called to a serious domestic incident at the home, reporting that services failed to exercise their powers under the ‘Right to Know’ route. This account reflects the ability of ‘Clare’s Law’ to responsabilise women as opposed to ‘empowering’ victims.

Instead, this is a misinterpretation and instead perpetuates the discourse of victim-blaming which “leads to revictimization whilst failing to promote perpetrator accountability.”⁵⁸ The assumption that knowledge of a previous history of violent offending is reflected through the criticism of ‘Clare’s Law’ in its ability to place ‘an unrealistic responsibility’⁵⁹ on the individual to remove themselves from the situation. The understanding that upon receiving this information will empower a person to then make an informed decision is presumptive. The understanding that this information will empower a person to make an informed decision regarding their relationship is presumptive. Regarding victims with children, fear of involvement of social services and removal of children from the family home is another example of how women are often held responsible to act to protect others. This is compounded by concerns of how the justice system will treat those who choose to remain with a partner following a disclosure. In reference to the negative and misogynistic treatment of women by the criminal justice system, victim blaming in response to violence against women as will be discussed below.

The police service is an agency of criminal justice that traditionally “victims of domestic violence have been hesitant to communicate with.”⁶⁰ The mistrust of police is likely to be exacerbated by the significantly low conviction rates. The Crime Survey 2024 in England and Wales reflected that there was 51,288 prosecutions for domestic abuse crimes, accounting for around 20% of police recorded domestic abuse crimes resulted in prosecution.⁶¹ The role of

⁵⁵ Fitz-Gibbon (n 9).

⁵⁶ Katerina Hadjimatheou (n 45).

⁵⁷ Charlotte Barlow, Sandra Walklate, Nicole Renehan, ‘Criminal Justice Policy and Victim-Survivor Empowerment: A Case Study of Domestic Violence Disclosure Schemes in England and Wales’, (2024) 13(1) *Feminists at Law* 1-31. 17

⁵⁸ Vesna E Clark, ‘Victim-blaming discourse underpinning police responses to domestic violence: A critical social work perspective.’ (2021)4(1) *The University of Sydney*.

⁵⁹Fitz Gibbon (n 9).

⁶⁰ (n 9) 292.

⁶¹ONS Centre (n 1).

the police service is at the heart of 'Clare's Law' effectiveness, heavily relying on the liaison between victims and police when disclosing information under a Clare's Law application. In turn, the involvement of the police is a significant barrier to the success of the scheme. The potential reluctance to seek help from services such as the police, misunderstands "women's exertions of personal choice and perceptions of dangerousness when examining their decisions about seeking help."⁶² A study conducted to better understand women's attitudes to seeking help, interviewed thirty-one women who had experienced abusive relationships.⁶³ This study raised a common reluctance among victims to liaise with statutory agencies such as the police, finding women were often deterred from reaching out due to a fear of repercussions of disclosure. This fear was described to be "inhibited by women's lack of trust, with fears around confidentiality and the potential misuse of personal information."⁶⁴ 'Clare's Law' does not address the "difficulties that women face in connecting with services when seeking to leave a violent relationship,"⁶⁵ with a lack of regard to conflicting emotions which prevent victims from seeking help.

A recent study on 'victim-survivor experiences of 'Clare's Law' the further evidenced disillusionment in the reality of using 'Clare's Law', reflecting "disparities between what was expected and the limits of what was delivered in practice."⁶⁶ The findings of the report also reflected the difficulty to establish a trusting relationship between police officers and victims, due to dissimilar desired outcomes from the interaction. This is compounded through the reported experience of 'victim-blaming' by one participant, who decided they were never going to report future incidents to the police where instead of "disclosing her partner's domestic abuse convictions, the police informed children's services."⁶⁷ As discussed, studies of women's experiences reveal that 'Clare's Law' in its current approach needs more work to deliver holistic, and sensitive responses to women managing violence in their lives.⁶⁸ The experiences reported reveal the unintended consequences of 'Clare's Law' and its approach claiming to be in the interests of victim protection, which is a central aim of this initiative. A disclosure of information under Clare's law may 'compound fears but may not do much to enable her to leave the relationship.' It is evident that there is an absence of support available to victims' post disclosure, which instead puts them in a position of greater risk than before the application was made. As reflected through the recent case study on the DVDS, eight women interviewed 'suggested they felt "left alone" and "unsupported".'⁶⁹ 'Clare's Law' in its current approach does not provide an adequate response to victims of domestic abuse, providing little support to those at risk of abuse.

The risk of creating a false sense of security.

There is also concern that 'Clare's Law' risks creating a false sense of security through applications which result in no information to disclose. The organisation Refuge voiced that 'we believe it may create an unrealistic expectation that women should "vet" their partners, and that it may lead to false reassurance.'⁷⁰ Indeed, any disclosures made under 'Clare's Law'

⁶² Janel Leone, Megan Lape, Yili Xu, 'Women's Decisions to not seek Formal Help for Partner Violence: A Comparison of Intimate Terrorism and Situational Couple Violence', (2013) 29(10) *Journal of Interpersonal Violence*.

⁶³ Maggie Evans, Gene Feder, 'Help-seeking amongst women survivors of Domestic Violence: a qualitative study of pathways towards formal and informal support', (2015) 19(1) *International Journal of Public Participation in Health Care and Health Policy*. 62-73.

⁶⁴ Evans, Feder (n 60).

⁶⁵ (n 60).

⁶⁶ Barlow, (n 53).

⁶⁷ (n 53) 17.

⁶⁸ (n 53).

⁶⁹ *ibid* 1.

⁷⁰ Fitz-Gibbon (n 9), Refuge, 11.

only provide information based on police records or known incidents of domestic violence. The information disclosed to an individual may not be an adequate reflection of the risks posed by an abusive partner. 'Clare's Law' is only able to provide a limited scope which does not fully reflect the behaviour or risks posed by a perpetrator. Again referring to the 'Clare's Law' experiences project, which reports on women's experiences accessing a Domestic Violence Disclosure Scheme.⁷¹ Where a DVDS enquiry results in 'nothing to disclose' this should not be taken as evidence that their partner has not previously been abusive.⁷² Disclosures made under the DVDS cannot be wholly relied upon, therefore undermining the effectiveness of 'Clare's Law.' to inform those at risk of abusive behaviour. Under the 'Right to Ask', there is the potential to create a false sense of security to those who are informed that their partner does not have a previous history of violence.⁷³ Often, incidents of abusive and violent behaviour will not be flagged up by 'Clare's Law' where there is no conviction. This concern was highlighted by a participant in the study, where 'there could have been 20 incidents of domestic violence but if there wasn't a conviction, people wouldn't know about it.'⁷⁴ In relation to 'Clare's Law', 'a persons who may have been serially violent to their partners are likely to never be subject of a 'right to know' disclosure where they do not have a prior arrest, conviction, and caution on their record.'⁷⁵ Despite the fact the individual felt the need to request such information under an application, there is fears that no disclosure 'risks lulling people into a false sense of security that they can know everything about a person's past actions and their future behaviour.'⁷⁶ 'Clare's Law' cannot be effective in its current form, particularly when considering the broader meaning of what domestic abuse can consist as.

Domestic abuse is a significantly underreported area of crime; therefore, a disclosure scheme is limited in its effect. It is likely that a vast number of perpetrators of abuse will not have a criminal background reflecting their behaviour. Often in domestic abuse related crimes, 'such high levels of underreporting are compounded by cases where crime is reported but no conviction is secured.'⁷⁷ This is reflected in the National Crime Survey 2024, which provides insight from incident to conviction. Domestic abuse data from incident to conviction in the year ending March 2024 reflects 851,062 incidents were recorded by the police, however, just 72,641 of suspects were referred to the CPS.⁷⁸ These figures reflect that information used to base a 'Clare's Law' disclosure, does not accurately reflect the extent of abusive behaviour. The scheme relies on information retained by the police as an 'effective way to capture information about prior offending.'⁷⁹ Considering this trend in figures which reflects underreporting of domestic abuse to authorities, 'Clare's Law' provides a limited scope of protection only where there is information to disclose, therefore posing uncertainty to the extent of protection 'Clare's Law' can provide to those at risk of abuse by individuals with no record.

The consequences of creating a false sense of security through a 'no disclosure' outcome was highlighted in the study. Following the outcome of the application, the respondent continued her relationship and proceeded to have a child with her partner. Eight months after submitting the DVDS application, she was approached by the police and told 'they got it wrong, and the

⁷¹ Charlotte Beneham, 'Clare's Law and Domestic Violence Disclosure Schemes: Victim-survivor perspectives,' (Clare's Law Experience Project, 2024). <<https://clareslawexperiencesproject.com/>> accessed 11 December 2024.

⁷² Jamie Grace (n 42).

⁷³ Fitz-Gibbon (n 9) 3.

⁷⁴ Charlotte Beneham, 'Clare's Law and Domestic Violence Disclosure Schemes: Victim-Survivor Perspectives' (n 68).

⁷⁵ Fitz-Gibbon (n 9).

⁷⁶ Fitz-Gibbon (n 9) 292.

⁷⁷ (n 9) 292.

⁷⁸ (n1).

⁷⁹(n 79) 292.

person in question was a very high-risk perpetrator.⁸⁰ These experiences highlight the flaws in the DVDS processes, and the consequences of misinformation. The importance of police officers to make clear that an absence of information does not imply there is nothing to disclose. An application under the 'Right to Ask', entails a woman herself is asking for information, therefore she has some concerns which suggest that further referral and support is required, likely there is more going on than meets the eye. Ensuring that individuals using the scheme are supported both during and after this process is important.⁸¹ The lack of support offered both during and after a 'Clare's Law' application significantly reduces the impact of the DVDS. For 'Clare's Law' to be considered as an effective measure against domestic abuse, further support must be provided to every applicant regardless of whether a disclosure is made.

5. Practical challenges of 'Clare's Law.'

The role of the police in 'Clare's Law.'

The effectiveness of 'Clare's Law' rests on its implementation by the police services, in which it has received wide scrutiny throughout the operation of the scheme. The scheme allows police to 'proactively (right to know) and reactively (right to ask) disclose 'intelligence' on alleged offenders to their partners.'⁸² However, there is a lack of joined-up approach between forces, resulting in an inconsistent implementation of 'Clare's Law' reducing the ability of the scheme to protect victims. The take-up of the scheme varies across police forces, providing inconsistency in the handling of applications made. This was uncovered by Freedom of Information requests to all police forces in England and Wales conducted by the Bureau of Investigative Journalism.⁸³ The findings reflect that currently there is a 'huge disparity in how police use law to protect women from violent partners.'⁸⁴ This is compounded by the variance of figures reflecting how forces release information to those that apply, 'with some forces disclosing to less than 10% of applications, others to more than 70%.'⁸⁵ MP Jess Phillips commented on the inconsistent application of the scheme, recognising that "the inconsistencies must be investigated and a level playing field must be reached. If we are going to make new legislation, we have to make sure it isn't just nice-looking law, it has to mean something on the ground."⁸⁶ Evaluating the outcome of 'right to ask' applications across police forces, 39% of applications in Lancashire resulted in disclosure, opposed to a 24% disclosure rate upheld in the Metropolitan police.⁸⁷ The inconsistency of how applications are handled by forces raises concerns of 'safety by geography.'⁸⁸ This is driven by 'different forces' priorities and resources resulting in an inconsistent response to applications. Clare Wood's father, criticised the application of 'Clare's Law', stating that 'it seems like some police forces just don't put domestic violence high up on the list.'⁸⁹ For 'Clare's Law' to be successful in its approach intended by Brown in his campaign, the police force implementation requires

⁸⁰Barlow (n 42) 13.

⁸¹ Grace (n 42).

⁸² Jamie Grace, 'Disclosing domestic violence: Jamie Grace critically assesses the national roll out of the Domestic Violence Disclosure Scheme' (2014) 97(1) Criminal Justice Matters.

⁸³ Sandra Walklate, Kate Fitz-Gibbon, 'Understanding Domestic Violence Disclosure Schemes ('Clare's Law'), (2018) Monash Gender and Family Violence Prevention Centre.

⁸⁴ Maeve McClenaghan, 'Huge Disparity in how police use law to protect women from violent partners', (The Bureau of Investigative Journalism 9 January 2018) <<https://www.thebureauinvestigates.com/stories/2018-01-09/huge-disparity-in-how-police-use-law-to-protect-women-from-violent-partners/>> accessed 10 December 2024.

⁸⁵ McClenaghan, 'Huge Disparity in How Police Use Law to Protect Women from Violent Partners', (n 80).

⁸⁶ McClenaghan, (n 80).

⁸⁷ *ibid.*

⁸⁸ Walklate, Fitz-Gibbon, Understanding Domestic Violence Disclosure Schemes (n 79).

⁸⁹ McClenaghan, (n 80).

consistency across England and Wales to be considered as an effective response to domestic abuse.

Limitations in resources and training

A significant barrier to the effectiveness of 'Clare's Law' is the resource limitations and the strain within police forces. Properly implementing the scheme requires time, attention, and coordination across the board. The operation of 'Clare's Law' operates under budgetary constraints, overstressing staff within the units. This is due to a lack of training and inadequate staff to manage the influx of applications. Subsequently, the process of disclosure is delayed, and applications are mishandled.

The urgent review into 'Clare's Law' applications is an example of resource limitations in forces. An investigation by the Independent Office for Police Conduct (IOPC) resulted in an audit of 'Clare's Law' applications made to Wiltshire police over eight years.⁹⁰ 3,788 applications made from April 2015 to August 2023 were reviewed as part of this audit.⁹¹ The investigation identified 33 failures made in the handling of 'Clare's Law'.⁹² Of these failures, two of which may have contributed to people being harmed because of failing to disclose information. The remaining 29 failures were administrative and service failures, reflecting inadequate training and instances where information was not disclosed due to inadequate research.⁹³ Critical failures by Wiltshire police service undermine 'Clare's Law' and limit its effectiveness in reducing incidents of domestic abuse. As a result of this investigation, in circumstances where people have not received a disclosure where they were entitled to, the force then contacted these individuals, potentially placing them in further risk, undermining the discretion of 'Clare's Law' which is central to the scheme. Furthermore, the Wiltshire police failure further feeds into the lack of police trust among people. Wiltshire police and crime commissioner, Phillip Wilkinson recognised the failure as a 'tragic consequence of an organisation', noting that the service was not performing adequately.⁹⁴ Despite its good intentions, police handling of 'Clare's Law' has been inconsistent and evidently in some cases counterproductive. The implementation of the Law has frequented issues, limiting its effectiveness to prevent domestic abuse. Delays in disclosure, resource limitations and uneven access are contributing factors to its reduced impact.

Another instance where the police failed to exercise their powers and implement strategies effectively, is the case management of Damien Bendall. Damien Bendall's case reflects the consequences of not using the scheme's 'Right to Know' to full effect. The 'Independent Serious further offence review of Damien Bendall' is an example that 'Change in policing frequently stems from failure, and the subsequent inquiries, inspections or commissions.'⁹⁵

In September 2021, Bendall murdered his pregnant partner Terri Harris, her two children, and their friend, at their house in Killamarsh, Derbyshire. At the time the murders were committed, Bendall was subject to a Suspended Sentence Order which included a five-month curfew to

⁹⁰ Wiltshire Police, 'Urgent review into more than 3,500 Clare's Law disclosures completed', (Wiltshire police, 22 May 2024). <<https://www.wiltshire.police.uk/news/wiltshire/news/2024/may-2024/urgent-review-into-more-than-3500-clares-law-disclosures-completed/>> accessed 10 December 2024.

⁹¹ Wiltshire Police, 'Urgent Review into more than 3,500 Clare's Law disclosures completed', *ibid*.

⁹² *Ibid*.

⁹³ "

⁹⁴ Paul Jacques, 'Wiltshire Police commissions 'urgent review' of Clare's Law applications', (Police Professional, 26 October 2023) <<https://policeprofessional.com/news/wiltshire-police-commissions-urgent-review-of-clares-law-applications/>> accessed 9 December 2024.

⁹⁵ Home Office, 'Policing Productivity Review' (Home Office 2023) <<https://www.gov.uk/government/publications/policing-productivity-review>> accessed 23 December 2024. 9.

the property where his partner and her children lived⁹⁶. Bendall should not have been curfewed to his partner's address, as identified in the Offence Review. 'Inspectors found successive probation practitioners missed opportunities to ensure vital information known about Damien Bendall was included in assessments and plans to manage and address the risk of serious harm he posed to both women and children.'⁹⁷ The use of risk assessments would have found this arrangement unsuitable, however, 'probation practitioners did not demonstrate sufficient professional curiosity, did not conduct safeguarding enquiries, and took information from Damien Bendall at face value.'⁹⁸ This exasperated the vulnerability of Harris and her children of risk to Bendall.

Bendall's case raises important concerns about the effectiveness of 'Clare's Law', and whether the police's poor handling of the scheme might have contributed to the tragedy. Bendall had a violent criminal past, including a history of violent offences and abusive behaviour, however there were significant failures on behalf of police services in the handling of Bendall which contributed to the murder of Terri Harris and the children. There are evidently significant failures in the implementation of 'Clare's Law' which could have led to earlier intervention. There is evidence within the offence review that despite his violent history being known to the authorities, the police did not disclose the relevant details of his criminal background through exercising judgment under the 'Right to Know' aspect. The police did not make use of 'Clare's Law' to assess Bendall's history, which could have played a significant role by providing the opportunity to warn Harris. The failure to exercise the 'Right to Know' reflects systemic issues within the police force which placed Harris in a position of great danger.

The research finding documented by the recent review of 'Clare's Law' in Wiltshire and the poor handling of Damien Bendall's information reflect that the scheme is not fit for purpose and is not being used appropriately to protect individuals on either basis of the 'Right to Ask' or 'Right to Know.'

Safety risks in time delays of application.

Another limitation of the scheme is the time delay following a 'Clare's Law' application between the submission of an application and the actual disclosure of this information. Although in 2022, the time frame to complete applications was reduced from 35 to 28 days.⁹⁹ The required investigation processes must be considered and the overwhelming demand on police services in England and Wales is a contributing factor to time delays in applications which limits the ability to efficiently respond to applications made under 'Clare's Law.' This is reflected in the recent policing productivity review in 2023, which outlined an inherent duty for forces to improve police responses to dealing with crime.¹⁰⁰

The impact of time delays on the operation of the scheme to provide timely response is raised within a study on using 'Clare's Law,' where one participant recalled her experience as 'a very long and drawn-out process.'¹⁰¹ Furthermore, stating 'it was just really disappointing. It was quite symbolic in a way, I just felt let down by the whole system.'¹⁰² It has been documented

⁹⁶ HM Inspectorate of Probation, 'Independent Serious Further Offence Review of Damien Bendall' 2022 <<https://www.justiceinspectors.gov.uk/hmiprobation/wpcontent/uploads/sites/5/2023/01/Independent-serious-further-offence-review-of-Damien-Bendall-1.pdf>> accessed 23 December 2024.

⁹⁷ HM Inspectorate of Probation, 'Independent Serious Further Offence Review of Damien Bendall', (n 110)3.

⁹⁸ HM Inspectorate of Probation, 'Independent Serious Further Offence Review of Damien Bendall' (n 110) 11.

⁹⁹ Home Office, Domestic Violence Disclosure Scheme (DVDS) Statutory Guidance' (April 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116278/8/Domestic_Violence_Disclosure_Scheme.pdf> accessed December 16, 2024.

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¹⁰⁰ Home Office (n 91).

¹⁰¹ Barlow (n 53) 13.

¹⁰² Barlow (n 53) 13.

that time delays under ‘Clare’s Law’ serve as a deterrence for the engagement, heralded to ‘undermine the purpose of the DVDS.’¹⁰³ This is linked to both a lack of information to disclose and a failure to keep applicants informed about decision-making to disclose. This is reflected in the experience reported, which highlights the flaws in DVDS processes.

6. Recommendations

A recommendation in response to the current operational limitations of ‘Clare’s Law’ is the need for improved support post disclosure. There is an absence of support throughout the course of the process, as reported by one applicant, ‘I made that request for a reason and nobody checked up on me to see if I was ok.’¹⁰⁴ For ‘Clare’s Law’ to be effective in its approach to protect victims, further support is required from police forces and external services to victims throughout the entire process, regardless of whether a disclosure was made. The presumption that information disclosed under the scheme is enough for people to leave their relationship, ‘particularly when there is often minimal follow up support in how this information could be acted upon.’¹⁰⁵ The study suggests that receiving a disclosure of information is not enough to empower victims to leave a violent partner. To empower women, the importance of listening and hearing victims is crucial. Reflecting on the experiences of women using ‘Clare’s Law’, to provide sufficient protection for victims of domestic abuse and violence, the current approach under ‘Clare’s Law’ must be questioned.

Regarding recommendations to improve police force response to ‘Clare’s Law,’ whilst undertaking this study, 6 principles were released by the College of Policing to ‘ensure consistent and effective implementation across UK police forces.’¹⁰⁶ I support the principles to accompany the Domestic Violence Disclosure Scheme. These principles are in response to ‘the approach and support to victims has been inconsistent in the way that individual forces apply thresholds for disclosing information.’¹⁰⁷ The current implementation of ‘Clare’s Law’ ultimately ‘leaves the public vulnerable to potential harm.’¹⁰⁸ The first principle concerns ‘governance and assurance’, in line with the Domestic Abuse Act, to ensure that ‘forces must be able to demonstrate that they considered the statutory duty,’¹⁰⁹ guided by robust governance and oversight mechanisms. The maintenance of performance measures is ensured through the second principle, which also provides further guidance to applications which result in a ‘non-disclosure,’ requiring documentation of any reasons for non-disclosure. Furthermore, this principle aims to monitor and address the current issue of disproportionality, which is central to improving trust and engagement with forces.¹¹⁰ The third principle, ‘Training and Resources’, aims ‘that all personnel involved in the DVDS receive thorough training.’¹¹¹ The importance of adequate training and resources provided to those involved in the DVDS is highlighted through the recent inquest into ‘Wiltshire Police.’ Principle four, provides for ‘Evidence of a full risk assessment’, ‘requires a dynamic approach to risk assessment throughout the process.’¹¹² This principle is fundamental to the improvement of ‘Clare’s Law’ implementation as it ensures ‘referrals to specialist services, multi-agency arrangements and

¹⁰³ College of Policing, ‘Domestic Violence Disclosure Scheme Principles’ (College of Policing January 2025) <https://www.college.police.uk/guidance/domestic-violence-disclosure-scheme-principles> accessed 2 January 2025.

¹⁰⁴ Barlow (n 53) 19.

¹⁰⁵ *ibid* 22.

¹⁰⁶ College of Policing, ‘Domestic Violence Disclosure Scheme Principles’, (College of Policing, 12 December 2024) <<https://www.college.police.uk/guidance/domestic-violence-disclosure-scheme-principles>> 1.

¹⁰⁷ College of Policing, ‘Domestic Violence Disclosure Scheme Principles’ (n 102).

¹⁰⁸ (n 102).

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

¹¹¹ *ibid*.

¹¹² *ibid*.

safeguarding authorities.¹¹³ The lack of ‘after-care’ provided to applicants is a noted limitation of the scheme, and this improvement is a significant step in the right direction. The ‘Killamarsh murders’ committed Damien Bendall highlight the pressing need for safeguarding, reflecting a ‘significant discrepancy in the way that police forces understand and implement DVDS.’¹¹⁴

Principle 5 provides for a ‘Robust ‘Right to Know’ entry route, requiring ‘forces should be vigilant for DVDS Right to Know opportunities in secondary risk assessments and multi-agency forums.’¹¹⁵ This principle enables a proactive use of information gathered from various policing activities.¹¹⁶ Throughout the implementation of the scheme, forces have not exercised ‘Right to Know’ opportunities, highlighted by the inquest into the Bendall murders. Instead, providing a reactive response to abusive behaviour, rather than a proactive one which is required for ‘Clare’s Law’ to be an effective measure in response to domestic abuse.

Principle 6 concerns the ‘roles and responsibilities of partner agencies.’¹¹⁷ This is to ‘ensure that independent domestic violence advisors (IDVAs) and other agencies are substantially involved during engagement and disclosure’¹¹⁸. This is fundamental in relation to the competing pressures of child protection and the implementation of an ‘empowerment-based approach, which has been criticised as an approach to domestic abuse safeguarding through research conducted by Hadjimatheou.’¹¹⁹ The disclosure process is shaped by a child protection agenda that makes victim-survivors responsible for protecting their children from the harms of domestic abuse. This is reflected through the exploration of impediments which limit the police in practice to effectively carry out the scheme as discussed earlier in this study. The principles implemented by the National Police Chief’s Council (NPCC) are set to improve their understanding and approach to promote a consistent process. The college of policing have introduced six governing principles, ‘to help prevent domestic abuse and ensure consistent and effective implementation across UK police forces.’¹²⁰ The implementation of the 6 principles by the College of Policing is a significant improvement to the handling of the DVDS by police forces. These 6 principles are promising in ensuring consistency, which currently prevents ‘Clare’s Law’ from having a positive impact on the reduction of domestic abuse as intended in its aims.

7. Conclusion

Legal reform places responsibility onto the state to take positive action to prevent behaviour which violates the rights of an individual.¹²¹ Within this, there ‘must be a reasonably possibility of prevention on the part of the state.’¹²² When evaluating the effectiveness of ‘Clare’s Law’, there is a lack of evidence that suggests this scheme acts as a preventative strategy in practice. While ‘Clare’s Law’ has the potential to be vital to aid the reduction of domestic abuse, there have been significant barriers to its success in practice. The police force implementation provided inconsistent application, delays in disclosure, with limited resources to the scheme largely contributing to the scheme’s limited effectiveness. For ‘Clare’s Law’ to be capable of protecting individuals, police forces require expanded resources, training and support to provide a consistent application of the scheme across England and Wales.

¹¹³ *ibid.*

¹¹⁴ *ibid* 6.

¹¹⁵ *ibid* 1.

¹¹⁶ *ibid* 6.

¹¹⁷ *ibid* 6.

¹¹⁸ *ibid* 8.

¹¹⁹ *ibid* 8.

¹²⁰ *ibid* 1.

¹²¹ *ibid* 9.

¹²² *ibid* 9.

During the development of this journal, the College of Policing in England and Wales released the introduction of the ‘Six Principles’ to ensure that ‘each decision is victim-led.’¹²³ Furthermore, these principles should provide accountability on police forces to demonstrate they considered the statutory duty in line with the Domestic Abuse Act 2021. The six measures are aimed at providing accountability and uphold a consistent, victim-centred approach across the UK.¹²⁴ The introduction of these measures should improve the scope of ‘Clare’s Law’ as an informative measure to those at risk of domestic abuse.

The voices presented through the case studies discussed in this study suggest that for ‘Clare’s Law’ to have value to assist victims of domestic abuse and prevent its escalation, more thought is required into the delivery of the Domestic Violence Disclosure Scheme. Greater effort is required by those implementing applications made under ‘Clare’s Law’ to ensure the interests of those making requests are better served. For ‘Clare’s Law’ to be considered as an effective means to prevent the perpetration of domestic abuse and violence, significant improvement is required in reference to police response to handling concerns. In its current approach, ‘Clare’s Law’ is not able to provide a timely and sensitive response to women who fear violence from a partner, and furthermore, it is unable to address the wider extent of intimate partner violence through its approach.

To improve the outreach and response to domestic abuse, further awareness is required to change the stance on domestic abuse. For ‘Clare’s Law’ to be a successful response to domestic abuse, the public must be aware of what ‘Clare’s Law’ can do and how to request information under the scheme.

¹²³ (n 1).

¹²⁴ *ibid*

A Critical Analysis of the Practices and Approaches to ICA, in light of the introduction of the Singapore Convention on Mediation

Sam Lomax*

Abstract

This paper critically examines the evolving landscape of International Commercial Arbitration (ICA) following the introduction of the Singapore Convention on Mediation (SMC). ICA has historically been the preferred method of resolving international disputes due to its enforceability and neutrality. However, the SMC, adopted in 2019, provides a framework for the enforcement of International Mediation Settlement Agreements (IMSAs), altering the balance between arbitration and mediation. The study employs a comparative legal analysis, assessing the SMC against established arbitral instruments such as the New York Convention (NYC) and the UNCITRAL Model Law. It explores how the introduction of the SMC has impacted ICA, focusing on its implications for arbitral institutions, dispute resolution strategies, and the global enforcement of mediated settlements. By examining legal texts, case law, and academic discourse, this research evaluates the compatibility between ICA and the SMC and whether the latter enhances or disrupts existing arbitration frameworks. The findings suggest that the SMC has significantly influenced international dispute resolution by legitimizing mediation as a viable alternative to arbitration, thereby increasing competition between the two mechanisms. Additionally, the convention has encouraged the development of hybrid dispute resolution methods, such as med-arb, which blend elements of both processes. While the SMC does not replace ICA, it fills a critical gap by providing enforceability to mediated settlements, fostering a more dynamic and flexible global dispute resolution system.

Key Words

Alternative Dispute Resolution, International Commercial Arbitration, Singapore Convention on Mediation, New York Convention on Arbitration, Mediation v Arbitration

1. Introduction

International Commercial Arbitration (ICA) is a private system of adjudication that has been hailed as a key mechanism in international dispute resolution, offering parties a flexible and efficient alternative to traditional litigation¹. In the current climate, where global trade seems to expand exponentially, there is a growing need for the development of the practices used for international dispute resolution. The two most common forms of dispute resolution are arbitration and mediation. Arbitration is a process in which an

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¹ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press) 1

impartial arbitrator makes a final decision to settle a dispute between parties², whereas mediation is a process in which a neutral third party facilitates negotiation between parties to help them reach a mutually acceptable settlement³. The United Nations Convention on International Settlement Agreements Resulting from Mediation, otherwise known as the Singapore Convention on Mediation (SMC)⁴, could be viewed as being developed to fulfil that need, as it has been called ‘a shot in the arm’ for international commercial mediation⁵. One of the reasons why it has been viewed as such is due to the rapid development of the ‘Tiger Economies’⁶ in south-east Asia where there was no formal instrument for the enforcement of settlement agreements rendered in international commercial mediations (IMSAs). This is propelled by the competitive nature of international dispute resolution, as each jurisdiction and set of rules is trying to offer the most well-rounded process to achieve an efficient and enforceable result.

Zukauskaitė’s observation that “within the EU every country has a mechanism how to transform a MSA into a directly enforceable title however outside the EU the situation varies significantly”⁷ highlights, how the need for such an instrument may have only become apparent with the emergence of the ‘Tiger Economies’, and why the SMC has quickly garnered attention as a method of enforcement⁸. The Creation of the SMC was heavily influenced by other pre-existing instruments of international dispute resolution such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention (NYC)⁹, and the UNCITRAL Arbitration Rules¹⁰. While these conventions served their purpose well, the need for an effective method of enforcing IMSAs was still necessary. This further evidences the competitive nature of ICA as in order to establish themselves within the market they had to identify what was currently missing and wanted.

The primary objective of this dissertation is to evaluate the compatibility between ICA and the SMC, and to highlight how the SMC has impacted the world of international dispute resolution, by critically assessing and comparing the instruments, practices and challenges associated with each mechanism. In doing this I will first examine and review the history of ICA, including a general overview of the major arbitral instruments and rules. I will then discuss the history of the SMC and what events occurred that caused the creation of this

² Alternative Dispute Resolution: Mediation v Arbitration, What is Arbitration?

<<https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/>> Accessed 03/01/25

³ Alternative Dispute Resolution: Mediation v Arbitration, What is Mediation? <<https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/>> Accessed 03/01/25

⁴ United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (Adopted 20 December 2018, entered into force 12 September 2020) UN Doc A/RES/73/198

⁵ Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

⁶ Andrew Bloomenthal, 'Four Asian Tigers: What They Are, Economic Strengths Explained

' (Investopedia, 05/10/2023) < <https://www.investopedia.com/terms/f/four-asian-tigers.asp> > accessed 23/11/2024

⁷ Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

⁸ Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (Adopted 10 June 1958, Entered into force 7 June 1959) 330 UNTS 38

¹⁰ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended in 2006) UN Doc A/40/17

instrument before beginning the critical analysis of both the SMC and other instruments. As well as the conventions I will introduce other important concepts in the process of ICA such as, the choosing of the seat, and Ad-Hoc vs Off the Shelf approaches. After this I will show what the outcome of my research is and provide a judgment as to whether I believe that SMC has greatly impacted ICA or not.

2. History and Background of ICA

International Commercial Arbitration (ICA) has been evolving for centuries, moulded by the need for a neutral and efficient mechanism for dispute resolution in inter-state trade¹¹. The early roots of arbitration can be traced back to ancient times and is viewed as one of the 'oldest methods for the peaceful settlement for international disputes'¹². In Medieval times, the presence of 'lex mercatoria'¹³ shows the existence of some form of arbitration as it was viewed as 'a method of adjudication in dispute-resolution situations where different sets of rules may coexist'¹⁴. However, arbitration in early periods would have been more informal, being heavily reliant on mutual trust between any trading parties in addition to the reputation of the arbitrators.

The industrial revolution was a turning point in the development of ICA, as with the introduction of globalisation that brought growth of competitive international trading and significant commercial developments, inter-state disputes became much more frequent. This was first presented in the Civil Procedure Act, which stated that an arbitration agreement which was made a rule of court could not be revoked¹⁵. This indicates that arbitration was beginning to show its merits for commercial disputes as it was solidifying the common law practices that were set out in *Vynior*¹⁶ 200 years earlier. This allowed for the formation of Arbitral institutions such as the London Court of International Arbitration (LCIA) in 1892¹⁷ as with the foundational rules they were able to provide some formality. Another institution that was later introduced was the International Chamber of Commerce (ICC) in 1919¹⁸ which later became a leading authority in ICA through its provision of an International Court of Arbitration which was introduced in 1923¹⁹. Initially, the ICC was reliant on the Geneva Protocol on arbitration clauses²⁰ and the Geneva Convention on the Execution of Foreign Arbitral Awards²¹ to oversee any enforcement, until the introduction of the NYC which became the dominant framework. These institutions were founded with the intention of provide a fair and routine administration of ICA under codified rules, and a solid foundation for the use of ICA in international dispute resolution.

After the Second World War there were significant legal milestones which standardised ICA on a global scale. The first major instrument that was introduced to facilitate ICA was the New York Convention (NYC). It was seen as the successor to the Geneva Protocol and Geneva

¹¹ Gary B. Born, *International Arbitration: Cases and Materials* (Kluwer Law International 2011) 2

¹² A. Stuyt, *Survey of International Arbitrations 1794-1989* (3rd ed. 1990)

¹³ Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' [1985] *International and Comparative Law Quarterly* 34(4) pp. 747-768. Doi:10.1093/iclqaj/34.4.747

¹⁴ Ulla Liukkunen, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013) 201

¹⁵ English Civil Procedure Act 1833, 3 & 4 Will. IV, Ch. 42

¹⁶ *Vynior v Wilde* [1609] 77 Eng. Rep. 595 (K.B.)

¹⁷ History of the LCIA < <https://www.lcia.org/lcia/history.aspx> > Accessed 15/12/22

¹⁸ About the ICC < <https://iccwbo.uk/about>. > Access 15/12/22

¹⁹ ICC International Court of Arbitration < <https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/> > 19/12/24

²⁰ Protocol on Arbitration Clauses (Adopted 24 September 1923, entered into force 28 July 1924) 27 LNTS 158

²¹ Convention on the Execution of Foreign Arbitral Awards (Adopted 26 September 1927, entered into force 25 July 1929) 92 LNTS 302

convention which were seen as 'inadequate' by some spectators including Van Den Berg who stated that 'despite being an improvement in comparison to the previous situation, they were still considered inadequate'²². The NYC provides a universal framework for the process of ICA²³ and there are currently 172 state parties including 169 of the 193 United Nations member states²⁴ making it a cornerstone in the world of ICA. In addition to the NYC, the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL)²⁵ was another influential development as it sought to harmonise arbitration procedures across jurisdictions by providing a consistent and predictable framework. The wide adoption of UNCITRAL²⁶ has aided in further embedding ICA as the preferred dispute resolution method in global commerce.

ICA is often preferred to litigation by international businesses due to the flexibility, confidentiality, and neutrality that it provides where litigation cannot. Moses suggested that the two main deciding factors are there is a higher likelihood of obtaining an enforceable award, due to the NYC, and the neutrality of the forum²⁷. Parties are able to choose their arbitrators and the seat at which the arbitration will occur which highlights the flexibility that is ingrained within ICA. The seat of arbitration is the legal venue or place of the arbitration and is not always the same as the physical location, but they are usually the same as it operates under the assumption of mutual agreement²⁸. Most jurisdictions have their own legislature on the seat and venue selection in ICA such as the Arbitration Act²⁹ in the United Kingdom where case law such as *Sulamerica*³⁰ is also an influencing factor, and the Federal Arbitration Act for the US where case law such as *Bremen*³¹ is used to a similar effect.

With the increasing reliance from international organisations on ICA, there has been an increase in the number of arbitral institutions that are available. One of these is the Singapore International Arbitration Centre (SIAC) which was established in 1991³². It is seen to be one of the top five most preferred arbitration centres in the world and from 2005 to 2015 its caseload increased by roughly 400 percent³³ demonstrating an increased demand for dispute resolution in Singapore and the surrounding Asia-Pacific area.

3. The Introduction of the Singapore Convention on Mediation

Developing an international convention with the aim of encouraging mediation as a form of international dispute resolution, was first proposed in July 2014 at the 47th meeting of UNCITRAL³⁴. Its aim was to introduce a uniform mechanism for the international

²² A. Van Den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* 7 (1981)

²³ Gary B. Born, *International Arbitration Cases and Materials* (Kluwer Law International 2011) 32

²⁴ New York Convention, Contracting States < <https://www.newyorkconvention.org/contracting-states> > Accessed 15/12/24

²⁵ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended in 2006) UN Doc A/40/17

²⁶ Who Participates in the drafting of UNCITRAL Texts? < <https://uncitral.un.org/en/about>. > Accessed 15/12/24

²⁷ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press) 3

²⁸ Nnaemeka Nweze, 'Ascertaining the Effect of the Seat of Arbitration on the Arbitral Award' (2024) 15 *Nnamdi Azikiwe U J Int'l L & Juris* 117

²⁹ Arbitration Act 1996

³⁰ *Sulamerica Cia Nacional de Seguros S.A v Enesa Engelheria S.A* [2012] EWCA Civ 638

³¹ *Bremen v Zapta Off-Shore Co.* [1972] 407 U.S. 1

³² Singapore International Arbitration Centre, About Us < <https://siac.org.sg/about-us> > Accessed 18/12/24

³³ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press) 13

³⁴ Shahla Ali, *Comparative and Transnational Dispute Resolution* (Routledge 2020) 171

enforcement and recognition of settlement agreements³⁵. It was adopted under resolution 73/198 of the United Nations General Assembly on 20 December 2018 and was opened for signature on the 7 August 2019³⁶. This marked as significant a milestone for international dispute resolution as the NYC, as it provided a routine framework for the enforcement of IMSAs, similarly to what is provided by the NYC³⁷, and increased the use of mediation as a form of international dispute resolution. This mirrored the growing trend in mediation as it came shortly after the ICC announced its revised mediation rules³⁸.

The primary goal of the SMC was to encourage the use of mediation as a form of dispute resolution in international commercial disputes³⁹. Upon its introduction in 2019, it saw large acceptance in the Asia-Pacific region with 16 jurisdictions signing⁴⁰ including 3 of Asia's biggest economies in China, South Korea and India⁴¹. After only a short time it had already garnered great success and recognition⁴² which suggests that it was something that had been missing from the international scope for quite some time. Additionally, just a year after implementation, the world was shut down by the global response to the COVID-19 Pandemic, this had an impact on the growth of the SMC. However, despite this interruption there has been continued use and acceptance of the practice and procedures of the SMC.

Between the first proposal of such an instrument and its opening for signature, there were many considerations to finalise the specificities of the convention, such as the scope and application. This task was given by UNCITRAL to Working Group II who first discussed it at a session in February 2015⁴³ where it was generally agreed that they should promote conciliation as a form of commercial dispute resolution and that a convention modelled on the NYC could be considered for this aim⁴⁴. However, they also shared daunting views concerning the time it would take to develop the convention effectively and the prospect of the convention being successful. Later in the summer of 2015 it was beginning to gather more support with most states believing it was a promising endeavour⁴⁵. The working group would focus on the mediation project for the next 6 sessions and were all chaired by Natalie Morris-Sharma from Singapore. In a February 2017 session they made what was seen as the significant breakthrough by addressing four key issues⁴⁶.

³⁵ Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 *N Ir Legal Q* 481

³⁶ <Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Negotiation and signing of the Convention > Accessed 18/12/24

³⁷ Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

³⁸ ICC Launches 2014 Mediation Rules in North America < <https://iccwbo.org/news-publications/news/icc-launches-2014-mediation-rules-in-north-america/> > Accessed 03/01/25

³⁹ Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (Pepperdine Dispute Resolution Law Journal, Vol 19:1) 2

⁴⁰ United Nations Treaty Collection, United Nations Convention on International Settlement Agreements Resulting from Mediation, Participants < <https://treaties.un.org/pages/ViewDetails> >

⁴¹ Trading Economics, GDP, Asia < <https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/> >

⁴² Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

⁴³ United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015), U.N. Doc. A/CN.9/832

⁴⁴ *Ibid* 13-15

⁴⁵ United Nations Commission on International Trade Law, Report on the Work of its Forty-Eighth Session, U.N. Doc. A/70/17 (2016)

⁴⁶ United Nations Commission on International Trade Law, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, 6-10 February 2017), U.N. Doc. A/CN.9/901

The first was concerned with the legal effect of settlement agreements and how they could ‘express that settlements could or should be given legal effect without using the expression, recognition’⁴⁷. This was to avoid breaching the intended scope of the convention, which was purely an enforcement mechanism and not to address the legal effect of a settlement agreement between the parties. Second, they addressed settlement agreements that could be enforced as arbitral awards would be excluded from the SMC, mainly due to the pre-existing NYC that could be implemented in cases such as these⁴⁸. The next issue considered was the opt-out or opt-in for the parties to the settlement agreements. This meant that it was deciding whether the application of the instrument would be dependent on the parties consenting to the settlement agreement. This was divided as some had the view that the ‘parties’ choice should not have any impact on the application of the instrument’ in order to provide an enforcement regime comparable to that of the NYC⁴⁹. Whereas other viewed that the parties should be able to decide whether the instrument is applicable to maintain the value of party autonomy. The final addressed the inclusion of two situations which a court could refuse to grant relief based on ‘misbehaviour by the mediator’⁵⁰. This was with the view to provide assurance on the proper procedures being followed and allowing for some form of relief where the situation calls for it. After these significant strides were taken the working group only required two more sessions to complete its efforts, and the convention was finalised by the commission on June 25, 2018, including the recommendation that it should be opened for signature in August of 2019⁵¹.

A key reason why the SMC was necessary in the first place was due to the unenforceability of IMSAs. Previous to the SMC, a business could have taken the time and energy needed to reach an agreement and if the other party do not uphold the agreement, their only option would be to restart in arbitration or litigation⁵². This demonstrates why mediation was seen as an inferior approach in international disputes prior to the SMC, as any outcomes reached lacked the legitimacy that often came with a domestic mediated settlement, or an international arbitral award enforced by the NYC. Article 3 of the SMC says that ‘each party to the convention shall enforce a settlement agreement in accordance with its rules of procedure’ demonstrating how one of the primary provisions is concerned with resolving the enforceability issues⁵³. However, it is equally important to note, that the convention was not intended to provide enforceability for settlement agreements that would not have been otherwise enforceable but only to provide a method of enforcement that is more efficient than litigation⁵⁴. Aside from its large-scale commercial application, another result of the SMC could be an increased level of competition and representation afforded to smaller businesses. This is because arbitration can be expensive and time-consuming meaning it wasn’t a viable option for smaller firms with less expendable resources⁵⁵.

⁴⁷ Ibid 16-24

⁴⁸ Ibid 25-32

⁴⁹ Ibid 32-49

⁵⁰ Ibid 41-50

⁵¹ U.N. Comm’n on Int’l Trade Law, Report on the Work of Its Fifty-First Session, U.N. Doc. A/73/17, ¶ 44 (2018).

⁵² Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (Pepperdine Dispute Resolution Law Journal, Vol 19:1) 3

⁵³ United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (Adopted 20 December 2018, entered into force 12 September 2020) UN Doc A/RES/73/198, Art 3

⁵⁴ Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (Pepperdine Dispute Resolution Law Journal, Vol 19:1) 4

⁵⁵ Apter, Itai, The Singapore Convention on Mediation: The Right Instrument at the Right Time. Proceedings of the Annual Meeting (American Society of International Law) 114 (2020): 120–23

4. Critical Analysis of the instruments and approaches to ICA

ICA has developed into a sophisticated mechanism for the resolution of international disputes, supported by various robust legal frameworks such as the NYC and the UNCITRAL Model Law. However, the introduction of the SMC presents a change in international dispute resolution, as it provides enforceability to mediated settlements which in turn creates competition between arbitration and mediation as the preferred mechanisms.

The NYC has been instrumental in cementing the role of ICA as the dominant method of international dispute resolution. The near universal adoption of 172 state parties⁵⁶ provides the predictable and efficient framework for the recognition and enforcement of arbitral awards and by ensuring that awards are enforceable internationally, the convention provides the parties with the security they need to engage in both arbitration and international trade as a whole, as without it there would be less incentive to engage with international trade in case it ends with a conflict and they have to then pursue litigation, which is often timely and costly. For parties engaging in arbitration, the speed, cost, and enforceability are the primary concerns, and arbitration has always been considered as more cost-effective and more time-effective compared to traditional litigation. However, this is dependent on the parties collaborating to resolve the dispute, as the common reason why arbitration can become expensive is where the parties don't attempt to collaborate, and the arbitration becomes more similar to litigation⁵⁷. This may be because with the growth of arbitration and the increasing amounts of money at stake⁵⁸ as the average amount in dispute in 2023 was \$65 Million compared to \$54 million in 2020⁵⁹. The higher stakes that are involved with these disputes could suggest that parties are becoming less concerned with collaboration and innovation, and the focus is shifting towards individual profit which would lead to the parties wishing to spend as little time as possible in the proceedings of these disputes which have both time and monetary cost involved.

However, the advantage offered by the NYC is that the scope for appealing an arbitral award is very limited⁶⁰ which means that there are seldom any appeals to the arbitral award and once the award has been decided that is the end of the dispute. The grounds are limited to procedural irregularities, lack of notice and the scope of the award which are all equally easy to prove or disprove when the situation calls for it. However, this could be seen as a double-edged sword as the interpretation of these provisions can be different in different jurisdictions as they are often dependent on the 'law of the country where the arbitration took place'⁶¹. This presents how if a state were to adopt an approach that would be unfavourable to one party, then they would be dissuaded from attempting arbitration, or maybe even international trade as a whole, with parties from that state. This highlights the importance of the selection of the seat in the process of arbitration and how it can have an effect on the award.

The decision of the arbitral seat is an equally important aspect of the arbitral process as the choice of approach or institution, as it is what determines the applicable law, and which court has supervisory jurisdiction over the arbitral process⁶². It has evolved into a crucial aspect in

⁵⁶ New York Convention, Contracting States <<https://www.newyorkconvention.org/contracting-states>> Accessed 15/12/24

⁵⁷ Steven Seidenberg, International Arbitration loses Its grip, 96 A.B.A. J. 50, 51 (2010)

⁵⁸ ICC Releases preliminary 2023 arbitration and ADR statistics, Amounts in dispute <<https://iccwbo.org/news-publications/news/icc-releases-preliminary-2023-arbitration-and-adr-statistics/>>

⁵⁹ ICC Dispute Resolution 2020 Statistics, Amounts in Dispute <<https://jsumundi.com/en/document/publication/en-2020-icc-dispute-resolution-statistics>>

⁶⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (Adopted 10 June 1958, Entered into force 7 June 1959) 330 UNTS 38, Art 3-5

⁶¹ Ibid

⁶² Nnaemeka Nweze, 'Ascertaining the Effect of the Seat of Arbitration on the Arbitral Award' (2024) 15 Nnamdi Azikiwe U J Int'l L & Juris 117

ensuring efficiency, fairness and enforceability within the arbitration process⁶³. One of the key factors that determines the choice of seat is how well equipped is the venue as different locations will be able to provide different levels of institutional support, expertise from the local practitioners and integrity during its operations⁶⁴. This provides different questions as to whether arbitration will be the most effective method of dispute resolution as it takes the concerns away from the legal aspects and points more towards social or economic factors as this is concerned less with the efficiency of the convention or statute being used and more with the people who are using it and how they are using it. Some evidence of this is shown in the respective case law as the UK and US have been shown to place more emphasis on party autonomy and minimal intervention⁶⁵ than Singapore or Switzerland who prioritise neutrality, efficiency and institutional support⁶⁶.

The UNCITRAL Model law provides a harmonised set of rules to be applied across jurisdictions ensuring consistency and predictability for those wishing to engage in ICA. It not only involves provisions on tribunal jurisdiction, interim measures and the recognition of awards but also provided a foundation for other rules to be created off, such as the SMC which was said to 'have origins in the UNCITRAL'⁶⁷ and even domestic law such as the Singapore International Arbitration Act⁶⁸ and the English Arbitration Act⁶⁹ which are both seen to adhere to the model law in many ways⁷⁰. The wide adoption of the Model law is one of the reasons it is so prevalent in the international scope, as the more acceptance it gains the more efficient it becomes due to a wider range of applicability. However, one criticism of the model law is that it is limited by its non-binding nature. Article 1 of the UNCITRAL model law provides that the rules are only applicable to the extent that the parties decide⁷¹. This can remove the certainty aspect of the rules as there is never a certainty as to how the rules will be applied for any given scenario, however it can also provide more control for the disputing parties as they do not have to be subject to the entire scope of the rules, only those which are desired. Furthermore, similarly to the NYC the scope of UNCITRAL is limited to arbitration and overlooks the growing importance of mediation in the context of international dispute resolution.

Another decision that parties will face when deciding to resolve disputes through arbitration is whether to use an arbitral institution or whether they want the arbitration to be Ad-Hoc. Ad-Hoc arbitration is where there is no administering institution⁷² and it can offer different advantages to that of institutional arbitration. An arbitral institution is an institution which administers arbitral proceedings under its arbitration rules. One advantage is the removal of any fees or expenses of the arbitral institution which can reduce what can already be quite a high cost, which makes Ad-Hoc more attractive to smaller, or less-equipped parties. This is

⁶³ Makam Ganesh Kumar, 'Seat and Venue Debate in International Arbitration: A Comparative Analysis of Jurisdiction' (2023) 3 Indian J Integrated Rsch L 1

⁶⁴ Ibid

⁶⁵ *Sulamerica Cia Nacional de Seguros S.A v Enesa Engelharria S.A* [2012] EWCA Civ 638, *Bremen v Zapta Off-Shore Co.* [1972] 407 U.S. 1

⁶⁶ *Dow Chemical Pacific Ltd v Isover Saint Gobain AG*, ICC Case No.4131, *BCY v BCZ* [2016] SGHC 249

⁶⁷ Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020)

⁷¹ N Ir Legal Q 481

⁶⁸ International Arbitration Act 1994

⁶⁹ Arbitration Act 1996

⁷⁰ Lingard N, Tan S, Seow V, <'How Singapore's international arbitration laws will compare with the position post-reform of the English Arbitration Act' > (2023)

⁷¹ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (adopted 21 June 1985, as amended in 2006) UN Doc A/40/17, Art 1

⁷² Ad-Hoc Arbitration – An introduction to the key features of Ad-Hoc Arbitration <

<https://www.lexisnexis.co.uk/legal/guidance/ad-hoc-arbitration-an-introduction-to-the-key-features-of-ad-hoc-arbitration> > Accessed 29/12/24

coupled with the ability to tailor the process to fit within the particular dispute as with the absence of an administering institution there are no set of rules that they must use. Often the UNCITRAL rules or some form of them are what is adopted⁷³ however the parties can draft their own rules if they feel it is necessary. This can mean that the arbitration proceeds more quickly and efficiently, but it can equally have the opposite effect as with the absence of an administering body the proceedings can come to a halt, if the parties are not attempting to collaborate or are intentionally obstructing the process.

Institutional arbitration is the involvement of an arbitral institution to administer the arbitration⁷⁴. The institution that is used is often indicated within the contract in the form of an arbitration clause that designates a specific institution as the arbitration administrator. Institutional arbitration offers different advantages to Ad-Hoc arbitration that can be just as influential depending on the needs of the parties, such as the reliable performance of the administrative functions, and the timely appointment of arbitrators and movement of proceedings⁷⁵. The reliable performance of these functions assures the parties that the arbitration can proceed efficiently and reduces the time and resources that the parties would need to expend if they used an Ad-Hoc approach. Furthermore, the award itself is often seen with more credibility within the international community and courts due to the established reputation of the various institutions, which provides a higher level of enforceability and recognition of an award.

5. The Impact of the Introduction of the SMC

The introduction of the SMC was followed by a swift adoption by the international community, particularly in the Asia-Pacific region⁷⁶. The significance of the SMC in more emerging economies arose from the absence of an instrument that addresses the enforcement of IMSAs which is a gap that the NYC hasn't filled. This coupled with the adoption by some of the largest global economies in the likes of USA, China and India, further evidences the initial success of the SMC indicating that the recognition of IMSAs was seen as a valuable asset to the international community. The adoption from Singapore underscored its compatibility with ICA as Singapore already promoted both arbitration and mediation through the Singapore International Arbitration Centre (SIAC)⁷⁷ and the Singapore mediation centre⁷⁸ which were both established prior to the introduction of the SMC. Singapore's dual approach to international dispute resolution demonstrated how both mechanisms can co-exist within a single jurisdiction. It also shows how it can potentially boost the efficiency of dispute resolution as between 2005 and 2015 alone the caseload for the SIAC was increased by 400 percent⁷⁹ which would suggest that Singapore was becoming more attractive as a centre for arbitration.

Before the introduction of the SMC, the issue of enforceability for IMSAs created a critical barrier to the use of mediation in international dispute resolution, as there was no guarantee that the outcome of the mediation would be complied with by the other parties. The SMCs

⁷³ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press) 10

⁷⁴ Glossary, Institutional Arbitration, < <https://uk.practicallaw.thomsonreuters.com/> . > Accessed 29/12/24

⁷⁵ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press) 10

⁷⁶ Apter, Itai, *The Singapore Convention on Mediation: The Right Instrument at the Right Time*. *Proceedings of the Annual Meeting (American Society of International Law)* 114 (2020): 120–23

⁷⁷ Singapore International Arbitration Centre, About Us < <https://siac.org.sg/about-us> > Accessed 01/01/25

⁷⁸ Singapore Mediation Centre, About Us < <https://mediation.com.sg/about-us/about-smc/> > Accessed 01/01/25

⁷⁹ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press) 13

primary aim was to eliminate this issue by providing a standardised enforcement framework, aligning mediation with arbitration in the scope of its international legal reliability. Its similarities with the NYC may have reassured the other parties due to the large-scale acceptance and success of the NYC which is proven and tested⁸⁰. The result of this introduction is a shift in attitudes toward mediation as it is viewed by businesses as not only a tool for preserving relationships but also as a strategic means of reducing time and financial expenditures. This shift was valuable in the international scope as preserving relationships is critical for the success of international trade as it helps collaboration to improve the various technology, production or construction methods used in different jurisdictions. However, the reliance on mutual agreement in mediation remains a barrier that has the potential to limit its use in certain situations. Unlike arbitration where a tribunal is used to make a decision and impose that decision on the parties⁸¹, mediation only uses a third party to facilitate an agreement using their specific expertise⁸², so unless one party voluntarily cooperates then the mediation will be at a standstill and arbitration, or litigation, will have to be implemented.

The introduction of the SMC has also had an influence on the development of arbitral institutions. Institutions such as the ICC had already begun to recognise the importance of mediation in dispute resolution as in 2014 the Secretary General Andrea Carlevaris stated that '90% of cases are mediation cases', and they had changed the name of the former ICC ADR Rules to the ICC Mediation Rules to reflect that majority⁸³. Shortly after this shift was when the initial meetings concerning the SMC were being held which suggests that while they had recognised the growing need for more structured frameworks concerning mediation, they had overlooked some key aspects in which the SMC was required to fill. The ICC mediation rules were focused on supporting parties to overcome the obstacles that opposed mediation such as how to start and where to hold the mediation process⁸⁴, but they didn't address any enforceability issues which meant that even if the parties could follow the rules provided there was no enforceable end result. This shows how the SMC could be viewed as the missing piece of the ICCs shift toward mediation and how its introduction impacted the efficiency and effectiveness of those rules, as without the SMC the ICC mediation rules provide a process that has no enforceable end product, and without the ICC mediation rules the SMC provides an enforceable end product for an inoperative process. This demonstrates the positive impact of the SMC on the efficiency of existing institutions.

It is also right to say that the SMC has encouraged growth in the use of alternatives such as med-arb or arb-med-arb which are combinations of the respective mediation and arbitration processes that aim to harmonise the two in order to gain the most efficient combination. Med-arb usually involves a situation where the parties seek to resolve the dispute through mediation but have agreed that if the mediation ends unresolved then the parties can move onto arbitration⁸⁵. This often means that the process will end with a successfully negotiated agreement as the potential for a third party to render a binding arbitral award often motivates

⁸⁰ United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015), U.N. Doc. A/CN.9/832

⁸¹ Alternative Dispute Resolution: Mediation v Arbitration, What is Arbitration?

<<https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/>> Accessed 03/01/25

⁸² Alternative Dispute Resolution: Mediation v Arbitration, What is Mediation?

<<https://lexlaw.co.uk/solicitors-london/alternative-dispute-resolution-adr-mediation-v-arbitration-pros-and-cons-second-opinion/>> Accessed 03/01/25

⁸³ ICC Launches 2014 Mediation Rules in North America <<https://iccwbo.org/news-publications/news/icc-launches-2014-mediation-rules-in-north-america/>> Accessed 03/01/25

⁸⁴ Ibid

⁸⁵ Joshua M. Javits, Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes, ABA Journal of Labour & Employment Law, Vol. 32, No. 2, 2017

the parties to reach an agreement⁸⁶. These processes only gained traction with the introduction of the SMC as it facilitated the enforcement of the original mediated award creating more incentive to resolve the dispute in the mediation process. This further shows how the introduction of the SMC has influenced international dispute resolution even further towards resolving disputes through mediation or some form of it.

This increased use of mediation in international dispute resolution also reduces the caseload of arbitral institutions and their arbitrators. This is because the edge that arbitration had over mediation was the enforceability of settlement agreements, without this edge the fear is that they will begin to lose more and more cases to mediation⁸⁷. However, this does not mean that Arbitration and Mediation are necessarily being pitted against one another, the dynamic between the two should be viewed as them competing against each other to reach their goal quicker than the other party, rather than competing in order to better themselves at the expense of the other party⁸⁸. This is because they are both trying to achieve the most efficient method of dispute resolution rather than remove the other completely, meaning that by reducing the caseload for arbitral institutions and arbitrators, the SMC seeks to help promote more efficient forms of dispute resolution by offering a more suitable alternative for those who had been forced to use arbitration due to the unenforceability of IMSAs.

6. Conclusion

The introduction of the SMC in 2019⁸⁹ has been shown to have had profound implications on the field of international dispute resolution, in particular in relation to ICA. After the issue was raised at the 47th meeting of UNCITRAL in July 2014⁹⁰ the attendants recognised the need to fill the gap left in the market by providing a framework for the enforcement of IMSAs addressing the long-standing challenge of enforceability for mediated outcomes for international disputes⁹¹. This has brought about a revision of the roles of arbitration and mediation in international dispute resolution, causing leading businesses, legal professionals, and institutions to rethink their approach to ICA and international dispute resolution.

The swift adoption of the SMC on its introduction underpins its importance to the international community as within a short period they had already garnered significant support in the Asia-Pacific region with three of the largest economies in the area⁹² becoming early signatories⁹³. The SMC was not only implemented within the Asia-Pacific region as it became clear to other jurisdictions that there was significant value in facilitating the enforcement of IMSAs as a supplement to international dispute resolution. It became clear that by filling this gap they were able to elevate mediation as an equally effective method of dispute resolution for international disputes. Despite the disruptions caused by the COVID-19 pandemic the SMC has continued to experience growth and continued recognition which only further

⁸⁶ Katie Shonk, What is Med-Arb? The pros and cons of Med-Arb a little-known Alternative dispute resolution process, 2024 <<https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/>>

⁸⁷ Iris Ng, The Singapore Mediation Convention: What Does it Mean for Arbitration and the Future of Dispute Resolution? <<https://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/>> Accessed 03/01/25

⁸⁸ Ibid

⁸⁹ <Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Negotiation and signing of the Convention > Accessed 18/12/24

⁹⁰ United Nations Commission on International Trade Law, Report on the Work of its Forty-Seventh Session, U.N. Doc. A/69/17 (2014)

⁹¹ Bryan Clark & Tania Sourdin, 'The Singapore Convention: A Solution in Search of a Problem?' (2020) 71 N Ir Legal Q 481

⁹² Trading Economics, GDP, Asia <<https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/>>

⁹³ United Nations Treaty Collection, United Nations Convention on International Settlement Agreements Resulting from Mediation, Participants <<https://treaties.un.org/pages/>>

demonstrates the resilience of the SMC, providing more evidence that supports its relevance and necessity in supporting the evolution of mechanisms in an evolving market.

An important implication of the introduction of the SMC was the potential to create a more competitive and accessible market for smaller businesses who may not have had the resources available to engage in arbitration. By providing an alternative to arbitration the SMC will encourage smaller businesses to engage in international trade without the worry of being bullied by larger businesses if a dispute arises. By fostering a more competitive environment the international economies that engage with this practice will surely grow due to the higher levels of innovation and efficiency that often pair with higher levels of competition. This means the impact of the SMC could have further reaching implications that just having a direct effect on the parties who would need to use it, but also has an overall positive effect for the area that it is used in.

Additionally, the SMC has caused the view on mediation and arbitration to shift as the two are no longer viewed as mutually exclusive but rather as complementary processes that can coexist within the same jurisdiction and even cooperate to achieve the most desirable outcome. The use of hybrid dispute resolution methods such as med-arb have gained popularity as now parties can be assured that if they are to resolve the dispute through mediation then the decision will be enforceable, and they will not have to resort to using arbitration in order to achieve an enforceable outcome. The SMC has formed a more seamless integration between arbitration and mediation, encouraging parties to resolve their disputes with assurance as to the enforceability of the outcome. This also is seen in the arbitral institutions which have grown increasingly responsive to mediation, such as the ICC which have been developing their own set of rules to determine mediation⁹⁴ similar to their rules on arbitration.

Ultimately, the SMC is not to be seen as an instrument to replace the established arbitration rules and institutions but rather as a supplement to fill in the missing gaps, its implementation creating a more dynamic, flexible and globally accessible market for dispute resolution. The NYC and UNCITRAL remain as important and influential as they were previously, as the SMC does not diminish the value of these instruments, but rather is a bridge for the longstanding gap between the differing dispute resolution methods forming a more coherent system of international dispute resolution. The SMC does not offer a universal solution to every scenario, instead it has provided a critical addition and the future of dispute resolution is likely to see a more integrated universal approach with mediation and arbitration working hand-in-hand to provide parties with the most efficient and effective option for resolving their conflict.

⁹⁴ ICC Launches 2014 Mediation Rules in North America < <https://iccwbo.org/news-publications/news/icc-launches-2014-mediation-rules-in-north-america/> > Accessed 03/01/25

Regulatory Frameworks for AI Governance: Why the Global South Must Play a Central Role

Oluwanifise Samuel Adeleke*

Abstract

The global governance of artificial intelligence (AI) cannot afford to repeat the mistakes of the past. Today, AI policies remain heavily shaped by the Global North, reinforcing historical power imbalances in technology, data control, and economic benefits, while sidelining the needs and contexts of the Global South. This article, through critical analysis of existing governance structures and comparative assessment of policy approaches, argues that equitable AI governance is impossible without centring the Global South's voices, priorities, and lived realities. By examining the colonial roots of this exclusion, the piece exposes how current frameworks risk cementing a new era of technological dependency rather than fostering justice.

The findings are clear: token representation is insufficient. The Global South requires real resources, i.e., capacity building, infrastructure, and technical support, to participate meaningfully in shaping AI's future. Crucially, homegrown AI ecosystems must be nurtured to ensure self-determination, not another cycle of extraction. Regional collaborations across the Global South could amplify shared demands, while proactive engagement with Northern policymakers must challenge the status quo.

Ultimately, the path forward demands action from both sides. The Global North must move beyond performative inclusion and redistribute power; the Global South must invest aggressively in local research, policy infrastructure, and transnational solidarity. Only through this dual commitment can AI governance become truly global—serving humanity, not just its most privileged corners.

Key Words

AI governance, Global South, regulatory frameworks, digital equity, policy inclusion, technological development.

1. Introduction

Artificial Intelligence (AI) has rapidly progressed in the last decade. The year 2023 saw the ascendancy of the promise and the perils of AI.¹ In 2024, generative and general-purpose AI dominated global discourse, sparking unprecedented interest, debate, and momentum in technological innovation and regulatory discussions.² The transformative potential of AI

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¹ Igarapé Institute, 'Global Futures Bulletin: Responsible Artificial Intelligence Efforts In the Global South - Instituto Igarapé' 3 <<https://igarape.org.br/en/global-futures-bulletin-responsible-artificial-intelligence-efforts-in-the-global-south/>> accessed 30 November 2024.

² *ibid.*

became a central narrative, driving conversations across technology, policy, and innovation sectors worldwide.

AI is already embedded in everyday life; from our mobile operating systems to our smart devices and virtual assistants like Alexa and Siri, AI is seemingly everywhere.³ In science, we are experiencing significant breakthroughs in medical diagnostics,⁴ drug discovery⁵ and climate research.⁶ AI is also transforming global markets with millions of dollars flowing through AI-influenced economic transformations.⁷ Moreover, in the area of international security, AI is revolutionising military strategies through advanced logistics, intelligence gathering, and emerging technologies such as: autonomous weapon systems, automated targeting capabilities, drone warfare, as well as sophisticated cyber-attack mechanisms.⁸

Notwithstanding, it is important to remember the risks and limitations associated with AI.⁹ These concerns are shared by both ordinary peoples from different walks of life, as well as experts alike.¹⁰ AI is a powerful tool because it allows humans to accomplish more with less: less time, education and equipment.¹¹ However, it is these same capabilities that make it dangerous in the wrong hands. Even humans with entirely good intentions can prompt AIs to produce bad outcomes.¹² Some existing risks that AI poses include harmful malfunctions, discrimination, reduced social connections, invasions of privacy and disinformation. Future advancements could exacerbate anticipated catastrophic risks, including bioterrorism, misuse of concentrated power, nuclear and conventional war, amongst many others.¹³ The report from the UK's Government Office for Science also underscores some disruptive potential risks such as, mis- or disinformation and deepfakes, cyber-attacks, reduced barriers to access harmful information and fraud.¹⁴ These concerns underscore the critical importance of AI regulation and governance frameworks. As the UN Secretary-General's High-level Advisory

³ Jurriaan van Mil and João Pedro Quintais, 'A Matter of (Joint) Control? Virtual Assistants and the General Data Protection Regulation' (2022) 45 *Computer Law & Security Review* 105689, 1–2.

⁴ Gehendra Mahara and others, 'Revolutionising Health Care: Exploring the Latest Advances in Medical Sciences' 13 *Journal of Global Health* 03042, 1–5; Shuroug A Alowais and others, 'Revolutionizing Healthcare: The Role of Artificial Intelligence in Clinical Practice' (2023) 23 *BMC Medical Education* 689, 3–7.

⁵ MKG Abbas and others, 'The Role of AI in Drug Discovery' (2024) 25 *ChemBioChem* e202300816, 1–4; Rizwan Qureshi and others, 'AI in Drug Discovery and Its Clinical Relevance' (2023) 9 *Heliyon* 2–17 <[https://www.cell.com/heliyon/abstract/S2405-8440\(23\)04783-7](https://www.cell.com/heliyon/abstract/S2405-8440(23)04783-7)> accessed 31 March 2025.

⁶ Josh Cowsls and others, 'The AI Gambit: Leveraging Artificial Intelligence to Combat Climate Change—Opportunities, Challenges, and Recommendations' (2023) 38 *AI & Society* 283, 284–286.

⁷ 'PDF' 3 <<https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf>> accessed 31 March 2025.

⁸ Ben Buchanan, 'The AI Triad and What It Means for National Security Strategy' (Center for Security and Emerging Technology 2020) V <<https://cset.georgetown.edu/publication/the-ai-triad-and-what-it-means-for-national-security-strategy/>> accessed 19 November 2024.

⁹ Eric Schmidt, 'This Is How AI Will Transform the Way Science Gets Done' [2023] *MIT Technology Review* <<https://www.technologyreview.com/2023/07/05/1075865/eric-schmidt-ai-will-transform-science/>> accessed 19 November 2024.

¹⁰ Baobao Zhang and Allan Dafoe, 'Artificial Intelligence: American Attitudes and Trends' [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3312874>> accessed 19 November 2024; 'International Scientific Report on the Safety of Advanced AI: Interim Report' (GOV.UK) <<https://www.gov.uk/government/publications/international-scientific-report-on-the-safety-of-advanced-ai/international-scientific-report-on-the-safety-of-advanced-ai-interim-report>> accessed 19 November 2024.

¹¹ Schmidt (n 9).

¹² *ibid.*

¹³ Adam Jones, 'What Risks Does AI Pose?' (*BlueDot Impact*, 21 February 2024) <<https://aisafetyfundamentals.com/blog/ai-risks/>> accessed 22 November 2024.

¹⁴ Department for Science, Innovation & Technology, 'Future Risks of Frontier AI (Annex A)' (GOV.UK) <<https://www.gov.uk/government/publications/frontier-ai-capabilities-and-risks-discussion-paper/future-risks-of-frontier-ai-annex-a>> accessed 24 November 2024.

Body emphasises, AI's transboundary nature demands a global approach that transcends market interests.¹⁵ The need for a strong, internationally coordinated AI governance is “irrefutable”, and requires collective oversight beyond fragmented national or corporate strategies.¹⁶ However, the lack of technical capability as well as the pace of development has greatly slowed down regulatory frameworks and policies in this field, despite the urgency to do so.¹⁷

When it comes to AI policies and governance across the globe, there is a fundamental imbalance, with a handful of states from the Global North, e.g., the United States; states from the European Union, and China dominating the regulatory discourse.¹⁸ These regions or states not only lead in the development of AI policy and practice, but also set and establish AI rules and practices that others adopt either formally or informally.¹⁹ However, such rules and practices may ignore the needs, capacities and unique perspectives of developing states or Global South States.²⁰ As a result of this regulatory asymmetry, there is a potent risk of creating a technological governance model that perpetuates existing global inequalities that can marginalize developing nations and leave them disadvantaged without meaningful contributions into AI's transformative potential, governance and societal implications. This in turn can lower the trust in AI.²¹ Already, there is a high distrust in AI from the Global South.²² It is, therefore, necessary to take an inclusive approach to the public understanding and the management of risks associated with AI technologies so that there can be a better account for the range of AI risks globally.

Charles Correa has pointed out the fundamental flaw in transplanting solutions across different contexts.²³ Just as a house designed for the cold climates of Northern Europe will not be suitable for the warm regions of the Global South, so too will AI governance paradigms from the Global North that ignore local contexts be unsuitable for the Global South.²⁴ This underscores the need for an understanding of our different cultural and socioeconomic realities before developing a global governance framework.

The perspective of the Global South in AI governance is necessary for developing an equitable and sustainable regulatory framework that is truly transnational in nature. Diverse perspectives from the Global South are essential to address the unique technological challenges, cultural contexts and socioeconomic realities that may not be easily seen or understood by the frameworks from the Global North. Including the perspective of the Global South in AI governance and safety frameworks will not only ensure global diversity and mitigate potential harm, but will prevent technological colonialism, and create a robust, flexible regulation that

¹⁵ UN AI Advisory Body, “‘Irrefutable’ Need for Global Regulation of AI: UN Experts’ (19 September 2024) <<https://news.un.org/en/story/2024/09/1154541>> accessed 28 November 2024.

¹⁶ *ibid.*

¹⁷ Esmat Zaidan and Imad Antoine Ibrahim, ‘AI Governance in a Complex and Rapidly Changing Regulatory Landscape: A Global Perspective’ (2024) 11 *Humanities and Social Sciences Communications* 1, 1.

¹⁸ Gordon LaForge, Robert Muggah and Gabriella Seiler, ‘Bridging the AI Governance Divide’ (New America (Planetary Politics Initiative) 2024) 4 <<http://newamerica.org/planetary-politics/policy-papers/bridging-the-ai-governance-divide/>> accessed 22 November 2024.

¹⁹ *Institute* (n 1) 3.

²⁰ *ibid* 3,6.

²¹ Aubra Anthony, Lakshme Sharma and Elina Noor, ‘Advancing a More Global Agenda for Trustworthy Artificial Intelligence’ (Carnegie Endowment for International Peace 2024) <<https://carnegieendowment.org/research/2024/04/advancing-a-more-global-agenda-for-trustworthy-artificial-intelligence?lang=en>> accessed 22 November 2024.

²² Lloyd's Register Foundation, ‘The World Is Split on Its Trust in Artificial Intelligence’ [2022] *LR Foundation* <<https://wrp.lrfoundation.org.uk/news/the-world-is-split-on-its-trust-in-artificial-intelligence>> accessed 1 December 2024.

²³ Charles Correa, *‘A Place in the Sun’ in A Place in the Shade* (Penguin Global 2012).

²⁴ *ibid.*

will reflect the different realities and needs of a truly global majority and technological ecosystem.²⁵

The meaningful integration of the Global South is critical to developing AI regulatory frameworks that are truly global, equitable, and responsive to diverse technological and societal needs.²⁶ Only by centring the perspectives, challenges, and innovative potential of developing nations can we create comprehensive AI governance that transcends the limited viewpoints of technological powerhouses and ensures fair, context-aware policy development. Accordingly, the essence of this paper is to examine the growing disparity in AI regulation between the Global North and South and to propose recommendations that ensure the Global South is not left behind in the evolving AI landscape.

2. Global South and North

The essence of this section is to understand the key terms that will frequently be employed in this article. This section will not concern itself with broader issues that relate to these terminologies but will focus majorly on the meaning of the terminologies within the context of AI governance.

The term ‘Global South and North’ does not necessarily denote hemispheric or geographical divisions,²⁷ even though it may in some sense relate to the regions. In the context of the discussion on AI, the Global South is seen to be the experiences of populations who are excluded, silenced or marginalised and disproportionately impacted by technology.²⁸ They often encounter unique challenges with AI and data systems.²⁹ On the other hand, the Global North are the dominant states on AI and data systems who set the global narrative around AI. For example, Global South refers to the regions of Africa, Asia, Latin America and Oceania, whereas the Global North refers to Europe and North America.³⁰ The terms refer to the framework for analysing the relative prosperity and international power of states globally.³¹ The terms gained prominence after the Cold War.³² In simple terms, the Global North refers to stable states and economies, while Global South refers to economically disadvantaged states.³³

While these terminologies are seen to be better than previously employed terms such as the three-world system and the developed and developing countries system,³⁴ they are in some sense still a function of the same political, epistemic, economic, and moral hierarchies that

²⁵ Anthony, Sharma and Noor (n 21).

²⁶ LaForge, Muggah and Seiler (n 18) 5.

²⁷ Martin Müller, ‘In Search of the Global East: Thinking between North and South’ (2020) 25 *Geopolitics* 734, 735.

²⁸ *ibid* 734–735.

²⁹ Marie-Therese Png, ‘At the Tensions of South and North: Critical Roles of Global South Stakeholders in AI Governance’, *Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency* (Association for Computing Machinery 2022) 1434–1435 <<https://doi.org/10.1145/3531146.3533200>> accessed 18 December 2025.

³⁰ Danica Anne Sims, ‘When I Say ... Global South and Global North’ (2024) 58 *Medical Education* 286.

³¹ Müller (n 27) 734–735.

³² Png (n 29) 1434.

³³ *ibid* 1434–1435.

³⁴ Kenny Miles, ‘Global North and Global South’, *Encyclopaedia Britannica* <<https://www.britannica.com/topic/Global-North-and-Global-South>> accessed 28 December 2024.

were established during the European colonisation.³⁵ The only difference is that today these hierarchies are more de-territorialised.³⁶

The terms described above have often been used to dichotomise the world into the haves and have nots. Though the term has consistently changed since colonial times, every new term continues to imply an inherent unevenness.³⁷ Santos articulates this perfectly by opining that the South is not a geographic concept but is a metaphor for human suffering that is caused by capitalism and colonialism on a global scale.³⁸ It goes to show how colonialism is deeply embedded in how states view themselves. Milan has also stated that the South must be understood as a 'plural entity' that encompasses 'the different, the underprivileged, the alternative, the resistant, the invisible, and the subversive'.³⁹

Having said that, there is no easy way out. It is difficult to have a global language standard that will adequately describe differences and categories, given our differing valid positionalities.⁴⁰ This is what has precisely informed this topic. Within the context of AI, perhaps the best way to address this is to recognise that every region is entitled to create its own standards based on its specific development, experience and understanding.⁴¹ Besides, there needs to be a fundamental shift to a more inclusive and equitable AI governance that challenges these entrenched hierarchies and ensures that all regions have a meaningful role in shaping the future of AI.

3. The Current AI Regulatory Landscape

While the discussions about AI governance and safety have primarily taken place in the abstract, AI has now entered into the mainstream and states are now formulating different plans and policies regarding AI and ethics. Fundamentally, states are the most relevant subjects in the international fora.⁴² As major actors, they have the authority to agree and determine regulations domestically, as well as enter into treaties on the international scene that binds states together.⁴³ When there are incidences of violations of such regulations, states can easily hold themselves accountable for their actions or lack of especially in the context of AI and how things can evolve rapidly.⁴⁴

Even though there is a growing need for a global regulation on AI, dialogue and collaboration amongst states is slower than desired.⁴⁵ This may be because of the increasing sophistication and Interconnectedness of AI systems.⁴⁶ Notwithstanding, states need to urgently address

³⁵ Png (n 29) 1435.

³⁶ *ibid.*

³⁷ Themrise Khan and others, 'How We Classify Countries and People—and Why It Matters' (2022) 7 *BMJ Global Health* <<https://gh.bmj.com/content/7/6/e009704>> accessed 28 December 2024.

³⁸ Boaventura de Sousa Santos, 'Epistemologies of the South and the Future' (2016) 1 *From the European South* 17, 18.

³⁹ Stefania Milan and Emiliano Treré, 'Big Data from the South(s): Beyond Data Universalism' (2019) 20 *Television & New Media* 319, 321.

⁴⁰ Khan and others (n 37).

⁴¹ *ibid.*

⁴² Simon Chesterman, *We, the Robots?: Regulating Artificial Intelligence and the Limits of the Law* (Cambridge University Press 2021) 4; Zaidan and Ibrahim (n 17) 5.

⁴³ Zaidan and Ibrahim (n 17) 5.

⁴⁴ *ibid.*; Edith Brown Weiss, 'International Law in a Kaleidoscopic World' [2011] *Georgetown Law Faculty Publications and Other Works* 26–32 <<https://scholarship.law.georgetown.edu/facpub/1622>>.

⁴⁵ Zaidan and Ibrahim (n 17) 6.

⁴⁶ *ibid.*

these systems and its increasing activities because of the potential for these systems to affect states, their sovereignty and their social, cultural, economic and political norms.⁴⁷

The establishment of a truly international AI governance framework is riddled with several complexities such as institutional barriers, the fragmented nature of international law, different geopolitical realities, human rights, economic considerations, and slow decision-making processes globally.⁴⁸ These are challenging themes to get past in a bid for a global framework. Besides, it will seem that states have different priorities when it comes to AI regulation. For some, domestic leadership on AI appears to be the priority, with international collaboration taking a back seat.⁴⁹ Moreover, only a few states have the technological and financial resources to participate in this debate.⁵⁰

Together, all of these challenges highlight the difficulties in crafting a globally acceptable paradigm for AI regulation. The path to achieving a global regulation requires nuanced diplomatic efforts, shared understanding, trust, and the willingness to balance national interests with global cooperation. For now, AI regulation globally is fraught with significant national divergencies, with states pursuing their own strategy that prioritises individual competitive advantages over collaborative governance.⁵¹ One example of this trend is evident in the approaches of major technological powers like China and the United States, which are reluctant to engage in comprehensive international regulatory frameworks.⁵² Instead of global discussions and international agreements, states are predominantly focused on creating domestic regulations that provide their technological companies strategic advantages in the rapidly evolving global AI competition.⁵³ This approach only serves to fragment any potential unified global governance efforts and also risks creating a fragmented global technological ecosystem.

While the Global North have made some strides and continue to achieve groundbreaking regulations in shaping the rules on AI, it would seem that the Global South, comprising of areas such as sub-Saharan Africa, some Central and South Asian countries, and some Latin American countries are lagging behind. The aspiration is to have a truly global regulation that reflects the perspectives and unique contexts of all states.⁵⁴ However, if the current AI regulation and governance trend is not averted, it will exacerbate the global inequalities in the near term.⁵⁵

In 2020, a survey conducted by the Global Partnership on AI and the Future Society identified 214 initiatives addressing AI ethics, governance, and social good across thirty-eight countries and regions. Notably, initiatives originating in Europe and North America accounted for 58 per cent of the total, underscoring the pronounced geographical concentration of norm-setting

⁴⁷ Hazrat Usman, Bushra Nawaz and Saiqa Naseer, 'The Future of State Sovereignty in the Age of Artificial Intelligence' [2023] *Social Studies* 142–150.

⁴⁸ Zaidan and Ibrahim (n 17) 6.

⁴⁹ Pekka Ala-Pietilä and Nathalie A Smuha, 'A Framework for Global Cooperation on Artificial Intelligence and Its Governance' (Social Science Research Network, 1 September 2020) 7 <<https://papers.ssrn.com/abstract=3696519>> accessed 15 December 2024.

⁵⁰ Margarita Robles Carrillo, 'Artificial Intelligence: From Ethics to Law' (2020) 44 *Telecommunications Policy* 101937, 5.

⁵¹ Ala-Pietilä and Smuha (n 49) 8.

⁵² Zaidan and Ibrahim (n 17) 6.

⁵³ Ala-Pietilä and Smuha (n 49) 7.

⁵⁴ Ethan Teo, Ewan Lusty and Giacomo Borsetti, 'AI beyond the Global North: A New Battleground for Influence' (*Flint Global*) <<https://flint-global.com/blog/ai-beyond-the-global-north-a-new-battleground-for-influence/>> accessed 2 December 2024.

⁵⁵ Gordon LaForge, 'The Dangers of Imposing Global North Approaches to AI Governance on the Global South | TechPolicy.Press' (*Tech Policy Press*, 5 September 2024) <<https://techpolicy.press/the-dangers-of-imposing-global-north-approaches-to-ai-governance-on-the-global-south>> accessed 2 December 2024.

efforts in these regions.⁵⁶ This highlights the limited global representation in AI policy and governance. Similarly, in 2022, North America accounted for about 40 percent of global AI revenue with less than 8 percent of the global population.⁵⁷ In a review prepared by New America and the Igarape Institute for G20, it was found that out of nearly 500 AI policies, standards and guidelines developed from 2011 through 2023, two-thirds originated in the US, Europe, or China, while only 7 percent came from Latin America and Africa.⁵⁸ This review underscores the gross AI governance imbalance and starkly reveals the marginalization of Global South perspectives from AI regulatory frameworks. It, therefore, calls for an urgent need for a much more inclusive and globally representative approach to AI governance.

Current AI governance models operate within a fragmented, heterogenous ecology that is characterised by dispersed AI regulatory frameworks and actors.⁵⁹ This makes the model on AI governance to be lacking in global inclusivity and ultimately reveals ideological differences that fails to provide a truly universal representative approach to AI regulation.⁶⁰ It is, therefore, necessary to give an overview of major states/regions and their approaches to AI governance. Such an overview will give an insight into current regulatory happenings and how to spell out a case for including the perspectives of the Global South.

4. The Global North

The United States

While the United States plans to establish dedicated AI legislation and federal regulatory oversight, it currently relies on a combination of existing federal laws and guidelines to regulate AI.⁶¹ As a result, developers and deployers of AI systems increasingly face complex patchworks of state and local regulations that creates compliance challenges and inconsistencies with standards across the globe.⁶² In recent congressional sessions, the United States has enacted its first federal AI laws, either as standalone legislation or as provisions within broader acts.⁶³ Key examples include the National Artificial Intelligence Initiative Act of 2020, which launched a national AI initiative, and the AI in Government Act and Advancing American AI Act, which tasked federal agencies with driving AI policies.⁶⁴

Recent developments highlight a growing policy focus. In 2023, the White House released its Blueprint for an AI Bill of Rights, and the National Institute of Standards and Technology introduced an AI Risk Management Framework.⁶⁵ Midyear, the SAFE Innovation Framework for AI Policy and the Blumenthal & Hawley Comprehensive AI Framework were proposed to

⁵⁶ Anthony, Sharma and Noor (n 21).

⁵⁷ *ibid.*

⁵⁸ LaForge, Muggah and Seiler (n 18); LaForge (n 55).

⁵⁹ Marta Galceran-Vercher, 'Artificial Intelligence and Cities: The Global Race to Regulate Algorithms'

(Barcelona Centre for International Affairs (CIDOB) 2023) 286 2–3

<<https://www.cidob.org/en/publications/artificial-intelligence-and-cities-global-race-regulate-algorithms-0>> accessed 2 December 2024.

⁶⁰ Galceran-Vercher (n 59).

⁶¹ Marcin Szczepański, 'United States Approach to Artificial Intelligence |' (European Parliamentary Research Service 2024) PE 757.605

<[https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2024\)757605](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2024)757605)> accessed 30 December 2024.

⁶² White & Case LLP, 'AI Watch: Global Regulatory Tracker - United States | White & Case LLP'

<<https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states>> accessed 1 January 2025.

⁶³ Szczepański (n 61).

⁶⁴ *ibid.*

⁶⁵ *ibid.*

guide future legislation.⁶⁶ At the state level, progress has also been significant. Between 2016 and 2022, 14 states passed AI-related laws, with Maryland leading (7 bills), followed by California (6), and Massachusetts and Washington (5 each).⁶⁷ This reflects a multi-level approach to AI governance in the U.S.

President Joe Biden's "Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence," issued in October 2023,⁶⁸ marked a pivotal step toward managing AI's risks and promises.⁶⁹ It builds on earlier work, like the Executive Order directing agencies to combat algorithmic discrimination and the securing of voluntary commitments from major US companies like Amazon, Google, Meta, Microsoft and OpenAI.⁷⁰

The Biden Order of 2023 sought to place an urgency on governing the development and use of AI safely and responsibly by co-ordinating a Federal Government-wide approach.⁷¹ It aimed to position the United States as a global leader in establishing AI safety standards, safeguarding privacy, advancing equity, and fostering innovation.⁷² Central to the Order was ensuring AI systems' safety and trustworthiness before public release. Key provisions included mandating safety test result sharing, emphasizing privacy-preserving techniques, addressing potential algorithmic discrimination, and guiding responsible AI use in critical sectors like healthcare and education. The Executive Order sought to preserve America's AI leadership by supporting research, protecting civil rights, and providing resources for small developers.⁷³ It represents a comprehensive approach to balancing technological innovation with robust ethical and security considerations.

The Biden Executive Order of 2023 establishes a comprehensive framework for governing AI development and deployment through eight guiding principles.⁷⁴ At its core, the order emphasizes that AI systems must be safe and secure while promoting responsible innovation and competition to maintain U.S. leadership in AI development.⁷⁵ The framework specifically addresses workforce implications, mandating that AI development must support rather than undermine American workers, while ensuring all AI policies advance equity and civil rights.⁷⁶ Moreover, recognizing AI's growing integration into daily life, the order prioritizes consumer protection for Americans who increasingly interact with AI systems.⁷⁷ It establishes robust safeguards for privacy and civil liberties, while also setting specific guidelines for the federal government's use of AI to improve public service delivery.⁷⁸ Through these principles, the

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ The White House, 'Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence' (*The White House*, 30 October 2023) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>> accessed 31 December 2024.

⁶⁹ The White House, 'Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence' (*The White House*, 30 October 2023) <<https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/>> accessed 2 December 2024; Yoshija Walter, 'Managing the Race to the Moon: Global Policy and Governance in Artificial Intelligence Regulation—A Contemporary Overview and an Analysis of Socioeconomic Consequences' (2024) 4 *Discover Artificial Intelligence* 14.

⁷⁰ Szczepański (n 61).

⁷¹ House (n 68).

⁷² Szczepański (n 61).

⁷³ House (n 68).

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Szczepański (n 61).

⁷⁷ *ibid.*

⁷⁸ House (n 68).

Biden Order positions the United States to continue its historical role as a leader in driving global societal, economic, and technological progress.

Canada

Canada's approach to AI governance has been largely influenced by its closest neighbour, the United States. Nevertheless, it has its own specific path to AI governance.⁷⁹ Canada's development of its Artificial Intelligence and Data Act (AIDA) is a longstanding effort to create a regulatory environment that is safe, ethical and equitable for the use of AI.⁸⁰ Similarly, the introduction of the voluntary AI Code of Conduct is another step that emphasises Canada's approach to ensuring public trust in AI and supporting the success of Canadian AI companies.⁸¹ Moreover, Canada has also committed to developing a cohesive national AI strategy through the Pan-Canadian Artificial Intelligence Strategy. Its aim through the strategy is to harness the potential of AI, promote collaboration and innovation in Canada.⁸²

Europe

The regulatory framework for AI in the European Union is primarily shaped by the EU AI Act, the world's first comprehensive AI law.⁸³ Proposed by the European Commission in April 2021, the Act categorizes AI systems into various risk levels, offering a structured approach to regulation.⁸⁴ Integral to the EU's broader digital strategy, the EU AI Act is designed to establish a robust framework for AI development and deployment. Its goal is to maximize AI's potential in critical sectors like healthcare, transportation, and manufacturing, while simultaneously providing clear guidelines to ensure safe, ethical, and innovative technological advancement.⁸⁵

The European Parliament, through the Act, aims to ensure AI systems are safe, transparent, traceable, non-discriminatory, and environmentally sustainable.⁸⁶ A key priority is safeguarding individuals from the potential harms of AI while fostering its beneficial applications. To this end, the Act classifies AI applications into three risk categories: (1) those posing an unacceptable risk, such as government-led social scoring or systems designed for cognitive manipulation, which are outright banned; (2) high-risk applications, including those affecting safety and fundamental rights, which are subject to strict legal requirements; and (3) applications deemed low-risk, which face minimal regulation.⁸⁷

The EU AI Act marks a pivotal milestone in the regulation of emerging technologies. By addressing diverse AI applications—from data prediction and content personalization to

⁷⁹ Walter (n 69).

⁸⁰ Aoun E Muhammad and Kin-Choong Yow, 'Demystifying Canada's Artificial Intelligence and Data Act (AIDA): The Good, the Bad and the Unclear Elements', *2023 IEEE Canadian Conference on Electrical and Computer Engineering (CCECE)* (2023) <<https://ieeexplore.ieee.org/document/10288878>> accessed 1 January 2025; John Beardwood, 'Heads Up: The Companion Document To The Canadian Artificial Intelligence And Data Act — AIDA Companion Provides Answers to Some Key Questions but Then Raises Others' <<https://www.degruyter.com/document/doi/10.9785/cr-2023-240302/html>> accessed 1 January 2025; Teresa Scassa, 'Regulating AI in Canada: A Critical Look at the Proposed Artificial Intelligence and Data Act' (2023) 101 *The Canadian Bar Review* <<https://cbr.cba.org/index.php/cbr/article/view/4817>> accessed 1 January 2025.

⁸¹ Walter (n 69).

⁸² *ibid.*

⁸³ Angela Daly and others, 'Artificial Intelligence, Governance and Ethics: Global Perspectives' (Social Science Research Network, 4 July 2019) 190 <<https://papers.ssrn.com/abstract=3414805>> accessed 6 December 2024.

⁸⁴ European Parliament, 'EU AI Act: First Regulation on Artificial Intelligence' (*Topics | European Parliament*, 6 August 2023) <<https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>> accessed 2 December 2024.

⁸⁵ *ibid.*

⁸⁶ Walter (n 69).

⁸⁷ *ibid.*

biometric systems and critical infrastructure—it mirrors the transformative impact of the GDPR in 2018.⁸⁸

Similar to the European states, non-EU countries have also been contemplating how to regulate AI systems effectively. The United Kingdom, for instance, published a White Paper on AI outlining a vision for a “responsible, trustworthy, and innovative” AI ecosystem. The document proposed a regulatory framework that includes the establishment of an AI Centre of Excellence and an AI Ethics Advisory Council.⁸⁹ The UK’s decision to chart its own path has been significantly influenced by Brexit, which afforded the country the freedom to develop specialized rules for AI independent of EU oversight. However, it remains unclear how the UK’s regulatory framework will interact with the European Union’s AI regulations, particularly in the context of cross-border AI applications and trade.⁹⁰

Switzerland has also adopted measures to emphasize the responsible development and use of AI.⁹¹ These measures focus on promoting AI research and innovation while addressing ethical and societal concerns. By fostering collaboration between academia and industry, Switzerland’s approach aims to balance technological advancement with societal well-being.⁹²

In contrast, despite being embroiled in conflict, both Russia and Ukraine have adopted laws and regulations for AI, though these remain limited in scope and fail to comprehensively address societal or ethical concerns. Ukraine’s AI strategy, adopted in 2021, closely mirrors Switzerland’s emphasis on research, innovation, and ethical considerations.⁹³ Russia, on the other hand, has focused its regulatory efforts primarily on promoting AI development and use, with little evidence of regulations targeting societal or ethical implications. Both nations have reportedly used AI in their ongoing conflict, particularly for targeting, surveillance, and disinformation campaigns, further complicating the regulatory landscape in these regions.⁹⁴

China

In the dichotomy of AI governance between the Global South and North, China occupies a complex status. While it may have traditionally belonged to the Global South because of the historical context of its developing economy, it is difficult to see China in that light now.⁹⁵ China has become one of the world’s biggest economies, a global leader in technology and a major industrial power which aligns more closely with the features of the Global North. Despite this, China still has significant internal disparities that can be associated with characteristics of the Global South. Besides, China often sees itself as an ally of the Global South, often resisting Western ideology.⁹⁶ Notwithstanding, China can be viewed as a bridge between the Global North and South. In the matter of AI governance, China operates like a Global North power with its own unique model.

⁸⁸ Galceran-Vercher (n 59).

⁸⁹ Huw Roberts and others, ‘Artificial Intelligence Regulation in the United Kingdom: A Path to Good Governance and Global Leadership?’ (2023) 12 *Internet Policy Review* <<https://policyreview.info/articles/analysis/artificial-intelligence-regulation-united-kingdom-path-good-governance>> accessed 1 January 2025.

⁹⁰ Walter (n 69).

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ Sarang Shidore, ‘China Is Not the Global South’ (*Foreign Policy*, 26 December 2024) <<https://foreignpolicy.com/2024/10/10/china-is-not-the-global-south/>> accessed 1 January 2025.

⁹⁶ Ngor Luong, ‘China’s AI Governance: Engaging the Global South’ (National Bureau of Asian Research 2024) <<https://www.nbr.org/publication/chinas-ai-governance-engaging-the-global-south/>> accessed 1 January 2025.

China's AI governance reflects a strategic approach balancing technological innovation with state control.⁹⁷ Otherwise known as techno-authoritarianism.⁹⁸ Since 2017, China has implemented comprehensive AI regulations that prioritize national stability and technological advancement while maintaining distinctive political characteristics.

The New Generation Artificial Intelligence Development Plan (2017) outlined strategic AI development objectives across multiple sectors.⁹⁹ With this Plan, China's aim is to stimulate high investment in the AI sector over the coming years, with the aim of becoming a world leader in AI innovation.¹⁰⁰ Subsequently, China adopted key regulatory measures: the Personal Information Protection Law (2021), inspired by Europe's GDPR, and a 2022 regulation monitoring recommendation algorithms and deep synthesis technologies.¹⁰¹

These regulations provide users specific rights, including algorithm opt-out options and data deletion permissions. However, the framework distinctly embodies China's techno-authoritarian model, characterized by stronger state oversight compared to the more flexible approaches of the EU and United States.¹⁰²

Unlike Western regulatory models that emphasize individual privacy and market-driven innovation, China's approach integrates technological development with its political philosophy, prioritizing collective interests and national strategic objectives.¹⁰³

5. The Global South

Having examined emerging AI governance frameworks in the Global North, this paper now explores the regulatory landscape in the Global South. While the Global North leads in AI safety and governance, the trajectory in the Global South is markedly more complex and heterogeneous. Emerging economies across Africa, Latin America, Asia, and the Middle East demonstrate significantly varied progress, primarily due to their diverse technological ecosystems.

Many states in the Global South contend with substantial structural challenges, including limited digital infrastructure, technological access disparities, and resource constraints.¹⁰⁴ Consequently, their AI regulatory development appears comparatively nascent relative to Global North jurisdictions.¹⁰⁵ However, these regions are not passively responding but actively developing nuanced, context-specific regulatory approaches that balance technological ambition with ethical considerations and local resource limitations.

Notably, states are strategically employing hybrid regulatory mechanisms and leveraging AI to address critical sectoral needs such as healthcare, agricultural development, and educational enhancement. In Africa, countries like Mauritius, Egypt, and Kenya are emerging as regulatory

⁹⁷ Walter (n 69).

⁹⁸ Galceran-Vercher (n 59).

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² Walter (n 69).

¹⁰³ *ibid.*

¹⁰⁴ Sorina Teleanu and Jovan Kurbalija, 'Stronger Digital Voices from Africa: Building African Digital Foreign Policy and Diplomacy' (DiploFoundation 2022) 129–134 <<https://www.diplomacy.edu/resource/report-stronger-digital-voices-from-africa/ai-africa-national-policies/>> accessed 1 January 2025.

¹⁰⁵ *ibid.*

pioneers, prioritizing innovation and developmental potential while acknowledging the need for robust governance frameworks.¹⁰⁶

In Asia, nations such as Malaysia, Thailand, and Indonesia are progressively refining their AI regulatory approaches.¹⁰⁷ Similarly, the Middle East demonstrates remarkable dynamism, with countries like Israel, the United Arab Emirates, and Saudi Arabia establishing themselves as regional AI governance leaders.¹⁰⁸ These efforts suggest a nuanced understanding that effective regulation requires balancing innovation with responsible technological development.

In South America, the AI regulatory landscape presents a diverse and evolving picture.¹⁰⁹ Countries are at varying stages of developing comprehensive AI governance frameworks, with some nations emerging as regional leaders in technological innovation and regulatory approaches. Brazil stands out as a prominent AI policy leader in the region.¹¹⁰ The country has been proactive in developing AI strategies, with the Brazilian Digital Strategy (*Estratégia Brasileira de Inteligência Artificial*) providing a foundational framework for AI development and governance.¹¹¹

Argentina has also made significant strides, with government initiatives focusing on AI's potential for social and economic development. The country has been developing national AI strategies that emphasize innovation, ethical considerations, and potential applications in public services and critical sectors like healthcare and education.

Chile presents another interesting case, with government and academic institutions collaborating to create forward-thinking AI policies. The country has been investing in AI research and development, with a particular focus on using AI to address social challenges and promote technological innovation.¹¹²

Colombia is emerging as another key player, with efforts to develop AI capabilities and create regulatory frameworks that balance innovation with ethical considerations.¹¹³ The government has been supporting AI initiatives in both the public and private sectors, recognizing the technology's potential for economic and social transformation.

However, the region faces significant challenges. Common obstacles include limited technological infrastructure, funding constraints, uneven digital literacy, and economic disparities that impact technological adoption.

Despite these challenges, South American countries are demonstrating a nuanced approach to AI governance.¹¹⁴ Rather than simply importing frameworks from the Global North, these nations are developing context-specific strategies that reflect their unique social, economic, and technological landscapes.¹¹⁵

While significant disparities remain between Global North and Global South AI governance frameworks, the emerging landscape indicates a sophisticated, context-sensitive approach to

¹⁰⁶ *ibid.*

¹⁰⁷ Walter (n 69).

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ Ministério da Ciência, Tecnologia e Inovação, 'Estratégia Brasileira de Inteligência Artificial' (*Ministério da Ciência, Tecnologia e Inovações (Governo Federal)*) <<https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/estrategia-brasileira-de-inteligencia-artificial>> accessed 18 December 2025.

¹¹² Walter (n 69).

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

technological regulation. The potential for global regulatory harmonization exists, with Global South states potentially adapting and contextualizing frameworks from more established jurisdictions.

7. Uneven Regulation: Consequences for the Global North and South

The preceding section has highlighted some of the trends from states in relation to AI governance. While states have largely been bothered with creating their own AI regulatory path to promote AI development, these efforts, although necessary, are not enough in and of themselves to handle the full scope of challenges AI presents.¹¹⁶ Our contemporary world is characterised by states' interconnectedness. Accordingly, a policy or decision taken in one state can advertently or inadvertently affect others.¹¹⁷ For example, the development of an AI system can spread globally, leading to questions about privacy, bias and safety. Similarly, the policy decisions in one state or region can influence trade, innovation, or geopolitical dynamics elsewhere. The challenges affecting AI are unique because AI has far-reaching effects. As such, to tackle these challenges, states need to work together in order to maximise its benefits.

While a lot has been said about the importance of states' collaboration, it is important to bring to light the existing disparity and widening AI governance divide between the Global North and the Global South. From the brief analysis in the preceding section, it is clear that the rules that are already shaping the trajectory of AI globally are being set by a small number of states.¹¹⁸ These states are primarily from the Global North and constitute the likes of the United States, China, EU states, etc. This growing disparity, if not addressed, holds grave consequences not just for the Global South, but for the aspiration of an effective global framework for AI governance.¹¹⁹ Without perspectives from the global south, it will be difficult to argue in favour for the legitimacy of any global paradigm that arises, since whatever rules emanate will not be a representation of perspectives from the Global South entirely. This has the potential to hamper global progress on AI regulation. Besides, without the meaningful participation of developing states, AI technology's evolution will be primarily driven by states from the Global North and their commercial interests.¹²⁰ These risks exacerbating global inequalities and widening the technological gap between the Global North and Global South.

As has already been stated, the current AI governance landscape is marked by a competitive relationship, especially in light of the 'race to AI'.¹²¹ Virtually all states emphasise strategies relating to the development, maintenance or strengthening of a position of 'leadership' in AI, often with reference to the positions of other states. If not careful, such a 'race to AI' can lead to states prioritising speed and dominance over quality, safety and ethical considerations. At its very worst, the current landscape may lead to what Ala-Pietilä and Smuha refer to as a zero-sum game, where one state's gain is another's loss.¹²² The end result of a zero-sum game is that states will begin to act in their own self-interest, by thinking short-term or through

¹¹⁶ Ala-Pietilä and Smuha (n 49) 6.

¹¹⁷ *ibid.*

¹¹⁸ LaForge, Muggah and Seiler (n 18) 5.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ European Commission – High-Level Expert Group on Artificial Intelligence (AI HLEG), 'Ethics Guidelines for Trustworthy AI' (European Commission (Digital Strategy – Shaping Europe's Digital Future) 2019) <<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>> accessed 18 December 2024; Yuval Noah Harari, 'Who Will Win the Race for AI?' [2019] *Foreign Policy (The List / GT Essay)* <<https://foreignpolicy.com/gt-essay/who-will-win-the-race-for-ai-united-states-china-data/>> accessed 18 December 2024.

¹²² Ala-Pietilä and Smuha (n 49) 7; James Carse, *Finite and Infinite Games: A Vision of Life As Play and Possibility* (1st edition, Free Press 2023).

protectionist policies. For example, states may ignore potential negative effects like increased inequality or ethical breaches, or they may restrict the use of certain technologies or data, ignoring the global consequences.¹²³ Contrariwise, if states take an infinite perspective, there will be opportunity for cooperation, shared benefits and long-term growth. This will lead to a win-win situation in for everyone.¹²⁴

While the priorities of the Global North currently may be focused on the misuses/risks of AI or challenges to the political or socioeconomic status quo, the Global South is faced with being excluded from the benefits of AI which could further widen global disparities in healthcare, education, economic development, and technological development.¹²⁵ This concern is particularly acute with the current existing divide that presents a barrier to technological equity. With about 2.7 billion people lacking internet access,¹²⁶ predominantly from areas in the Global South, the technological gap is already a critical source of global inequality. It is a compounding effect. Lack of basic digital infrastructure equals a limited economic growth as well as inaccessibility to technological advancements. Accordingly, the International Monetary Fund (IMF) has stated that, it is crucial to increase internet access and enable AI adoption in areas within the Global South to increase economic growth,¹²⁷ achieve sustainable development goals (SDGs) and reduce the gap between itself and the Global North.¹²⁸

The Global South must develop its own distinct AI ecosystem rather than simply adopting solutions designed for different contexts.¹²⁹ The unique challenges, cultural nuances, and socioeconomic realities of developing nations require tailored approaches to AI development and governance. Technological policies, AI models, and regulatory frameworks created in the Global North often fail to address the specific needs and constraints of developing regions, as they emerge from fundamentally different social, economic, and technological contexts.¹³⁰

Without locally developed AI systems and governance frameworks that reflect regional priorities and circumstances, there is a risk of implementing ill-fitting solutions that could prove ineffective or potentially harmful. This emphasizes the importance of building indigenous AI capabilities, fostering local talent, and creating regulatory frameworks that align with the specific development goals and cultural values of Global South nations. Until this is in place, it will be difficult to have a harmonised framework that truly reflects our unique challenges and diversity globally.

¹²³ Ala-Pietilä and Smuha (n 49) 7.

¹²⁴ *ibid.*

¹²⁵ LaForge (n 55).

¹²⁶ Landry Signé, 'Fixing the Global Digital Divide and Digital Access Gap' (2023)

<<https://www.brookings.edu/articles/fixing-the-global-digital-divide-and-digital-access-gap/>> accessed 21 December 2024.

¹²⁷ IMF, 'Digitalizing Sub-Saharan Africa: Hopes and Hurdles' (IMF)

<<https://www.imf.org/en/News/Articles/2020/06/15/na061520-digitalizing-sub-saharan-africa-hopes-and-hurdles>> accessed 21 December 2024.

¹²⁸ United Nations – General Assembly Second Committee, 'Widening Digital Gap between Developed, Developing States Threatening to Exclude World's Poorest from Next Industrial Revolution, Speakers Tell Second Committee' (*United Nations Meetings Coverage and Press Releases*, 6 October 2023)

<<https://press.un.org/en/2023/gaef3587.doc.htm>> accessed 23 December 2024.

¹²⁹ Robert Muggah LaForge Gabriella Seiler and Gordon, 'AI and the Global South | by Robert Muggah, Gabriella Seiler and Gordon LaForge' (*Project Syndicate*, 2 March 2023) <<https://www.project-syndicate.org/commentary/ai-governance-first-principles-must-include-global-south-by-robert-muggah-et-al-2023-03>> accessed 23 December 2024.

¹³⁰ *ibid.*

8. A Case for Inclusive Power Sharing in Global AI Governance

From the preceding section, there is currently a great imbalance in AI governance globally. Most policies, standards, models, guidelines and rules surrounding the development, deployment and use of AI systems predominantly emerge from a handful of nations in the Global North, particularly the United States and Europe. These nations hold the power to shape the digital landscape, influence global narratives, and reap the economic benefits of the digital economy. They are also increasingly determining how AI systems are developed and used worldwide.

This dynamic which sees the Global North as a powerhouse can be described as the coloniality of power in AI governance.¹³¹ The coloniality of power refers to how colonial power structures and hierarchies continue to influence current global relations, even after formal colonisation has ended.¹³² In essence, it constitutes a modern analogue of colonialism, in which authority and influence are exercised not through physical occupation, but through the regulation and exploitation of digital technologies and the infrastructures that sustain them. The exclusion of the Global South from important technological decisions can be seen as a continuation of these historical power dynamics.

The technological divide does not reflect differences in capability or aspiration, but rather emerges from deeply rooted structural inequalities that have historically advantaged the Global North.¹³³ This form of "colonialism" is evident in various ways. One significant aspect is the control of essential platforms by leading tech corporations based in the Global North, such as social media networks, search engines, cloud computing services, and e-commerce platforms.¹³⁴ This dominance enables the Global North to shape global communication, control information flow, and influence economic exchanges.¹³⁵ Additionally, data produced by users in the Global South is frequently stored and processed on servers located in the Global North. This situation raises critical concerns regarding privacy, data sovereignty, and the disproportionate economic advantages gained through data analysis and monetization.¹³⁶ Lastly, a key issue pertains to AI governance, where the Global North is establishing global standards and norms that may not reflect the priorities or values of the Global South.¹³⁷

The rise of 'inclusive AI Governance' as a phenomenon is a critical turning point in AI governance globally.¹³⁸ Without meaningful participation from the Global South in shaping the rules and standards that govern AI, there is a risk of amplifying global power imbalances. The effectiveness of AI governance increasingly depends on global participation as AI capabilities spread beyond traditional centres of innovation. Early inclusion of the Global South in AI governance discussions is not merely desirable but a strategic imperative to prevent future governance failures. Inclusive global dialogue facilitates international alliances, enriches expertise through diverse perspectives, and ensures governance frameworks reflect worldwide realities rather than narrow regional interests.

¹³¹ Anibal Quijano and Michael Ennis, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 *Nepantla: Views from South* 533, 533–580; Png (n 29) 1441–1442.

¹³² Quijano and Ennis (n 131) 533.

¹³³ Png (n 29) 1441.

¹³⁴ Robert Atkinson, 'Digital Colonialism 2.0: How AI Is Deepening Global Inequities | LinkedIn' (20 September 2024) <<https://www.linkedin.com/pulse/digital-colonialism-20-how-ai-deepening-global-robert-atkinson-6oxac/>> accessed 29 December 2024.

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Png (n 29) 1435.

One of the reasons why the Global North may prefer to relate amongst themselves is because it may be easier to agree on complex regulations. This is particularly, appealing given the concentrated nature of AI development, where some states in the Global North dominate the creation of cutting-edge AI technologies.¹³⁹ The logic behind this exclusive approach suggests that since most advanced AI systems originate from a small number of countries, coordinating regulations among just these key players could theoretically address the majority of immediate global risks. However, this perspective overlooks the broader implications of AI deployment and its impacts on diverse global communities, potentially creating blind spots in governance frameworks.¹⁴⁰

Historical examples demonstrate the pitfalls of exclusionary approaches to global governance. The failure of initiatives like the Multilateral Agreement on Investment (MAI)¹⁴¹ and Anti-Counterfeiting Trade Agreement (ACTA),¹⁴² despite being led by major economies like the UK and US, stemmed largely from mistrust among excluded nations.¹⁴³ A similar pattern of exclusion in AI governance could generate comparable scepticism and resistance, ultimately undermining global cooperation efforts.

The stakes of exclusion extend beyond mere participation. A governance vacuum in the Global South creates opportunities for strategic competition, as evidenced by China's growing influence through initiatives like the Belt and Road and the establishment of AI working groups within the BRICS alliance.¹⁴⁴ Moreover, inclusive governance frameworks better anticipate and address challenges across diverse regional, cultural, and socioeconomic contexts, creating truly global standards that serve all nations' interests.

The ethical dimension of inclusion is particularly crucial given the global impact of AI systems. Technologies developed in the Global North have worldwide implications – whether in spreading misinformation, exhibiting biases, affecting employment, or raising safety concerns.¹⁴⁵ Equally, the potential benefits of AI in areas like productivity, education, and healthcare could benefit all nations with appropriate support and infrastructure.¹⁴⁶ While practical challenges exist in implementing inclusive governance, the ethical imperative of including nations in decisions that profoundly affect their futures cannot be ignored.

9. Concluding Reflections

The dominance of the Global North in technological advancements and AI governance reveals the ongoing coloniality of power, wherein decision-making and resource control remain skewed. This has led to an imbalance that has marginalised the Global South and perpetuated

¹³⁹ Sumaya Nur Adan, 'The Case for Including the Global South in AI Governance Discussions' (*GovAI (Governance.ai)*, 20 October 2023) <<https://www.governance.ai/post/the-case-for-including-the-global-south-in-ai-governance-conversations>> accessed 28 December 2024.

¹⁴⁰ *ibid.*

¹⁴¹ UNCTAD (ed), *Lessons from the MAI* (United Nations 1999).

¹⁴² European Parliament. Directorate General for External Policies of the Union. and Maastricht University Institute for Globalisation and International Regulation (IGIR), *The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment*. (Publications Office 2011) <<https://data.europa.eu/doi/10.2861/13090>> accessed 30 December 2024.

¹⁴³ Adan (n 139).

¹⁴⁴ James McBride, Noah Berman and Andrew Chatzky, 'China's Massive Belt and Road Initiative' (*Council on Foreign Relations (CFR)*, 2 February 2023) <<https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative>> accessed 30 December 2024; Digital Watch, 'BRICS Announces Formation of AI Study Group' (*Digital Watch Observatory*, 23 August 2023) <<https://dig.watch/updates/brics-members-announce-formation-of-ai-study-group>> accessed 30 December 2024.

¹⁴⁵ Adan (n 139).

¹⁴⁶ *ibid.*

systemic inequities in data ownership, privacy, and economic benefits. As AI continues to pervade societies and shape global frameworks, the Global South cannot continue to be ignored. If there is to be a global approach to the risks and dangers posed by AI systems, there must be an inclusive approach to AI governance. The Global South, with its unique contexts, diverse values, priorities and needs must be accounted for if we are ever to achieve an equitable AI governance.

AI is all encompassing and is rapidly becoming the brainbox of economic growth, decision making, and social development. Consequently, the stakes are too high to keep repeating historical patterns of exclusion, since AI will shape the future of all nations. In order to bridge this existing gap, the Global North must begin to pay attention to the lived experiences of the Global South, which shapes the needs of the world's largest populations. This can be done by ensuring a genuine participation and representation from the Global South, not merely their symbolic representation. Accordingly, resources for capacity building, technical expertise development, and infrastructural support must be granted to ensure meaningful participation from states in the Global South. Additionally, governance frameworks must take cognisance of diverse perspectives, challenges and needs. There must be a move away from the western-centric approach to governance and recognise other socioeconomic contexts and approaches, as well as the development goals of different regions. Moreover, the development of indigenous AI ecosystems in the Global South must be supported to facilitate technological transfer in a way that encourages local capacity, as opposed to creating new forms of dependency.

It is only through a genuine collaboration between the Global North and South that governance frameworks that serve the interests of all humanity rather than continuing the cycle North-centric dominance that overlooks local diversity and context. Notwithstanding, the Global South must take necessary actions to invest in AI research and development, including local digital infrastructures.¹⁴⁷ They must develop the necessary political infrastructure to aid in passing effective and efficient AI policies for their populace.¹⁴⁸ The Global South must also work to engage with global AI policy efforts from the Global North to promote the interests of the Global South.¹⁴⁹ It may also be highly beneficial for the Global South to form regional initiatives that promote AI policy design and development from the understanding of their common contexts and challenges.¹⁵⁰

¹⁴⁷ Institute (n 1) 13.

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

Post-9/11 US Intervention in Afghanistan: Challenges to Unprivileged Combatants' Rights

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Abstract

Following the September 11 attack on the US, the US launched military operations in Afghanistan to target terrorist groups like al-Qaeda and the Taliban, leading to the detention of numerous individuals classified as unprivileged combatants. These individuals, often non-state actors who engaged in asymmetrical warfare, were denied the protections afforded to lawful combatants and thereby raising significant legal and ethical questions. The article examines the legal framework governing the rights of unprivileged combatants, the rights and protections afforded to unprivileged combatants, US' practices and policies which violates the rights of unprivileged combatants, judicial and non-judicial decisions that addresses the legal challenges to the rights of unprivileged combatants and the impacts of these decisions, and lastly, an analysis of the lessons learnt from other international interventions and conflicts. It argues that the US intervention in Afghanistan has exposed significant gaps and inconsistencies in the application of International Humanitarian Law (IHL) and International Human Right Law (IHRL) to unprivileged combatants and calls for a re-examination of current legal norms to ensure the protection of human rights in contemporary conflict scenarios. By offering insights into the challenges faced by unprivileged combatants, this study contributes to the ongoing discourse on the need to balance security interests with the preservation of fundamental human rights in the context of global counter-terrorism efforts. The findings and arguments put forth in the study aim to influence how future conflicts and counter-terrorism measures are approached, emphasizing the importance of safeguarding human rights even in the face of security threats. Overall, the work calls for a critical reassessment of the legal frameworks to better protect human rights in the context of modern conflicts, where the lines between combatants and civilians are increasingly blurred.

Key Words

Human Rights, Armed Conflict, Intervention, Enemy Combatant, Unprivileged Combatant, International Humanitarian Law.

1. Introduction

1.1 Historical Context and Evolution of the concept of unprivileged combatant

The concept of an unprivileged combatant has evolved significantly over time, shaped by the development of International Humanitarian Law (IHL) and the changing nature of warfare. The formal distinction between lawful and unlawful combatants began to take shape with the

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development of IHL in the 19th and early 20th centuries. This period saw the codification of the rules of war in various treaties and conventions which include the Lieber Code,¹ the Hague Conventions,² the Geneva Conventions and the Additional Protocols to the Geneva Conventions,³ the post-9/11 Era and the War on Terror.⁴

1.2 Background of the Research Topic

Controversy arose in connection to the US military action in Afghanistan in the wake of the September 11, 2001 attacks under which the US former President Bush Administration decided to deny Prisoner-of-War (POW) status to Taliban and al-Qaeda detainees and to classify them as unprivileged combatants.⁵ This has brought under scrutiny the issue whether customary and conventional international law rules which prescribe conditions for entitlement to POW status apply to all or only specific categories of combatants.⁶ The intervention in Afghanistan brought significant attention to the treatment and legal status of unprivileged combatants. Controversial practices such as indefinite detention, enhanced interrogation techniques, the establishment of detention facilities like Guantanamo Bay and the targeted killings of Taliban and al-Qaeda detainees have raised critical questions about compliance with IHL and International Human Right Law (IHRL). These practices have sparked debates about the balance between security imperatives and the protection of individual rights.

1.3 Meaning of unprivileged combatant

An unprivileged combatant refers to an individual who directly and actively participate in hostilities without having the legal protections afforded to lawful combatants under IHL.⁷ This term generally describes persons who engage in combat activities but do not meet the criteria established by the Geneva Conventions III for being classified as lawful combatants.⁸ Unprivileged combatants are often distinguished from civilians, who are non-combatants, and lawful combatants, who have the right to participate directly in hostilities and are entitled to POW status if captured. Examples of unprivileged combatants including spies, mercenaries, members of irregular forces who do not wear uniforms or distinguish themselves from the civilian population, certain civilians accompanying the armed forces, and non-combatant members of the armed forces who in violation of their protected status, actively engaged in

¹ John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press 2012) 498.

² Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson 1980) 46

³ Sandra Krahenmann, 'Protection of Prisoners in Armed Conflict' in Fleck, Dieter (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press, 2013) 359

⁴ Jason Ralph, *America's War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford University Press 2013) 114

⁵ Stephen D. Reese and Seth C. Lewis, 'Framing the War on Terror: The internalization of policy in the US press' (2009) University of Texas, USA <www.journalism.utexas.edu/sites/default/files/framing-war-on-terror-sagepub.pdf> accessed 14 January 2026

⁶ *ibid*

⁷ Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 40

⁸ Jelena Pejic, 'Unlawful/Enemy Combatants: Interpretations and Consequences' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* (Brill Nijhoff Publishers 2007) 16

hostilities.⁹ The legal status of unprivileged combatants is complex and not clearly defined under international law. Unprivileged combatants operate in a legal gray area, lacking the privileges of lawful combatants while still being entitled to basic human rights protections, and their treatment and status vary depending on the laws of the capturing state and the nature of the conflict.¹⁰ Unlike lawful combatants, unprivileged combatants do not enjoy combatant immunity, meaning that they do not qualify for POW status if captured and they can be prosecuted under domestic law for acts of violence they commit during armed conflict, even if those acts would be lawful if performed by a lawful combatant.¹¹

2. Overview of the Legal Framework Governing the Rights of Unprivileged Combatants in Relation to the US Intervention in Afghanistan

The legal framework governing the rights of unprivileged combatants in the context of the US intervention in Afghanistan is complex and multifaceted, incorporating a combination of IHL, IHRL, CIL, CIHL and US domestic laws. This overview focuses on the relevant bodies of law which regulates Unprivileged Combatants in respect to US' intervention in Afghanistan and how they intersect.

2.1 International Humanitarian Law (IHL)

IHL outline protections for different categories of individuals in conflict situations, including Unprivileged Combatants. Geneva Convention III and Additional Protocol I (API) play a critical role in regulating the rights of Unprivileged Combatants as follows:

Geneva Convention III: Under Geneva Convention III, lawful combatants are entitled to POW status upon capture, granting them specific protections. Unprivileged combatants on the other hand, such as the captured Taliban or al-Qaeda fighters, are generally not entitled to POW status.¹² However, the Geneva Convention III provides certain higher stringent conditions or requirement which must be fulfilled for POW status to be extended to unprivileged combatants. The stringent conditions or requirements include that they must belong to an organized group,¹³ that they group must belong to a party to the conflict,¹⁴ that the group must be commanded by a person responsible for his subordinates,¹⁵ that the group must ensure that its members have a fixed, distinctive sign recognizable from a distance,¹⁶ that the group must ensure that its members carry their arms openly,¹⁷ that the group must ensure that its members conduct their operations in accordance with the laws and customs of war.¹⁸

⁹ Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) 113

¹⁰ Knut Dormann, *The legal situation of "unlawful/unprivileged combatants"* (Cambridge University Press 2011) 69

¹¹ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford University Press, 2010) 134

¹² Third Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135 art 4A(2); Knut Dormann and Ors (eds), *ICRC Commentary on the Third Geneva Convention (III) Relative to the Treatment of Prisoners of War* (Cambridge University Press 2021) Note 998

¹³ *ibid* Dormann Note 999-1000

¹⁴ *ibid* note 1001-1009

¹⁵ *ibid* note 1013-1014

¹⁶ *ibid* note 1015- 1020

¹⁷ *ibid* note 1021- 1023

¹⁸ *ibid* note 1024-1027

Additional Protocol I (API): AP1 primarily focus on enhancing the protections for civilians and lawful combatants and it touches on and expands the rights of unprivileged combatants involved in international armed conflicts.¹⁹ API has loosened the strict requirements under Geneva Convention III by introducing some flexibility regarding the requirement for combatants to distinguish themselves from civilians which is designed to accommodate guerrilla fighters who may not always be able to wear uniforms.²⁰ However, spies and mercenaries when captured while conducting their operations are considered unprivileged combatants and specifically denied POW status.²¹ While unprivileged combatants do not benefit from the full protections granted to lawful combatants, API still provide certain minimum standards of treatment in relation to Unprivileged Combatants including humane treatment,²² fair trial guarantees,²³ and prevention of unlawful punishments.²⁴

2.2 International Human Rights Law (IHRL)

IHRL offers additional legal framework to IHL and governs the rights and treatment of Unprivileged Combatants. It basically includes International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

International Covenant on Civil and Political Rights (ICCPR): The ICCPR adopted by the United Nations General Assembly (UNGA) in 1966, establishes a broad framework for the protection of human rights, including the right to life, freedom from torture, and the right to a fair trial.²⁵ While the ICCPR does not explicitly address the status of combatants, its provisions apply to all individuals within a state's jurisdiction, including unprivileged combatants. Key provisions relevant to unprivileged combatants include right to life,²⁶ freedom from torture,²⁷ right to liberty and security,²⁸ right to a fair trial,²⁹ and right to non-discrimination.³⁰

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): Unprivileged Combatants, like all individuals, are afforded protection against torture and other forms of ill-treatment under the CAT. The CAT applies regardless of the legal status of individuals involve in hostilities, making it an important international legal instrument for safeguarding the rights of individuals, including unprivileged combatants.³¹ The CAT adopted in 1984, is a comprehensive international treaty that aims to prevent torture and other cruel, inhuman, or degrading treatment or punishment under all circumstances and its provisions apply

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977) 1125 UNTS 3 (AP1)

²⁰ *ibid* art 44(3)

²¹ *ibid* art 47

²² *ibid* art 75

²³ *ibid*

²⁴ *ibid*

²⁵ International Covenant on Civil and Political Rights (1966) UNGA Res 2200A 999 UNTS 171 (ICCPR)

²⁶ *ibid* art 6

²⁷ *ibid* art 7

²⁸ *ibid* art 9

²⁹ *ibid* art 14

³⁰ *ibid* art 26

³¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UNGA Res 39/46 1465 UNTS 85 (CAT)

to all persons, without exception, including unprivileged combatants captured during armed conflicts.³² Relevant provisions of the CAT concerning unprivileged combatants include: prohibition of torture,³³ absolute prohibition of torture with no exceptions,³⁴ principle of non-refoulement,³⁵ obligation on states to prevent torture,³⁶ obligation of state to investigate allegations of torture,³⁷ and right to redress and compensation.³⁸

2.3 Customary International Law (CIL)

CIL consists of rules that have been developed over time through widespread and consistent state practice, accompanied by a belief that such practices are legally binding (*opinio juris*), and these rules apply to all states, even if they have not explicitly signed treaties on the subject.³⁹ While unprivileged combatants are not afforded the same legal protections as lawful combatants, they are still subject to certain customary legal norms, particularly regarding the treatment of detainees and the conduct of hostilities.⁴⁰ The key principles of CIL regarding Unprivileged Combatants include the following: no combatant privilege for Unprivileged Combatants,⁴¹ protection from torture and inhumane treatment,⁴² principle of distinction,⁴³ right to a fair trial,⁴⁴ and prohibition of indiscriminate attacks.⁴⁵

2.4 Customary International Humanitarian Law (CIHL)

CIHL, as identified by the International Committee of the Red Cross (ICRC), provides certain baseline protections that apply to all individuals involved in armed conflicts, including unprivileged combatants. Key protections include humane Treatment,⁴⁶ no unlawful confinement or punishment⁴⁷ and fair trial guarantee.⁴⁸

2.5 The US Domestic Law

US' domestic law also plays a pivotal role in defining the status and treatment of unprivileged combatants. Some of the key legal developments include the following:

³² *ibid*

³³ *ibid* Art 1

³⁴ *ibid* Art 2

³⁵ *ibid* Art 3

³⁶ *ibid* Art 10 & 11

³⁷ *ibid* Art 12

³⁸ *ibid* Art 14

³⁹ Kenneth Watkin, 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' (2005) Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 30

⁴⁰ *ibid*

⁴¹ Knut Dormann, 'The legal situation of unlawful/unprivileged combatants' (2003) 85 IRRC 45

⁴² *ibid*

⁴³ *ibid*

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ Jean-Marie Henckaets and Louise Doswald-Beck, *Customary International Humanitarian Databases* (Cambridge University Press 2005) 299, 306

⁴⁷ *ibid* 344

⁴⁸ *ibid* 352

Authorization for Use of Military Force (AUMF): Following the 9/11 attacks, US Congress passed the Authorization for Use of Military Force (AUMF), granting the US president broad authority to use military forces against those responsible for the attacks and their associates, such as the al-Qaeda and the Taliban. The AUMF has been the legal foundation for detaining unprivileged combatants, including those held at Guantanamo Bay. Individuals captured under the AUMF have been labeled as enemy combatants, and the AUMF has been interpreted by courts to allow indefinite detention of such individuals without trial, as long as hostilities continue.⁴⁹

Military Commissions Act (MCA): MCA was passed in 2006 and later amended in 2009 to provide the legal framework for the detention and trial of alien unprivileged enemy combatants (i.e., non-US citizens). This is done through military commissions rather than traditional courts.⁵⁰ The MCA defines unprivileged enemy combatants as individuals who have engaged in hostilities against the US or its allies, or who are members of forces engaged in such hostilities. It allows for the prosecution of these individuals for violations of the laws of war (e.g., terrorism, conspiracy, providing material support to terrorism) and provides limited procedural protections compared to regular criminal trials.⁵¹ The MCA was passed after the US Supreme Court ruled in *Hamdan v Rumsfeld* that the Combatant Status Review Tribunals were unconstitutional, but the MCA was struck down by the US Supreme Court in *Boumediene v Bush* on June 12, 2008.⁵²

Detainee Treatment Act (DTA): DTA was passed by the US Congress to provide standards for the treatment of individuals in US custody, including unprivileged combatants.⁵³ The DTA specifically prohibits cruel, inhuman, or degrading treatment of detainees, in line with US obligations under the CAT,⁵⁴ and limited some judicial review of detainee cases, with minimum standards of humane treatment.⁵⁵

Enemy Combatant Status Review Tribunals (CSRTs): After 9/11, the US government established CSRTs to determine whether individuals detained as enemy combatants at Guantanamo Bay were to be classified as “enemy combatants.”⁵⁶ These tribunals were non-judicial and conducted outside of the traditional court system. It has severally been criticized for providing limited procedural safeguards, including restricted access to evidence and the lack of a right to legal counsel for detainees.¹⁰⁷ However, the CSRT process was an attempt by the US government to provide some form of review for detainees classified as unprivileged combatants.⁵⁷

Detention and Habeas Corpus Rights: The US Supreme Court has addressed the rights of unprivileged combatants in several landmark cases, particularly regarding their detention at

⁴⁹ Jennifer Daskal and Stephen I. Vladeck, ‘After the Authorization for Use of Military Force’ (2013) Open Society Foundations <www.opensocietyfoundations.org/publications/after-authorization-use-military-force> accessed 16 January 2026

⁵⁰ Military Commissions Act (2006) PL 109-366

⁵¹ *ibid*

⁵² Human Rights Watch ‘Q and A: Military Commissions Act of 2006’ <www.hrw.org/legacy/backgrounder/usa/qna1006/usqna1006.htm#_Toc148852441> accessed 16 January 2026

⁵³ Detainee Treatment Act (2005) PL 109 -148 Sec. 1001-1006 as amended through PL 111-84

⁵⁴ *ibid* Sec 1003

⁵⁵ *ibid*

⁵⁶ Deputy Secretary of Defence, ‘Memorandum for the Secretary of the Navy, Subject: Order establishing combatant status Review Tribunal’ (2004) <www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf> accessed 16 January 2026

⁵⁷ *ibid*

Guantanamo Bay. The US Supreme Court has ruled that US citizens detained as enemy combatants have the right to challenge their detention through a habeas corpus petition, and the decision emphasized that due process rights apply even in cases of individuals classified as unprivileged combatants.⁵⁸ The US Supreme Court also held that foreign nationals held at Guantanamo Bay could challenge their detention through habeas corpus, extending certain rights to unprivileged combatants, regardless of their citizenship.⁵⁹ It is also the decision of the US Supreme Court that the detainees at Guantanamo Bay, even though they were classified as unprivileged combatants, had the constitutional right to habeas corpus to challenge the legality of their detention in Federal Courts particularly with regard to the conditions of detention, and this decision invalidate some sections of the Military Commissions Act of 2006 that sought to strip detainees of the right to habeas corpus.⁶⁰

3. Overview of the Rights and Protections Afforded to Unprivileged Combatants in the Context of Post-9/11 US Intervention of Afghanistan

While unprivileged combatants do not enjoy the same rights and protections as lawful combatants, they are still entitled to certain fundamental rights and protections under IHL, IHRL and CIHL. The nature and extent of these rights and protections varies depending on the context, but they generally cover the right to protection against unlawful detention, right to humane treatment, and right to fair trial.

3.1 Right to Protection against unlawful detention

IHRL provides for the right to protection of the personal liberty of unprivileged combatants in the context of their right not to be subjected to arbitrary arrest and detention. It permits for their detention in circumstances expressly provided by law, subject to strict adherence to the procedures defined under law.⁶¹ ICCPR is a key international human rights treaty and its provisions remain relevant to the protection of unprivileged combatants against unlawful arrest and detention and deprivation of personal liberty.⁶² CAT is another key international instrument that specifically prohibits torture and other forms of ill-treatment including unlawful detention.⁶³ Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) safeguards the right to liberty, security and protection against unlawful detention.⁶⁴ IHL on its part permits the detention of captured combatants based upon grounds and conditions allowed by law as provided under the Geneva Convention III which permits the internment of POW by a detaining power until the cessation of active hostilities, when they must be released and repatriated.⁶⁵ However, detainees against whom criminal proceedings for an indictable offence is pending may be detained until the end of such proceedings and if necessary, until the completion of punishment. While similar requirements are not expressly provided for

⁵⁸ Hamdi v Rumsfeld (2004) 542 US 507

⁵⁹ Rasul v Bush (2004) 542 US 466

⁶⁰ Boumediene v Bush (2008) 553 US 723

⁶¹ Rene Vark, 'The Status and Protection of Unlawful Combatants' (2005) <www.juridicainternational.eu/public/pdf/ji_2005_X_191.pdf> accessed 15 January 2026

⁶² ICCPR (n 25) art 9

⁶³ CAT (n 31) art 1, 2 & 11

⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221 (ECHR) art 5

⁶⁵ Third Geneva Convention III (n 12) art 5

unprivileged combatants, it is necessary for these requirements to be extended to them.⁶⁶ It has also been recognized that the rules and mechanisms under IHL in certain circumstances may prove insufficient to properly regulate the detention of victims of armed conflicts. During such circumstance, human rights supervisory mechanisms, including habeas corpus and comparable remedies under domestic law may necessarily supersede IHL where this is necessary to safeguard the fundamental rights of the detainees.⁶⁷ The United Nations has developed guidelines and principles that protects against detention of individuals, including unprivileged combatants.⁶⁸

3.2. Right to Humane Treatment

Both IHRL and IHL provide for the right to humane treatment for unprivileged combatants which is predicated on the fundamental respect for dignity of the human person. Various legal instruments and principles under IHRL ensure that unprivileged combatants are treated with humanity and respect for their dignity, regardless of their status. Foremost among the right to humane treatment is the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment,⁶⁹ which has been further elaborated upon with specific provision that no exceptional circumstances whatsoever may be invoked as a justification for torture.⁷⁰ IHL on its part provides for similar provision with even more specific humane treatment and protections against torture or other cruel, inhuman or degrading treatment or punishment.⁷¹ CIHL similarly provides for the humane treatment of all combatants including unprivileged combatants who have been captured or otherwise placed under the control of the opposing party.⁷²

3.3. Right to Fair Trial

Unprivileged combatants, if prosecuted, are entitled to a fair trial. A detailed catalogue of substantive and procedural fair trial rights are guarantees under IHRL⁷³ CIHL similarly plays a critical role in reinforcing fair trial rights for unprivileged combatants and it is crucial in protecting unprivileged combatants from summary execution and arbitrary punishment⁷⁴ IHL on its part provides for fair trial rights which are similar to those provided under IHRL.⁷⁵ However, there are several fundamental fair trial procedures included in Article 14 of ICCPR which are not explicitly enumerated in Article 75 of API. That notwithstanding, the same protection should be considered applicable in penal prosecutions against unprivileged combatants detained during international armed conflicts, and considered to fall within the parameters of broader protections that are included.⁷⁶ There is also a preclusion of the said Article 75 from being construed so as to

⁶⁶ Knut Ipsen, *Combatants and Non-Combatants in Dieter Fleck (ed) The Handbook of Humanitarian Law in armed Conflict* (4th edn, Oxford university Press 1995) 326

⁶⁷ Theodor Meron, *The Humanization of Humanitarian Law* (Cambridge University Press, 2017) 239

⁶⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) UN General Assembly Resolution 43/173

⁶⁹ ICCPR (n 25) arts 4(2), 7 & 10; ECHR (n 77) arts 3 & 4

⁷⁰ CAT (n 31) arts 2 & 16

⁷¹ API (n 19) art 75 (2) (ii); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (977)1125 UNTS 609 (AP2) art 4

⁷² Henckaets (n 46)

⁷³ ICCPR (n25) arts 14 & 15; Universal Declaration of Human Rights (1948) UNGA Res 217 A III arts 10 & 11; ECHR (n46) arts 6 & 7

⁷⁴ Henckaets (n 46)

⁷⁵ API (n19) art 75(4)

⁷⁶ *ibid*

limit any other more favourable provision granting greater protection under any applicable rules of international law to persons covered by the provisions.⁷⁷ The US cannot therefore rely on the absence of the above protections from the said Article 75(4) as the basis for denying right to fair trial to unprivileged combatants when same has already been guaranteed under Article 14 of ICCPR.⁷⁸

4. An Overview of US' Practices and Policies which Violates the Rights of Unprivileged Combatants during the Post-9/11 US Intervention of Afghanistan

US treatment of the Taliban and al-Qaeda detainees classified as unprivileged combatants has been a subject of intense scrutiny, controversy and criticisms. There are allegations of US detention system, abuse of US interrogation techniques, unfair trial process, targeted killings of Taliban and al-Qaeda detainees and other human rights violations which have been leveled against the US government.

4.1. US' Detention System of Taliban and al-Qaeda Detainees

Many Taliban and al-Qaeda detainees were held indefinitely at various facilities located at Guantanamo Bay, Bagram Air Base, Black Sites and other locations without formal charges or trials for years. US government categorized these individuals as unprivileged combatants arguing that they could be detained indefinitely under the laws of war and deprived of their basic legal and fundamental rights.⁷⁹ The grounds for criticism reflect deep concerns about the legal, moral, and ethical implications of the US' actions in its treatment of Taliban and al-Qaeda detainees, with lasting impacts on the US' legal framework, human rights reputation, and global standing. The US has also been heavily criticized based on several grounds including denial of due process,⁸⁰ violation of international law,⁸¹ lack of transparency and accountability,⁸² damage to US reputation,⁸³ and ethical concerns.⁸⁴

⁷⁷ *ibid* art 75(8)

⁷⁸ Kasey McCall-Smith, 'How Torture and National Security Have Corrupted the Right to Fair Trial in the 9/11 Military Commissions Journal of Conflict and Security Law' (2022) 27 Journal of Conflict and Security Law 83-116 <www.doi.org/10.1093/jcsl/krac002> accessed 15 January 2026

⁷⁹ Harold Hongju Koh, 'Authorization for Use of Military Force after Iraq and Afghanistan' (2014) The US Senate Foreign Relations Committee <www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf> accessed 15 January 2026

⁸⁰ Elizabeth Haight, '22 years of justice denied' (2024) Amnesty International' <www.amnesty.org/en/latest/news/2024/03/22-years-of-justice-denied> accessed 15 January 2026

⁸¹ Amnesty International, 'Guantanamo: Lives Torn Apart— The Impact of Indefinite Detention on Detainees and Their Families' (2006) AMR51/007/2006 <www.amnesty.org/en/documents/amr51/007/2006/en/> accessed 15 January 2026

⁸² UN Experts 'Guantanamo Bay: "Ugly chapter of unrelenting human rights violations"' (2022) United Nations <www.ohchr.org/en/press-releases/2022/01/guantanamo-bay-ugly-chapter-unrelenting-human-rights-violations-un-experts> accessed 15 January 2026

⁸³ Letta Tayler and Elisa Epstein, 'Legacy of the 'Dark Side', The Costs of Unlawful US Detentions and Interrogations Post-9/11' (2022) Human Rights Watch <www.hrw.org/news/2022/01/09/legacy-dark-side> accessed 15 January 2026

⁸⁴ Nigel S. Rodley, 'Detention as a response to Terrorism' in Ana María Salinas de Frías, Katja LH Samuel, and Nigel D White (eds), *Counterterrorism International Law and Practice* (Oxford university Press 2012) 457

4.2. US' Interrogation Techniques of Taliban and al-Qaeda Detainees

The interrogation techniques used by the US on Taliban and al-Qaeda detainees have been the subject of significant controversy, criticism and legal scrutiny. The interrogation techniques such as the Enhanced Interrogation Techniques (EITs) used by the CIA to elicit information from detainees include waterboarding,⁸⁵ sleep deprivation,⁸⁶ stress positions and physical coercion⁸⁷ walling,⁸⁸ and exposure to extreme temperatures.⁸⁹

4.3. US' Unfair Trial Process of Taliban and al-Qaeda Detainees

The US' trial process of Taliban and al-Qaeda detainees held by the US have been widely criticized on several fronts, with concerns focusing on legal, ethical, and human rights issues.⁹⁰ Some of the key criticisms include trial by US Military Commissions,⁹¹ evidence obtained through torture,⁹² limited access to legal representation,⁹³ lack of public trials,⁹⁴ and restricted appeals process.⁹⁵

4.4. US' Targeted Killings of Taliban and al-Qaeda Detainees

Targeted killings of Taliban and al-Qaeda detainees have been a significant and controversial aspect of US counterterrorism efforts, especially following the events of September 11, 2001.⁹⁶ These actions have been carried out by various means, including drone strikes, special operations raids, and other covert operations primarily conducted by the CIA and the US military.⁹⁷ An overview of the key aspects and controversies surrounding these targeted killings include violation of international law,⁹⁸ bypass of due process and human rights violation,⁹⁹ precedent

⁸⁵ Farnoosh Hashemian, 'Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact' (2008) Torture, United States <www.phr.org/our-work/resources/broken-laws-broken-lives> accessed 15 January 2026

⁸⁶ Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press 2005) 23

⁸⁷ Human Rights Watch 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees' (2011) Human Rights Watch <www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees> accessed 15 January 2026

⁸⁸ *ibid*

⁸⁹ Human Rights Watch, 'Enduring Freedom: Abuses by US Forces in Afghanistan' (2004) Human Rights Watch <www.hrw.org/report/2004/03/08/enduring-freedom/abuses-us-forces-afghanistan> accessed 16 January 2026

⁹⁰ Jonathan Tracy, 'Detention and Prosecution of Alleged Terrorists and Combatants' <www.corteidh.or.cr/tablas/R22254.pdf> accessed 15 January 2026

⁹¹ Amnesty International, 'USA: Justice Delayed and Justice Denied? Trials Under the Military Commissions Act' (2007) <www.refworld.org/reference/countryrep/amnesty/2007/en/91983> accessed 15 January 2026

⁹² Detlev F. Vagts, 'Why Courts should try persons accused of terrorism?' (2003) *European Journal of International Law* <www.ejil.org/pdfs/14/2/417.pdf> accessed 15 January 2026

⁹³ Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (NYU Press 2011) 81

⁹⁴ *ibid*

⁹⁵ *ibid*

⁹⁶ Himi Shamsi, 'Targeted Killing' and the Rule of Law: The Legal and Human Costs of 20 Years of US Drone Strikes' (2022) *American Civil Liberties Union* <www.judiciary.senate.gov/imo/media/doc/Shamsi%20Testimony.pdf> accessed 16 January 2026

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ *ibid*

for state-sponsored assassinations,¹⁰⁰ collateral damage,¹⁰¹ counterproductive effects,¹⁰² and lack of accountability.¹⁰³

5. Decisions of the US Domestic Courts and International Courts and Human Rights Bodies that Addresses the Legal Challenges of Unprivileged Combatants and their Impacts

5.1. Decisions of US' Domestic Courts

The US judicial system played a crucial role in addressing the legal challenges brought by detainees held in the context of the Afghanistan intervention. Several landmark decisions of the US Supreme Court which affect the rights of detainees and limits US executive power include the following:

Hamdi v Rumsfeld: Yaser Hamdi, a US citizen captured in Afghanistan, was designated as an "enemy combatant" and detained without charges or access to legal counsel, and detained indefinitely without trial.¹⁰⁴ The US Supreme Court ruled that while the government had the authority to detain enemy combatants, even US citizens, detainees must be afforded a meaningful opportunity to challenge their detention before an impartial tribunal. This decision underscored the need for due process rights, even in cases involving national security concerns.¹⁰⁵

Rasul v. Bush: This case involved foreign nationals detained at Guantanamo Bay. The central question was whether US courts had jurisdiction to hear habeas corpus petitions filed by non-citizens detained outside the mainland US.¹⁰⁶ The US Supreme Court held that US Federal Courts have jurisdiction to consider habeas corpus petitions filed by foreign nationals held at Guantanamo Bay. This ruling effectively allowed detainees to challenge the legality of their detention in US Courts, marking a significant check on executive powers.¹⁰⁷

Hamdan v Rumsfeld: Salim Ahmed Hamdan, a Yemeni national and former driver for Osama bin Laden, challenged the legality of the military commissions set up to try Guantanamo detainees, arguing that they violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.¹⁰⁸ The US Supreme Court ruled that the military commissions as constituted violated US law and the Geneva Conventions, and the ruling emphasized that even enemy combatants are entitled to minimum standards of trial fairness and that the US executive arm of

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ *Hamdi v Rumsfeld* (2004) 542 US 507

¹⁰⁵ Jonathan Hafetz, "The Supreme Court's 'Enemy Combatant' Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law," (2006) 14 *Temple Polit. & Civ. Rts. L. Rev.* 409; Daniel Moeckli, "The US Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory for the Rule of Law'?" (*Journal of Conflict & Security Law*, Vol. 10, No. 1 Spring, Oxford University Press 2005) 75-99

¹⁰⁶ *Rasul v Bush* (2004) 542 US 466

¹⁰⁷ n105

¹⁰⁸ *Hamdan v Rumsfeld* (2006) 548 US 557

government could not unilaterally create military commissions without congressional authorization.¹⁰⁹

Boumediene v Bush: This case focused on whether non-citizen detainees at Guantanamo Bay had the constitutional right to file habeas corpus petitions in US Federal Courts after the passage of the Military Commissions Act of 2006, which aimed to strip courts of jurisdiction over such petitions.¹¹⁰ The US Supreme Court held that the detainees had a constitutional right to habeas corpus and that the procedures established by the Military Commissions Act were ultra vires, and this landmark decision affirmed the right of detainees to challenge their detention in civilian courts, reinforcing the principle of judicial oversight.¹¹¹

5.2. Decisions of International Courts and Human Rights Bodies

Various international courts and human rights bodies have responded to the treatment of unprivileged combatants by the US in the context of its intervention in Afghanistan which are discussed below:

International Court of Justice (ICJ): While the ICJ has not directly adjudicated cases on the treatment of unprivileged combatants in Afghanistan, its general principles on state responsibility and the protection of human rights provide a backdrop for understanding international obligations. The ICJ has emphasized that states must respect international law, including human rights and humanitarian law, even during armed conflicts. The ICJ's decisions underscore that actions like torture and inhumane treatment are prohibited under customary international law, which binds all states.¹¹²

International Criminal Court (ICC): The ICC's involvement became prominent with Chief Prosecutor Fatou Bensouda's request in 2017 to investigate potential war crimes and crimes against humanity in Afghanistan, which included actions by US forces and the CIA. This investigation focused on alleged crimes such as torture and ill-treatment of detainees, a significant portion of whom were classified as unprivileged combatants.¹¹³ In 2020, the ICC Appeals Chamber authorized the investigation, overturning the initial rejection, and this marked a critical moment, highlighting international concern over the treatment of detainees and the importance of accountability, even from powerful states like the US.¹¹⁴

European Court of Human Rights (ECHR): Although the ECHR does not have jurisdiction over the US, it has ruled on cases involving European countries' complicity with US detention practices in several cases. One of such is Poland's violation of the European Convention on Human Rights by enabling the CIA to detain and torture individuals on Polish soil. The ruling criticized

¹⁰⁹ n105

¹¹⁰ Boumediene v Bush (2008) 553 US 723

¹¹¹ n105

¹¹² Nicaragua v US (1986) ICJ Rep 14; Helen Duffy, *The "War on Terror" and the Framework of International Law* (2nd ed., Cambridge University Press 2015).

¹¹³ ICC, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorization to commence an investigation into the Situation in the Islamic Republic of Afghanistan' (2017) office of the Prosecutor <www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation> assessed 15 January 2026

¹¹⁴ Ehsan Qaane, *The International Criminal Court's Afghanistan Investigation, Challenges and Constraints* (Raoul Wallenberg Institute for Human Rights and Humanitarian Law 2023)

the use of secret detention sites and the transfer of detainees without due process, practices closely associated with the treatment of unprivileged combatants.¹¹⁵ The court in another case found Macedonia responsible for ill-treatment and unlawful rendition to US authorities, which highlight European states' complicity in practices deemed in violation of international human rights norms.¹¹⁶

United Nations Human Rights Council (UNHRC): Several UN Special Rapporteurs have documented abuses and called for the protection of detainee rights. Reports by Special Rapporteurs have criticized the use of torture and indefinite detention without trial, and these reports frequently highlight cases of detainees held at Guantanamo Bay. It also underscores the need for compliance with international human rights standards, even in counter-terrorism contexts.¹¹⁷]

UN Committee Against Torture: The UN Committee Against Torture has periodically reviewed US compliance with the Convention Against Torture. In its concluding observations, the Committee expressed concerns about reports of torture, ill-treatment, and the legal justifications used by the US for practices like waterboarding. The Committee urged the US to investigate allegations, prosecute perpetrators, and provide remedies to victims, such that the Committee's statements emphasize that the prohibition of torture is absolute and non-derogable.¹¹⁸

Inter-American Commission on Human Rights (IACHR): The IACHR has issued precautionary measures concerning detainees held at Guantanamo Bay, urging the US to respect due process rights and humane treatment. The IACHR has consistently criticized the lack of legal rights afforded to detainees, the conditions of detention, and the indefinite nature of detention without trial. It has also called for the closure of Guantanamo Bay and the implementation of fair legal procedures.¹¹⁹

Non-Governmental Organizations (NGOs) and Advocacy Groups: NGOs have played a critical role in highlighting abuses and advocating for detainee rights. Reports by organizations like Human Rights Watch, Amnesty International, and the American Civil Liberties Union (ACLU) have provided detailed accounts of detainee treatment, including torture and extraordinary rendition. It has also brought attention to specific cases, filed lawsuits, and submitted amicus briefs to courts and human rights bodies, pushing for greater accountability and transparency, for

¹¹⁵ *Al Nashiri v Poland* Appl (2014) 28761/11; *Husayn Abu Zubaydah v Poland* (2014) 7511/13

¹¹⁶ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012) 39630/09; Steven Greer "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?" (2015) *Human Rights Law Review*, Vol 15, 101–137

¹¹⁷ Juan E. Mendez, 'Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2011) A/HRC/16/52; Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar Publishing, 2018) 371.

¹¹⁸ Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America (2014) CAT/C/USA/CO/3-5; UNHRC, Report of the Special Rapporteur on Torture, UN Doc. A/HRC/13/39 (2010) <<https://undocs.org/A/HRC/13/39>> accessed 16 January 2026

¹¹⁹ Inter American Commission on Human Rights, *Towards the Closure of Guantanamo* (Organization of American States 2015) <www.oas.org/en/iachr/reports/pdfs/towards-closure-guantanamo.pdf> accessed 16 January 2026

example, the ACLU's legal actions have challenged the legality of practices like indefinite detention and the use of torture in the name of national security.¹²⁰

5.3. Impacts of the decisions of the US' Domestic Courts and International Courts and Human Rights Bodies on the rights of unprivileged combatants

The decisions of both domestic and international courts and Human Rights Bodies to the US treatment of unprivileged combatants during the Afghanistan intervention had significant implications, which includes:

Check on Executive Power: The rulings by the US Supreme Court established critical checks on executive authority, affirming the role of the judiciary in safeguarding human rights, even during wartime, and these decisions emphasized the importance of due process and judicial review.¹²¹

Reaffirmation of Human Rights Standards: International court rulings and the advocacy of human rights bodies reinforced the global commitment to upholding international humanitarian law and human rights standards by sending a clear message that violations of detainee rights would not be tolerated, and that accountability is essential.¹²²

Policy Reforms: The legal challenges and court decisions prompted changes in US detention policies, including the establishment of review processes for detainees at Guantanamo Bay and the eventual cessation of certain controversial interrogation techniques, and these reforms reflect the impact of judicial intervention in shaping policy.¹²³

Global Legal and Ethical Discourse: The court responses contributed to the broader international discourse on the rights of combatants, the legality of detention practices, and the moral and ethical considerations of counter-terrorism strategies, and these debates continue to influence how states approach the treatment of combatants in conflict situations.¹²⁴

6. The Lessons Learnt from the other International Interventions and Conflicts

The treatment of unprivileged combatants and the broader conduct of international interventions have led to significant lessons that can be gleaned from various global conflicts. The comparative analysis of these conflict situations provides several key lessons for future conflicts involving unprivileged combatants as follows:

¹²⁰ACLU v Department of Defense (2005) 389 F. Supp. 2d 547; Amnesty International, "USA: "War on terror" detentions at a crossroads: New AI report on detentions and trials following the US Supreme Court's Hamdan v. Rumsfeld Ruling" <www.amnesty.org/en/documents/AMR51/148/2006/en/> accessed 16 January 2026

¹²¹ Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* (Simon & Schuster Publishers 2007) 126

¹²²Kim Lane Scheppele, "The International State of Emergency: Legitimacy, Legality, and Constitutionalism after September 11" (2006) *Law and Social Inquiry, Princeton University* 647 <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1048&context=schmooze_papers> accessed 16 January 2026

¹²³ Peter Margulies, "Judging Terror in the 'Zone of Twilight': Exigency, Institutional Equity, and Procedure after September 11"th (2004) *Boston University Law Review* Vol 84, 383 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=840086> accessed 16 January 2026

¹²⁴ Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (3rd edn, Routledge 2011)

6.1. Clear Legal Standards and Definitions: The ambiguity surrounding the classification of unprivileged combatants needs to be addressed as clear and universally accepted definitions should be established to guide the treatment of combatants and non-combatants alike.¹²⁵

6.2. Upholding international legal norms: In many conflicts, such as the US intervention in Afghanistan and Israeli-Palestinian conflict, the erosion of international legal norms, like the Geneva Conventions, has led to widespread criticism and long-term consequences.¹²⁶ It is crucial to adhere to international law, particularly the Geneva Conventions and human rights treaties, to maintain legitimacy and reduce the risk of backlash.¹²⁷ Even in asymmetric warfare, where enemies may not adhere to these norms, state actors benefit from maintaining legal standards to prevent violence from escalating into broader conflicts or undermining international support.¹²⁸

6.3. The importance of due process in detention practices and human rights: The indefinite detention without trial, as seen in Guantanamo Bay and the internment practices in Sri Lanka, undermines the rule of law and damages the credibility of the intervening power.¹²⁹ Establishing clear legal processes for detainees, including timely trials and access to legal representation, is essential to prevent human rights abuses and maintain moral authority.¹³⁰ Also, detention practices should be transparent and subject to judicial review to avoid accusations of arbitrary or unjust imprisonment.¹³¹

6.4. Long-term Consequences of interrogation techniques and torture: The use of enhanced interrogation techniques by the US, as well as the reported use of torture in Russia and Israel, have led to widespread condemnation and have had lasting negative impacts on the reputations of these states.¹³² Torture and other forms of inhumane treatment not only violate international law but also have long-term strategic consequences, including radicalizing opponents, damaging relationships with allies, and undermining efforts to promote human rights globally.¹³³ Alternative, lawful interrogation methods should be developed and employed.¹³⁴

6.5. Managing Public Perception and Strategic Communication: Irish Republican Army (IRA) is a republican Paramilitary organization seeking the end of British rule in Northern Ireland and the reunification of Ireland.¹³⁵ During the Troubles in Northern Ireland (1960s-1998), the British government used internment without trial to detain suspected IRA members. This policy was

¹²⁵David P. Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (Cambridge University Press 2011) 42

¹²⁶ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 16

¹²⁷ *ibid*

¹²⁸ *ibid*

¹²⁹ Michael Byers, 'Terrorism, the Use of Force, and International Law After 11 September' (2002) 51 *International and Comparative Law Quarterly* 401

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² Jamie Mayerfeld, 'Playing by Our Own Rules: How US Marginalization of International Human Rights Law Led to Torture' (2007) 20 *Harvard Human Rights Journal* 89

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ Kevin Boyle, Tom Hadden, & Paddy Hill, *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (Cobden Trust, 1980) 5

highly controversial and contributed to further unrest.¹³⁶ The British military and police forces used what were later termed as the “five techniques” which the European Court of Human Rights found to constitute inhuman and degrading treatment.¹³⁷ Similar to the US where Guantanamo has been a focal point, the British policies faced significant legal challenges and public backlash, leading to policy changes over time.¹³⁸ The British experience demonstrated how public perception can significantly impact the outcome of a conflict.¹³⁹ Missteps like internment without trial fueled further unrest and undermined the British government’s position.¹⁴⁰ Effective communication and maintaining the moral high ground are vital interventions and should be accompanied by transparent communication strategies that address public concerns, explain actions, and promote understanding, while managing the narrative helps to prevent the adversary from exploiting human rights abuses or legal violations to gain support.¹⁴¹

7. Conclusion and Recommendations

7.1. Conclusion

Following the 9/11 attacks, the US launched military operations in Afghanistan with the objective of dismantling the Taliban regime and eliminating al-Qaeda operatives. The events of post-9/11 provide a critical analysis of the impact of US military operations in Afghanistan on the rights of unprivileged combatants, also known as unlawful combatants or enemy combatants. This intervention led to significant legal, ethical, and humanitarian challenges regarding the treatment of individuals captured on the battlefield who did not fit into traditional categories of lawful combatants or civilians. Key findings of the article highlight that unprivileged combatants were often denied the protections afforded by the Geneva Conventions. The US administration’s stance that such individuals were not entitled to POW status under IHL led to controversial practices, including indefinite detention without trial, enhanced interrogation techniques, and extraordinary rendition. These practices have been criticized for violating IHL, IHRL and international legal standards, thereby challenging the legitimacy of the US intervention in the eyes of the international community. The US approach to detainee treatment, characterized by the creation of Guantanamo Bay detention center, has sparked widespread debate and legal challenges, including landmark decisions of the US Supreme Court which underscore the tension between national security imperatives and the protection of individual rights, illustrating the complex dynamics at play in the post-9/11 security landscape. The analysis concludes that while the US had legitimate security concerns following the 9/11 attacks, the methods employed in Afghanistan raised significant ethical and legal issues. The treatment of unprivileged combatants not only posed challenges to international humanitarian norms but also risked undermining the moral authority of the US on the global stage. Furthermore, the lack of clear legal status for these individuals created a precedent that could be exploited by other states to justify similar actions, potentially eroding the established framework of IHL and IHRL.

¹³⁶ *ibid*

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ Graham Dawson, Jo Dover and Stephen Hopkins, *The Northern Ireland Troubles in Britain: Impacts, engagements, legacies and memories* (Manchester University Press 2017) 29

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

7.2 Recommendations

Clarification of Legal Definitions and Protections: There is an urgent need for the international community to revisit and clarify the definitions and protections afforded to various categories of combatants under international law. Establishing clear guidelines for the treatment of unprivileged combatants will help prevent ambiguity and ensure consistent application of humanitarian principles. This could involve updating the Geneva Conventions or drafting supplementary protocols to address the evolving nature of warfare and combatant status.

Strengthening International Oversight Mechanisms: To ensure compliance with IHL, it is crucial to strengthen international oversight and accountability mechanisms. Institutions such as the International Committee of the Red Cross (ICRC) and the International Criminal Court (ICC) should be empowered to monitor and investigate alleged violations of combatant rights. States should cooperate with these bodies and support their efforts to uphold the rule of law in conflict situations.

Balancing Security and Human Rights: Governments must strike a balance between national security concerns and the protection of individual rights. Policies should be formulated to ensure that counterterrorism measures do not come at the expense of fundamental human rights. Adopting transparent detention practices, providing detainees with fair trial rights, and ensuring access to legal representation are essential steps toward achieving this balance.

Promoting Dialogue and Cooperation: The international community should foster dialogue and cooperation among states to address the challenges posed by unprivileged combatants. Collaborative efforts to share intelligence, best practices, and legal frameworks can enhance the collective ability to respond effectively to security threats while respecting human rights. Diplomatic channels and multilateral forums such as the United Nations can play a pivotal role in facilitating such cooperation.

Reparations and Rehabilitation: For those individuals who have been wrongfully detained or subjected to ill-treatment, there should be mechanisms for reparations and rehabilitation. Providing compensation, medical care, and psychological support to affected individuals can help redress the injustices suffered and promote healing and reconciliation. States involved in detention should take responsibility for addressing the harm caused by their actions.

Conference on
**Democracy and State Building in Bangladesh after the breakdown
of One-Party Dominance**

26-27 March 2025, University of Hull

M Jashim Ali Chowdhury*

1. Context of Conference

Bangladesh's political journey has been a tumultuous one, marked by profound ideological shifts and political upheavals. Since gaining independence in 1971, the country has grappled with defining its constitutional identity amid extreme political and religious contestation.

The 1972 Bangladesh Constitution¹ adopted a Westminster parliamentary system. In 1975, it was radically transformed into a national party-led presidential system², soon to be overthrown by a military coup³. While the 1972 Constitution emphasised the secular Bengali ethnic and linguistic identity as an organising principle of the state, the post-1975 regimes Islamised the country. The military regime re-introduced the multi-party politics but retained the presidential system too. Though parliamentary democracy was restored in 1991, it failed to stabilize the political landscape⁴ due to mutual distrust among the ruling and opposition parties, suppression of intra-party dissent and parliamentary opposition, violent street agitation, election rigging, and back-door conspiracies for ascending or clinging to power, which eventually became the norm.

The introduction of a non-party caretaker government⁵ system in 1996 aimed to ensure fair elections. However, it was later manipulated⁶ and ultimately repealed⁷ in 2011, leading to legitimacy crises in subsequent elections of 2014, 2018 and 2024 marred by allegations of

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¹ The Constitution of Bangladesh 1972 <https://www.constituteproject.org/constitution/Bangladesh_2014> accessed 18 December 2024.

² Md. Morsbedul Islam, 'The Politics behind the Passage of Fourth Amendment to the Constitution of the People's Republic of Bangladesh and Its Provisions: A Modest Analysis', (2014) 4(9) Public Policy and Administration Research, <<https://iiste.org/Journals/index.php/PPAR/article/view/15674>> accessed 18 December 2024.

³ Emajuddin Ahmed, *The Military and Democracy in Bangladesh*, ANU E Press (2004) <<https://press-files.anu.edu.au/downloads/press/p33231/pdf/ch0731.pdf>> accessed 18 December 2024.

⁴ Shafi Md Mostafa and Db Subedi, 'Rise of Competitive Authoritarianism in Bangladesh' (2020) 14(3:1) Politics and Religion 1

⁵ Dr Rafiqul Islam, 'Political process under caretaker government' *The Daily Star Dhaka* (12 May 2007) <<https://www.thedailystar.net/law/2007/05/02/vision.htm>> accessed 18 December 2024.

⁶ Barrister Harun ur Rashid, '14th amendment of the Constitution: A legal view' *The Daily Star* (13 June 2004) <<https://www.thedailystar.net/law/2004/06/02/index.htm>> accessed 18 December 2024.

⁷ Adeeba Aziz Khan 'The politics of constitutional amendments in Bangladesh: The case of the non-political caretaker government' (2015) 9 *International Review of Law* <<https://pdfs.semanticscholar.org/a00f/743096214f991d5656d26c39ca09e31364ea.pdf>> accessed 18 December 2024.

manipulation⁸. In 2024, widespread protests—initially sparked by demands for reform of civil service quotas—culminated in the fall of the authoritarian Awami League (AL) government⁹.

2. The Recent Reform Initiatives

The interim government formed in 2024, under the leadership of Nobel Laureate Professor Muhammad Yunus—a figure widely regarded as a development icon and favoured by Western powers—generated significant public expectations. It was perceived as an opportunity for systemic realignment, the establishment of safeguards against authoritarianism, and a decisive break from entrenched political practices. Endorsed by protest leaders, the administration initially constituted six reform commissions tasked with recommending institutional changes in the judiciary, bureaucracy, police, electoral system, anti-corruption mechanisms, and, most notably, the Constitution.¹⁰ Subsequently, four additional commissions were introduced to address health care, mass media, labour rights, and women’s rights.¹¹ Among these, the Constitutional Reform Commission attracted the greatest attention, symbolizing prospects for a new political beginning. Although early demands for a complete abrogation of the Constitution—advanced primarily by Jamaat-e-Islami, which opposed Bangladesh’s liberation war, and certain far-left groups—were prominent, these calls gradually weakened as the reform conversation progressed.¹² The leading centre-right party, the Bangladesh Nationalist Party (BNP), opposed wholesale constitutional replacement, partly due to concerns over potential delays in electoral timelines.¹³ Consequently, while the movement for a new constitution subsided, proposals for substantial constitutional reform remained strongly supported by BNP, Jamaat-e-Islami, and most anti-Awami League political actors.

The Constitutional Reform Commission initiated consultations with major political actors to build “consensus” on the reform agenda. However, these efforts were undermined by persistent disagreements and the absence of a shared constitutional vision among the actors. Despite these challenges, the Commission produced an extensive set of recommendations encompassing both constitutional amendments and administrative restructuring.¹⁴ Following its report, the interim government established a “National Consensus Commission”, which notably excluded—and formally banned—the Awami League, Bangladesh’s largest political

⁸ Antonio Spinelli, ‘Overcoming Bangladesh’s electoral integrity deficit: time for political compromise and dialogue’ Idea International (5 February 2024) <<https://www.idea.int/news/overcoming-bangladeshs-electoral-integrity-deficit-time-political-compromise-and-dialogue>> accessed 18 December 2024.

⁹ The Conversation, ‘Bangladesh’s civil service is plagued by corruption – the country can’t get back on its feet without major reform’ 10 September 2024 <<https://theconversation.com/bangladeshs-civil-service-is-plagued-by-corruption-the-country-cant-get-back-on-its-feet-without-major-reform-237732>> accessed 18 December 2024.

¹⁰ The Daily Prothom Alo, ‘6 reform commissions gazette awaiting notification’ 2 October 2024 <<https://en.prothomalo.com/bangladesh/y5wowab63f>> accessed 12 October 2025.

¹¹ Ali Asif Shawon, ‘Four new reform commissions announced’ Dhaka Tribune, (17 October 2024) <<https://www.dhakatribune.com/bangladesh/government-affairs/362244/four-new-reform-commissions-announced>> accessed 18 November 2025.

¹² M Jashim Ali Chowdhury, ‘The Agenda and Dilemmas of Constitutional Reform in Bangladesh’, ConstitutionNet, International IDEA, 18 November 2024, <<https://constitutionnet.org/news/voices/agenda-and-dilemmas-constitutional-reform-bangladesh>> accessed 10 July 2025.

¹³ Shafi Md Mostofa, ‘From Revolution to Reform: The BNP’s Uphill Battle in a New Bangladesh’, The Diplomat, 10 April 2025 <<https://thediplomat.com/2025/04/from-revolution-to-reform-the-bnps-uphill-battle-in-a-new-bangladesh/>> accessed 14 August 2025.

¹⁴ Muhammad Ekramul Haque and Sumit Bisarya, ‘July Charter and Constitutional Reforms in Bangladesh’, ConstitutionNet, International IDEA, 1 December 2025, <<https://constitutionnet.org/news/voices/july-charter-and-constitutional-reforms-bangladesh>> accessed 1 December 2025.

party representing approximately 40 percent of the electorate, along with its allied groups on the left and moderate right. This exclusionary approach raised concerns regarding the legitimacy and inclusiveness of the reform and consensus building process.¹⁵ Critics argue that the commissions operated with evident bias and favouritism, reflecting a top-down agenda rather than a participatory, bottom-up model typically expected of any democratic reform initiatives.¹⁶ Allegations of partiality intensified as rival parties, including Jamaat-e-Islami and the Bangladesh Nationalist Party (BNP), accused the interim leadership of favouring the student-led National Citizens Party (NCP), a key actor of the protest movement that facilitated the government's rise to power. Further controversy emerged when Jamaat-e-Islami advocated for proportional representation—a proposal widely perceived as advantageous to its interests over those of the BNP. Overall, the exclusion of the Awami League without broad political consultation and the perceived co-optation of reform processes underscore the fragility of the interim government's so-called “consensus-building”.

Concerns about the integrity of the reform process were further heightened by demands from student representatives to elevate the “July Charter”—a government-issued document—above the Constitution, proclaim it under the government's asserted revolutionary authority, and subsequently constitutionalize it through a national referendum. It became a major point of contention. The claim of constitutional supremacy for the “July Charter” was strongly disputed by legal and political actors.¹⁷ Subsequently, the “July Charter Implementation Ordinance”, issued by the President under the claimed authority of the “July Revolution” rather than constitutional mandate, required its incorporation into the constitutional framework through a national referendum. It further directed Parliament to reconstitute itself as a constitutional reform assembly and, failing that, provided for the Charter's automatic inclusion in the constitutional text—a provision widely criticized as impractical and procedurally flawed.¹⁸ After its promulgation, the Bangladesh Nationalist Party (BNP)—a principal stakeholder in the interim administration—accused the government of fraud and breach of trust, framing the move as a betrayal of the “July Revolution”¹⁹.

¹⁵ Arafat Hosen Khan, ‘Bangladesh's Constitutional Reforms: Caught Between Democratic Hopes and Authoritarian Resilience’, ConstitutionNet, International IDEA, 16 May 2025, <<https://constitutionnet.org/news/voices/bangladeshs-constitutional-reforms-caught-between-democratic-hopes-and-authoritarian>> accessed on 22 July 2025.

¹⁶ Kawser Ahmed, ‘Bangladesh's Apolitical Constitution-making Initiative: Silver Lining or Slippery Slope?’ I•CONNECT Blog, 20 April 2025 <<https://www.iconnectblog.com/bangladeshs-apolitical-constitution-making-initiative-silver-lining-or-slippery-slope/>> accessed 25 November 2025.

¹⁷ Ridwanul Hoque (Interview), “July Charter cannot be placed above the Constitution”, Daily Prothom Alo, 21 September 2025 <<http://en.prothomalo.com/opinion/interview/3d09w3we01>>; Sangita Gazi, ‘Can the July Charter override the constitution?’ The Daily Star, 21 September 2025 <<https://www.thedailystar.net/opinion/views/news/can-the-july-charter-override-the-constitution-3990396>>; Ahmed, Mustak, ‘The July 2025 Interim Ruler's Charter under the 1972 Constitution of Bangladesh: A Legal Analysis of Treason and Constitutional Violation’ SSRN 22 October 2025 <<http://dx.doi.org/10.2139/ssrn.5640410>>; The Business Standard, ‘Can the July Charter take precedence over the Constitution?’ 18 August 2025 <<https://www.tbsnews.net/features/panorama/can-july-charter-take-precedence-over-constitution-1214476>> all accessed 21 November 2025.

¹⁸ Kallol Mustafa, ‘How the consensus commission jeopardises the July charter’ The Daily Star, 31 October 2025 <<https://www.thedailystar.net/opinion/views/news/how-the-consensus-commission-jeopardises-the-july-charter-4023156>>; Moinul Hoque Chowdhury and Masum Billah, ‘Legal and political storm brews over July Charter: who has the power to issue order, and under what law?’ Bdnews24.com, Dhaka 1 November 2025 <<https://bdnews24.com/bangladesh/2c5f3ffd2895>>; Political consensus eludes Bangladesh, The Kathmandu Post, Smruti S Pattanaik, 6 November 2025 <<https://kathmandupost.com/columns/2025/11/06/political-consensus-eludes-bangladesh>> all accessed on 17 November 2025.

¹⁹ The Daily Sun, ‘BNP won't bear liability for unsigned parts of July National Charter: Fakhru’ Dhaka 1 November 2025 <<https://www.daily-sun.com/printversion/details/837235>> accessed 22 November 2025.

Beyond procedural flaws, serious doubts have emerged regarding the interim government's commitment to its professed reform agenda. While it claims to seek a sustainable constitutional framework to prevent authoritarianism, its actions suggest continuity with or even more regressive than the previous regime's authoritarian practices. Pending recommendations from reform commissions on the judiciary, electoral system, anti-corruption mechanisms, and public administration, the government has compelled the entire Appellate Division to resign²⁰, placed a substantial number of Supreme Court judges on forced leave²¹, appointed²², elevated²³ or removed²⁴ a substantial other on purely political considerations. One judge was impeached solely for a judicial opinion on quota litigation.²⁵ Additionally, the government appointed a highly politicized Election Commission²⁶ through a search committee established under a condemned AL-era law²⁷, and reconstituted the Public Service²⁸ and Anti-Corruption Commissions²⁹ with its own nominees. The revised Human Rights Commission law has been criticized for enhancing governmental control rather than independence.³⁰ Transparency International Bangladesh (TIB) condemned the government for disregarding key recommendations of its own Anti-Corruption Commission (ACC) Reform Commission to establish "Selection and Review Commission" for the ACC which aimed at ensuring political neutrality and accountability in the ACC's activities. TIB chair Mr Iftekharuzzaman, who was also a member of the government's National Consensus Commission labelled the government's approach "anti-reform and self-contradictory."³¹

²⁰ The Pioneer, 'Bangladesh Chief Justice forced to resign' 11 August 2024 <<https://www.dailypioneer.com/2024/page1/bangladesh-chief-justice-forced-to-resign.html>> accessed 19 November 2025.

²¹ TBS Report, 'CJ sends 12 judges appointed under AL govt on leave amid protests' The Business Standard (16 October 2024) <<https://www.tbsnews.net/bangladesh/chief-justice-extends-tea-invitation-12-judges-appointed-during-al-govt-968211>> accessed 22 November 2025.

²² RTV News, '23 New Judges Appointed to the High Court Division' 9 October 2024 <<https://www.rtvonline.com/english/bangladesh/17031>> accessed 22 November 2025.

²³ The Business Standard, '22 additional judges appointed as permanent High Court judges' Dhaka, 11 November 2025 <<https://www.tbsnews.net/bangladesh/court/22-additional-judges-appointed-permanent-high-court-judges-1283296>> accessed 01 December 2025.

²⁴ BdNews24.com, 'Justice Khizir Hayat dismissed from High Court Division' (Dhaka: 20 March 2025) <<https://bdnews24.com/bangladesh/2e5f4e4cddcf>> accessed on 22 November 2025; BdNews24, 'Justice Khurshid Alam Sarkar dismissed from High Court Division' 5 November 2025 <<https://bdnews24.com/bangladesh/ea9135684c89>> accessed 1 December 2025.

²⁵ SM Masum Billah, 'Justice: Sunset or dawn?', Bdnews24.com, 30 May 2025 <<https://bdnews24.com/opinion/8d0204fa4937>> accessed 21 November 2025.

²⁶ Mohiuddin Alamgir, 'Who are the EC search committee members? Let's find out' The Daily Star (31 October 2024) <<https://www.thedailystar.net/news/bangladesh/elections/news/who-are-the-ec-search-committee-members-lets-find-out-3741731>> accessed 18 December 2024.

²⁷ Mohiuddin Alamgir, 'Who are the EC search committee members? Let's find out' The Daily Star (31 October 2024) <<https://www.thedailystar.net/news/bangladesh/elections/news/who-are-the-ec-search-committee-members-lets-find-out-3741731>> accessed 18 December 2024.

²⁸ TBS Report, 'PSC Chairman and 12 members resign' The Business Standard (08 October 2024) <<https://www.tbsnews.net/bangladesh/public-service-commission-chairman-resigns-961716>> accessed 18 December 2024.

²⁹ Dipan Nandi and Md Abbas, 'ACC chairman, 2 commissioners quit their jobs' The Daily Star (30 October 2024) <<https://www.thedailystar.net/news/bangladesh/news/acc-chairman-2-commissioners-quit-their-jobs-3739556>> accessed 18 December 2024.

³⁰ Md Abdul Halim, 'Why the proposed NHRC amendment risks ineffectiveness' The Daily Star, Dhaka 30 October 2025 <<https://www.thedailystar.net/opinion/views/news/why-the-proposed-nhrc-amendment-risks-ineffectiveness-4022331>> accessed 11 November 2025.

³¹ The Business Standard, 'TIB slams govt for dropping key ACC oversight proposal in final ordinance.' Dhaka, 29 November 2025 <<https://www.tbsnews.net/bangladesh/tib-slams-govt-dropping-key-acc-oversight-proposal-final-ordinance-1297231>> accessed 30 November 2025.

Although the Supreme Court initially reinstated the Thirteenth Amendment, which provides for a non-partisan caretaker government and which was scrapped by Awami League in 2011, the interim government appealed the decision. The Appellate Division ultimately ruled that the caretaker system would apply only to the fourteenth parliamentary election, meaning that the thirteenth parliamentary election to be conducted under the interim government will not be under a neutral caretaker government, exclude the Awami League and its allies – nearly fifty percent of the electorate. This outcome has created further uncertainty regarding how future caretaker arrangements will be structured, particularly given the ongoing controversy surrounding constitutional reform processes suggested by the National Consensus Commission under the July Charter.

In the domain of human rights and fundamental freedoms, the interim government—now eighteen months in office—has presided over a marked deterioration in governance. Reports indicate a surge in Islamic radicalism, minority repression, and intolerance to cultural and democratic pluralism.³² This instability has been compounded by widespread mob violence, arson, and looting of factories and businesses of the “sympathizers of the previous regime”, alongside extrajudicial reprisals against political opponents and dissenting voices.³³ Sectarian violence and targeted attacks on marginalized religious groups³⁴ have also intensified. Repealing the previous government’s controversial Cyber Security Act in August 2024, the government introduced its own Cyber Safety Ordinance 2025, which has drawn criticism for retaining repressive provisions, including warrantless arrests.³⁵ In addition, amendments to the Anti-Terrorism Act have extended its extraterritorial reach³⁶, granting the state authority to prohibit and prosecute any form of publication, media campaign, or assembly—both domestic and international—under Sections 9 and 18(1). These provisions effectively criminalize expressions of political support for opposition groups.³⁷ The government’s decision to revoke accreditation for approximately sixty journalists³⁸ has further provoked condemnation from international press freedom organizations, underscoring growing concerns over democratic backsliding and rights violations.

The independence of the lower judiciary in Bangladesh remains deeply compromised by entrenched political patronage. Successive governments have routinely politicized judicial appointments, using state agencies—including the judiciary—as instruments for consolidating

³² Iftekharul Bashar, ‘Bangladesh’s Evolving Security Crisis: The Rise of Religious Extremism Amid Political Transition’ (2025) 17(4) Counter Terrorist Trends and Analyses 23–28.

³³ Dr. Milton Hasnat, *Bangladesh in Collapse: Lawlessness, Fear, and the Failure of Muhammad Yunus*’ Global Center for Democratic Governance, August 2025 <<https://globalcdg.org/bangladesh-in-collapse-lawlessness-fear-and-the-failure-of-muhammad-yunus/>> accessed 26 October 2025.

³⁴ Dhaka Tribune, ‘4 dead, scores injured as Ijtema grounds clash turns violent’ 18 December 2024 <<https://www.dhakatribune.com/bangladesh/nation/368528/4-dead-scores-injured-as-ijtema-grounds-clash>> accessed 18 December 2024.

³⁵ Daily Prothom Alo, ‘Govt issues gazette of Cyber Security Ordinance’ Dhaka: 22 May 2025, 09: 22 <<https://en.prothomalo.com/bangladesh/government/5gj5obvmuw> > accessed 20 October 2025; Bdnews24.com, ‘Bangladesh scraps controversial Cyber Security Act, introduces new AI-focused Cyber Safety Ordinance’ Dhaka: 22 May 2025 <<https://bdnews24.com/bangladesh/a275a547a07a>> accessed on 20 October 2025.

³⁶ The Daily Star, Law and Our Rights, ‘Reflecting on the Anti-Terrorism Act 2009’ 3 December 2019 <<http://thedailystar.net/law-our-rights/news/reflecting-the-anti-terrorism-act-2009-1835092>> accessed 16 October 2025.

³⁷ The Anti-Terrorism Act 2009 (Bangladesh) <https://www.satp.org/satporgtp/countries/bangladesh/document/papers/AntiTerrorism_Act2009.pdf> accessed 16 October 2025 (Please see Section 9 at the page number 5).

³⁸ CPJ, ‘CPJ Raises Concerns Over Bangladesh’s Revocation of Journalists’ Press Accreditation’ 7 November 2024 <<https://www.newsonair.gov.in/cpj-raises-concerns-over-bangladeshs-revocation-of-journalists-press-accreditation/>> accessed 18 December 2024.

power. Reports indicate that, despite the absence of credible evidence from law enforcement, individuals detained by the interim administration have been systematically denied bail and remanded for interrogation by courts at all levels, including magistrates, district courts, and the High Court Division.³⁹ This pattern of mechanical adjudication has disproportionately targeted Awami League supporters⁴⁰, lawyers⁴¹, academics⁴², journalists⁴³, civil society actors⁴⁴, and even former senior public officials such as the former Chief Election Commissioners⁴⁵, judges of the Appellate Division⁴⁶ and the former Chief Justice of Bangladesh⁴⁷. In an open letter to the current Chief Justice, a senior advocate described the arrest of a former Chief Justice as “a blot on the judicial culture of the country,” signalling a profound erosion of judicial independence.⁴⁸

The most notable instance of legal abuse has been the trial of Sheikh Hasina before the International Crimes Tribunal, culminating in a death sentence rendered without legal representation. While calls for accountability regarding the July–August 2024 protest killings may be justified, the Tribunal’s composition—dominated by individuals linked to Jamaat-e-Islami and other political adversaries of Hasina⁴⁹—raises serious concerns of partisan bias. The retributive approach in Hasina and other trials has been termed as a “political retribution

³⁹ Bdnews24.com, ‘Why are journalists being harassed with murder charges? Farzana Rupa asks court’ 17 February 2025 <<https://bdnews24.com/bangladesh/1d2c75ac7052>> accessed 21 November 2025.

⁴⁰ Bangladesh Snagbad Sangstha 13 May 2025 9 AL men including ex-MP Momtaz arrested in city <<https://www.bssnews.net/others/272456>> accessed 22 November 2025.

⁴¹ Bdnews24.com, ‘A smiling Tureen Afroz shown arrested in murder case, 18 June 2025 <<https://bdnews24.com/bangladesh/4639043c14d3>> accessed 21 November 2025.

⁴² The Shillong Times, ‘Bangladesh: Teachers declared ‘unwanted’ for supporting Awami League, barred from taking classes’ 19 March 2025 <<https://theshillongtimes.com/2025/03/19/bangladesh-teachers-declared-unwanted-for-supporting-awami-league-barred-from-taking-classes/>> accessed 7 November 2025; The daily Observer, ‘Sher-e-Bangla Agricultural Univ suspends 12 AL teachers’ Dhaka 19 February 2025 <<https://www.observerbd.com/news/512932>> accessed 7 November 2025. Bddigest.com, ‘HRFB Expresses Deep Concern Over Imprisonment of Freedom Fighter Professor Anwara’ 2 June 2025 <<https://en.bddigest.com/hrfb-expresses-deep-concern-over-imprisonment-of-freedom-fighter-professor-anwara/>> accessed 7 November 2025. The Daily Star, ‘Accusations unacceptable’, Dhaka, 18 August 2025 <<https://www.thedailystar.net/news/bangladesh/rights/news/accusations-unacceptable-3964801>> accessed 7 November 2025

⁴³ The Daily Prothom Alo, ‘Mass filing of lawsuits against journalists contrary to independent journalism: Mahfuz Anam’ 5 May 2025 <<https://en.prothomalo.com/bangladesh/i4br6o8a2d>> accessed 6 November 2025.

⁴⁴ The Daily Star, ‘Ex-secy Abu Alam Shahid Khan arrested’ 9 September 2025 <<https://www.thedailystar.net/news/bangladesh/crime-justice/news/ex-secy-abu-alam-shahid-khan-arrested-3980846>> accessed 7 November 2025. The Daily Observer, ‘Nusraat Faria denied bail, sent to jail; Home adviser defends arrest, cultural adviser terms ‘embarrassing’, 20 May 2025 <<https://www.observerbd.com/news/526307>> accessed 22 November 2025

⁴⁵ The Daily Observer, ‘Ex-CEC Nurul Huda remanded for four days’ 24 June 2025 <<https://www.observerbd.com/news/530989>> accessed 19 November 2025. Dean Herald, ‘Bangladesh’s former election chief Habibul Awal arrested’ 25 June 2025 <<https://www.deccanherald.com/world/bangladeshs-former-election-chief-habibul-awal-arrested-3602403>> accessed 19 November 2025. The Daily Prothom Alo, ‘Former CEC Habibul Awal placed on 3-day remand’ 26 June 2025 <<https://en.prothomalo.com/bangladesh/h5b0ycg9mv>> accessed 19 November 2025

⁴⁶ Serajul Islam, ‘Former justice Manik admitted to ICU in critical condition, He was assaulted at Sylhet court’ (Dhaka Tribune, 25 August 2024) <<https://www.dhakatribune.com/bangladesh/355994/former-justice-manik-admitted-to-icu-in-critical>> accessed 15 December 2024.

⁴⁷ The Business Standard, Dhaka ‘Ex-chief justice Khairul Haque denied bail in murder case’ 31 July 2025 <<https://www.tbsnews.net/bangladesh/ex-chief-justice-khairul-haque-denied-bail-murder-case-1201266>> accessed on 19 November 2025.

⁴⁸ The Business Standard, Dhaka, ‘ZI Panna condemns ex-CJ Khairul’s arrest in open letter to CJ Syed Reefat’ 4 August 2025 <<https://www.tbsnews.net/bangladesh/zi-panna-condemns-ex-cj-khairuls-arrest-open-letter-cj-syed-reefat-1204326>> accessed 22 November 2025.

⁴⁹ Kallol Bhattacharjee, ‘Justice vs judgment’ The Hindu, 16 November 2025 <<https://www.thehindu.com/news/national/justice-vs-judgment-on-international-crimes-tribunal/article70285036.ece>> accessed 22 November 2025.

disguised as criminal justice”⁵⁰, a view echoed by Human Rights Watch, which expressed “grave human rights concerns”⁵¹. Notably, while the interim government has pursued prosecutions against former Awami League officials, it has exempted perpetrators of violence during the post-regime upheaval—including the killing of police officers and widespread arson—justifying these acts as expressions of “public anger” and “self-defence”⁵². Such selective accountability underscores the politicization of transitional justice mechanisms and the growing evidence that the interim government is leveraging judicial processes to advance political objectives.⁵³

Although Professor Yunus’s interim government initially inspired widespread confidence as a vehicle for democratic reform, its failure has revived bitter memories of Bangladesh’s previous aborted democratic transitions and constitutional moments.⁵⁴ Developments under the interim administration raise fundamental questions about its professed commitment to democratic consolidation, the rule of law, and inclusive governance. The interim government’s July Charter, its implementation order and the subsequent referendum on it (12 February 2026) – all remained deeply controversial and questionable. The scale of controversy is such that the newly elected government on 12 February 2026 election refused to take oath as a Constitution Reform Council, as required by the interim government’s July Charter implementation order and the whole reform process got stuck in limbo.⁵⁵

These dynamics underscore the urgent need for sustained civic engagement and rigorous scholarly inquiry into the roots, persistence, and consequences of Bangladesh’s democratic crisis, as well as potential pathways for reform.

3. Scope of the Conference and Selected Papers

This two-day hybrid Conference proposes to investigate the problems and prospects of democracy and state-building in Bangladesh after the fall of the country’s long-time ruler Sheikh Hasina on 5 August 2024. The Conference speaks directly to one of the UKRI’s International Science Partnership Fund (ISPF) and its designated Overseas Development Assistance (ODA) objectives - the promotion of “sustainable development meaning lasting benefit for the people” in developing countries. Bangladesh is a leading beneficiary of the UK Government’s robust ODA activities involving financial, logistic, human capital development and democracy-building support. Bangladesh’s transition from one-party authoritarianism towards an inclusive, equal, and sustainable democratic system is of direct interest to the British government and the people.

⁵⁰ David Bbergman, ‘Justice v Justice,’ JusticeInfo.Net 22 April 2025 <<https://www.justiceinfo.net/en/144479-bangladesh-justice-vs-justice.html>> accessed 22 November 2025.

⁵¹ The Human Rights Watch, ‘Bangladesh: Hasina Found Guilty of Crimes Against Humanity Fair Trial Concerns Over Proceedings in Absentia, Death Penalty’, 21 November 2025 <<https://www.hrw.org/news/2025/11/17/bangladesh-hasina-found-guilty-of-crimes-against-humanity>> accessed 21 November 2025.

⁵² RFI, ‘Bangladesh immunity order sparks fear of justice denied’ 10 October 2024 <<https://www.rfi.fr/en/international-news/20241028-bangladesh-immunity-order-sparks-fears-of-justice-denied>> accessed 22 June 2025.

⁵³ Tasmiah Ahmed, ‘Bangladesh: Are human rights eroding under Muhammad Yunus?’ *Deutsche Welle* 30 December 2024 <<https://www.dw.com/en/bangladesh-are-human-rights-eroding-under-muhammad-yunus/a-71185927>> accessed 22 November 2025.

⁵⁴ M Jashim Ali Chowdury, ‘Fifty Years of Bangladesh Parliament: A Critical Evaluation (Brill Nijhoff 2025) 200-230.

⁵⁵ BDNews24.com, ‘BNP’s refusal to take Reform Council oath casts uncertainty over July Charter’, Dhaka, 23 February 2026 <<https://bdnews24.com/bangladesh/a976377822be>> accessed 25 Feb. 26.

Apart from raising awareness of Bangladesh's reform agenda and future direction among the Bangladeshi diaspora, the University of Hull Conference titled, '*Democracy and State Building in Bangladesh after the Breakdown of One-Party Dominance*', held on 26–27 March 2025 aimed at facilitating the British policymakers and think tanks better understanding the prospects and pitfalls of the UK Government's ODA policies and programs regarding Bangladesh. The conference was organised in eight plenary and parallel sessions considering papers, presentations, and discussion around the trajectories, prospects, and problems of the country's ongoing efforts on Constitutional Reform, Reform of the Oversight Bodies, Political Party Reform, Rule of Law and Human Rights, Gender Equality, Minority Rights and National Security. It engaged extensively with the Bangladeshi diaspora in the UK, Canada, Australia, USA, France, Bangladesh and around the world. The following three papers of this volume are selected from those presented in the Conference. The papers were further reviewed after the Conference, and the authors were invited to revise the papers as per the comments. We hope these papers will mark thought provoking contributions to Bangladesh's ongoing reform processes.

Assessing the Effectiveness of the National Human Rights Commission of Bangladesh: Compliance with the Paris Principles

Md Abdul Halim*

Abstract

This paper examines the extent to which the National Human Rights Commission of Bangladesh (NHRC) complies with the Paris Principles in relation to capacity-building as part of its statutory mandate under the National Human Rights Commission Act 2009 (NHRC Act). It analyses the institutional role of the NHRC as a national human rights institution (NHRI) within the framework of the Paris Principles and the Global Alliance of National Human Rights Institutions (GANHRI). Focusing on selected quasi-judicial decisions concerning human rights violation (HRV) complaints, the paper evaluates the NHRC's institutional and individual capacity in complaint disposal processes. It argues that the NHRC has yet to develop a sufficient understanding of the quasi-judicial functions required for effective HRV complaint handling, thereby limiting its compliance with the Paris Principles and GANHRI accreditation standards.

Key Words

NHRIs, Paris Principles, Human Rights, Human Rights Violations, Human Rights Protection.

1. Introduction

National human rights institutions (NHRIs) have become a salient feature of both national and global human rights architecture.¹ They are generally defined as state organs with constitutional or legislative mandates to protect and promote human rights.² Often described as institutions playing essential bridging role between international and national human rights protection systems,³ NHRIs and their functions in human rights protection have received significant attention from UN bodies. Consequently, the Paris Principles 1993, adopted by

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¹ Luka Glusac, Universal Periodic Review and Policy Change: The Case of National Human Rights Institutions, *Journal of Human Rights Practice* (2022) 285-304.

² Global Alliance of National Human Rights Institutions (GANHRI), 'National Human Rights Institutions' <https://ganhri.org/> (accessed 25th January 2025). Many constitutional experts term these NHRIs as institutions of 'fourth branch' institutions, integrity institutions or guarantor institutions. See for example, Ackerman, B. the New Separation of Powers. *Harvard Law Review* (2000) 113(3), 633-729; Khaitan, T., Guarantor Institutions. *Asian Journal of Comparative Law* 16(S1), S40-S59; Rosalind D. & Mark T., Democratic Constitutions, Poverty and Economic Inequality: Redress through the Fourth Branch Institutions? *Australian National University Federal Law Review* 2023, 51(3) 285-295.

³ Richard Carver, A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law, (2010) 10 *HRLRev* 1, 2. See also, Sonia Cardenas, National Human Rights Institutions and State Compliance, in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge 2012), Part-1, Chapter 2.

the UN General Assembly,⁴ have emerged as primary foundation and reference point for the establishment, regulation and assessment of NHRI mandates, activities and performances.⁵ The Bangladesh NHRC is one such institution, established in 2010 with an active support from the UN.⁶ However, twice, once in 2011 and again in 2015, the NHRC has been assessed by GANHRI evaluating its compliance with the Paris Principles.⁷ On both occasions, the NHRC was denied ‘A’ status, meaning it was not fully compliant with the Paris Principles. In contrast, NHRIs of neighbouring countries, such as, Nepal, India, Thailand and Malaysia have been given ‘A’ status.⁸ This disparity has led the NHRC to allege that it was discriminated against in the GANHRI accreditation process.⁹ Although there is no dearth of international literature examining the performance of NHRIs globally, the available literature in Bangladesh has largely failed to engage critically with the performance of the NHRC. Against this background, this paper examines selected quasi-judicial decisions of the NHRC concerning human rights violations (HRVs). It argues that these decisions reveal an unprincipled and inadequately uninstitutionalised capacity and expertise within the NHRC. This paper further contends that, in order to be compliant with the Paris Principles and meet GANHRI accreditation standards, and to function effectively as the ‘fourth branch’ institution¹⁰ of the state, the NHRC requires both *de jure* and *de facto* institutionalism in its complaint disposal processes.

2. What is a National Human Rights Institution?

The UN defines an NHRI as ‘a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of

⁴ In 1991, an UN-sponsored meeting of representatives of NHRIs was held in Paris. This meeting developed a detailed set of principles on the status of NHRIs, popularly known as the Paris Principles. These principles, subsequently endorsed by the UN Commission on Human Rights (UNCHR) and the UN General Assembly have become the foundation and reference point for the establishment and operation of NHRIs around the globe (General Assembly Resolution 48/134 of 20 December 1993, A/RES/48/134/ dated 4 March 1994) (hereinafter referred to as the Paris Principles).

⁵ As of April 2023, there are 129 states which have NHRIs and 89 of them have ‘A’ status whilst 40 have ‘B’ status. For detail, see GANHRI Status List of NHRIs. According to this ‘Status Chart of National Institutions’ dated 13 July 2022 of the GANHRI and OHCHR, there is a list of 129 NHRIs. Among these 129 NHRIs 89 are accredited with A status. Among these 89 institutions, 49 exist in the form or model of ‘Commissions’, 12 exist in the form of ‘Defensor’ (also Defensor, Defensor etc), 10 exist in the form of ‘Ombudsman’, 9 exist in the form of ‘Institute’, 1 as ‘Centre’, 1 as ‘Committee’, 3 as ‘Counsel’ (or Counsel, Council), 2 as ‘Protector’, 2 as ‘Peoples’ Advocate’ and 1 as ‘Chancellor’ (assembled by the researcher). https://ganhri.org/wp-content/uploads/2022/11/StatusAccreditationChartNHRIs_29-Nov-2022.pdf (accessed 20 January 2024).

⁶ See, Establishment of the National Human Rights Commission in Bangladesh <http://www.nhrc.org.bd/site/page/1c65dfa1-f9c2-48e9-a66b-eab8de75d9b1/-> (accessed 23 July 2023). NHRC is not the first of its kind among the South Asian countries. Indian NHRC was the first in formation of such commission in 1993. The Human Rights Commission of Sri Lanka was established under the Human Rights Commission of Sri Lanka Act, No. 21(1996) and became operational in September 1997. The National Human Rights Commission (NHRC) of Nepal is an independent and autonomous statutory body established in the year 2000 under the Human Rights Commission Act 1997.

⁷ See, GANHRI Accreditation Chart November 2022 (n 5). For Bangladesh status, see B status item 2 in ‘Asia and the Pacific part’; Also see, NHRC Annual Report 2012, p. 9; NHRC Annual Report 2013, p. 12; NHRC Annual Report 2014, p. 5; NHRC Annual Report 2015 pp. ix, 41; NHRC Annual Report 2019 p. 8; NHRC Annual Report 2020, p. 58; Also, ASK 2020 (Ain O Shalish Kendra), *A Decade of National Human Rights Commission of Bangladesh: Efficacy, Existing Challenges and Opportunities* (Dhaka 2020); Also, SCA Accreditation Report, May 2011; Also, SCA Accreditation Report, May 2015 https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf (accessed 14 February 2022).

⁸ See, GANHRI Status chart for NHRIs (n 5). For the status of India, Indonesia, and Malaysia, see A status list ‘Asia and Pacific’ part; for Nepal see item 8, and for Thailand, see item 15.

⁹ NHRC Annual Report 2019, p. 8; NHRC Annual Report 2020, p. 58; NHRC Annual Report 2021, p. 104.

¹⁰ On ‘fourth branch institutions, see Ackerman, Rosalind & Mark (n 2).

the promotion and protection of human rights.¹¹ According to the GANHRI statute, NHRI is also defined as an independent national institution established by a Member or Observer State of the UN with a constitutional or legislative mandate to promote and protect human rights, and which is, or intends to be, accredited by GANHRI in line with the Paris Principles.¹² They are established by the state but operate independently from the government.¹³ Although there is no uniform definition of NHRIs,¹⁴ they are defined by different scholars from different perspectives. However, NHRIs can be characterised by the following five common features: (i) statutory autonomous and independent bodies created by a ‘constitutional or legislative text’;¹⁵ (ii) mandate to protect and promote human rights;¹⁶ (iii) bridging the gap between national and international human rights system;¹⁷ (iv) recommendatory powers and process as opposed to enforcing powers and processes like courts;¹⁸ and (v) quasi-judicial powers as opposed to judicial powers by Commonwealth-type NHRIs.¹⁹

¹¹ OHCHR (2010), *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (Geneva, 2010, Professional Training Series No. 4), para 39 (Hereinafter, UN NHRI Training series- 4).

¹² GANHRI Statute, Article 1 (UN Commission on Human Rights resolution 2005/74, dated 20 April 2005; the United Nations Human Rights Council resolution 5/1 dated 18 June 2007), available at https://ganhri.org/wp-content/uploads/2023/04/GANHRI-Statute-adopted-March2023_EN.pdf (accessed 12 January 2024).

¹³ GANHRI, *A Practical Guide to the Work of the Sub-Committee on Accreditation*, (Online edn, 2023) p. 10; Also, Lyer, K. R., National Human Rights Institutions in Oberleitner G and Hoadley S. (eds) *Human Rights Institutions, Tribunals and Courts- Legacy and Promise* (Springer Major Reference Works series 2019).

¹⁴ UN NHRI Professional Training Series No. 4 (n 11), para 36.

¹⁵ Paris Principles: Competence and Responsibilities, Article 2; ICC, General Observations (GOs) 1.1; Also, UN NHRI Training Series-4 (n 11) pp. 13-14; Also, United Nations (1990), *National Institutions for the Promotion and Protection of Human Rights*, C.H.R. Res. 1990/73, 3 UN Doc. E/CN.4/RES/1990/73 (1990); United Nations (2011), *National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary General* (2011), (A/HRC/16/76 dated 7 February 2011; OHCHR (2005), *Economic, Social and Cultural Rights, Handbook for National Human Rights Institutions* (Professional Training Series No. 12); OHCHR (2010), *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (Geneva, 2010, Professional Training Series No. 4); See also, OHCHR Annual Report 2010, A/HRC/13/44 dated 15 January 2010. OHCHR (UN Office of the High Commissioner for Human Rights) has recognised them as the pillars of national human rights systems for the promotion and protection of human rights connected to the international human rights system. See also, OHCHR Annual Report 2012, A/HRC/20/10 dated 10 April 2012 (hereinafter referred to as ‘the UN Documents on NHRIs).

¹⁶ Paris Principles: Competence and Responsibilities, Article 1; ICC, GOs 1.2; See generally Burdekin and Naun, *National Human Rights Institutions in the Asia Pacific Region* (Boston: Martinus Nijhoff Publishers, 2007) at xiv, 555; Carver, *Performance and Legitimacy: National Human Rights Institutions* (Geneva: International Council on Human Rights Policy, 2000) at 132; De Beco G and Rachel Murray, *A Commentary on the Principles on National Human Rights Institutions* (Cambridge, Cambridge University Press 2015).

¹⁷ Paris Principles, Competence and Responsibilities, Article 3(d), (e); SCA, GOs 1.4, 1.5

¹⁸ UN NHRI Training Series No. 4 (n 11), pp. 15-18; Also see Carver (n 3).

¹⁹ Paris Principles: Additional principles concerning status of the Commissions with quasi-judicial competence; Also SCA, GOs 2.10; Also see, Carver (n 3); See, for example, section 16, NHRC Act, 2009 (Bangladesh); section 13(1), the Protection of Human Rights Act 1996 (India); section 18, Law on the Public Defender of Georgia 1996; section 14, Human Rights Commission of Malaysia Act 1999; section 21, Human Rights and Equal Opportunity Act 1986 (Australia); section 9(c), Human Rights Commission Act 1994 (South Africa). Also see, SCA, General Principles 2.10; L. Lindholt and F. Kerrigan, General Aspects of Quasi-judicial Competence of National Human Rights Institutions, in B. Lindsnaes, L. Lindholt and K. Ygen (eds), *National Human Rights Institutions. Articles and Working Papers* (Copenhagen: Danish Centre for Human Rights, 2000) 92-93; Also see, UNDP, OHCHR, APF, *Capacity Assessment for NHRIs* (UNDP, December 2012), p. 60.

3. GANHRI and NHRI Accreditation Process within the UN System

GANHRI is a global association of NHRIs.²⁰ NHRIs are reviewed by the Sub-Committee on Accreditation (SCA) of GANHRI.²¹ GANHRI also represents NHRIs within the UN system, and has achieved formal status within UN structures, although it is not directly a UN body.²² In other words, the OHCHR supports the work of the GANHRI SCA in its accrediting and monitoring NHRIs' compliance with the Paris Principles.²³ This SCA consists of four members, one from each of the GANHRI regions: Africa, the Americas, Asia Pacific and Europe. Each member must be an NHRI who is already accredited with 'A' status.²⁴ It should be noted that in the accreditation process, the OHCHR, a permanent observer, serves as the secretariat of the SCA or GANHRI.²⁵ This accreditation process assesses compliance with the Paris Principles from both a legal and practical perspective. It considers, inter alia, the concerned NHRI's enabling law, institutional capacity, independence, budget, and personal independence of the members and their willingness to address pressing human rights issues.²⁶

4. 'B' Status of the NHRC and its Performance under the Paris Principles

As indicated in section 1, the NHRC made its first application in 2011 before the ICC (now GANHRI) and the SCA met in Geneva from 23 to 27 May 2011 to consider the applications submitted from Bangladesh, Hungary, Sierra Leone and Sweden.²⁷ Bangladesh, Hungary, and Sweden received 'B' status while Sierra Leone was awarded 'A' status. When GANHRI considers the application for the status of a particular NHRI of a country, it follows its General Observations (GOs).²⁸ The SCA's accreditation decision consist of two components:

²⁰ See, GANHRI (Global Alliance for National Human Rights Institutions) <https://ganhri.org/> (accessed 10 January 2024); GANHRI was known formerly as ICC (International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights) which was established in 1993 in accordance with the Paris Principles. Initially, an informal grouping of NHRIs formed in Vienna. In 2008, the ICC was incorporated under Swiss law as an association. See, Linos, K. & Pegram, T., Architects of their own Making: National Human Rights Institutions and the United Nations, *Human Rights Quarterly*, 38(2016) 1109-1134; Also, Linos, K., & Pegram, T., What Works in Human Rights Institutions? *The American Journal of International Law* (2017), Vol. 111:3, PP. 628-688.

²¹ See, GANHRI (ibid).

²² National Institutions for the Promotion and Protection of Human Rights, C.H.R. Res. 2004/75, U.N. Doc. E/CN.4/RES/2004/75 (2004); Also see, UNGA Res 172 (18 December 2008) UN Doc A/Res/63/172, para 19.

²³ The ICC drafted in 1998 to establish an accreditation system and the SCA met for the first time in April 2000 at the Fifth ICC International Workshop in Rabat, Morocco.

²⁴ Rules of Procedure for the GANHRI Sub-Committee on Accreditation 2019, Section 3.1 (hereinafter SCA Rules of Procedure); Also, SCA Practice Note 3 on 'Assessing the Performance of NHRIs.' https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/EN_PracticeNote3_AssessingPerformance_adopted_06.03.2017.pdf (accessed 10 January 2024).

²⁵ Rosenblum in Goodman, R. & Pegram, T. (eds) *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2012), p. 318.

²⁶ SCA Rules of Procedure 2019 (n 24) Section 8.1; Also, SCA Practice Note 3 (n 24). For a critical discussion on this, see, Beco & Murray (n 16) 143-147; The SCA Rules of Procedure provide that each NHRI applying for either its first accreditation or re-accreditation must complete a 'Statement of Compliance with the Paris Principles' and additional supporting materials. Addition to the statement, the NHRI must submit (1) a copy of the legislation or other instrument by which it is established and empowered in its official or published format; (2) an outline of its organizational structure, including staff complement; (3) its annual budget; (4) a copy of its most recent annual report or equivalent document in its official or published format. See also, SCA Rules of Procedure (n 24) Section 6.1.

²⁷ ICC Sub-Committee on Accreditation Report, May 2011; Also see UN GA Documents, A/HR/20/10 (10 April 2012), https://ap.ohchr.org/documents/alldocs.aspx?doc_id=20000 (accessed 20 January 2024).

²⁸ ICC Sub-Committee on Accreditation Report, May 2011, < https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/SCA_REPORT_MAY_2011_-_FINAL_%28with_annexes%29.pdf> (accessed 14 February 2022).

the recommendations and concerns or observations.²⁹ In recommendations section of its 2011 report, the SCA placed particular emphasis that the Bangladesh NHRC needed to develop its institutional capacity by working in close cooperation with the UNDP.³⁰ However, it is argued that the NHRC and its Chairman were vocal in responding to the SCA's observations concerning the amendment to the NHRC Act, but they contributed little to the capacity building despite this being explicitly highlighted in the recommendation section. In 2015, the NHRC's application for accreditation was reviewed by the SCA for a second time and it was re-accredited with B status. In its recommendation section, the SCA once more emphasised the importance of strengthening the NHRC's institutional capacity.³¹ It is further argued that this 'institutional capacity', similar to that developed by the Indian NHRC, could have been strengthened sufficiently to secure 'A' status, notwithstanding concerns regarding legislative amendments. This is particularly significant given that the effectiveness of an NHRI depends more on its institutional capacity than its legal framework.³²

5. Capacity and Performance of NHRI under the Paris Principles

The concept of capacity can be of different types and dimensions.³³ For the purposes of this paper, two specific forms of capacities of the NHRC are examined here: institutional capacity and personal capacity, particularly that of the members and chairman of the NHRC, as an NHRI operating within the framework of the NHRC Act and the Paris Principles. In this paper, the terms 'capacity to identify human rights and their violations', 'capacity to protect human rights' and 'capacity to prevent HRVs' are used as umbrella concepts. They refer to the expressions found in the NHRC Act 2009, relevant treaties and conventions, case law, and other interpretative sources that take into account a State's (Bangladesh) obligation and consequent breach that influence what is capable of doing to protect human rights obligations in particular circumstances.³⁴ It has also been asserted and argued that 'capacity' of the NHRIs a fourth branch institutions refers to possessing high levels of relevant

²⁹ The SCA noted as follows: "*The SCA recommends the NHRCB be accredited B status. The SCA welcomes the recent establishment of the NHRCB. In particular, the SCA recognises the significant public advocacy undertaken by the new Chairperson [...] The SCA also welcomes the information that the NHRCB is working in cooperation with the UNDP to develop further the capacity of the Commission.*" (ibid).

³⁰ In the observation section, the SCA wrote about three things: (i) Composition of the selection committee, (ii) Secondment of the Secretary General, and (iii) Adequate Resources. (SCA Report n 28)).

³¹ ICC Sub-Committee on Accreditation Report, May 2015 https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/SCA_MARCH_2015_FINAL_REPORT_-_ENGLISH.pdf (accessed 14 February 2022). *The SCA acknowledges [...] and commends its ongoing efforts to promote and protect human rights in Bangladesh [...] the SCA also commends the NHRC's efforts to: (i) progressively build institutional capacity, including through the current process to develop its strategic plan; (ii) pursue amendments to the NHRC Act; (iv) establish a parliamentary committee on human rights; (v) engage regularly with the IHRS.*

³² Renshaw, Catherin, Byrnes, Nadrew and Durbach, Andrea. Human Rights Protection in the Pacific: The Emerging role of National Human Rights Institutions in the Region. 8(1) *New Zealand Journal of Public and International Law* (2010) 117-144; OHCHR (2010) (n 11) <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf> (last accessed 10 January 2022); Jensen, Steven L.B., *Lessons from Research on National Human Rights Institutions* (The Danish Institute for Human Rights, 2018), pp. 15-27.

³³ For a detail discussion on the NHRI capacities, see, Global Principles for the Capacity Assessment of NHRIs (OHCHR, UNDP, 2016), available at <https://ganhri.org/wp-content/uploads/2020/03/GANHRI-UNDP-OHCHR-Global-Principles-for-the-Capacity-Assessment-of-NHRIs.pdf> (accessed 23 January 2024).

³⁴ On the issues of relationship between crime and human rights violations, See, Nieke, v.d. H, *The Prevention of Gross Human Rights Violations under International Human Rights Law* (The Hague, Asser Press & Springer 2018) p.3; Also, F. Tulkens, The Paradoxical relationship between Criminal Law and Human Rights 9 *Journal of International Criminal Justice* (2011) 577; Also, M. Pinto, Awakening the Leviathan through Human Rights Law- How Human Rights Bodies trigger the Application of Criminal Law, *Utrecht Journal of International and European Law* 34(2) (2018) 161-184; Kent Roach, *Remedies for Human Rights Violations: A Two-track Approach to Supra-National and National Law* (Cambridge, Cambridge University Press 2021); See also, Kamber K, *Prosecuting Human Rights Offences: Rethinking the Sword Functions of Human Rights Law*, (Leiden, Brill 2017) 6-9.

knowledge, expertise, and skill in decision-making process and procedures.³⁵ It is also widely acknowledged that an NHRI may formally comply with the Paris Principles yet still lack genuine independence if its members do not possess independent capacity and thinking.³⁶ True independence is a personal quality, best described as independent thinking and decision making.³⁷ Some of the most effective NHRIs have not been in full compliance with the Paris Principles but because of their member's independent thinking and capacity, they proved to be strong protectors of human rights.³⁸ Researchers find that an NHRI can work effectively even in dictatorial regimes³⁹ and this is possible because of the institutional strengths and moral personality of the Chairman.⁴⁰ Researchers find further that although the founding law does not empower the Indian NHRC (INHRC) to investigate against the disciplined force, it was the institutional capacity of the Indian retired Chief Justice as the Chairman of the Commission which strengthened its internal capability.⁴¹ The Indian NHRC was awarded 'A' status by GANHRI since 1996 onwards despite the fact that its constituent law does not allow it to investigate HRVs allegations against LEAs⁴² and this has been possible because the Indian NHRC used its 'report-seeking' quasi-judicial process with progressive and purposive interpretation.⁴³ Some researchers find that while most NHRIs in the Asia-Pacific region have medium degree of *de jure* independence, they possess higher degree of *de facto* independence and capacity and these come from NHRI leadership and institutional ability to form constructive ties with governmental and CSO levels.⁴⁴

6. Institutional and Personal Capacity of the Members under the NHRC Act

It is a matter of record that the NHRC, as part of its institutional capacity, has failed to frame rules of procedure for the disposal of HRVs complaints even after more than a decade of its existence. This institutional failure persists despite the High Court Division issued three

³⁵ Elliot, B. Independent Regulatory and Oversight (Fourth Branch) Institutions (2019) IDEA. Available at <https://www.idea.int/publications/catalogue/independent-regulatory-and-oversight-fourth-branch-institutions> (Accessed 25 January 2025).

³⁶ APF: Fact Sheet-3: The Importance of Independence of NHRIs, p. 20, available at <https://www.asiapacificforum.net/members/what-are-nhris/independence/> (accessed 24 July 2022); See also, Asia Pacific Forum, *A Manual on National Human Rights Institutions* (APF, Sydney 2018) p. 37-40; See further, UNDP-OHCHR *Toolkit for Collaboration with National Human Rights Institutions* (Geneva and New York, 2010) (hereinafter UNDP-OHCHR Toolkit), pp. 247-250.

³⁷ Beko and Murray (n 16), pp. 82-90.

³⁸ APF Fact Sheet-3 (n 36), p. 20.

³⁹ Linos & Pegram (n 20). In their piece, Linos and Pegram find, for example, that in authoritarian regimes like Chile and Peru, NHRIs have been very effective in making the government accountable for HRVs; See also, Welch, R. M., National Human Rights Institutions: Domestic Implementation of International Human Rights Law, *Journal of Human Rights*, (2017), 16(1), 96-116.

⁴⁰ On this, also see, Murray (n 16), Gomez and Ramcharan, B. (eds). *The Protection Role of National Human Rights Institutions* (The Hague, Martinus Nijhoff Law Special Series, (2005) Vol. 62; also, Welch (n 39).

⁴¹ Dhavan, R. Strengthening Capabilities: Reflecting on the National Human Rights Commission's (NHRC) Fifth Report (1997-98), *Journal of Indian Law Institute*, 43(4), (2001), 469-499; Halim, Md. Abdul, *National Human Rights Commission of Bangladesh: Problems and Prospects* (Dhaka, CCBF, 2015).

⁴² More on the activism of the Indian NHRC, see, Dhavan (ibid), Halim (ibid).

⁴³ More on the 'report-seeking' process as a quasi-judicial process, see Halim (ibid), pp. 73-80, 105-114. In particular, see, interpretation given by the Indian NHRC, for example, *The Killing of two civilians by a BSF Jawan, District Ganganagar, Rajasthan*- Case No. 1060/20/2000-2001-PF & 1061/20/2000-2001-PF; Complaint No. 4499/4/3/2014, (Indian NHRC AR 2015-2016, pp. 59-62); Also see, 16-year old boy killed by Indian Army, Case No. 1438/7/15/2012 (Indian NHRC AR 2015-2016, p. 174); See also, Sexual harassment of a girl by a teacher, Case No. 1438/7/15/2012 (Indian NHRC AR 2015-2016, p. 174). In this complaint, the Indian NHRC recommended for a monetary compensation of Rs. 50,000 to be paid to the victim by the Chief Secretary of the Government; Also, a deaf and dumb girl sexually abused by her co-student at Deaf & Dumb school (Indian NHRC Case No.31/8/2001-2002, INHRC AR 2007-2008, P. 44).

⁴⁴ Lacatus, C. & Carraro, V. National Human Rights Institutions: Independent Actors in Global Human Rights governance, *International Affairs* 99(3) (2023), 1176-1189.

separate directions to the Commission over time.⁴⁵ As a result, the entire institutional *de jure* process of receiving, managing, processing, and disposing of complaints has remained largely ad hoc, reflecting a significant deficit in institutional capacity.

This paper further argues that the NHRC Chairmen and members generally lack sufficient capacity, knowledge and independent thinking on the concepts of ‘human rights’, ‘HRVs’, ‘human rights protection’ in the context of a crime, criminal law and criminal process.⁴⁶ Institutional capacity and independence are fundamental requirement for the effective functioning of a NHRI.⁴⁷ In this regard, independence under the NHRC Act operates at two levels: (i) institutional independence and (ii) personal independence. Section 3(2) of the Act regulates the Commission’s institutional independence and capacity.⁴⁸ Additionally, the Act provides that no suit, prosecution, or other legal proceedings shall lie against the Commission or its members for any report, act, or action performed in good faith in the discharge of their official duties.⁴⁹ This provision ensures the legal independence and capacity of the Chairman and members of the Commission and aligns with the general observations of the Sub-Committee on Accreditation (SCA).⁵⁰ In order to strengthen the Commission’s independence, the Act has secured the positions of its members by providing that ‘the Chairman or Members of the Commission shall not be removed from their office except in like manner and on the like grounds as a Judge of the Supreme Court.’⁵¹ The Commission consists of a Chairman, an FTM and six other honorary members who are selected by a selection committee.⁵² The Chairman and one FTM serve the Commission on a full-time basis, along with five other Honorary Members who provide their expertise and support to the Commission.⁵³ In its first Annual Report, the Commission stated that, as a statutory independent body, the NHRC stands in conformity with the Paris Principles,⁵⁴ and has acquired sufficient capacity, expertise and experience in its human rights protection programmes.⁵⁵ In 2021, the Commission informed the High Court Division in 2021 that the detailed rules of procedure under the NHRC Act either for investigation or inquiry remain in draft form.⁵⁶ Sections 16, 17, 18 and 19 read together with sections 12 and 2 confer quasi-judicial powers upon the NHRC to investigate and inquire into HRVs and to ‘seek reports’⁵⁷

⁴⁵ The first direction was issued in 2013 in *Md. Mozammel Hoque v NHRC and Others* (WP No. 6228 of 2013); the second followed in the same case during a supplementary rule (show-cause) hearing on 23 August 2016; and the third arose in the Khadija torture case in 2019. See, *CCB Foundation v NHRC and Others* [2020] 8 CLR(HCD) 49; See also, Sidoti, C., *NHRC: Capacity Assessment of the National Human Rights Commission, Bangladesh* (UNDP, 2019, p. 11.

⁴⁶ See, Halim (n 41) pp. 30-32, 83-89; For a critical analysis of crime and human rights violations and their interacts, see, Kent Roach (n 34); The author has designed a framework for the interaction of crime-HRVs in his doctoral thesis, *National Human Rights Commission in Bangladesh: Exploring Quasi-Judicial Activism in Human Rights Protection* (to be submitted).

⁴⁷ GANHRI SCA General Observations May 2013, GO 2.3.

⁴⁸ ‘The Commission shall be a statutory independent body having perpetual succession and the power, among others, to acquire, hold, manage, dispose of property, both moveable and immoveable, and shall by the said names sue and be sued.’ NHRC Act 2009, Sec. 3.

⁴⁹ NHRC Act, 2009, section 29.

⁵⁰ GANHRI SCA General Observations, May 2013, GO 2.3. Also, OHCHR Training Series-4 (n 11), p. 42.

⁵¹ NHRC Act 2009, Section 8(1).

⁵² NHRC Act 2009, Section 7.

⁵³ NHRC Act 2009, section 7.

⁵⁴ NHRC Annual Report, 2010, p. 12.

⁵⁵ NHRC Annual Report, 2013, (Preface of the Chairman) p. 07.

⁵⁶ See, *CCB Foundation v NHRC and Others* [2020] 8 CLR(HCD) 49 (arising out of the NHRC Complaint No. 413/2013, full Commission’s decision on 14.09.2020, popularly known as *Khadija torture case*).

⁵⁷ ‘Report-seeking’ is an independent quasi-judicial process for NHRIs.

from the Government in assessing HRVs committed by LEAs.⁵⁸ These sections also empower the Commission to issue recommendations and to seek compliance from the Government.⁵⁹ Despite this extensive statutory mandate, a critical question remains as to whether the Chairman and members have exercised their independent thinking or decision making in complaint disposal process of the Commission.

7. Complaint Disposal by the NHRC against Law Enforcement Agencies (LEAs)

This section critically analyses selected HRV complaint disposals of the Commission against LEAs⁶⁰ to examine whether, and to what extent, the Commission has exercised its institutional and individual capacity, and how it has understood the quasi-judicial ‘report-seeking’ process in contrast to the formal investigation process for establishing HRVs.

(a) Beaten up and Injured by Rapid Action Battalion (RAB) (2011): Who is the Violator of Human Rights?

One Ziaul filed a complaint alleging that RAB⁶¹ members illegally beat him, causing injuries to his leg and a fractured finger. His records of hospitalisation and treatment were attached to the complaint. The Commission took cognisance of the complaint, and in its first order, sought a report from a local district bar association.⁶² From 06.06.2011 to 13.11.2011, five orders were issued by the Full Time Member (FTM), each seeking a report from the same third party.⁶³ This disposal shows that the FTM’s orders were in violation of Section 18 of the Act.⁶⁴ Under the Act, the NHRC has a legal duty to seek a ‘report’ from Ministry of Home Affairs (MOHA) which represents the Government.⁶⁵ This disposal order further substantiates that the Commission lacks institutional knowledge on how and who to approach against a complaint on gross HRVs committed by LEAs and who should be held accountable for such violations.

(b) 16-Year-old Boy shot Dead by Police (2011): Are HRVs lost in the Process Gap?

A 16-year-old boy was shot dead by the police.⁶⁶ In his first order, the Chairman sought a report from the IGP⁶⁷ instead of ‘the Government’. The Chairman issued five orders on five different dates seeking a report from the IGP. Finally, the IGP sent a report to the NHRC and the NHRC disposed of the complaint on the grounds that there three criminal charges

⁵⁸ Law Enforcement Agencies (LEAs) means members of a ‘disciplined forces’ including police force, army, navy, air force and any other force declared by law to a disciplined force (See, Article 152 of the Constitution of Bangladesh. Government of Bangladesh may declare any other force to be included as a ‘disciplined force’ within the meaning of this definition. RAB has been declared by the GOB as a ‘disciplined force’. See, section 2(hh), the Armed Police Battalions Ordinance 1978, amended by the Armed Police Battalions (Amendment) Act, 2003.

⁵⁹ In particular see section 16 which gives the NHRC the power of a civil court. However, since the Commission has not outlined its detailed rules, it arguably lacks the process of the power of a civil court. More on this, see, Halim (n 41), pp. 95-179.

⁶⁰ Law Enforcement Agencies (LEAs) (n 58).

⁶¹ RAB and other LEA members are controlled by MOHA. It has been held by the apex court in *Bangladesh v Md. Mojibul Haque* 3 CLR (AD) (2015) 261 that ‘[...] by no stretch of imagination can the Inspector General of Police, [...] be brought within the definition of the phrase ‘Government’ (paras 75, 112-115).

⁶² First order dated 06.06.2011, Barishal District Bar Association is an organisation composed of lawyers which is not a part of the Government.

⁶³ Complaint No. 133/2011.

⁶⁴ The only signature found in the disposal was the signature of the FTM, which is violative of section 11(3) of the NHRC Act 2009.

⁶⁵ RAB and other LEA members are controlled by MOHA. It has been held by the apex court in *Bangladesh v Md. Mojibul Haque* 3 CLR (AD) (2015) 261 that ‘[...] by no stretch of imagination can the Inspector General of Police, [...] be brought within the definition of the phrase ‘Government’ (paras 75, 112-115).

⁶⁶ Complaint No. 108/2011 dated 04.07.2011, 25.07.2011, 25.08.2011, 25.09.2011, 25.10.2011.

⁶⁷ Inspector-General of Police. To be noted that IGP is not the Government. For a legal interpretation on this see, *Bangladesh V Md. Mojibul Haque* 3 CLR (AD) (2015) 261 (Paras 75, 112-115).

had been pending against the boy.⁶⁸ This disposal raises grave concerns over the capacity of the NHRC and its chairman. First, it is not clear on what grounds the Chairman dismissed a complaint involving the killing of a child by the police. Furthermore, the disposal order is non-speaking order. It provides an example of how the pendency of criminal cases justified the killing. Second, the order, which consists of less than one paragraph, fails to cite any section of the Act, or any article of the Constitution or relevant provisions of the ICCPR that guarantee the right to life of every individual in Bangladesh. The disposal order lacks any discussion of the substance and procedure of HRP, or the due process of police investigation, or whether the State and its agents (police) have fulfilled their duties by following the process of investigation (the ‘means’ obligation as opposed to ‘ends’ obligation).⁶⁹ Third, the Commission did not even ask for the post-mortem report to assess the legal and *prima facie* causes of the death. Fourth, while the NHRC does not have the power to prosecute a murder, it was its legal duty to use its quasi-judicial power to examine whether the public duties had been breached by the police. There is no objective assessment by the NHRC on how it formed its ‘institutional satisfaction’ as part of its institutional capacity.⁷⁰ Neither is there any assessment by the NHRC of the police action that led to the killing. Fifth, the complainant was not sent any notice for a hearing before its disposal. It is a well-established principle that failure to hold a hearing before the disposal of a quasi-judicial complaint is a gross breach of the principle of natural justice,⁷¹ considering that the complainant was an NGO working for HRP in the country. Sixth, this disposal order reflects the absence of a quasi-judicial process of the NHRC. This further illustrates a serious institutional incapacity of the Commission, which is why the High Court Division strongly criticised the Commission’s unprofessional disposal in *Khadija torture* case by the same Chairman.⁷² This disposal provides the Commission’s inadequate understanding of what

⁶⁸ The last order written by the Chairman was: “There have been specific criminal cases being Police Station Case No. 27 (10.01.2011) under section 19A of the Arms Act 1878, Case No. 28 (10.01.2011) under section 353/332/333 under the Penal Code, and Case No. 29 (10.01.2011) under section 399/402/302 and the matter being pending before a criminal court the Commission has no jurisdiction.”

⁶⁹ For the State’s positive obligation as to both the process of means and ends, see HRC decisions, e.g., in *Pedro Pablo Camargo v. Colombia*, Communication No. 45/1979, U.N. Doc. CCPR/C/OP/1 at 112 (1985) paras 13.1, 13.2, 13.3, 15; *Jayawardena v Sri Lanka*, Communication No. 916/2000, UN Doc A/57/40 at 234 (2002) paras 7.2, 7.3; *Njaru v Cameroon*, Communication No. 1353/2005, UN Doc CCPR/C/89/D/1353/2005, para 8; Report of the UNHRC, UN GOAR, Comm. No. 1353/2005, UN Doc CCPR C/89/D/1353/2005(2007); *Mukong v Cameroon*, Communication No. 458/1991 UN Doc CCPR/C/51/D/458/1991, paras 10-11; Also see, HRC, General Comment No. 35(2014) on liberty and security of persons, paras 9 and 55; Also, the Report of the Secretary General of HRC, A/HRC/13/44 (13th Session, agenda 2, 15th January 2010; Also, HRC Report on ICCPR, General Comment No. 6, 16th Session 1982, General Comment No. 14, 23rd Session 1984; Also, HRC Report on ICCPR (CCPR/C/GC/36 (General Comment No. 36, 3 September 2019) (hereinafter HRC General Comments).

⁷⁰ ‘Satisfaction’ mentioned in section 18(3a and b) means ‘institutional satisfaction of the Commission’ and not any personal satisfaction of the Chairman.

⁷¹ Natural justice comprises two pillars- the hearing rule and the rule against bias. The hearing rule requires that people affected by the exercise of official power be provided with sufficient notice of a possible adverse decision and a sufficient chance to put their own case before any decision is made. Matthew Groves, *The Waiver of Natural Justice*, https://law.adelaide.edu.au/ua/media/1386/ALR_40%283%29_03_Groves_Web.pdf (accessed 22 June 2023); also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 715–21; “The principles of natural justice were those fundamental rules, the breach will prevent justice from being seen to be done.” Lord Widgery in *Ridge v Baldwin and others* [1963] 2 All ER 66. Even both the SC and HCD of Bangladesh has held that in all proceedings by whomsoever held, whether juridical or administrative, the principles of natural have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned *Miah Mobammad Abdul Nayem v. Review Panel* (2017) 5 CLR (HCD) 247 Para 23). The concept of “administrative fairness” requires that an Authority, while taking a decision which affects a person’s right prejudicially, must act fairly and in accordance with law. *Md Shamsuzzaman Khan v Bangladesh and Others* (2019) 7 CLR(HCD) 301 (Para 23).

⁷² *Khadija torture case* (n 56).

constitutes HRV, particularly in the context of an ‘unlawful killing by the police’, how to identify such violations, and how to hold the State agents, i.e., members of LEAs accountable. It appears, as though, for the NHRC, all issues of HRVs ‘die a natural death’ as soon as a crime is reported to a police station or a charge sheet is submitted to the court. However, the growing global scholarship developed by IHRL and NHRIs suggests otherwise.⁷³ This disposal order raises two contextual question- Does the mere existence or pendency of a crime function as an ‘open manhole’ into which all HRVs are discarded by the Commission? A further question arises as to whether the NHRC adequately understands the significance of HRVs as distinct from criminal offences. Such forms of disposal⁷⁴ by the NHRC potentially sent a ‘green signal’ to the police and other LEAs that the NHRC, as an institution, lacked a minimum level of understanding of HRVs within the criminal process and applicable standards.⁷⁵ This, in turn, provided the police with a rationale for their subsequent non-cooperation with the NHRC.⁷⁶

(c) **Bullet-Injuries by RAB (2011): Quasi-Judicial Process lost in a Crime?**

ASK, a reputed NGO complained based on a newspaper stating that RAB⁷⁷ members had picked up two persons in their pickup van, both were then found in hospitals with bullet injuries.⁷⁸ Hospital beds were reportedly being monitored by the RAB members. The Chairman sought a report from the Director General of the RAB (DG, RAB). This raises a legal question as to whether DG, RAB qualifies as the ‘Government’ within the meaning of Section 18 of the Act. In this complaint, the Commission issued more than 13 orders, all signed by the Chairman.⁷⁹ In the final order dated 01.08.2012, the Chairman dismissed the complaint on two grounds: (i) that the information in the complaint was not true, and (ii) that two suspects were accused in criminal cases.⁸⁰ This disposal requires analysis. First, the Commission failed to give the complainant an opportunity to make submissions on the question of jurisdiction. Second, it is legally problematic to accept such mechanical or stereotyped orders from the Chairman, who is expected to apply the Commission’s quasi-judicial power to derive ‘institutional satisfaction’ as part of its institutional capacity.⁸¹ However, the final order shows no reflection of such ‘satisfaction’. Third, it was the NHRC’s legal duty to ask for a medical reports and hospital records to assess whether HRVs had occurred. The Commission or its Chairman failed to do so. Fourth, the pattern of these orders reveal that neither the NHRC nor its Chairman demonstrated its understanding of

⁷³ In this context, see the activism of the Indian NHRC in *The Killing of two civilians by a BSF Jawan, District Ganganagar, Rajasthan- Case No. 1060/20/2000-2001-PF & 1061/20/2000-2001-PF; Complaint No. 4499/4/3/2014, (Indian NHRC AR 2015-2016, pp. 59-62); Also see, 16-year old boy killed by Indian Army, Case No. 1438/7/15/2012 (Indian NHRC AR 2015-2016, p. 174) (n 43).*

⁷⁴ See more of these types of disposals, Halim (n 41) Chapter 7 pp. 126-190.

⁷⁵ See Halim (n 41) pp. 30-32, 106-190. For a general discussion on human rights in a criminal proceeding, see further, Trechsel, Stefan. *Human Rights in Criminal Proceedings* (Oxford, Oxford University Press, 2006).

⁷⁶ “We don't like to be engaged in loose talks with anybody.” (amra karor sathe bahase jorate chaina). This was what the IGP commented against the NHRC Chairman’s statement on the lack of chain of command in the police. *Bangla News*, 10 December 2014. <https://www.banglanews24.com/print/339183> (accessed 21 June 2023). Also see, Halim, MA, *Making the National Human Rights Commission grow up*, *Daily Financial Express*, 11 December 2014.

⁷⁷ RAB (n 58).

⁷⁸ Complaint No. 112/2011 dated 04.07.2011, 25.07.2011, 29.09.2011, 27.10.2011, 28.11.2011, 28.12.2011, 29.11.2012, 29.02.2012, 29.03.2012, 29.05.2012, 28.06.2012, 26.07.2012, 01.08.2012; For RAB (n 58) (a copy on file with the author).

⁷⁹ The Commission had set up two Benches to hear complaints on HRVs, the Full Bench being chaired by the Chairman to dispose of the sensational and more complicated cases and the other Bench being chaired by the FTM to deal with the comparatively easier cases. See NHRC Annual Report, 2016, p. 2.

⁸⁰ The Chairman also noted that charge sheets were submitted in those cases before court, the Commission lacked jurisdiction.

⁸¹ ‘Institutional satisfaction’ of the Commission as an outcome of its quasi-judicial process (n 70).

due process for establishing HRVs.⁸² The Chairman's orders suggests that the Commission waits for a report containing some information of a criminal allegation, and once such a report is received, that information becomes the basis for the 'mechanical disposal'⁸³ of complaints of HRVs by it.⁸⁴ It appears that the existence of a crime or criminal process becomes a 'quasi-judicial crossfire' for the NHRC through which it conveniently 'dumps' or rejects all HRVs committed by LEAs or any other public authorities. Fifth, it is legally and logically questionable whether the NHRC, a quasi-judicial body, should accept a one-sided report from LEAs without any quasi-judicial process or institutional satisfaction as required by the Act.⁸⁵

(d) *The Limon Case (2011): The Critical Juncture of Hype versus real Action of the NHRC*

The NHRC's role can also be assessed by analysing how it disposed of the widely publicised Limon case, involving a 16-year-old student who was shot in the leg by RAB in 2011.⁸⁶ Being very vocal on this issue, the Chairman met Limon and his family immediately after his hospital admission, where his leg had to be amputated.⁸⁷ The subsequent admission by RAB of an accidental shooting, hospital record, amputation and filing of two false cases as a counter to the shooting could have provided the Commission with strong grounds to determine HRVs in favour of Limon.⁸⁸ However, the Commission lacks that capacity and knowledge of HRVs standards.⁸⁹ In an official press conference, the Chairman stated that 'the state is playing a crucial game with the innocent boy and the Commission will take this matter to the HCD.'⁹⁰ However, on 23 June 2013, the Chairman made an ominous proposal to Limon and his family to withdraw the case they filed against RAB.⁹¹ This Limon case also

⁸² More on the absence of a fair process, see Halim (n 41), pp. 127-189.

⁸³ The term 'mechanical disposal' is used by the researcher as opposed to quasi-judicial or speaking disposal.

⁸⁴ Similar type orders have frequently been passed by the Chairman of the first and second Commissions. For example, in Complaint No. 420/2013 (Pallab Sarkar), involving an allegation of a 'crossfire' death, the Commission merely requested an investigation report, despite the fact that this is not the method mentioned in section 18 of the Act. Similarly, in Complaint No. 379/2013 (Md. Fourkan), in which two criminal cases were filed against a 9-year-old-boy by members of the armed forces, the Commission sought report from the Director of the Social Service Department and continued for almost two years seeking a report. The NHRC appeared unable to understand how to appropriately approach or dispose of a HRV case involving an innocent child. It was particularly alarming that two false cases (Criminal Misc. case No. 745/13 and Criminal False Case No. 708/13) were filed against a child aged only 9, a child by law, is incapable of committing a crime, and the Commission failed to generate any meaningful recommendation for the child. Ultimately, after two years, the complainant ceased to communicate, and the Commission also kept silent thereafter. Similarly, in Complaint No. 417/2013 (Pallab Sarakr), a 10-year-old girl was brutally raped and was hospitalized. The NHRC took the allegation into cognisance. However, in the first order, the Chairman disposed of the complaint on the grounds that the complainant's complaint was untrue, and that a criminal case has already been filed with the local police station. Notably, the complainant was not given any opportunity to controvert the Commission's position. Moreover, when a child below the age of consent is subject to rape, it inherently constitutes a grave HRV, raising concerns about the role of the State institutions and the criminal justice system.

⁸⁵ See Sections 17, 18 and 19 of the Act.

⁸⁶ NHRC *Suo Motu* Complaint No.01/2011; See also Halim (n 41) chapter VIII.

⁸⁷ Daily Newage, 7 July 2012.

⁸⁸ HRVs are assessed on a balance of probabilities and there are thousands of examples of complaint disposals by Indian NHRC. For example, see *the Killing of a 16-year-old boy by the Indian Border Safety Force; Sexual harassment of a girl; Sexual Abuse of a Deaf Girl*. See n 43; See further, Halim (n 41), pp. 279-322.

⁸⁹ A Bench of the HCD could realise this and issued a supplementary rule against the NHRC in 2017, see, WP No. 6228/2013 (*Md. Mozammel Hoque v NHRC and Others*, pending for hearing as of December 2025).

⁹⁰ Daily Newage, 28 August 2012, <http://www.newagebd.com/detail.php?date=2012-08-28&nid=21664#.UIPUB8XR7dp> (accessed 29 July 2021).

⁹¹ Daily Star, *NHRC Chairman's advice is an affront to concept of justice*, editorial, Daily Star, 27 July 2013; *Due process of law ignored in Limon case: BBC Sanglap*, Daily Star, July 8, 2013; Abrar, C.R., *Paris Principles and NHRC: The Rights Commission on a Wrong Track*, Daily Star, August 9, 2013; *Limon Repression case: the Proposal of Mediation by NHRC is contrary to Law and Ethics*, Prothom Alo, 26 June 2013. For details of this case, see Halim (n 41) chapter VIII.

exemplifies how the NHRC deviated from its legal mandate and capacity under the Act. It involved a brutal action by LEAs against a boy, and the NHRC's role under Section 18 warrants close analysis. First, this case is a glaring example of loss of 'life and limb'⁹² caused by LEAs without justification, as admitted RAB. Further, two false cases were filed by the RAB against this boy and his mother simply because his mother had filed a criminal case against RAB members. Sections 12 and 18, read with Section 2(f) require the NHRC to seek 'reports' with full explanations from MOHA. However, the Commission failed to do so. Instead, it directed MOHA to conduct an investigation, which itself violated the NHRC's legal mandate. This reveals that the 'report-seeking' process' on the basis of 'institutional satisfaction of the Commission' and then generate 'recommendations' for HRVs have been bypassed by the NHRC. This elucidates that the Commission, both as a statutory organ and as an NHRI, lacks awareness of the process of establishing HRVs against the members of LEAs. Third, the Commission sent a DO letter to the Home Minister requesting the withdrawal of two false cases against Limon.⁹³ This act, clearly a personal step initiated by the Chairman, was outside the purview of the Act. Such steps not only turned the NHRC a toothless institution, but also undermined the idea that the State should be held liable for gross HRVs under its positive obligations.⁹⁴ Fourth, even when charge sheets were given in the court against Limon, the Commission did not provide any legal assistance to him or intervene in the court proceeding as required by Section 19(6).⁹⁵ What the NHRC did in this case is completely against the ethics and norms of human rights.⁹⁶

7. Conclusion

The analysis of four quasi-judicial complaint disposals by the NHRC substantiates the argument that the NHRC has yet to develop adequate institutional and individual capacity to properly identify and adjudicate complaints of HRVs. As the GANHRI has twice emphasised the need to enhance the NHRC's institutional capacity in its accreditation reports, this paper concludes by recommending that the NHRC undertake targeted training programmes with either UNDP or the Indian NHRC. Such training should focus on distinguishing HRVs from ordinary criminal offences and on developing a sound understanding of the quasi-judicial functions essential for the effective disposal of HRV complaints. Rather than emphasising the expansion of its formal legal investigative powers, the NHRC should prioritise strengthening its capacity to exercise its existing quasi-judicial powers effectively.

⁹² "The right to life is lost not only when someone loses his/her body or limbs but also when they cannot have protection of health, pollution free water and air..." *Bangladesh and Others v Professor Nurul Islam and another* [2017] 9 SCOB (AD) 46.

⁹³ DO (Demi Official) letter was signed on 11.07.2012. The Supreme Court held that there is no legal consequence of a DO letter, *Md Mahmudul Hasn v Government* [2014] 2 CLR (HCD) 377. For details, see Halim (n 41) p. 208-209.

⁹⁴ More on this, see Halim (n 41), pp. 192-212.

⁹⁵ It will be examined later that the Commission has interpreted this sub-section narrowly and against the substance and process of NHRC Act 2009.

⁹⁶ TIB, ASK, Human Rights Forum, *The Role of the NHRC in Limon Case is contrary to Human Rights*, Daily Prothom Alo, 26 June 2013; BLAST, Rights Organisations protest at NHRC Chair's call to Limon, Daily New Age 24 June 2013. There are many instances of complaint disposals by the Commission on custodial deaths and torture. However, since 2010 to till date, there is no noticeable development in the process or institution building within the Commission. See for example, Complaint No. Cha. 59/2019, D. 153/22 (Razib Kor Razu) in which the Commission made no recommendation for effective remedy or interim relief even though there were sufficient evidence on HRVs committed by the police.

Rohingya Influx from Myanmar and the Associated Security Challenges in Bangladesh: An Empirical Study in Kutupalong Camp, Cox's Bazar

Mohammad Mohiuddin and SM Ashfaqr Rahman*

Abstract

The Rohingya refugee crisis, resulting from systematic persecution in Myanmar, has led to one of the largest and most enduring displacements in recent history. This study provides an empirical analysis of the influx of Rohingya refugees into Bangladesh, highlighting the security challenges that have emerged from this humanitarian situation. By utilizing primary data collected from refugee camps through qualitative methods, the research examines the security challenges associated with refugee inflow, specifically socioeconomic, environmental, national, and political security concerns. It places special emphasis on security implications, including the rise of transnational crime, human trafficking, intergroup conflict, drug-related issues, and the potential for radicalization within and out of the camps. Findings indicate that while Bangladesh has demonstrated remarkable hospitality, the prolonged presence of refugees poses significant risks to national and regional stability. The paper concludes with policy recommendations aimed at mitigating security challenges, enhancing international cooperation, and pursuing sustainable solutions for the Rohingya population. This research contributes to the broader discourse on forced migration, refugee management, and the intersection of humanitarian crises with security concerns.

Key Words

Rohingya refugees, forced displacement, border tensions, regional stability, transnational crime, human trafficking, radicalized activity.

1. Introduction

The Rohingya crisis, often considered one of the most pressing humanitarian challenges of the 21st century, has attracted global attention to the plight of the Rohingya people, a Muslim ethnic minority from Myanmar's Rakhine State. Beginning in the late 20th century, the Rohingya have faced systemic persecution, violence, and denial of citizenship by the Myanmar government, which unfairly labels them as illegal immigrants from Bangladesh despite their long-standing presence in the region¹. The latest and most severe outbreak of violence began in August 2017, following a violent military crackdown by Myanmar in response to attacks by a Rohingya insurgent group. This campaign, characterized by widespread killings, sexual

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¹ Brac Report (2017). *Impact of Forcibly Displaced Myanmar Nationals' Influx on Host Community*, Dhaka, Bangladesh, 25-26.

violence, and arson, led to over 700,000 Rohingya fleeing to Bangladesh², joining hundreds of thousands who had already sought refuge in previous years. Currently, Bangladesh hosts more than 1.3 million Rohingya refugees, making it one of the largest refugee populations in the world³. While Bangladesh has received praise for its humanitarian efforts, the large influx of refugees has also created significant security challenges, including socio-economic pressures, geopolitical tensions, and an increased risk of radicalization⁴.

The Rohingya crisis has deep roots in Myanmar's complex history of ethnic and religious divisions. The Rohingya, who are predominantly Muslim, have long been marginalized in a primarily Buddhist country⁵. The 1982 Citizenship Law effectively rendered them stateless by excluding them from the list of officially recognized ethnic groups. Over the decades, they have faced restrictions on their movement, education, and employment, as well as periodic outbreaks of violence. However, the 2017 military crackdown known as the "Clearance Operation" marked a dramatic escalation in the severity of their persecution⁶. Reports from international organizations and human rights groups documented widespread atrocities, including mass killings, rape, and the destruction of entire villages. The United Nations described the campaign as a "textbook example of ethnic cleansing"⁷, and there have been calls for the situation to be investigated as genocide⁸. The sheer scale of violence and displacement has turned the Rohingya crisis into a global humanitarian emergency, with profound implications for regional stability and security.

Bangladesh, as Myanmar's immediate neighbor, has confronted significant challenges due to the influx of refugees. Despite being a developing country with its own economic and environmental issues, Bangladesh has demonstrated remarkable generosity by opening its borders to the Rohingya people. The government, in collaboration with international organizations and local communities, has provided shelter, food, and medical care to the refugees, many of whom live in large camps in the Cox's Bazar district. The Kutupalong refugee camp, now the largest in the world, accommodates over 800,000 people and has become a symbol of both the crisis's scale and the resilience of the Rohingya community⁹. However, the long-term presence of such a large refugee population has exerted immense pressure on Bangladesh's resources and infrastructure, exacerbating existing socio-economic challenges and creating new ones.

² Alam, M. (2018). How the Rohingya crisis is affecting Bangladesh and why it matters. *The Washington Post*. 7-10. <<https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/12/>>

³ Anwary, A. (2020). Interethnic Conflict and Genocide in Myanmar. *Homicide Studies*, Vol. 24(1), 85–102, SAGE Publications <<https://doi.org/10.1177/1088767919827354>>

⁴ Ansar, A. & Khaled, F., M., A. (2021). From solidarity to resistance: host communities' evolving response to the Rohingya refugees in Bangladesh. *Journal of International Humanitarian Action*, 6:16, Open Access <<https://doi.org/10.1186/s41018-021-00104-9>>

⁵ Anwary, A. (2018). Atrocities against the Rohingya community of Myanmar. *Indian Journal of Asian Affairs*, Vol. 31, No. 1&2, PP. 91-102 <www.jstor.org/stable/10.2307/26608825>

⁶ Chowdhury, R. (2021). The Mobilization of Noncooperative Spaces: Reflections from Rohingya Refugee Camps. *Journal of Management Studies*. 58 (3), 914-921. doi:10.1111/joms.12612

⁷ Levine, V.A. (2019). A Modern-Day Holocaust: The Genocide of the Rohingya Muslims of Myanmar. *Rutgers Journal of Law and Religion*. Rutgers' Law School, Vol. 19, N. 398. <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/rjlr19&div=22&id=&page=>>>

⁸ Kirby, J. (2018, Sep 18). A New UN report documents evidence of mass atrocities in Myanmar against the Rohingya. *VOX*. <<https://www.vox.com/world/2018/9/18/17873638/rohingya-united-nations-myanmar-war-crimes>>

⁹ United Nations Human Rights Council- UNHRC. (2017). *Independent International Fact-Finding Mission on Myanmar report- IFFMM* <<https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index>>

One of the most pressing security challenges posed by the influx of Rohingya refugees is the strain on local communities and resources. Cox's Bazar, a region already grappling with poverty and underdevelopment, has experienced a population increase of over a million people in just a few months. This sudden surge in demand for food, water, and healthcare has overwhelmed local systems, resulting in shortages and rising prices¹⁰. Furthermore, the environmental impact of the refugee camps has been substantial, with extensive deforestation and soil erosion occurring due to the demand for shelter materials and firewood¹¹. These pressures have intensified tensions between the refugee population and local communities, who feel that their needs are being neglected in favor of the Rohingya. At times, these tensions have escalated into violence, further complicating security¹².

The ongoing crisis worsens socio-economic challenges. While the international community has provided significant aid, the funding has frequently been insufficient to meet the basic needs of the refugees¹³. Moreover, there is no clear solution in sight. Efforts to repatriate the Rohingya to Myanmar have consistently failed, primarily due to the lack of guarantees for their safety and rights. The Myanmar government has shown little willingness to address the root causes of the crisis or establish conditions that would allow refugees to return safely¹⁴. As a result, the Rohingya remain in limbo, unable to return home and facing limited opportunities for integration into Bangladeshi society. This prolonged displacement has created a sense of hopelessness among the refugees¹⁵, which in turn has security implications.

One of the primary security issues is the potential for radicalization within the refugee community¹⁶. The Rohingya have endured years of persecution and displacement, creating an environment conducive to the emergence of extremist views. While most Rohingya refugees are peaceful and primarily focused on survival, concerns arise that militant organizations might exploit their grievances to recruit individuals or establish a foothold in the camps¹⁷. The Arakan Rohingya Salvation Army (ARSA), an insurgent group whose actions triggered the crackdown in 2017, along with several other militant groups, has been active in these camps, heightening

¹⁰ Abrar, C.R. (2017, March 19). Lost in conversation: voice of the host community. *The Daily Star*. <<https://www.thedailystar.net/starweekend/the-shadow-violence/voice-the-host-community-1475143>> & Khuda, E., K. (2020). The impact and challenges to the host country, Bangladesh, due to sheltering the Rohingya refugees. *Cogent Social Sciences*, Taylor & Francis, 6.1, 8-11.

¹¹ Department of Environment. (2019). Geospatial technology-based Water Quality Monitoring system for Bangladesh. centre for Environmental and Geographic Information Services, Dhaka, Bangladesh, 55-62.

¹² Fajth, V., Bilgili, O., Loschmann, C. & Siegel, M. (2019). How do refugees affect social life in host communities? The case of the Congolese refugees in Rwanda. *Comparative Migration Studies*, VOL. 7:33 <<https://doi.org/10.1186/s40878-019-0139-1>> &

Abraham, I. (2020). Host Communities and Refugees in Southeast Asia. *Journal of Social Issues in Southeast Asia*, Vol. 35, No. 1, pp. 178-196, ISEAS - Yusof Ishak Institute <<https://www.jstor.org/stable/10.2307/26883625>>

¹³ Sattar, Z. (2021, Oct. 28). Rohingya crisis and the host community. *The Financial Express*, Policy Research Institute of Bangladesh, Accessed on May 20, 2025. <<https://thefinancialexpress.com.bd/views/reviews/>> ; Imtiaz, S. (2018). Ecological impact of Rohingya refugees on forest resources: remote sensing analysis of vegetation cover change in Teknaf Peninsula in Bangladesh. *Scientific journal of European Ecocycles Society*, vol.4.1 pp.10-15.

¹⁴ Chowdhury, J. (2019, Sep.11). Bangladesh, growing tired of hosting Rohingya refugees, puts new squeeze on the teeming camps. *The Washington Post*. <https://www.washingtonpost.com/world/asia_pacific/bangladesh-growing-tired-of-hosting-rohingya-refugees-puts-new-squeeze-on-a-displaced-minority/2019/09/10/4488cfb4-cfd5-11e9-a620-0a91656d7db6_story.html>

¹⁵ Ramsden, M. (2022). Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights. *European Journal of International Law*, Vol. 33 No. 2, pp.441–472.

¹⁶ Filipski, J. M., Rosenbach, G., Tiburcio, E., Dorosh, P., Hoddinott, J. (2020). Refugees who mean business: Economic activities in and around the Rohingya settlements in Bangladesh. *Journal of Refugee Studies*, Vol. 0, No. 0, pp. 08-10.

¹⁷ Islam, D., M. & Siddika, A. (2021). Implications of the Rohingya Relocation from Cox's Bazar to Bhasan Char, Bangladesh. *International Migration Review*, pp. 1-11.

worries about the potential for renewed violence¹⁸. Furthermore, the presence of a large, stateless population with limited access to education and employment creates conditions that transnational terrorist groups could exploit. Bangladesh, experienced in addressing Islamist extremism, is particularly aware of these threats and has implemented measures to enhance security within the camps¹⁹. Nonetheless, the challenge of preventing radicalization while respecting the rights of refugees requires a careful balancing act.

The Rohingya crisis also carries significant geopolitical implications for Bangladesh. The situation has severely strained the country's relationship with Myanmar, as Bangladesh accuses Myanmar of failing to take responsibility for the displacement of its citizens²⁰. Diplomatic efforts to resolve the crisis have seen little progress, raising concerns that the situation could escalate into a broader regional conflict. The involvement of international actors, including China, India, and the United States, adds another layer of complexity. China, for instance, has supported Myanmar amidst international criticism while providing economic assistance to Bangladesh²¹. Conversely, India has adopted a more cautious approach, reflecting its concerns about regional stability and its relationship with Myanmar²². The United States and other Western nations have condemned Myanmar's actions and imposed sanctions, yet their ability to influence the situation remains limited²³. For Bangladesh, navigating this complex geopolitical landscape poses a significant challenge, particularly as it seeks to balance its humanitarian obligations with its national interests.

In addition to these external challenges, the Rohingya crisis has also exposed internal weaknesses in Bangladesh. The arrival of such a large refugee population has put a strain on the country's political and social structures. The Bangladeshi government has faced criticism from opposition parties and civil society organizations over its management of the crisis, with some accusing it of using the situation for political gain²⁴. There are concerns that the crisis could exacerbate existing religious and ethnic tensions in Bangladesh, which has a history of sectarian conflict. The government's efforts to address these issues have been further complicated by the need to maintain stability and security in a region already vulnerable to natural disasters, including cyclones and flooding²⁵.

Despite these challenges, Bangladesh has exhibited remarkable resilience and compassion in addressing the Rohingya crisis. The international community has praised the country's

¹⁸ Bashar, I. (2017). Exploitation of the Rohingya Crisis by Jihadist Groups: Implications for Bangladesh's Internal Security. *Counter Terrorist Trends and Analyses*, vol. 9, No. 9, pp. 5-7, International Centre for Political Violence and Terrorism Research <<https://www.jstor.org/stable/10.2307/26351550>>

¹⁹ Wolf, S. (2015, April 6). Myanmar's Rohingya conflict is "more economic than religious." DW News, Accessed on May 20, 2025 <<http://www.dw.com/en/myanmars-rohingya-conflict-more-economic-than-religious/a-18496206>>

²⁰ Tayeb, T. (2024). Civil war in Myanmar: Bangladesh should revisit its national security strategy. *The Daily Star*, June 26, 2024, Accessed on May 28, 2025 <<https://www.thedailystar.net/opinion/views/closer-look/news/civil-war-myanmar-bangladesh-should-revisit-its-national-security-strategy-3641321>>

²¹ Joy, A. (2018). Understanding China's Response to the Rakhine Crisis. *US Institute of Peace*, Special report, February <<http://www.jstor.com/stable/resrep17671>>

²² United States Institute of Peace (2018). *China's Role in Myanmar's Internal Conflicts*. September, ISBN: 978-1-60127-735-0 <<https://www.usa.gov/agencies/united-states-institute-of-peace>>

²³ Selth, A. (2018). Myanmar armed forces and the Rohingya crisis. *United Nations Institute of Peace*, 2301 Constitution Ave., NW.

²⁴ Khuda, *supra note* 10 at 3

²⁵ Ahmed, N., Islam, N.M., Hasan, F.M., Motahar, T. & Sujauddin, M. (2019). Understanding the political ecology of forced migration and deforestation through a multi-algorithm classification approach: the case of Rohingya displacement in the southeastern border region of Bangladesh. *Geology, Ecology, and Landscapes*, Vol. 3, N.4, pp. 282-294 <<https://doi.org/10.1080/24749508.2018.1558025>>

initiatives, and it has played a crucial role in bringing attention to the struggles faced by the Rohingya. However, the long-term sustainability of this response remains uncertain. The ongoing presence of over a million refugees poses significant risks to Bangladesh's stability, security, and development²⁶. Addressing these issues will require a coordinated and multifaceted strategy that involves not only the Bangladeshi government but also the international community, regional stakeholders, and NGOs²⁷.

In summary, the influx of Rohingya refugees from Myanmar has led to a complex security challenge for Bangladesh. The socio-economic, environmental, and geopolitical impacts of the crisis are substantial, and the risk of radicalization and violence should not be ignored. Addressing these issues will require sustained international support, along with a commitment to finding a lasting solution to the Rohingya crisis. Until a resolution is achieved, Bangladesh will bear the burden of a crisis it did not cause, which has now become an integral part of its recent history. The international community must not turn a blind eye to the suffering of the Rohingya, or the difficulties faced by the nation that has welcomed them.

In the upcoming sections, this paper will focus on the methodological issues and findings derived from the empirical data collected at the refugee camp in Bangladesh. It will address the security challenges and the matters related to increased conflict, militancy, and radicalization within the camp and the nearby host community villages.

2. Methods and Data Collection Process

We conducted exploratory research to understand the Rohingya camp area's socioeconomic and environmental changes. Utilizing various qualitative methods, including case studies and key informant interviews (KIIs), we navigated our research's non-linear trajectory and applied grounded theory²⁸. A non-probability purposive sampling method was used to select participants. The sample aligned with the study's objectives, focusing on three primary target groups: Rohingyas, members of the host community, and service providers. The service providers included Camp in Charge (CiC) officers, representatives from non-governmental organizations (NGOs), and police officers. The sample distribution was asymmetrical, with thirty (30) participants selected from the host community and twenty (20) from the Rohingya population. Additionally, we conducted ten (10) KIIs with service providers, including CiC officers, NGO representatives, and police officers. These interviews were essential for gaining insight into the changes occurring within the camp. A detailed distribution of the samples is presented in Table 1.

Table 1: Sampling distribution among the stakeholders

Stakeholders	Sampling method	Sampling distribution
Host community	Case study	Interviewees 30
Rohingya people	Case study	Interviewees 20
CiC	KII	Interviewees 5
NGO	KII	Interviewees 2
Police	KII	Interviewees 3

²⁶ Crimes in the Rohingya camps. *The Daily Star*, 18 August 2020: 1-3, Accessed on May 25, 2025. <<https://www.thedailystar.net/editorial/news/crimes-the-rohingya-camps>>

²⁷ United Nations Human Rights Council (2018). *Report of the independent international fact-finding mission on Myanmar*. Advanced edited version, September 10-28 <<https://www.ohchr.org/en/hrbodies/hrc/home>>

²⁸ Punch, K. F. (1998). Research Design in Qualitative and Quantitative Research. *Introduction to Social Research: Quantitative and qualitative approaches*. The Gromwell Press, Trowbridge, Wiltshire, pp. 123-126.

Total samples	Cases (50) + KII (10)	60
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Data were gathered following the Case Study protocol, using a semi-structured interview schedule that allowed for flexibility in questioning. The interviews did not follow a strict set of questions. An open-ended, non-structured interview schedule was employed for the Key Informant Interviews (KIIs), allowing for greater freedom to ask follow-up questions or skip specific questions as needed. The study included male and female respondents aged 20 to 50. It took place in the Rohingya camp located in Ukhia Upazila and its surrounding areas. The Ukhia refugee camp is known for hosting registered refugee camps and houses the largest population of Rohingyas. According to the Bangladesh Bureau of Statistics²⁹, approximately 300,000 host individuals and 700,000 Rohingyas reside in Ukhia. Data from Rohingyas were specifically collected from camps 10 and 11, while information from service providers was gathered at these camps' Camp-In-Charge (CIC) office. Additionally, data from the host community were collected in the West and East Balukhali villages, located in Palongkhali Union, the nearest locality to the camp. Before the study, the researcher made several visits to the area with three research assistants who were trained in the study's methodologies and concepts. After developing the data collection instruments, the researcher and three research assistants conducted the data collection during the first two weeks of August 2023. Ultimately, the recorded data were transcribed and analyzed qualitatively.

3. Results

In this section, we present the empirical data gathered from the host community members, Rohingya refugees, and service providers in the Rohingya camps concerning the security issues related to the influx of refugees. We also referenced secondary sources when necessary. Both empirical and non-empirical data are explained below.

The Economic Security Challenge

Local residents say that the security situation in the local market has worsened since the arrival of the Rohingya refugees. The influx of this large population has increased the prices of essential daily goods. The prices in the area have allegedly risen around fivefold. For example, local people used to buy various types of fish, such as Catla, Rohu, and Mrigal, for about 300-350 BDT (approximately 4 dollars) per kilogram; however, these prices have now climbed to around 500-600 BDT (about 7 dollars).

Additionally, the costs of more expensive fish like Hilsa, shrimp, and pomfret have doubled. The prices of beef, chicken, and other common meats have also tripled. Routine grocery items such as milk powder, chili powder, sugar, salt, garlic, onion, and turmeric have become more expensive, as the population has doubled while supplies remain limited. Every household in the host community is struggling with the rising cost of living, exacerbated by the influx of one million Rohingya individuals, which is putting intense pressure on the supply chain and prices. This surge in prices has impacted both ordinary Rohingyas and the host residents, although traders and producers have benefited from the situation. Humanitarian organizations, including UNHCR, distribute relief items to the Rohingya refugees; however, many sell excess supplies in what is known as the "Rohingya market," despite such sales being prohibited and illegal.

Locals are strictly prohibited from selling relief items collected from the Rohingya community in their shops. The police, Border Guard Bangladesh (BGB), and military personnel routinely

²⁹ Bangladesh Bureau of Statistics-BSS (2020). *Bangladesh Statistics*. Ministry of Planning, Dhaka, Bangladesh, pp. 8-11. <https://bbs.portal.gov.bd/sites/default/files/files/bbs.portal.gov.bd/page/a1d32f13_8553_44f1>

inspect local establishments to ensure compliance with this ban. Additionally, locals are not allowed to set up shops or establish permanent settlements near the Rohingya camps due to alleged security concerns, while Rohingyas are permitted to build their shops and infrastructure. This blatant double standard is seen as a discriminatory attitude by the security personnel. The research team has identified a “Rohingya market” adjacent to the camp, where Rohingyas freely buy and sell goods, including relief items. Many structures and shops created by the Rohingyas operate illegally, lacking proper licenses. They do not pay taxes to the government because they lack legal documentation. Locals claim that security forces and law enforcement agencies refrain from enforcing rules against the Rohingyas, fearing backlash from international media and journalists. Rohingya individuals deny accusations that their presence creates insecurity in local markets. Initially, they did exert some pressure on local markets by purchasing necessary items, but now they primarily rely on a relief scheme, turning to local shops only for a limited range of items like green vegetables, fish, and meat.

Members of the host community in Cox’s Bazar have expressed concerns about the deteriorating labor market, with wages plummeting by nearly 50% since the influx of Rohingya refugees. The arrival of Rohingyas has led to increased competition, as they often accept lower pay for work in the area. Although Rohingyas are officially prohibited from working outside the camps, many secretly venture out to find short-term jobs in nearby towns like Ukhia, Teknaf, and Cox’s Bazar. A significant portion of the local population comprises day laborers who primarily work in agriculture. However, the government’s appropriation of 60% of the cultivable land and 40% of the hills and reserved forests for camps and offices has left many poor local laborers without employment³⁰. In stark contrast, Rohingya workers have been observed offering their labor in hotels, motels, restaurants, shops, vehicles, and boats in Cox’s Bazar City and Saint Martin Island³¹. During data collection, several Rohingya mobile vendors were seen at Cox’s Bazar Sea Beach and Saint Martin Island, having escaped from the camps, many of whom are not officially registered. This situation has negatively impacted on the livelihoods and earnings of local residents. The incidence of poverty in the post-influx period has been recorded as significantly higher in Ukhia and Teknaf compared to the national average of 24%³². In discussions, a Rohingya leader countered the claims of Rohingya workers in the cities, although he did acknowledge that such instances do occur. *“It is impossible to work outside the camp because we are prohibited from doing so, a policy strictly enforced by the military, the Border Guard of Bangladesh (BGB), and the police. While it’s true that some individuals may find ways to work in the city by escaping from the camp, the situation is complex.”*

Residents in the area have reported that various sources of income tied to the land and rivers have faced delays since the arrival of refugees. Historically, the community depended on forests and hills for gathering wood and leaves. Rivers provided crucial resources for fishing, which constituted a significant income source, as fish were often sold at the market. Fishing was one of the primary livelihoods, accounting for approximately 28% of local employment through activities such as shrimp farming, dried fish processing, and fish breeding³³.

³⁰ Brac, *supra* note 1 at 1

³¹ Almost 200 Rohingyas caught fleeing Bangladeshi camps by boat. *Dhaka Tribune*, 17 December 2019, Accessed on May 25, 2025. <<https://www.dhakatribune.com/world/south-asia/2019/12/17/myanmar-seizes-boat-carrying-173-rohingya>>

³² Making the Rohingya settle down. *The Financial Express*, 16 August 2021, Accessed on May 25, 2025. <<https://thefinancialexpress.com.bd/views/making-rohingya-settle-down-1629129716>>

³³ Responding to the Rohingya emergency in Bangladesh. *British Broadcasting Corporation (BBC)*, Media Action Asia, 15 September 2020, Accessed on May 25, 2025. <<https://www.bbc.co.uk/mediaaction/where-we-work/asia/bangladesh/rohingya-lifeline>>

However, in August 2017, the government implemented a fishing ban, leaving around 30,000 to 35,000 fishermen unemployed and significantly impacting their annual income. Before the ban, local fishermen earned between 40,000 and 90,000 takas (\$470 - \$1,058) per year, but their earnings dropped sharply afterward. Many host families live in poverty and depend on rice farming, with rice serving as their main food source. Numerous families managed to produce surplus rice to sell to meet their living expenses. Some households also engaged in banana cultivation to improve their finances. Additionally, many locals raised livestock such as chickens, cows, and goats, selling these animals to support their livelihoods.

Unfortunately, following the influx, agricultural activities have been limited due to insufficient available land. Daily wage laborers, who once worked in the fields, harvested rice paddies, and sold their labor to wealthier landowners, have suffered significant losses. Farming activities in the camp area have nearly stopped. The expansion of camps into hills and fields has forced local farmers to halt their farming and cultivation practices. Additionally, a large portion of land has become unusable due to contamination and pollution, especially from human waste and refusal from the camps. The lack of a multipurpose drainage system around the camp has led to garbage, dirt, and debris polluting the vacant land. On average, 2 to 3 acres of land are affected by waste from the camp, although some Camp in Charge (CiC) officials have disputed these figures³⁴.

Initially, some arable land was allocated for the Rohingya when they first arrived and began living in the yards and open areas of the host community. However, this land was later repurposed for the construction of the Rohingya camp. Residents have voiced complaints about the Rohingya allegedly encroaching on their land, although no concrete evidence supporting these claims has been collected. Discussions with government officials reveal that numerous applications regarding the locals' allegations of land grabbing are still awaiting review. An NGO officer dismissed the accusations against the Rohingya, stating that, *"Rohingyas cannot occupy others' land because they live in the camps. However, most of the camp is constructed on land belonging to the host community, as well as private and reserved forests, which the Rohingya also acknowledged."*

The author discovered that the offices of the CIC, NGOs, and international organizations occupy land that belongs to the local host community. According to residents, the government had promised to recruit at least two members from each host family for camp jobs in exchange for the land during its establishment. However, this commitment was not honored, and locals were not hired as promised. Many frustrated members of the host community attempted to dismantle government offices to reclaim their land. In response, government officials urged them to be patient, but they continue to wait for a resolution. The CIC office did respond to these accusations by stating that they have employed several locals. Additionally, many NGOs have also hired members of the host community. During discussions with both male and female host workers inside the camp, they denied receiving any assistance from the CIC offices.

The Social Security Challenge

Multiple stakeholders from the host community have reported that various social security challenges have emerged and worsened following the recent inflow, although some issues existed prior. Notably, incidents of theft and robbery have surged in the camp area during the post-inflow period. Both the Camp-in-Charge (CiC) office and Rohingya representatives have stated that certain local and Rohingya youth have formed alliances to engage in these activities at night, taking advantage of the inadequate security within the camp. Numerous reports of

³⁴ Sattar, *supra note* 13 at 3

such incidents have surfaced in the Ukhia and Teknaf Upazilas³⁵. Law enforcement and CiC officials have confirmed these observations, noting the documentation of several theft and robbery cases involving accusations against both Rohingya individuals and local residents. The police have pointed out that while many robberies have occurred in recent years across various villages, the perpetrators have often remained unidentified. Local residents speculate that the involvement of both host and Rohingya youth in these crimes is contributing to a growing sense of intimidation among community members.

The host community reported frequent incidents of stolen mobile phones, household items, cows, goats, and chickens. In the past, people grazed their cows, buffalo, and goats on large stretches of barren land, but now they must constantly check to ensure their animals remain safe from theft. While the Rohingya community denied the allegations against them, claiming they have little opportunity to steal since they are confined to the camp, the Camp in Charge (CIC) acknowledged that they had received a few complaints regarding the Rohingyas. Multiple sources informed the author that some Rohingya youth and children have engaged in stealing domestic animals and valuable items from local residents. However, such incidents do not occur daily, and only a small number of Rohingyas may be involved in these activities.

Local residents noted that some Rohingyas frequently visit their homes seeking assistance and food, including curries, vegetables, and dry goods, seemingly to gather information about household belongings for potential theft later on. The hosts believe that certain Rohingya women typically carry out these acts during the day when they can visit local families. When a theft occurs, the perpetrator often retreats into the camp, making it nearly impossible to trace them afterward. Currently, there is no punishment for such offenses, and both the CIC and other authorities appear hesitant to address the issue. Nevertheless, the Rohingya community rejected the accusations but admitted that some individuals may indeed be involved in these activities with local residents. As a result, the hosts feel that the responsibility primarily lies with them. Both communities have urged the CIC, the Refugee Relief and Repatriation Commissioner (RRRC), and other authorities to strengthen their presence at night and act against the culprits.

The host community has noticed a significant change in the behavior of youths following the influx of Rohingya migrants. This shift is attributed to the breakdown of the social structure and a decline in moral values among young people. Many local youths have engaged in various activities with the Rohingyas since their arrival, such as supplying gas cylinders, providing various goods, and operating small shops. Conversely, some have become involved in the illegal drug trade, including the sale of Yaba tablets. Although Yaba, which originated in Myanmar, is not new to Bangladesh, its availability and accessibility have surged with the arrival of the Rohingya, allowing local youths to seize the opportunity to become both drug dealers and users³⁶. Various agencies in the camp area have confirmed that the supply of Yaba tablets has increased in the post-influx period, with numerous Rohingya gangs participating in this trade. Local youths often befriend these gangs and become involved in drug use as well. Some locals reportedly remain in the camp while consuming drugs, as local and Rohingya youths supply Yaba tablets to the host community. Several senior citizens in the area have expressed concern about this troubling development and stated, *"Ninety percent (90%) of young people have become schizophrenic and fixated on obtaining drugs, as well as Rohingya women. They have abandoned their long-cherished culture and traditions."*

³⁵ Uttom, S. & Rozario, R., R. (2019, May 09). Struggling Rohingya seduced by crime at refugee camps. *Union of Catholic Asian News*, Accessed on May 25, 2025. <<https://www.ucanews.com/news/>>

³⁶ Crimes on the rise in Cox's Bazar camps. *Dhaka Tribune*, 01 September 2018, Accessed on May 25, 2025. <<https://www.dhakatribune.com/bangladesh/nation/2018/09/01/>>

Many members of the host community have voiced concerns that some local youths are becoming involved in drug trafficking to major cities, like Dhaka and Chittagong. This has resulted in a significant intracultural shift among the youth in the host area, which local parents and elders find difficult to accept. In interviews, several residents noted, *"They (the youth) no longer follow the rules, regulations, and customs of society as they once did before the arrival of the Rohingya."* Some members of the host community believe local youths are attracted to young Rohingya girls, leading to romantic relationships and even marriage. An NGO worker stated, *"Since I began working in the camp, I haven't encountered any cases like this, though I've heard rumors."* Local police reported they have documented several intercultural marriages in the area involving both host community members and Rohingya individuals. They attribute this trend to the interactions between the two ethnic communities.

Ahmed³⁷ highlighted that many outsiders come into refugee camps to marry Rohingya women and subsequently take them to Chittagong and Dhaka, where they are often forced into prostitution. Local residents reported that several intercultural marriages between the Rohingya and the host communities occur in secrecy. Additionally, some previously married individuals from the local population marry Rohingya women, as this process is simple and does not require any documentation or government registration. Some Rohingya women engage in transactional relationships for money and may even marry foreigners to migrate to developed countries. In some instances, local intermediaries facilitate the trafficking of Rohingya women seeking migration. As a result, numerous Rohingya women have been trafficked from the camps and sold abroad³⁸. These circumstances have had significant repercussions for both the host and Rohingya families. Local residents express concerns that if protective measures are not implemented, marriages between Rohingya and Bengalis may increase in the future. The host community acknowledges that these inter-ethnic marriages can lead to disturbances, instability, and domestic violence within both Rohingya and local families. There are instances where married men have divorced their wives due to relationships with Rohingya women and girls. A local interviewee recounted a story about a Rohingya-Bengali marriage and its repercussions, stating, *"A married man, who has two children, became involved with a Rohingya woman and married her without the consent of his first wife. This situation led to significant domestic strife, and now he must support both wives."*

Most Rohingya individuals contest the local claims regarding Rohingya women's involvement in prostitution and seduction, arguing that if such occurrences do exist, they are exceedingly rare. Rohingya people are unable to leave the camps without government permission. Moreover, while there may be cases of marriages between hosts and Rohingya women, these unions are based solely on individual choices rather than community consensus.

Movement and Environmental Security Challenge

The host community expressed that the presence of the Rohingya camps has significantly affected their lives in various ways. Movement for both the host community members and the Rohingyas has become increasingly restricted, with neither group able to move freely. All individuals are now required to carry identity cards while outside, which has created a sense of discomfort among the local population. Since the influx of Rohingya refugees, local residents have reported a rise in accidents and fatalities, marking the highest number in the past 15

³⁷ Ahmed, K. (2019). Rohingya women and girls are trafficked to Malaysia for marriage. *Al Jazeera*, 2019. Accessed on May 20, 2025. <<https://www.aljazeera.com/indepth/features/rohingya-women-girls-trafficked-malaysia-marriage-190507212543893.html>>

³⁸ Ahmed, *supra note* 37 at 11

years³⁹. Additionally, local roads have suffered damage due to the heavy trucks and lorries transporting food and supplies for the Rohingyas. Rohingya individuals also drive various vehicles to facilitate the transfer of materials and goods.

The major challenges stem from environmental issues, as nature has lost its equilibrium due to deforestation, pollution, and increased population density during post-inflow periods. The temperature in the camp area has risen in comparison to nearby Upazilas, leading both hosts and Rohingyas to experience significant heat and climate change impacts. During the summer, dust blankets the entire region, contributing to various respiratory illnesses among both locals and Rohingyas. The consequences of deforestation and pollution also include the loss of biodiversity, forested land, and endangered wildlife. A local resident remarked, "*A thousand acres of forestland cleared for refugee camps. Every year, the Rohingya and host people suffer and die because of landslides, floods, and cyclones.*" A CIC officer explained, "*In the last three years, around 50-60 events of monsoon-triggered landslides, floods, and cyclones took place in the camp where more than 20 Rohingyas died.*"

The local communities argued that deforestation and the clearance of forest lands have resulted in a significant loss of their nature-based resources and livelihoods. A CiC officer reported that development agencies are implementing various projects aimed at rapid reforestation and introducing alternative cooking technologies, such as LPG cylinders, cookstoves, biomass briquettes, and biogas. In December 2022, the majority of refugee camps had transitioned to using LPG gas cylinders⁴⁰. While the extensive exploitation of natural resources has ceased, environmental harmony and ecological balance remain elusive in the camp area. Furthermore, the shortage of groundwater has become a critical issue for the community, exacerbated by the influx of population. Thousands of shallow tube wells have been constructed at various slopes within the camp, leading to excessive withdrawal from the shallow aquifer and resulting in drying groundwater supplies. Many tube wells have already ceased to function, intensifying the groundwater crisis, especially during the summer and winter seasons. Water service providers are exploring the possibility of accessing deeper water levels, although this initiative has not yet received approval⁴¹.

Groundwater contamination has emerged as a significant concern for experts in the field, primarily due to issues such as leakage, seepage, and overflow. The presence of thousands of non-functional latrines and tube wells has led to widespread water contamination. Experts from the Environmental Department of Bangladesh have reported that 70% of the groundwater in the camp area is polluted. The influx of Rohingya refugees has resulted in critical impacts, including groundwater depletion and contamination⁴². Many local hosts and Rohingya individuals have noted a decline in water levels and the dysfunction of numerous tub wells. One Rohingya woman articulated the challenge faced by her community, stating, "*We must bring water from half a kilometer away, as all the tube wells around our house are unused and non-functional.*"

Both the host community and members of the Rohingya population have reported that surface water in the camp area is contaminated. This contamination is primarily caused by camp waste and open defecation practices among both host and refugee children. Additionally, sedimentation in the river stream contributes to the deteriorating quality of surface water. The

³⁹ Gebrehiwet, K., Gebreyesus, H. & Teweldemedhin, M. (2020). The Social Health Impact of Eritrean Refugees on the Host Communities: The Case of May-ayni Refugee Camp, Northern Ethiopia." *BMC Research Notes*, vol. 13.182, pp. 3-5. DOI: 10.1186/s13104-020-05036-y

⁴⁰ Chowdhury, T., Chowdhury, H., Miskat, I. M., & Chowdhury, P., Sait, M.S., Thirugnanasambandam, M., & Saidur, R. (2020). Developing and evaluating a stand-alone hybrid energy system for the Rohingya refugee community in Bangladesh.

⁴¹ DoE, *supra note 11* at 3

⁴² DoE, *supra note 11* at 3

poor waste management practices in the camp area have significant negative effects on the environment, as there is no cohesive solid and liquid waste management or drainage system in place. Consequently, waste is being discharged into the host community's surface water and land.

Experts have pointed out that landslides pose a serious and potentially hazardous natural threat to both the host and Rohingya populations. The construction of camps has led to the removal of vegetation and alterations to the terrain, compromising their natural state. The weakened soil structure has increased susceptibility to erosion, making topsoil and loose soils particularly vulnerable to being carried away during the rainy season and strong winds. Erosion has already obstructed pathways, and hazardous hill-cutting poses a risk of landslides within the camp at any moment. During the rainy season, soil minerals are washed away and accumulate in the mud, further contributing to slides in the camp area⁴³.

Asian elephants are increasingly facing critical endangerment as a result of this influx. According to the International Union for Conservation of Nature⁴⁴, 40 elephants have become trapped on the western side of the Rohingya camp near the Myanmar border. The repercussions on the ecosystem are profound, particularly concerning wildlife, vegetation, and marine and freshwater ecosystems.

Rohingya Terrorist Groups and National Security Challenge

The Rapid Action Battalion (RAB) apprehended Ataulah, the chief of the Arakan Rohingya Salvation Army (ARSA), along with six other individuals, and presented them before the Senior Judicial Magistrate Court of Narayanganj. They have filed a request for a 10-day remand in two separate cases: one concerning illegal entry and another related to criminal activities. RAB also took into custody three women and a child in connection with the six arrests. According to the first information report lodged at Siddhirganj police station, the detainees had convened in the region to conduct clandestine meetings aimed at orchestrating subversive activities and serious crimes. Over the years, hundreds of Rohingyas have been killed by ARSA members following the mass exodus in 2017. The group has been implicated in a range of criminal activities, including murder, smuggling, abduction, trafficking, and extortion within the camps⁴⁵.

The activities of the Arakan Rohingya Salvation Army (ARSA) garnered significant attention following the assassination of Rohingya rights activist and leader Mohib Ullah at the Kutupalong camp. On November 23, 2022, ARSA's commander-in-chief, Ataulah, was named the principal suspect in the murder of a DGFI officer near the Tumbru border in Bandarban's Naikkhangchhari, a case that also implicated 65 others. The incident, which occurred on November 14, resulted in the death of Bangladesh Air Force Squadron Leader Rizwan Rushdee, who was serving with the DGFI, while Rab official Sohel Barua sustained injuries during a confrontation with drug smugglers⁴⁶.

The Defense Ministry of Bangladesh prepared a report and submitted it to the parliamentary standing committee in 2023. The report showed that at least ten terrorist and robber gangs are

⁴³ DoE, *supra note* 11 at 3

⁴⁴ The International Union for Conservation of Nature (IUCN) (2020). *Annual Report 2019*, en, Gland, Switzerland, 38-41 <<https://portals.iucn.org/library/node/49096>>

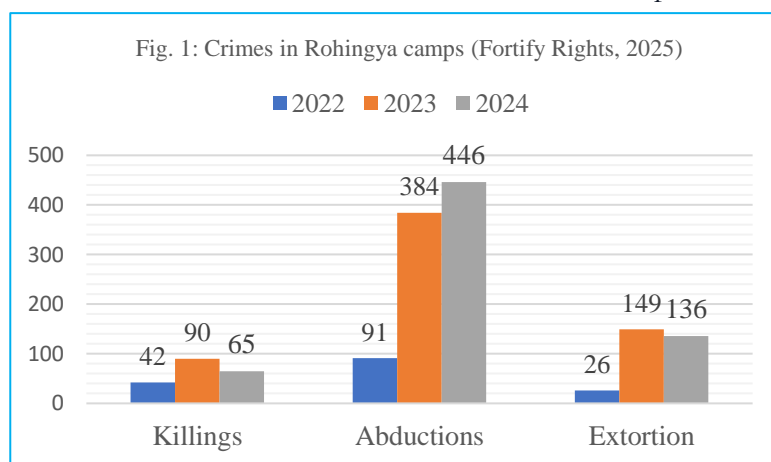
⁴⁵ ARSA chief, 10 others held, placed on remand. *The Daily Star*, March 18, 2025. Accessed on May 28, 2025. <<https://www.thedailystar.net/news/bangladesh/crime-justice/news/arsa-chief-10-others-held-placed-remand-3851896>>

⁴⁶ Tayeb, *supra note* 20 at 4

actively operating within the Rohingya camps. Among these, ARSA operates in Ukhiya, Balukhali, Palongkhali, and Whykong, while other groups, such as the RSO and Master Munna gangs are active in Ukhiya and Palongkhali. The Islami Mahaj and Jabu dacoit gangs operate in Whykong, and various robber gangs, including the Chakma, Nabi Hussain, Putia, Salman Shah, and Khaleq gangs, are operational in the Nayapara camp⁴⁷. The following table 2 shows the Rohingya and local terrorists’ groups surrounding the refugee camps in Bangladesh.

Originality	Terrorist groups	Activity Area
Myanmar	ARSA	Ukhiya (Balukhali, Palongkhali & Whykong)
Myanmar	RSO	Ukhiya (Palongkhali)
Myanmar	Master Munna gang	Ukhiya (Palongkhali)
Myanmar	Islamic Mahaj	Ukhiya (Whykong)
Bangladesh	Jabu dacoit gangs	Ukhiya (Whykong)
Bangladesh	Chakma Robbers	Teknaf (Nayapara)
Myanmar	Nabi Hussain	Teknaf (Nayapara)
Bangladesh	Putia gang	Teknaf (Nayapara)
Myanmar	Salman Shah gang	Teknaf (Nayapara)
Myanmar	Khaleq gang	Teknaf (Nayapara)

Fortify Rights⁴⁸ published a report on the Rohingya crisis in 2025. The report shows that the number of thefts and robberies saw a decline from 77 incidents in 2021 to 75 in 2022. Similarly, shootings decreased significantly from 51 to 18, kidnappings fell from 173 to 86, internal feuds declined from 11 to just one, and drug-related incidents dropped from 268 to 249. Other crimes also witnessed a decrease, from 567 to 553. However, Rohingya refugees have endured years of violence perpetrated by militant groups. The fatalities attributed to camp-based militants rose from 22 in 2021 to 42 in 2022, then spiked to 90 in 2023, and reached at least



65 in 2024. In 2022, there were 91 abductions in the camps by Rohingya militants and criminal organizations; this number surged to 384 in 2023 and 446 in 2024. Extortion incidents also saw a significant rise, increasing from just 26 in 2022 to 149 in 2023, followed by 136 in 2024 (for further details, see Figure 1). John Quinley, Director of Fortify Rights,

⁴⁷ Arsa, 9 other armed groups active in the Rohingya camps (2023, Feb. 15). *The Daily Star*, Accessed on May 28, 2025. <<https://www.thedailystar.net/news/bangladesh/crime-justice/news/arsa-9-other-armed-groups-active-rohingya-camps-3248906>>

⁴⁸ Fortify Rights. (2025). *I May Be Killed Any Moment”: Killings, Abductions, Torture, and Other Serious Violations by Rohingya Militant Groups in Bangladesh*. <[https://www.fortifyrights.org/downloads/I%20May%20Be%20Killed%20Any%20Moment%20-%20Fortify%20Rights%20Report%20\(ENG\).pdf](https://www.fortifyrights.org/downloads/I%20May%20Be%20Killed%20Any%20Moment%20-%20Fortify%20Rights%20Report%20(ENG).pdf)>

remarked: "*Rohingya armed groups are wreaking havoc in Bangladesh and Myanmar with near complete impunity*" (2025, p. 5). He further stated, "*War crimes are usually committed within the immediate theater of armed conflict, but in this case, crimes in Bangladesh are directly connected to the war in Myanmar. Bangladesh's interim government should cooperate with international justice mechanisms to bring perpetrators to justice.*"⁴⁹"

During the study, members of the host community reported a notable increase in criminal activity attributed to Rohingya criminals and extremist groups compared to the past. Local residents expressed feelings of fear and anxiety, as rival Rohingya factions frequently engage in conflicts both within and outside the camp. The Camp-in-Charge (CiC) and security forces share similar concerns, noting a rise in tensions among these rival groups. A police inspector commented, "*Rohingya criminal and extremist factions become active in the evenings after office hours, leading to several violent incidents among themselves.*"

The police officer emphasized that extremist groups operate both within and around the camp, aiming to instill panic among the mass of refugees and the local hosts. Reports from Rohingya individuals indicate that those who oppose the interests of these extremist groups are often forcibly taken away and punished according to their interpretation of Islamic law. Both the Rohingya and the hosts are feeling increasingly anxious due to the actions of these criminal groups⁵⁰. One local host described their situation, saying, "*Whenever we step outside for work, we worry about our families since our homes are surrounded by Rohingya camps.*"

He acknowledged that it may not be accurate to claim all Rohingyas are involved in illegal activities that disrupt the lives of host families. Nevertheless, incidents of crime in the area have surged significantly since the arrival of the Rohingya. Tensions between the local population and the Rohingya have also escalated, sometimes leading to disputes over minor issues. Conflicts between the two ethnic groups have been known to arise, often affecting children. A CIC officer noted, "*Tension between the Rohingya and the hosts has increased, leading to greater intolerance.*"

Local hosts expressed concern that the Rohingya community is united, and they feel that the camp administration occasionally favors the migrants. A Rohingya man living in the camp corroborated this perspective, stating, "*Criminal activity, drug trafficking, and internal conflicts have risen within the camp.*" However, he overlooked the involvement of women and girls in drug-related activities and prostitution.

Bangladesh-Myanmar border security challenge

The Bangladesh-Myanmar border is consistently plagued by insecurity, attracting criminals and drug traffickers. Smugglers exploit this area to transport drugs, weapons, and illicit goods from Myanmar. The border's vulnerability became particularly evident during the mass influx of Rohingya refugees in 2017, when it served as a passage for Rohingya criminals and terrorist groups to move into Myanmar and Arakan. Even ordinary Rohingya families have resorted to using this border for informal entry into Bangladesh. The situation worsened following the outbreak of civil war in Myanmar, which intensified the risks for the Bangladeshi border

⁴⁹ Fortify Rights, *supra note* 48 at 14

⁵⁰ Czimmek, S. & Islam, A. (2019, Sep.). Rohingya militants are active in Bangladeshi refugee camps. *Deutsche Welle (DW)*, Accessed on May 30, 2025 <<https://www.dw.com/en/rohingya-militants-active-in-bangladeshi-refugee-camps/a-50490888>>

community. Numerous incidents have seen bullets and mortar shells stray into Bangladeshi territory, injuring several families and villagers⁵¹.

On February 9, 2024, an unexploded mortar shell landed in Bangladesh, with the Myanmar military subsequently firing into Bangladeshi territory after the shell was rendered inactive by the Bangladesh military. This escalation rendered the border extremely unsafe, forcing local residents to seek refuge in safer areas. The Border Guard Bangladesh (BGB) and the military found themselves in a precarious situation due to the ongoing conflict in Myanmar and the resulting cross-border fire. In light of these events, former Prime Minister Sheikh Hasina urged security forces to exercise utmost patience. Additionally, former Foreign Minister Hasan Mahmud summoned the Myanmar ambassador to Dhaka to protest the military activities occurring along the border, which have caused significant alarm among the Bangladeshi population⁵².

In February 2024, gunfire from Burma's military helicopters caused bullets and mortar shells to hit a village near the Bangladeshi border, resulting in the deaths of at least four people and injuring around ten others. In response to the violence along the border, all schools and colleges in the affected area were closed. Additionally, the Rohingya camp has become increasingly unsafe amidst this turmoil. Although a barbed wire fence surrounds all 34 camps in Ukha, some Rohingyas have resorted to cutting the wire to move discreetly and engage in drug trafficking, facing various dangers from the situation in Burma.

Due to security concerns, Bangladesh has suspended all maritime and communication access to Saint Martin Island, a prime tourist destination during the winter, and Cox's Bazar from February to March 2024. Thousands of villagers from the Ghumdhum, Tomru, and Rohomoter Bil areas have been relocated to safe zones, leaving their communities desolate and residents in panic over the threat of bullets and mortar shells. The Bangladeshi authorities have sealed off three border entries: Ghumdhum Union in Naikhangchori, Bandarban; Tumru (Bandarban); and Rohomoter Bil in Ukhiya, along with Thaingkhali in Teknaf, due to the ongoing security issues. It has also been reported that approximately 400,000 Rohingyas are awaiting entry into Bangladesh to escape the civil war in Myanmar's Rakhine state⁵³. The country has adopted a strict policy of zero tolerance regarding the admission of any Rohingya individuals. Additionally, the Coast Guard of Bangladesh (CGB) has intensified patrols along the Naf River to prevent any potential crossings into the country. According to the latest updates, the Arakan Army has successfully taken control of Rakhine state, defeating the Junta Army. Along with the tight security measures at the border, an additional 180,000 fresh Rohingya refugees entered Bangladesh in March 2025 to escape from the Arakan Army's torture and violence⁵⁴.

Rohingya individuals are reportedly participating in the conflict in Myanmar, crossing the border from the Cox's Bazar camp. The participating groups are primarily composed of ARSA

⁵¹ Moniruzzaman, A. (2022, Sep. 21). *Why should Bangladesh pay for Myanmar's internal conflict?* *The Daily Star*, Accessed on May 30, 2025 <<https://www.thedailystar.net/star-multimedia/views-multimedia/news/why-should-bangladesh-pay-myanmars-internal-conflict-3124776>>

⁵² Myanmar junta enforces mandatory military service for young people. (2024, Feb. 11). *The Reuters*, Accessed on May 30, 2025. <<https://www.reuters.com/world/asia-pacific/myanmar-junta-enforces-mandatory-military-service-young-people-2024-02-11/>>

⁵³ Head, J. (2017, Oct. 11). Rohingya crisis: finding out the truth about Arsa militants. *BBC*, Accessed on June 2, 2025 <<https://www.bbc.com/news/world-asia-41521268>>

⁵⁴ Millions of new Rohingyas in Bangladesh, where is the concern? Translated the title from Bengali. (2025, May 09). *British Broadcasting Corporation*, Accessed on December 20, 2025 <<https://www.youtube.com/watch?v=xSYP9q7EW98>>

members led by Nobi Hossen. On February 6, 2024, Bangladeshi authorities apprehended 23 Rohingya individuals armed with weapons at the Ukhia border; they possessed identification cards from the Rohingya camp⁵⁵. These individuals were returning from Myanmar, where they had seized arms from members of the Myanmar Border Guard (BGP). There has been significant unrest among the Rohingya in reaction to the situation in Myanmar, particularly after learning about the successes of the Arakan Army (AA) against the Myanmar military in Rakhine State. Motivated by this, many Rohingya sought to join the Arakan Army.

Witnesses have indicated that the primary objective of these Rohingya groups was to retrieve weapons abandoned by the Myanmar Border Guard (BGP) and to gain control over the local drug trade. Rohingya fighters have considerable freedom of movement across the two Bangladeshi borders, allowing them to operate relatively easily. During clashes along the Dekubunia border in Myanmar, some Rohingya crossed into Bangladesh through the Nolbunia border (Thaingkhali river) and opened fire on Bangladeshi villagers when they were obstructed from entering⁵⁶.

The overarching Rohingya population in the camp is also experiencing anxiety due to the ongoing conflict in Myanmar. Many feel unsafe within the camps, as there are insufficient facilities and security measures in place. Among the various Rohingya extremist groups, there exists a marked hostility toward one another in the context of the Myanmar conflict. Some factions are allied with the Myanmar military government, while others support the Arakan Army. The Rohingya Solidarity Organization (RSO), categorized as an extremist group, has been actively fighting for the Arakan Army and their territorial rights, while ARSA has aligned itself with the Myanmar government, creating opposing positions within the conflict⁵⁷.

Numerous Myanmar soldiers have sought refuge in Bangladesh to escape the conflict with the Arakan Army. As of February 2024, approximately 328 members of the Myanmar Border Police (BGP), the Criminal Investigation Department (CID), and the Tatmadaw (military) have crossed into Bangladesh for their safety⁵⁸. Following the Geneva Conventions, Bangladesh has provided them with disarmament, shelter, and healthcare. However, after receiving a request from the Myanmar authorities, the Bangladesh government returned all of them to Myanmar.

Camp Terrorist groups to nationalist Politics

In the Rohingya refugee camps, at least 15-20 terrorist groups are active inside and outside the camp. Many of them participated in the Myanmar civil war and collected huge amounts of weapons. They frequently cross the border and returning to the camps⁵⁹. They have already committed several criminal and terrorist incidents inside and surrounding the camp. The Arsa chief was arrested with his ten allies in Dhaka, Narayanganj. The Rohingya terrorist groups have already been intimidated by Bangladeshi nationalist politics. The Arsa chief had planned to miscreants in Dhaka and the nearest area. Therefore, the Rohingya terrorist and militant

⁵⁵ Khan, E. A. (2024, Feb 4). Analysis: Time to stabilise Rakhine for good. *The Daily Star*, Accessed on May 30, 2025. Retrieved from <https://www.thedailystar.net/news/bangladesh/news/analysis-time-stabilise-rakhine-good-3536446>

⁵⁶ Shuvo, M. & Islam, S. (2024, Feb. 5). Tensions spill over Tumbru border. *The Daily Star*, Accessed on May 30, 2025 <<https://www.thedailystar.net/news/bangladesh/news/tensions-spill-over-tumbru-border-3536286>>

⁵⁷ Goshal, D. & McPherson, P. (2024, Nov. 26). In the world's largest refugee camps, Rohingya mobilize to fight in Myanmar. *Reuters*, Accessed on May 31, 2025 <<https://www.reuters.com/world/asia-pacific/worlds-largest-refugee-camps-rohingya-mobilise-fight-myanmar-2024-11-25/>>

⁵⁸ 288 Myanmar security personnel sent back from Bangladesh. (2024, Apr. 25). *The Daily Star*, Accessed on June 2, 2025 <<https://www.thedailystar.net/news/bangladesh/news/288-myanmar-security-personnel-sent-back-bangladesh-3594981>>

⁵⁹ Fortify Rights, *supra notes* 48 at 14

groups have become part of Bangladeshi politics, and in the future, they might be a significant partner in submerging the political opponents⁶⁰.

The appeasement of Islamist movements and parties has long been a feature of Bangladeshi politics, a strategy employed by both the Awami League and the BNP. The Rohingya crisis presents an opportunity for Bangladeshi political parties, but it also raises concerns about the potential recruitment of Rohingyas by extremist groups in Bangladesh. Rahman⁶¹ highlights the militancy risk associated with refugees, noting that “*The Rohingya camps in Cox’s Bazar District are fertile grounds for recruitment by Islamic militants.*” Isolated from Myanmar and marginalized within Bangladesh, the stateless Rohingyas are vulnerable and desperate, making them susceptible to militant influences in their pursuit of interests. A risk assessment conducted by USAID in 2012 similarly cautioned that the plight of both Rohingya and Bihari refugee communities in Bangladesh, who are stripped of citizenship rights and face persecution, could render them more open to recruitment by extremist factions⁶².

Lintner⁶³ and Idris⁶⁴ assert that the existing Rohingya camps (Those camps of refugees who fled to Bangladesh before 2017) were operated by Harkat-ul-Jihad-i-Islami (HuJI). He identified links between militant organizations in Bangladesh and those in Myanmar. Moreover, Fair and Oldmixon⁶⁵ contended that groups affiliated with Islamic politics in Bangladesh have actively recruited Rohingya refugees in the past and are presently continuing this practice amid the ongoing influx. They warn that “*As the Rohingya crisis continues to deepen, Bangladesh will become increasingly attractive to a range of Islamist militant groups seeking to recruit the hapless victims of the Burmese government*” (p.5).

Felix-Joehnk⁶⁶ argued that radical Islamist movements are benefiting from the crisis, raising concerns about the potential recruitment of Rohingya refugees by extremists and jihadists. Additionally, there are worries that the Rohingya crisis could incite militancy in other countries within the region.

4. Conclusion

The empirical findings and the content analysis of the paper primarily highlight the security challenges faced by Bangladesh, particularly in light of the socioeconomic, environmental, and political changes that have occurred in the camp areas following the Rohingya exodus. These changes have affected both the Rohingya and the host communities, which are grappling with various adverse issues, including drug-related problems, crime, and extremist activities both within and outside the camps. There is a consensus among national and international communities that the influx of Rohingya refugees has put a strain on limited natural resources, local infrastructure, public services, and the local economy, as well as contributing to mass

⁶⁰ Idris, I. (2017). Rohingya refugee crisis: impact on Bangladeshi politics. *GSDRC, University of Birmingham*, K4D Helpdesk report, pp.4-10, Brighton, UK: Institute of Development Studies <<https://gsdrc.org/wp-content/uploads/2017/11/233-Rohingya-Refugee-Crisis-Impact-on-Bangladeshi-Politics.pdf>>

⁶¹ Rahman, U. (2010). The Rohingya refugee: A security dilemma for Bangladesh. *Journal of Immigrants and Refugee Studies*. Vol. 8:2, pp.233-239, DOI: 10.1080/15562941003792135

⁶² Idris, *supra note* 59 at 17

⁶³ Lintner, B. (2017, Sep. 27). The world will soon have a new terror hub in Myanmar if the Rohingya crisis isn’t tackled well. *Quartz India*, Accessed on June 2, 2025 <<https://qz.com/1088213/the-world-will-soon-have-a-new-terror-hub-in-myanmar-if-the-rohingya-crisis-isnt-tackled-well/>>

⁶⁴ Idris, *supra note* 59 at 17

⁶⁵ Fair, C. & Oldmixon, S. (2015). Think Again: Islamism and Militancy in Bangladesh. *The National Interest*, 13 August 2015, Accessed on June 2, 2025 <<http://nationalinterest.org/feature/think-again-islamism-militancy-bangladesh-13567>>

⁶⁶ Felix-Joehnk, T. (2017, Oct. 6). How the Rohingya crisis is changing Bangladesh. *New York Times*, Accessed on June 2, 2025 <<https://www.nytimes.com/2017/10/06/opinion/rohingya-bangladesh-myanmar.html>>

movements of people. These factors have created significant barriers to fostering inclusive relationships between the Rohingya and their hosts. Additionally, the presence of Rohingya terrorist groups both inside and outside the camps, along with their ability to move freely to Myanmar, poses a threat to national security in Bangladesh. The involvement of Rohingyas in the Myanmar Civil War on opposing sides can further impact the stability and security of the refugee camps. Furthermore, competition among factions and group conflicts within the camps have already resulted in numerous incidents, leading to injuries and fatalities.

The ownership of heavy arms by Rohingyas poses a significant risk to both the camps and the host communities, potentially compromising national security. Numerous national and international media outlets, as well as organizations, have highlighted the likelihood of Rohingyas becoming involved in nationalist politics. Bangladesh's political landscape is often characterized by hostility, and any political party may seek to recruit Rohingyas to undermine or target their opponents. Additionally, since the Rohingyas are predominantly Muslim, they may become targets for recruitment by extremist political parties, both within Bangladesh and abroad. If Rohingya groups align themselves with extremist factions in Bangladesh or with international militant organizations, the security landscape of the country could face severe repercussions.

In light of these concerns, it is imperative for Bangladesh, in collaboration with international partners, to develop comprehensive policies and initiatives aimed at safeguard its socioeconomic and environmental security. The camp authorities, along with the Bangladeshi government, must remain vigilant regarding Rohingya terrorist activities and enhance surveillance both within and beyond the camps to address any criminal or terrorist threats. The Border Guard Bangladesh (BGB) should exercise heightened vigilance regarding the movement of Rohingya groups toward Myanmar and their potential access to weapons. Furthermore, it is crucial for Bangladeshi political parties, especially Islamic ones, to commit to excluding any Rohingya from their ranks. A national census is necessary to effectively combat the threats of Rohingya terrorism and militancy both inside the camps and throughout Bangladesh.

Embedding AI in the Constitution of Bangladesh: A Case for the Framework for Algorithmic Constitutionalism

Nafees Ahmad and Sk. Iftesham Islam*

Abstract

With the ascendance of Artificial Intelligence (AI), constitutionalism has attained the algorithmic characteristics in its application to digital justice, digital fair play, and digital equity that designate it as Algorithmic Constitutionalism. Fundamentally, constitutional AI is the fusion of AI systems with legal frameworks, especially constitutional concepts. Today, states are utilising AI applications in all sectors of governance and providing services to citizens. However, it has also raised questions about discriminatory state practices in giving rights and services due to dubious AI applications worldwide. AI systems are being resorted to for surveillance, racial profiling of citizens and depriving people of social benefits. Therefore, the objective is to include and ensure that AI applications must be free from bias, racial and prejudiced state actions and adhere to the algorithmic accountability, morality and legal standards established in the architecture of modern national constitutions or other fundamental legal texts. This entails developing the fundamental rights, privileges, and values in AI systems at par with those traditionally acknowledged in our social contracts. Thus, AI technologies are profoundly intertwined with constitutionalism. As Bangladesh undergoes unique circumstances with the interim government's formation of a Constitution Reform Commission, it must be the first constitution in the world to have embedded AI into its constitutional framework to create uniform constitutional interpretations of algorithmic accountability and the digital rule of law consistent with the emerging technologies in a democratic dispensation of justice. This article explores whether incorporating algorithmic constitutionalism could enhance citizen voices in state affairs by envisioning digital accountability, inclusion, participation, or political conversation. If so, what institutional arrangements might be devised to ensure that algorithmic accountability under the new constitution works in the real-world affairs of the state? How AI can be embedded within Bangladesh's Constitution to promote digital justice, fairness, and equity. Analysing the intersection of AI and constitutionalism proposes a framework for accountability and justice, particularly regarding how AI can reshape the exercise of freedoms and powers in a digital society. The jurisprudential history of rights may support extending constitutional rights to artificial intelligence. Over time, constitutional rights have changed to provide new rights and protect new subjects.

Key Words

Algorithmic Constitutionalism, Artificial Intelligence (AI) Governance, Constitutional Reform in Bangladesh, Algorithmic Accountability, Digital Justice and Fundamental Rights.

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1. Introduction

Artificial intelligence (AI) and algorithmic decision-making systems increasingly shape the exercise of public power in contemporary states.¹ Governments now rely on algorithms in areas such as welfare distribution, predictive policing, electoral administration, content moderation, and bureaucratic decision-making. These developments have profound implications for constitutional governance, particularly in relation to accountability, transparency, equality before the law, and the protection of fundamental rights.² Yet, most existing responses to AI governance remain fragmented,³ sector-specific, and predominantly legislative, leaving unresolved questions about legitimacy, continuity, and democratic control in an algorithmically mediated state.⁴ At its core, democratic governance is anchored in people's rights, representation, and participation.⁵ At the same time, state-building involves the establishment of institutions, legal frameworks, and governing structures capable of exercising power within constitutional limits.⁶ As algorithms increasingly mediate public decision-making, they are no longer merely technical tools but governance instruments that shape how authority is exercised and how rights are realised.⁷ This raises a fundamental constitutional question: whether algorithmic power should be constrained solely through ordinary legislation or embedded within constitutional structures that provide durability, supremacy, and normative legitimacy.⁸

This article advances the argument that algorithmic constitutionalism offers a principled response to this challenge.⁹ Algorithmic constitutionalism refers to the incorporation of constitutional values such as accountability, transparency, equality, and the rule of law into the design, deployment,¹⁰ and governance of algorithmic systems that exercise public or quasi-public power.¹¹ Rather than treating algorithms as neutral technological artefacts, this approach recognises them as normative governance mechanisms that must be constitutionally constrained.¹² It builds on, but goes beyond, the well-known proposition that “code is law” by insisting that algorithmic regulation itself must derive legality, legitimacy, and authority from

¹ Surden H, “Artificial Intelligence and Law: An Overview” (2019) Georgia State University Law Review, <<https://readingroom.law.gsu.edu/gsulr/vol35/iss4/8/>> accessed 15 September 2024

² Filippo A Raso, ‘Artificial Intelligence & Human Rights: Opportunities & Risks’ (2018) 2018–6 The Berkman Klein Center for Internet & Society at Harvard University p. 11 <<https://cyber.harvard.edu/publication/2018/artificial-intelligence-human-rights>> accessed 15 September 2024

³ ‘OII: Internet Governance’ (Oxford Internet Institute Internet Governance Comments), <<https://ora.ox.ac.uk/objects/uuid:7e3b98a6-bba3-4878-939e-e86fad7e5a2/files/s4x51hk76q>> accessed 17 September 2024.

⁴ *ibid*

⁵ Temperman, Jeroen, and Alberto Quintavalla (eds), *Artificial Intelligence and Human Rights* (2023; online edn, Oxford Academic), <<https://doi.org/10.1093/law/9780192882486.001.0001>,> accessed 15 September 2024

⁶ Palladino N, “The Role of Epistemic Communities in the ‘Constitutionalization’ of Internet Governance: The Example of the European Commission High-Level Expert Group on Artificial Intelligence” (2021) 45 *Telecommunications Policy* 102149 <<https://doi.org/10.1016/j.telpol.2021.102149>> accessed 17 September 2024.

⁷ *Ibid*

⁸ *Ibid*

⁹ Anneke Zk a and others, ‘Implications of the Use of Artificial Intelligence in Public Governance: A Systematic Literature Review and a Research Agenda’ (*Government Information Quarterly*, 23 March 2021) accessed 17 September 2024

¹⁰ Feijóo C and others, “Harnessing Artificial Intelligence (AI) to Increase Wellbeing for All: The Case for a New Technology Diplomacy” (2020) 44 *Telecommunications Policy* 101988 <<https://doi.org/10.1016/j.telpol.2020.101988>> accessed 16 September 2024

¹¹ *Ibid*

¹² *Ibid*

constitutional norms.¹³ A central concern addressed by algorithmic constitutionalism is the issue of algorithmic bias and opacity.¹⁴ Algorithmic systems often reproduce existing social inequalities, embed discriminatory assumptions, and operate through complex processes that are difficult for affected individuals or public authorities to scrutinise.¹⁵ While ethical frameworks and principles of public reason are frequently invoked to mitigate these risks, they are not always sufficient to do so. Ethical consensus may itself reflect dominant moral assumptions that marginalise vulnerable groups, and even widely accepted normative standards may yield discriminatory outcomes when translated into code.¹⁶ Embedding constitutional principles within algorithmic governance provides a more robust mechanism for limiting bias, ensuring accountability, and safeguarding fundamental rights in a democratic society. The relevance of algorithmic constitutionalism is particularly acute in contexts of constitutional transition. Bangladesh presents a unique and timely case study.¹⁷ Following the mass uprising of 5 August 2024, the country has entered a critical reform moment marked by the establishment of a Constitution Reform Commission tasked with revisiting the existing constitutional framework or drafting a new one.¹⁸ This rare constitutional opening provides an opportunity not merely to respond to past governance failures, but to future-proof the constitutional order against emerging forms of algorithmic power. Embedding AI governance within the Constitution can ensure that technological transformation does not outpace constitutional safeguards, while reinforcing democratic accountability and institutional legitimacy.

This article argues that constitutional regulation of AI offers advantages that ordinary legislation cannot provide. Constitutional norms-driven algorithms can limit excessive executive discretion, restrain opaque and unaccountable algorithmic governance, and ensure that both state institutions and powerful private actors remain subject to the rule of law. Existing IT, cybersecurity, and criminal laws, while important, lack the constitutional authority and continuity necessary to address the structural redistribution of power in an algorithmic society. Algorithmic constitutionalism thus serves both a constraining and enabling function: it curbs concentrations of unaccountable power while supporting effective, equitable, and rights-respecting governance. The article proceeds in five parts. The first part outlines the foundational concepts of artificial intelligence and algorithms and surveys existing global and domestic legal frameworks governing AI. The second part examines the relationship between AI, fundamental rights, and human dignity, highlighting the constitutional risks posed by algorithmic decision-making. The third part develops the concept of algorithmic constitutionalism and analyses its implications for contemporary constitutional theory. The

¹³ Celeste E, “Digital Constitutionalism: A New Systematic Theorisation” (2019) 33 *International Review of Law Computers & Technology* 76 <<https://doi.org/10.1080/13600869.2019.1562604>> accessed 16 September 2024

¹⁴ Perez O and Wimer N, “Algorithmic Constitutionalism” [2023] *SSRN Electronic Journal* <<https://doi.org/10.2139/ssrn.4373466>> accessed 16 September 2024

¹⁵ *Ibid*

¹⁶ Yilma KM, “Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts” (2017) 25 *International Journal of Law and Information Technology* 115 <<https://doi.org/10.1093/ijlit/eax001>> accessed 16 September 2024

¹⁷ “A New Dawn Rises on Bangladesh” *The Daily Star* (August 6, 2024) <<https://www.thedailystar.net/opinion/editorial/news/new-dawn-rises-bangladesh-3670546>> accessed 18 September 2024.

¹⁸ “Govt Finalises 5 of 6 Reform Commissions” *The Daily Star* (October 4, 2024) <<https://www.thedailystar.net/news/bangladesh/news/govt-finalises-5-6-reform-commissions-3719361>> accessed 18 September 2024.

fourth part focuses on Bangladesh's constitutional reform process and proposes a framework for embedding AI governance within the Constitution to ensure accountability, fairness, and democratic legitimacy. The final part concludes by reflecting on the broader significance of algorithmic constitutionalism for constitutional governance in the digital age.

2. Understanding AI and Algorithms

The definition of Artificial Intelligence was also much debated, even if multiple reports and experts point out that, by definition, ambiguity has been constant.¹⁹ According to the JRC Technical Reports, consensus on the definition of AI is lacking in public discourses and academic disciplines such as computer science and law.²⁰ This ambiguity arises because AI is not one technology but a collection of different methods and subfields, such as speech recognition, computer vision, attention, and memory.²¹ According to Gasser and Almeida, definitions tend to reflect personal ideologies, and that is why a fixed definition has not yet been inimitably captured, as these technologies are under constant evolution.²²

With such a lack of specificity, it isn't easy to generalise on a basic understanding of what AI exactly is.²³ Despite the vagueness, we shall try to look at some accepted definitions. As the father of AI, John McCarthy defined the subject as "the science and engineering of making intelligent machines."²⁴ A rather general perception of AI would be that it researches how to make intelligent agents that can think and act much like human beings.²⁵ The Joint Research Centre, in a 2018 report, referred to AI as "a generic term that refers to any machine or algorithm which can observe its environment, learn, and, based on the gained knowledge and experience, take intelligent actions or decisions."²⁶ Likewise, in its April 2018 Communication on Artificial Intelligence, the European Commission defined AI as systems displaying intelligent behaviour by interpreting their environment and taking action autonomously to achieve particular objectives.²⁷ These AI systems may be software-based and thus operate in

¹⁹ Wang P, "On Defining Artificial Intelligence," vol 10 (Dagmar Monett, Colin W. P. Lewis, and Kristinn R. Th'orisson eds, 2019) journal-article <<https://sciendo.com/downloadpdf/journals/jagi/10/2/article-p1.pdf>> accessed 18 September 2024.

²⁰ AI Watch, Defining Artificial Intelligence (JRC Technical Report, EUR 30117 EN, 2020) para. 2.1. <<https://publications.jrc.ec.europa.eu/repository/handle/JRC118163>> accessed 18 September 2024.

²¹ Chen X and others, "Application and Theory Gaps during the Rise of Artificial Intelligence in Education" (2020) 1 Computers and Education Artificial Intelligence 100002 <<https://doi.org/10.1016/j.caeai.2020.100002>> accessed 18 September 2024.

²² "Gasser, U. and Almeida, V.A.F. (2017) A Layered Model for AI Governance. IEEE Internet Computing, 21, 58-62. - References - Scientific Research Publishing" <<https://www.scirp.org/reference/referencespapers?referenceid=3205650>> accessed 18 September 2024

²³ Borsci S and others, "Embedding Artificial Intelligence in Society: Looking beyond the EU AI Master Plan Using the Culture Cycle" (2022) 38 AI & Society 1465 <<https://doi.org/10.1007/s00146-021-01383-x>> accessed 18 September 2024

²⁴ Lukowicz M, "History of Artificial Intelligence (AI) — Defining Key Milestones from 4th Century B.C. to 2017" Medium (May 1, 2024) <<https://medium.com/@marcin.lukowicz/history-of-artificial-intelligence-ai-defining-key-milestones-from-4th-century-b-c-to-2017-1249448d95d3>> accessed 18 September 2024

²⁵ Korteling JE (Hans), and others, 'Human versus Artificial Intelligence' (Frontiers, 1 February 2021) accessed 18 September 2024

²⁶ Blagoj D, Chrysi T and Uros K, "Historical Evolution of Artificial Intelligence: Analysis of the Three Main Paradigm Shifts in AI" [2020] JRC Publications Repository <<https://publications.jrc.ec.europa.eu/repository/handle/JRC120469>> accessed 19 September 2024

²⁷ High-Level Expert Group on Artificial Intelligence, "A Definition of AI: Main Capabilities and Scientific Disciplines" (Directorate-General for Communication 2018) <https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf> accessed 19 September 2024

virtual environments such as voice assistants, image analysis, and search engines, or they may be embedded in hardware, including autonomous cars, drones, and IoT devices.²⁸

The High-Level Expert Group on AI, constituted by the European Commission in June 2018, has also contributed significantly to the conceptualisation of AI.²⁹ In addition to the Ethics Guidelines, HLEG has issued a so-called Definition Document to explain AI both as a scientific field and as a technological tool, aiming at creating a shared understanding between experts and non-experts. The HLEG 2019 adopted the following definition, further elaborated in their report “A Definition of AI: Main Capabilities and Disciplines.”³⁰ This definition underlines that AI can be understood as software-hardware systems that perceive their environment, comprehend structured or unstructured data, draw inferences from the knowledge gained, and act optimally to achieve a set objective.³¹ Such systems may use symbolic rules or learn from numeric models to improve performance by observing environmental impacts. 21st-century AI has concentrated on intelligent systems that could simulate human intelligence by a predefined set of rules using complex algorithms.³² At face value, algorithms appear to be neutral tools that analyse data to gain insight and forecast future developments. Technologically, they are simply mechanisms that produce outcomes from the data fed into them.³³ This veil of neutrality disperses when their innate human biases come to the fore. Human decisions and objectives significantly influence the creation and use of algorithms; hence, values are pumped into them.³⁴ While algorithms might technically be methods by which value is derived from data, the impact of algorithms certainly extends much further than that when put into a socio-ecological perspective.³⁵ They are automated decision-making systems that create and shape social realities and have the potential to profoundly affect constitutional principles, particularly those concerning fundamental rights and even the very survival of democratic values. However, AI is a general term that describes various computational approaches intended to improve the efficiency of AI machines to perform tasks that typically require intelligent human intervention.³⁶ New developments within machine learning and deep learning approaches push the development of advanced AI systems that can make complicated decisions with much higher accuracy.³⁷ While AI has evolved, some key

²⁸ Far SB and Rad AI, “Internet of Artificial Intelligence (IoAI): The Emergence of an Autonomous, Generative, and Fully Human-Disconnected Community” (2024) 6 Deleted Journal <<https://doi.org/10.1007/s42452-024-05726-3>> accessed 19 September 2024.

²⁹ High-Level Expert Group on Artificial Intelligence, “A Definition of AI: Main Capabilities and Scientific Disciplines” (Directorate-General for Communication 2018) <https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf> accessed 19 September 2024

³⁰ Ibid

³¹ Palomares I and others, “A Panoramic View and Swot Analysis of Artificial Intelligence for Achieving the Sustainable Development Goals by 2030: Progress and Prospects” (2021) 51 Applied Intelligence 6497 <<https://doi.org/10.1007/s10489-021-02264-y>> accessed 20 September 2024

³² Sheikh H, Prins C and Schrijvers E, “Artificial Intelligence: Definition and Background,” Research for policy (2023) <https://doi.org/10.1007/978-3-031-21448-6_2> 20 September 2024

³³ Schuilenburg M and Peeters R, *The Algorithmic Society: Technology, Power, and Knowledge* (Routledge 2022), <<https://www.routledge.com/The-Algorithmic-Society-Technology-Power-and-Knowledge/Schuilenburg-Peeters/p/book/9780367682651?srsId=AfmBOoqi7WfUHPwA-RhnciZBaulARVNGGoOpHunTY8HRSvT6a-PQ64S>> accessed 20 September 2024

³⁴ Constitutional Challenges in the Algorithmic Society (2021) <<https://doi.org/10.1017/9781108914857>> accessed 20 September 2024

³⁵ Tsamados A and others, “The Ethics of Algorithms: Key Problems and Solutions” (2021) 37 AI & Society 215 <<https://doi.org/10.1007/s00146-021-01154-8>> accessed 21 September 2024

³⁶ Part I - Algorithms, Freedom, and Fundamental Rights, (2021) <<https://doi.org/10.1017/9781108914857>> accessed 21 September 2024

³⁷ Manheim K and Lyric Kaplan, “Artificial Intelligence: Risks to Privacy and Democracy,” vol 21 (2019) <https://yjolt.org/sites/default/files/21_yale_j.l._tech._106_0.pdf> accessed 21 September 2024

elements remain, such as the ability to operate automatically and intelligently react to an environmental stimulus. In this fluidity of concept lies an intervening reason why defining AI is challenging yet exciting, since it is growing into a multidisciplinary field.³⁸

2.1 Global Approaches to AI Governance: A Comparative Overview

AI is an evolving technology that influences and is altering many aspects of life in the world, whether in health spheres, financial transactions, law enforcement, or education.³⁹ The legal frameworks vastly vary across various jurisdictions as they exist and regulate AI. Thus, Nations have begun taking different regulatory approaches to emerging technology to balance innovation, ethics, and legality.⁴⁰ According to Cath, AI regulation is a unique challenge given its technologically complex nature, rapid development, and the arising issues related to ethical dilemmas in application.⁴¹ Approaches toward the governance of AI by the United States reflect the sector-specific, market-oriented orientation with the comprehensive framework of the European Union.⁴² Without uniform legislation to regulate artificial intelligence, AI applications are regulated in the U.S. under domain-specific laws, such as the Health Insurance Portability and Accountability Act of the healthcare industry and norms issued by the Federal Aviation Administration for unmanned aerial vehicles.⁴³ This dispersed regulatory framework rests on various federal agencies authorising AI uses under different sectors. For instance, the Federal Trade Commission is a primary agency that oversees the business uses of AI in protecting consumers. At the same time, the FDA has taken on oversight responsibilities relating to AI technologies in health, particularly machine learning algorithms in medical devices. Without a central legislative framework, there are significant obstacles in overcoming comprehensive legal and ethical issues about AI, despite the advantages that come with sectoral regulation.⁴⁴

Since there is no federal regulation concerning AI, case law has been instrumental to date in shaping the governance of AI in the U.S. Indeed, courts made landmark decisions about cases, such as *Robbins v. Lower Merion School District*.⁴⁵ Regarding unauthorised webcam usage by the school, these have been of immense importance regarding privacy-related issues concerning AI.⁴⁶ Civil liberties organisations like the Electronic Frontier Foundation, the American Civil Liberties Union, etc., have heavily influenced policy concerning AI in the U.S. to ensure ethical consideration remains at the forefront of AI regulation. Recent efforts, such as the AI in Government Act this year, have coalesced to develop guidelines on responsible AI use for government agencies.⁴⁷ This is a turn toward a more coordinated regulatory approach, although progress remains uneven across legislatures.

³⁸ König PD and Wenzelburger G, “Between Technochauvinism and Human-Centrism: Can Algorithms Improve Decision-Making in Democratic Politics?” (2021) 21 *European Political Science* 132 <<https://doi.org/10.1057/s41304-020-00298-3>> accessed 21 September 2024

³⁹ Scherer MU * and others, “REGULATING ARTIFICIAL INTELLIGENCE SYSTEMS: RISKS, CHALLENGES, COMPETENCIES, AND STRATEGIES,” vol 29 (2016) <<https://jolt.law.harvard.edu/articles/pdf/v29/29HarvJLTech353.pdf>> accessed 21 September 2024

⁴⁰ Ibid

⁴¹ Bouhouita-Guermech S, Gogognon P and Bélisle-Pipon J-C, ‘Specific Challenges Posed by Artificial Intelligence in Research Ethics’ (*Frontiers in artificial intelligence*, 6 July 2023), accessed 22 September 2024

⁴² “Unesdoc.unesco.org”, < <https://unesdoc.unesco.org/>>, accessed 22 September 2024

⁴³ “States are writing their own rules for AI in health care” <<https://www.axios.com/2024/08/12/states-regulate-ai-health-care>> accessed 22 September 2024.

⁴⁴ Ibid

⁴⁵ ‘*Robbins v. Lower Merion School District*’ (ACLU Pennsylvania, 24 July 2019), <<https://www.aclupa.org/en/cases/robbins-v-lower-merion-school-district>>, accessed 24 September 2024

⁴⁶ Ibid

⁴⁷ ‘Accountability in Artificial Intelligence’ (American Civil Liberties Union, 18 September 2024) accessed 24 September 2024

Through such sustained advocacy by groups focused on civil liberties, tech giants such as Google, Microsoft, and IBM have nevertheless pushed the development of AI in the United States, where the pace of innovation is driven hard but also carries with it the potential risks of monopolisation and ethical considerations.⁴⁸ The piecemeal, sectoral approach to AI governance has the advantage of speedy adaptation and innovation. However, such a sectoral approach lacks comprehensive coverage to address those critical cross-sectoral issues that range from algorithmic discrimination to accountability.⁴⁹ Some scholars have also suggested extending current laws, such as the Civil Rights Act, to address the challenges presented by AI-based discrimination. Still, so far, no unified legal framework has been offered that could ensure algorithmic responsibility.⁵⁰ The Federal Trade Commission enforces legislation on privacy whenever data is collected through false or misleading methods, and HIPAA has been instituted to provide privacy for AI-driven healthcare solutions.⁵¹

More recently, debates over intellectual property rights regarding works created by AI have occurred because current U.S. copyright law does not consider AI an entity holding copyright. The use of face recognition technologies by law enforcement agencies has also raised controversies, and the Justice in Policing Act of 2020 has tried to impose certain restrictions amidst concerns about civil liberties.⁵² From a general perspective, the United States has adopted a highly fragmented approach to AI regulation. However, sector-specific laws emphasise the areas raising essential issues in a broader ethical and legal concern for a unified framework. Generally, the present regulatory system reveals serious lacunae and requires a holistic and harmonised approach toward AI governance.⁵³

In the meantime, the EU has made significant steps toward creating a single legal framework for regulating AI. The approach of the EU, through the General Data Protection Regulation, requires comprehensive data protection standards for all AI technologies that process personal data.⁵⁴ This GDPR framework provides rights to individuals with a so-called “right to explanation” for decisions occurring within automated systems that affect them. The transparency, fairness, and accountability principles feature in the European Commission’s White Paper on AI and form part of the Ethics Guidelines for Trustworthy AI developed by the High-Level Expert Group.⁵⁵ However, this broad EU approach has also been criticised as

⁴⁸ “Technical difficulties” <<https://bd.usembassy.gov/united-states-and-eight-companies-launch-the-partnership-for-global-inclusivity-on-ai/>> accessed 24 September 2024

⁴⁹ “Ad Hoc Committee on Artificial Intelligence” <<https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>> accessed 24 September 2024

⁵⁰ “Unfair Artificial Intelligence: How FTC intervention can” <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9812&context=penn_law_review> accessed 24 September 2024

⁵¹ Glenn A. Brown KB, ‘Sensitive Data Processing Is in the FTC’s Crosshairs’ (Privacy World, 9 February 2024), <<https://www.privacyworld.blog/2024/02/sensitive-data-processing-is-in-the-ftcs-crosshairs/>> accessed 26 September 2024

⁵² Gaffar H and Albarashdi S, “Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape” [2024] Asian Journal of International Law 1 <<https://doi.org/10.1017/s2044251323000735>> accessed 26 September 2024

⁵³ “United States approach to Artificial Intelligence” <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/757605/EPRS_ATA\(2024\)757605_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/757605/EPRS_ATA(2024)757605_EN.pdf)> accessed 26 September 2024

⁵⁴ ‘EU AI Act: First Regulation on Artificial Intelligence: Topics: European Parliament’ (Topics | European Parliament), <<https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>> accessed 26 September 2024

⁵⁵ Lazcoz G and De Hert P, “Humans in the GDPR and AIA Governance of Automated and Algorithmic Systems. Essential Pre-Requisites against Abdicating Responsibilities” (2023) 50 Computer Law & Security Review 105833 <<https://doi.org/10.1016/j.clsr.2023.105833>> accessed 26 September 2024

overly restrictive, if not stifling, of innovation. Further, the single and rigid application of AI-related regulations for all member states poses a significant barrier to practical implementation.⁵⁶ Nevertheless, with a focus on data privacy, consumer protection, and ethical considerations, the EU's AI governance framework has set an example of how to handle the complexity of AI while opening up avenues for innovation amidst strict regulations.⁵⁷ Suppose the European Union moves ahead with broad regulations on artificial intelligence. In that case, it will diverge from the path taken in China, which mixes formidable government control with market-oriented experimentation under the “New Generation Artificial Intelligence Development Plan” of 2017.⁵⁸

The main regulatory body in China is the Cyberspace Administration of China, CAC, responsible for everything from technical standards to ethical concerns. While there is no national law on AI regulation in China, certain cities have enacted localised rules.⁵⁹ While not legally binding, the 2019 Beijing AI Principles focused on ethical values such as transparency and fairness. Data protection has fallen under various Chinese legislation, including the Personal Information Protection and Data Security Law. Still, these are considered mechanisms to enhance state surveillance rather than protect personal data. Facial recognition and AI analytics are conducted in China to feed into public surveillance and the social credit system.⁶⁰ All this raises serious ethical issues concerning privacy and individual rights. Ethics in China have been shaped by Confucian values that reference social harmony, whereas in the West, it is more a question of personal freedoms.⁶¹ This moral basis is at the heart of Chinese AI regulation, extending into how China advances its model of AI governance abroad, including with the Digital Silk Road under the BRI. On the international scene, China's AI governance is known to be state-driven in its control,⁶² Coupled with technological dominance, this raises apprehensions around possible authoritarian practices.⁶³ It becomes highly pronounced regarding surveillance and social credit, thus increasing the demand for an ethical regulatory way out concerning AI. Since the State has been an essential guiding factor in Chinese development, besides being a global player, understanding the approach to AI governance in China has become imperative for comparative studies in international AI regulation.⁶⁴

⁵⁶ Hacker P, “The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future” (2023) 51 *Computer Law & Security Review* 105871 <<https://doi.org/10.1016/j.clsr.2023.105871>> accessed 26 September 2024

⁵⁷ Evas T and others, “European Framework on Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies” (2020) report <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654179/EPRS_STU\(2020\)654179_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654179/EPRS_STU(2020)654179_EN.pdf)> accessed 27 September 2024

⁵⁸ Ibid

⁵⁹ Latham & Watkins, “China's New AI Regulations” (2023) 3110 <<https://www.lw.com/admin/upload/SiteAttachments/Chinas-New-AI-Regulations.pdf>> accessed 27 September 2024

⁶⁰ Ibid

⁶¹ Zhu J, ‘Ai Ethics with Chinese Characteristics? Concerns and Preferred Solutions in Chinese Academia’ (AI & society, 17 October 2022) accessed 27 September 2024

⁶² “China's Digital Silk Road: Integration into national it”, <<https://www.iiss.org/globalassets/media-library---content--migration/files/research-papers/china-digital-silk-road---iiss-research-paper.pdf>>, accessed 27 September 2024

⁶³ Ibid

⁶⁴ Yogesh K. Dwivedi a b and others, ‘Opinion Paper: “So What If Chatgpt Wrote It?” Multidisciplinary Perspectives on Opportunities, Challenges and Implications of Generative Conversational AI for Research, Practice and Policy’ (*International Journal of Information Management*, 11 March 2023), <<https://www.sciencedirect.com/science/article/pii/S0268401223000233>>, accessed 27 September 2024

On issues of AI governance, India is still at a budding stage in its development, with no holistic legal framework yet. In 2018, India proposed the National Strategy for Artificial Intelligence, which was aimed at inclusive growth in core areas such as healthcare, agriculture, and education.⁶⁵ AI regulation falls under the ambit of existing legal frameworks- the Information Technology Act of, 2000-which has mainly tackled data protection and cybercrime but failed to address critical AI issues such as algorithmic bias.⁶⁶ Discussions on AI ethics in India involve a clutch of academic and civil society institutions on data privacy and fairness, though these are yet to be translated into law.⁶⁷ Industry groups like NASSCOM work with government departments to draft a set of best practices. Given India's multicultural and diverse population with socio-economic disparities, the policy on the regulation of AI is more centred on the welfare of the community rather than the rights of its people.⁶⁸

It is one of the members of the Global Partnership on Artificial Intelligence (GPAI) and an active participant in the international debate on artificial intelligence governance. With a raft of policy initiatives ongoing, India's engagement with AI remains partial and incomplete.⁶⁹ It does not have comprehensive AI-specific laws and regulations; the risks inherent in this gap will be essentially discriminatory and the perverted use of AI. The development of the Indian AI governance model, thus, would have immense ramifications domestically and internationally as the country treads the tightrope between technological advancement and its ethical implications.⁷⁰ The overview underlines the divergent paths different countries take in AI governance as a function of diverse values and priorities enshrined in their respective legal and regulatory regimes.⁷¹ In any case, against the background of an evolving global debate about the regulation of AI, scholars such as Binns argue that the ethical principles guiding it have to be harmonised across borders if this technological advance is not to undermine fundamental human rights and freedoms.⁷² According to Balkin, integrating AI-related provisions into constitutions would be a significant step in reaching this balance, embedding the core principles of fairness, transparency, and accountability within national legal systems; similarly, De Gregorio affirms.⁷³

⁶⁵ Kumar A and others, "National Strategy for Artificial Intelligence" report <<https://www.niti.gov.in/sites/default/files/2023-03/National-Strategy-for-Artificial-Intelligence.pdf>> accessed 27 September 2024

⁶⁶ Bhalla N, Brooks L and Leach T, "Ensuring a 'Responsible' AI Future in India: RRI as an Approach for Identifying the Ethical Challenges from an Indian Perspective" [2023] AI And Ethics <<https://doi.org/10.1007/s43681-023-00370-w>> accessed 27 September 2024

⁶⁷ "Decoding India's AI governance strategy and its", <<https://ippr.in/index.php/ippr/article/download/301/124/451>> accessed 28 September 2024

⁶⁸ Ibid

⁶⁹ "Global Partnership on Artificial Intelligence" (OECD) <<https://www.oecd.org/en/about/programmes/global-partnership-on-artificial-intelligence.html>> accessed 28 September 2024

⁷⁰ "The big issue: Command and combat in the information age" <<https://www.govinfo.gov/content/pkg/GOVPUB-D-PURL-gpo65634/pdf/GOVPUB-D-PURL-gpo65634.pdf>> accessed 28 September 2024

⁷¹ "United Nations system white paper on AI Governance.pdf" <<https://unsceb.org/sites/default/files/2024-04/United%20Nations%20System%20White%20Paper%20on%20AI%20Governance.pdf>> accessed 28 September 2024

⁷² "Principles for the ethical use of artificial intelligence in the", <https://unsceb.org/sites/default/files/2022-09/Principles%20for%20the%20Ethical%20Use%20of%20AI%20in%20the%20UN%20System_1.pdf> accessed 28 September 2024

⁷³ "Constitutional challenges in the algorithmic society" (2021), <<https://doi.org/10.1017/9781108914857>> accessed 28 September 2024

2.2 Current Legal Framework of AI: Bangladesh Perspective

At over 160 million, Bangladesh is among the most densely populated countries in the world. The main occupation is agriculture-based, although, of late, technological improvements have also dispersed to other fields and given them a new dynamism.⁷⁴ Automation and control technologies have taken up greater prominence in industrial areas. More recently, there have been many discussions in Bangladesh over Artificial Intelligence.⁷⁵ However, despite this lengthy historical journey of evolution, the tangible impacts of AI are only now being felt within the country.⁷⁶ Various sectors identified for integrating AI in Bangladesh's effective assimilation include services, transportation, education, agriculture, health, and environmental management. Remarkably, 34% of the population of Bangladesh consists of youth and is technologically inclined, which acts as a demographic advantage for integrating AI into the country's developmental strategy.⁷⁷ AI-based technology adoption is bound to drive innovation and improvement in many areas for the betterment of Bangladesh. The number of stakeholders in AI-based systems is enormous and is increasing daily.⁷⁸

However, the growth of AI-based technologies in Bangladesh raises concerns about potential human rights violations. Some broad risks include threats to equal protection, free speech, and privacy issues that have resurfaced in even the most developed nations.⁷⁹ The adverse impact of AI on human rights is an issue of critical concern since these rights have been protected by several international legal instruments, of which Bangladesh is a signatory.⁸⁰ On top of that, the Constitution of the People's Republic of Bangladesh purports to make the State protect fundamental rights under Chapter III. Although the Constitution recognises a few significant human rights, it does not elaborate on the risks related to AI technologies.⁸¹

In April 2024, Bangladesh's ICT Division proposed the National Strategy for Artificial Intelligence (Draft),⁸² A significant step toward integrating AI into the national framework. However, neither the human rights-based approach nor the constitutional context in which artificial intelligence would be adopted was considered in this strategy.⁸³ It should also be

⁷⁴ "Report on agriculture and rural statistics", <https://bbs.portal.gov.bd/sites/default/files/files/bbs.portal.gov.bd/page/b343a8b4_956b_45ca_872f_4cf9b2f1a6e0/2020-02-02-10-36-84ecf771aa4c2e480f245fb79538ce14.pdf> accessed 28 September 2024

⁷⁵ Dewan MFI, "Can Automation and AI Bring Work-Life Balance in Bangladesh?" *The Daily Star* (May 24, 2024) <<https://www.thedailystar.net/opinion/views/news/can-automation-and-ai-bring-work-life-balance-bangladesh-3616991>> accessed 28 September 2024

⁷⁶ Issue-I TA, "Impact of Artificial Intelligence in Bangladesh's IT Sector" (*The Financial Express*, December 1, 2021) <<https://thefinancialexpress.com.bd/views/views/impact-of-artificial-intelligence-in-bangladeshs-it-sector-1638370510>> accessed 28 September 2024

⁷⁷ Babu KEK, "Artificial Intelligence in Bangladesh, Its Applications in Different Sectors and Relevant Challenges for the Government: An Analysis" (2021) 7 *International Journal of Public Law and Policy* 1 <<https://doi.org/10.1504/ijplap.2021.10039992>> accessed 28 September 2024

⁷⁸ Baree MNM, "An Overview of Bangladesh National Artificial Intelligence Policy 2024" *The Daily Star* (April 18, 2024) <<https://www.thedailystar.net/law-our-rights/law-vision/news/overview-bangladesh-national-artificial-intelligence-policy-2024-3590351>> accessed 28 September 2024

⁷⁹ Ashraf SB and Islam MM, "AI and the Future of Human Rights in Bangladesh: A Call for Robust Legal and Ethical Frameworks" [2024] *International Journal of Law and Information Technology* <<https://doi.org/10.1093/ijlit/eaee002>> accessed 29 September 2024

⁸⁰ *Ibid*

⁸¹ Islam R, "Human Rights in the Constitution of Bangladesh" *The Daily Star* (November 3, 2022) <<https://www.thedailystar.net/supplements/50-years-our-constitution-original-ideals-vs-reality/news/human-rights-the-constitution-bangladesh-3160256>> accessed 29 September 2024

⁸² "National Artificial Intelligence Policy 2024 – draft" <https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd/page/6c9773a2_7556_4395_bbec_f132b9d819f0/National_AI_Policy_2024_DRAFT.pdf> accessed 29 September 2024

⁸³ *Ibid*

underlined that while much praised, AI and automation raise many challenges regarding transparency and accountability, including some ethical issues with algorithmic biases.⁸⁴ Bangladesh is at that crossroad where it must make aware and sensible choices to ensure that the regulatory mechanism in AI-related matters is ingrained within the constitutional provisions.⁸⁵ How this newer challenge is met requires an all-encompassing regulatory regime, which would facilitate the adoption of AI for national development and ensure the protection of fundamental human rights, entrenched with transparency, accountability, and ethical governance of AI systems.⁸⁶

3. AI, Human Rights, and Human Dignity

To address AI through the lens of fundamental rights and human dignity, human rights provide a crucial foundation. Having their origin in the Western philosophical tradition, they form the highest legal norms in many legal systems, which are supposed to enshrine values such as self-determination and personal autonomy.⁸⁷ AI technology is just unfolding at high speed and is increasingly embedded in more or less all facets of life. While AI holds tremendous promise in efficiency and creativity, it comes with a significant risk to protecting constitutional rights, such as privacy protection, the prohibition of discrimination, and due process.⁸⁸ The rampant use of AI could further historical inequity and infringe upon human liberty, which means there should be oversight so that the technology of AI respects human life.⁸⁹

Scholars like Luciano Floridi and Virginia Dignum,⁹⁰ Believe that governments, private sectors, academia, civil society, and international bodies have a multi-stakeholder approach to regulating AI.⁹¹ This reflects that because AI will have transnational consequences, collective activity will be needed to integrate many perspectives into policy-making.⁹² According to David Leslie, human agency in AI decision-making plays a fundamental role in safeguarding human rights, which are currently being used or applied in high-stakes areas: healthcare, employment, and criminal justice.⁹³ In this sense, the “right to explanation” within automated decisions

⁸⁴ Technologies C, “Algorithmic Bias & AI Ethics - Configr Technologies - Medium” Medium (April 9, 2024) <<https://configr.medium.com/algorithmic-bias-ai-ethics-a188f54efc96>> accessed 29 September 2024

⁸⁵ Hossen A, “AI in Bangladesh’s Public Policy” The Daily Star (February 15, 2024) <<https://www.thedailystar.net/opinion/views/news/ai-bangladeshs-public-policy-3544226>> accessed 29 September 2024

⁸⁶ “AI for Humanitarian Action: Human Rights and Ethics” (International Review of the Red Cross, March 1, 2021) <<http://international-review.icrc.org/articles/ai-humanitarian-action-human-rights-ethics-913>> accessed 29 September 2024

⁸⁷ Ufert F, “AI Regulation Through the Lens of Fundamental Rights: How Well Does the GDPR Address the Challenges Posed by AI?” [2020] DOAJ (DOAJ: Directory of Open Access Journals) <<https://www.europeanpapers.eu/en/europeanforum/ai-regulation-through-the-lens-of-fundamental-rights>> 29 September 2024

⁸⁸ “Human rights must be at the core of Generative AI Technologies, says Türk | OHCHR” <<https://www.ohchr.org/en/statements-and-speeches/2024/02/human-rights-must-be-core-generative-ai-technologies-says-turk>> accessed 29 September 2024

⁸⁹ Ibid

⁹⁰ Floridi L and Cows J, “A Unified Framework of Five Principles for AI in Society” [2019] Harvard Data Science Review <<https://hdsr.mitpress.mit.edu/pub/10jsh9d1>> accessed 29 September 2024

⁹¹ Ibid

⁹² Floridi L and others, “AI4People - An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations” (November 6, 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3284141> accessed 29 September 2024

⁹³ Leslie D and others, “Artificial Intelligence, Human Rights, Democracy, and the Rule of Law: A Primer” [2021] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817999> accessed 29 September 2024

becomes one of the most critical elements of democratic principles and a means of preventing unjust outcomes.⁹⁴

Education is vital in ensuring that AI will be developed without ethical skew. According to Suresh Venkatasubramanian, developers must be taught ethics relevant to AI and how different biases result in AI.⁹⁵ Helen Nissenbaum says, “The general public must be made aware of how AI functions and the consequences regarding individual rights.”⁹⁶ Martha Nussbaum concludes, “Public engagement is key to ensuring AI governance will include the needs of different populations and therefore that the technology serves all communities justly.”⁹⁷ Brian Cantwell Smith’s notion of “ethics by design” suggests that human rights need to be baked into AI at the outset and to guide developers toward social gain.⁹⁸ Julie Cohen warns of a potential “race to the bottom” in regulation, emphasising the need for international collaboration that results in a set of standard norms applicable to AI governance.⁹⁹ Otherwise, says Cohen, companies will exploit jurisdictions that fail to secure core rights.

Algorithmic opacity is one of the worst enemies of accountability within AI systems.¹⁰⁰ Researchers like Kate Crawford and Trevor Paglen ask for “explainable AI”, in which AI decision-making would be more understandable and accessible to human insight.¹⁰¹ Only then can trust in AI be established, with full compliance assured with international human rights standards. Shoshana Zuboff warns about privacy risks deriving from AI and requires stringent data protection to prevent data breaches that could nullify personal autonomy.¹⁰² Eventually, AI innovation must balance protecting human rights with an ethical and responsible approach. Authors such as Floridi, Dignum, and Leslie urge for more transparent, fair, and inclusive regulation of AI. This may be termed “algorithmic constitutionalism,” a regulatory role that provides a legal and ethical framework for guiding AI to protect fundamental rights while enabling AI to serve the greater good. Only by implanting human dignity at the heart of AI design can we be sure that technology improves, rather than impairs, those values that mean so much for human life and justice.

⁹⁴ Leslie D and The Alan Turing Institute, *Understanding Artificial Intelligence Ethics and Safety: A Guide for the Responsible Design and Implementation of AI Systems in the Public Sector* (2019) <https://www.turing.ac.uk/sites/default/files/2019-06/understanding_artificial_intelligence_ethics_and_safety.pdf> accessed 29 September 2024

⁹⁵ Venkatasubramanian S and others, “Interdisciplinary Approaches to Understanding Artificial Intelligence’s Impact on Society” (arXiv.org, December 11, 2020) <<https://arxiv.org/abs/2012.06057>> accessed 29 September 2024

⁹⁶ Berinato S, ““Stop Thinking About Consent: It Isn’t Possible and It Isn’t Right”” (Harvard Business Review, November 8, 2022) <<https://hbr.org/2018/09/stop-thinking-about-consent-it-isnt-possible-and-it-isnt-right>> accessed 29 September 2024

⁹⁷ “What, According to Martha Nussbaum, Makes Socratic Method Essential for Education, and More Specifically for the Maintenance of Democracy...” (Quora) <<https://www.quora.com/What-according-to-Martha-Nussbaum-makes-Socratic-method-essential-for-education-and-more-specifically-for-the-maintenance-of-democracy-and-for-the-economic-success-Explain-whether-you-agree-or-disagree-with-her-arguments>> accessed 29 September 2024

⁹⁸ “The state of Ai Ethics Report, volume 5 (July 2021)”, <<https://montreal.ethics.ai/wp-content/uploads/2021/09/State-of-AI-Ethics-Report-Volume-5-July-2021.pdf>> accessed 29 September 2024

⁹⁹ Katharine Kemp, “Concealed Data Practices and Competition Law: Why Privacy Matters” (2020) 16 *European Competition Journal* 628 <<https://doi.org/10.1080/17441056.2020.1839228>> accessed 29 September 2024

¹⁰⁰ Lu S, “Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence” (Scholarship@Vanderbilt Law) <<https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss1/3/>> accessed 29 September 2024

¹⁰¹ “AI bias and human rights: Why ethical ai matters – Ericsson” <<https://www.ericsson.com/en/blog/2021/11/ai-bias-what-is-it>> accessed 29 September 2024

¹⁰² Kavenna J, “Shoshana Zuboff: ‘Surveillance Capitalism Is an Assault on Human Autonomy’” *The Guardian* (October 29, 2019) <<https://www.theguardian.com/books/2019/oct/04/shoshana-zuboff-surveillance-capitalism-assault-human-autonomy-digital-privacy>> accessed 29 September 2024

3.1 Ethical Considerations in AI

Ethical considerations of AI work to spell out what applications are morally acceptable, beneficial, or detrimental and what sort of response society needs to make about AI-controlled behaviour.¹⁰³ While not legally binding, ethical principles form a basis of trust and help mould responsible AI development. Since AI drastically changes human behaviour, old ethics may not suffice anymore; new ethics are needed to fit the problems AI presents.¹⁰⁴ Ethical guidelines for AI represent a balance among individual, social, and environmental values while protecting human dignity and ensuring that technology serves the best interests of humanity.¹⁰⁵ Certain AI-driven activities, such as targeted advertisements, may seem unethical yet may not be illegal, hence creating the need for clear-cut ethical guidelines that will not seriously curtail individual freedom.¹⁰⁶ Rocci Luppiccini has long insisted on reconsidering ethics against the background of rapid technological advancements, and this is crucial for AI, given issues of transparency, equity, and responsibility.¹⁰⁷

Frameworks such as AI4People and the High-Level Expert Group on Artificial Intelligence, instituted by the European Commission, have also given valuable ethical guidelines. They underlined principles that respect human autonomy, do not cause harm, and assure fairness and explicability.¹⁰⁸ Human autonomy involves making sure that decisions involving AI remain within the control of people, while prevention of harm assumes a caring role for human dignity and well-being.¹⁰⁹ Fairness addresses how to avoid bias and discrimination, while explicability puts weight on the transparency of AI systems to ensure the understandability of decisions. These values have been translated into seven critical requirements for trustworthy and responsible AI: human agency and control, technical sturdiness and safety,¹¹⁰ Transparency, privacy and data governance, diversity and fairness, societal and environmental well-being, and accountability.¹¹¹ Meeting these seven requirements reassures that the development of AI will not violate any fundamental human rights and will improve the common good. Ultimately, AI ethics governance must manage a balance between the augmentation of human capabilities and preventing harm while simultaneously encouraging accountability, equity, and respect for individual rights.¹¹²

¹⁰³ Bankins S and Formosa P, “The Ethical Implications of Artificial Intelligence (AI) For Meaningful Work” (2023) 185 *Journal of Business Ethics* 725 <<https://doi.org/10.1007/s10551-023-05339-7>> accessed 30 September 2024

¹⁰⁴ Sullivan M, “Key Principles for Ethical AI Development” (Transcend, October 20, 2023) <<https://transcend.io/blog/ai-ethics>> accessed 30 September 2024

¹⁰⁵ Jedličková A, “Ethical Approaches in Designing Autonomous and Intelligent Systems: A Comprehensive Survey towards Responsible Development” [2024] *AI & Society* <<https://doi.org/10.1007/s00146-024-02040-9>> accessed 30 September 2024

¹⁰⁶ Ibid

¹⁰⁷ World Health Organization, *Ethics and Governance of Artificial Intelligence for Health* (World Health Organization 2021) <<https://iris.who.int/bitstream/handle/10665/341996/9789240029200-eng.pdf?sequence=1>> accessed 30 September 2024

¹⁰⁸ “AI4People’s 7 ai global frameworks” <https://ai4people.org/PDF/AI4People_7_AI_Global_Frameworks.pdf> accessed 30 September 2024

¹⁰⁹ Laitinen A and Sahlgren O, “AI Systems and Respect for Human Autonomy” (2021) 4 *Frontiers in Artificial Intelligence* <<https://doi.org/10.3389/frai.2021.705164>> accessed 30 September 2024

¹¹⁰ Alvarez JM and others, “Policy Advice and Best Practices on Bias and Fairness in AI” (2024) 26 *Ethics and Information Technology* <<https://doi.org/10.1007/s10676-024-09746-w>> accessed 30 September 2024

¹¹¹ Ibid

¹¹² United Nations, “Interim Report: Governing AI for Humanity” (2023) <https://www.un.org/techenvoy/sites/www.un.org.techenvoy/files/ai_advisory_body_interim_report.pdf> 30 September 2024

4. Constitution & AI Interface: The Evolution of Algorithmic Constitutionalism

The relation of AI with the Constitution represents a multi-dimensional linkage that deals with several challenges, such as the integration of advanced technologies within the legal and constitutional framework of a state.¹¹³ This is primarily a vital link because AI-powered technologies influence various components of life, including governance, interaction between people, and economic activities. The idea is to apply constitutional principles to the governance of algorithms, ensuring that they respect human welfare and rights.¹¹⁴ The term “Algorithmic Constitutionalism” was introduced by Oren Perez and Nurit Wimer.¹¹⁵ They proposed this concept as a novel approach to address the risks presented by AI governance, particularly within digital platforms.¹¹⁶ As these technologies develop further, constitutional democracies need to make sure that AI is deployed in a manner that protects human rights, fosters democracy, and prevents abuses of power.¹¹⁷ One of the central dilemmas presented by the digital era is how constitutional democracies should respond to the power wielded by large technology companies and the algorithms they deploy. Given the development of AI and other digital technologies, it is necessary to return to the traditional notions of constitutionalism dedicated to limiting public powers and protecting fundamental rights.¹¹⁸ As scholars like Jack Balkin emphasise, we have moved into an “algorithmic society” where large, multinational social platforms such as Facebook, Amazon, and TikTok operate at the junction of public and private authority to effectively govern populations via algorithms and AI systems.¹¹⁹ These platforms have usurped quasi-public functions but have not been subject to similar accountability mechanisms used against public authorities, raising constitutional concerns.¹²⁰

In more traditional constitutional settings, the State was considered the original site of power, and constitutions were created to contain governmental authority to protect people from government overreach.¹²¹ In the algorithmic society, however, private companies have become power holders on a par with public authorities, often surpassing their potential. Such companies govern large chunks of digital spaces according to their rules, impose their terms of service, and employ AI for content and data management.¹²² José van Dijck and others have argued that these private platforms have become constituents of public communication,

¹¹³ “Public constitutional I” <<https://arxiv.org/pdf/2406.16696>> accessed 30 September 2024

¹¹⁴ Tallberg J and others, “The Global Governance of Artificial Intelligence: Next Steps for Empirical and Normative Research” (2023) 25 *International Studies Review* <<https://doi.org/10.1093/isr/viad040>> 30 September 2024

¹¹⁵ Perez O and Wimer N, “Algorithmic Constitutionalism” (2023) *SSRN Electronic Journal* <<https://doi.org/10.2139/ssrn.4373466>> 30 September 2024

¹¹⁶ *Ibid*

¹¹⁷ Muller C, “The Impact of Artificial Intelligence on Human Rights, Democracy and the Rule of Law” (2020) <<https://allai.nl/wp-content/uploads/2020/06/The-Impact-of-AI-on-Human-Rights-Democracy-and-the-Rule-of-Law-draft.pdf>> 30 September 2024

¹¹⁸ Ahmad N, “Why AI Tech Needs to Be Democratised” *The Daily Star* (October 5, 2023) <<https://www.thedailystar.net/opinion/views/news/why-ai-tech-needs-be-democratised-3434631>> 30 September 2024

¹¹⁹ “Toward a fourth law of robotics: Preserving attribution,” <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2608&context=fac_pubs> accessed 30 September 2024

¹²⁰ *Ibid*

¹²¹ ‘Resource Separation of Powers: An Overview’ (National Conference of State Legislatures), <<https://www.ncsl.org/about-state-legislatures/separation-of-powers-an-overview>>, accessed 30 September 2024

¹²² Lindman J, Makinen J and Kasanen E, “Big Tech’s Power, Political Corporate Social Responsibility and Regulation” (2022) 38 *Journal of Information Technology* 144 <<https://doi.org/10.1177/02683962221113596>> 1 October 2024

structuring information flows and setting standards of participation. Consequently,¹²³ we see a situation in which private actors are no longer just market participants but also rights regulators without checks and balances.¹²⁴ It follows that the connection between AI and the Constitution is one of extending constitutional values to private actors wielding significant power over the lives of individuals. It is an extension required for designing and using AI systems in a way that does not violate fundamental rights of privacy, freedom of speech, and equality.¹²⁵ The central mission of contemporary constitutionalism has been characterised as preventing the rise of different forms of unchecked power and safeguarding the fundamental rights of all. András Sajó and Renáta Uitz have pointed out that constitutionalism must change and make room for the threats from such powerful non-state actors, whose activities are grounded in algorithmic governmentality.¹²⁶ The threats that AI is based on do not originate from state action but also from the practices of nongovernmental entities that process large streams of personal data and shape public discourse.

The main constitutional difficulties presented by AI relate to accountability insofar as AI systems are often black boxes, and the decision-making processes that lie behind algorithmic outputs are not accessible.¹²⁷ Frank Pasquale defines such a reality as a threat to human expertise because decisions affecting individuals are increasingly delegated to opaque, automated systems that are not subjected to effective oversight.¹²⁸ From a constitutional point of view, this is an appalling lack of transparency, which undermines great principles of accountability and the rule of law upon which all constitutional democracies depend.¹²⁹ The increasing application of AI in decisions impacting individual rights in credit scoring, hiring, or policing portends a rethink on how constitutional principles of fairness, due process, and accountability will be preserved in the digital era.¹³⁰ The horizontal application of rights is another area where AI and the Constitution resonate. Traditionally, constitutions have been devised to protect individuals against the State in a vertical relationship.¹³¹ However, as private actors like social media and data analytics play an increasingly important role in people's lives, so does the need to horizontally apply constitutional protections between private entities and private individuals.¹³² Eleni Frantziou develops the argument from the European Union perspective. She supports the idea that constitutional values, such as privacy, freedom of

¹²³ Van Dijck J, "Governing Trust in European Platform Societies: Introduction to the Special Issue" (2021) 36 *European Journal of Communication* 323 <<https://doi.org/10.1177/02673231211028378>> 1 October 2024

¹²⁴ *Ibid*

¹²⁵ Biswas M, "Artificial Intelligence through the Lens of Human Rights" *The Daily Star* (December 10, 2018) <<https://www.thedailystar.net/law-our-rights/news/artificial-intelligence-through-the-lens-human-rights-1672039>> 1 October 2024

¹²⁶ "Uitz and Sajó's New Book Explores Why Constitutionalism Matters | Central European University" (February 15, 2018) <<https://www.ceu.edu/article/2018-02-15/uitz-and-sajos-new-book-explores-why-constitutionalism-matters>> 1 October 2024

¹²⁷ Wischmeyer T, "Artificial Intelligence and Transparency: Opening the Black Box," Springer eBooks (2019) <https://doi.org/10.1007/978-3-030-32361-5_4> 1 October 2024

¹²⁸ Seijo M and Seijo M, "New Laws of Robotics with Frank Pasquale | MR Online" *MR Online* (December 2, 2020) <<https://mronline.org/2020/12/02/new-laws-of-robotics-with-frank-pasquale/>> 1 October 2024

¹²⁹ Abiri G, "Public Constitutional Ai" (SSRN, 25 June 2024), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4874670> accessed 16 October 2024

¹³⁰ Cheong BC, "Transparency and Accountability in AI Systems: Safeguarding Wellbeing in the Age of Algorithmic Decision-Making" (2024) 6 *Frontiers in Human Dynamics* <<https://doi.org/10.3389/fhumd.2024.1421273>> 1 October 2024

¹³¹ *Ibid*

¹³² Lane L, "The Horizontal Effect of International Human Rights Law in Practice" (2018) 5 *European Journal of Comparative Law and Governance* 5 <https://brill.com/view/journals/ejcl/5/1/article-p5_5.xml?language=en> 1 October 2024

expression, and non-discrimination principles, could be extended to private corporations that exercise state-like power.¹³³

Within the purview of this paper, algorithmic constitutionalism is the application of constitutional principles to the governance of AI-driven technologies and the digital space, where private actors increasingly exercise powers reminiscent of public authority.¹³⁴ A normative strategy purporting to respond to emerging phenomena of algorithmic decision-making systems performing functions directly touching on individual and social rights, freedoms, and values without the corrective oversight mechanisms typically applied to public power.¹³⁵ Algorithmic constitutionalism, therefore, also pursues the extension of constitutional values, such as transparency, accountability, and protection of fundamental rights, within the sphere of private actors governing through algorithms.¹³⁶ These private actors, comprising online platforms such as Facebook, Amazon, and Google, are hugely influential in content moderation, exercising control over free speech and data processing to wield state-like power over individuals' rights.¹³⁷ In a nutshell, Algorithmic constitutionalism is a conception that favours the regulation of those digital platforms on constitutional grounds so their power can be curtailed, their actions transparent, and the protection of individual rights upheld.¹³⁸ It dares to challenge the creation of novel methods of checking abuses of power in networked society by imposing checks akin to those created by traditional constitutional mechanisms on state actors.

4.1 Algorithmic Constitutionalism as a Jurisprudential Framework for Digital Rights

Algorithmic constitutionalism should not be viewed as a descriptive or regulatory model; rather, it should evolve as a normative theory of interpretation able to guide practical reasoning in courts during a contemporary technological age. It specifically provides constitutional courts with a powerful tool to reexamine the interpretation and application of fundamental rights in cyberspace. Classic ideas of due process, equality, and privacy require expansion and reconceptualisation to deal effectively with algorithmic opacity, discrimination, and prejudice. Through comparative jurisprudence, e.g., in examining Indian Supreme Court jurisprudence on informational privacy in Justice K.S. Puttaswamy v. Union of India,¹³⁹ European Union pioneering digital constitutionalism embodied by the Digital Services Act,¹⁴⁰ and American court decisions on AI and the Fourth Amendment,¹⁴¹ Bangladeshi courts can similarly embrace an algorithmic approach to protecting digital rights. Where an AI system consistently denies access to social welfare or disproportionately singles out persons in predictive policing, constitutional courts have a duty to make algorithmic fairness and transparency guiding factors

¹³³ “The horizontal effect of the EU charter of fundamental”, <<https://discovery.ucl.ac.uk/id/eprint/1531161/1/Frantziou-The%20Horizontal%20Effect%20of%20the%20EU%20Charter.pdf>> accessed 1 October 2024

¹³⁴ Pollicino O and others, “Constitutional Law in the Algorithmic Society” <https://iris.unibocconi.it/retrieve/e31e10d4-8712-31fb-e053-1705fe0a5b99/CUP_constitutional-law-in-the-algorithmic-society.pdf> accessed 1 October 2024

¹³⁵ Pollicino O and Paolucci F, ‘Digital Constitutionalism to the Test of the Smart Identity’ (Journal of e-Learning and Knowledge Society), <https://www.je-lks.org/ojs/index.php/Je-LKS_EN/article/download/1135815/1330/> accessed 1 October 2024

¹³⁶ Katzenbach C and Ulbricht L, “Algorithmic Governance” (Internet Policy Review, April 21, 2020) <<https://policyreview.info/concepts/algorithmic-governance>> accessed 1 October 2024

¹³⁷ “Imagining the AI We Want: Towards a New AI Constitutionalism – A Digital New Deal” (November 1, 2020) <<https://projects.itforchange.net/digital-new-deal/2020/11/01/imagining-the-ai-we-want-towards-ai-constitutionalism/>> accessed 1 October 2024

¹³⁸ Ibid

¹³⁹ Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors. (2017) 10 SCC 1.

¹⁴⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

¹⁴¹ See *Carpenter v United States* 138 S Ct 2206 (2018); also see *Riley v California* 573 US 373 (2014).

in adjudication, as well as redressing rights.¹⁴² Constitutional discourse incorporating algorithmic constitutionalism guarantees that courts remain meaningfully accountable and sensitive to changing socio-technological realities.¹⁴³

4.2 Why is a constitutional framework important rather than a legislative framework?

In its modern trend to affect everything, from governance and business to the rights of individual citizens and public policy, the most appropriate regulation of AI in the digital era would be through a constitutional framework.¹⁴⁴ Whereas legislation is vital in this regard, it would be weak compared to a constitutional framework approach for overcoming AI's challenges concerning fundamental rights, democracy, and governance.¹⁴⁵ While constitutions provide a stable platform for regulatory measures designed to last long and endure changing social needs and demands, legislation is reactive, thus repeatedly evolving as a result of political cycles or due to pressures from lobbies. Relying exclusively upon legislation may make, in the rapid advance of AI technologies, a regulatory system not fit for keeping up with them.¹⁴⁶ A constitutional approach seems more likely to ensure that principles of fairness, accountability, and transparency in protecting human rights are baked into the legal framework from the beginning, making it predictably consistent for long-term AI governance.¹⁴⁷ AI systems raise important implications for a range of constitutional rights, including, but not limited to, privacy, equality, freedom of expression, and due process. For instance, AI-driven decision-making could double down on biases to produce discrimination around critical activities such as hiring, lending, and law enforcement.¹⁴⁸ These, argues Cathy O'Neil, are better described as "weapons of math destruction" that institutionalise inequality but have no transparency or accountability in their operation. It is against such risks that a constitutional framework safeguards by embedding protections of fundamental rights and making it more challenging to cut down by political and economic pressure.¹⁴⁹

While most constitutions have traditionally been understood as a protection against the State, interpretations that treat them as protecting individuals against strong private players, such as significant technology companies owning AI systems, are gaining momentum.¹⁵⁰ Indeed,

¹⁴² Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7(2) *International Data Privacy Law* 76.

¹⁴³ Giovanni De Gregorio, *The Rise of Digital Constitutionalism: The Case of the Digital Services Act* (2022) 45(1) *Computer Law and Security Review* 105618.

¹⁴⁴ Nemitz P, "Constitutional Democracy and Technology in the Age of Artificial Intelligence" (2018) 376 *Philosophical Transactions of the Royal Society a Mathematical Physical and Engineering Sciences* 20180089 <<https://doi.org/10.1098/rsta.2018.0089>> accessed 5 October 2024

¹⁴⁵ (Artificial Intelligence: Development, risks and Regulation - House of Lords Library), <<https://lordslibrary.parliament.uk/artificial-intelligence-development-risks-and-regulation/>> accessed 5 October 2024

¹⁴⁶ "Social Change and Modernity" <<https://publishing.cdlib.org/ucpressebooks/view?docId=ft6000078s;chunk.id=0;doc.view=print>> accessed 5 October 2024

¹⁴⁷ "AI governance and human rights", <<https://www.chathamhouse.org/sites/default/files/2023-01/2023-01-10-AI-governance-human-rights-jones.pdf>> accessed 5 October 2024

¹⁴⁸ "Assessing Impacts of AI on Human Rights: It's Not Solely About Privacy and Nondiscrimination" (Default) <<https://www.lawfaremedia.org/article/assessing-impacts-of-ai-on-human-rights-it-s-not-solely-about-privacy-and-nondiscrimination>> accessed 5 October 2024

¹⁴⁹ "Algorithmic discrimination is an information problem" <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=3867&context=hastings_law_journal> accessed 5 October 2024

¹⁵⁰ "Strengthening Legal Protection against discrimination by algorithms and Artificial Intelligence," <<https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1743976>> accessed 6 October 2024

several scholars, including Eleni Frantziou, have emphasised that constitutions may apply horizontally: private corporations should be held to the same standard as governments when protecting individual rights.¹⁵¹ In this respect, AI governance through a constitutional framework can set the necessary boundaries within which the untrammelled powers of giant tech companies can ensure transparency and accountability for the use of AI.¹⁵² A constitutional framework also deals with the challenge of power concentration in private hands: those with ownership over AI typically tend to exercise extensive discretionary power concerning data and decision-making processes that define public life.¹⁵³ This “algorithmic governance” in content moderation, political discourse, and public services frequently takes place without oversight and accountability mechanisms, many of which exist for governments exercising the same functions.¹⁵⁴ Embedding AI regulation in the Constitution means that societies establish checks and balances against abuses of power, including those from both public and private sources.

Unlike legislative frameworks, most of which are sector-specific, the constitutional approach can grant a holistic regulatory system for AI. This would ensure that governance is consistent across healthcare, education, and criminal justice sectors and that fragmentary regulation is avoided.¹⁵⁵ For example, legislation that might be limited to artificial intelligence applications in health care would fall short in criminal justice, and protections would become inconsistent.¹⁵⁶ A constitutional approach lets principles cascade down from the top, with AI systems designed to universally respect human dignity, equity, and justice across all domains. Constitutional frameworks also have broader legitimacy because of the public involvement in their formulation.¹⁵⁷ While most legislation is representative; it often misses the element of direct participation by the public that constitutional processes enable. To the extent that AI's impact will cut across various facets of life, placing its governance at the constitutional level guarantees democratic principles and the people's will are embedded therein; thus, technological governance satisfies the people's expectations.¹⁵⁸ As Shoshana Zuboff has argued, AI and data-driven technologies, if left to their own devices, are well-placed to concentrate power in the hands of a few. Thus, she has pointed out, it threatens democratic processes. The constitutional framework ensures safeguards so that AI technologies serve the

¹⁵¹ Frantziou E, “(Most of) the Charter of Fundamental Rights Is Horizontally Applicable” (2019) 15 *European Constitutional Law Review* 306 <<https://www.cambridge.org/core/journals/european-constitutional-law-review/article/most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/6863889307DDD5D0ADFA92D674E5900E>> accessed 6 October 2024

¹⁵² *Ibid*

¹⁵³ Bu Q, “The Global Governance on Automated Facial Recognition (AFR): Ethical and Legal Opportunities and Privacy Challenges” (2021) 2 *International Cybersecurity Law Review* 113 <<https://doi.org/10.1365/s43439-021-00022-x>> accessed 6 October 2024

¹⁵⁴ Gorwa R, Binns R and Katzenbach C, “Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance” (2020) 7 *Big Data & Society* 205395171989794 <<https://doi.org/10.1177/2053951719897945>> accessed 6 October 2024

¹⁵⁵ “Artificial Intelligence Regulation in the United Kingdom: A Path to Good Governance and Global Leadership?” (Internet Policy Review, July 31, 2023) <<https://policyreview.info/articles/analysis/artificial-intelligence-regulation-united-kingdom-path-good-governance>> accessed 6 October 2024

¹⁵⁶ *Ibid*

¹⁵⁷ Sahota N, “Constitutional AI: Making AI Systems Uphold Human Values” (Neil Sahota, August 29, 2024) <<https://www.neilsahota.com/constitutional-ai-making-ai-systems-uphold-human-values/>> accessed 6 October 2024

¹⁵⁸ “The Democratic Regulation of Artificial Intelligence” (Copyright © 2024 Knight First Amendment Institute, January 31, 2022) <<https://knightcolumbia.org/content/the-democratic-regulation-of-artificial-intelligence>> accessed 7 October 2024

public interest and protect democratic values.¹⁵⁹ Conclusively, embedding the regulation of AI within a constitutional framework would add a degree of stability, lock in fundamental rights, prevent governments and business concerns from abusing power, and render oversight consistent across sectors.¹⁶⁰ In that respect, this will guarantee that AI technologies are governed in a manner that reflects democratic principles while protecting the freedoms of individuals and holding those in control of AI accountable before the public.

The constitutional entrenchment of algorithmic rule raises profound questions about the scope of protection of fundamental rights, especially in cases of access by and harms to third parties. The precedent of Bangladesh's constitutional jurisprudence has always affirmed horizontal application of rights, as can be illustrated by cases like *Bangladesh Beverage Industries Ltd. v. Rowshan Ara Begum*,¹⁶¹ Where recourse to judicial intervention was sought against a private employer regarding workplace discrimination, and *Shela v. Bangladesh*,¹⁶² Where public interest litigation ensured access to constitutional remedies regarding cases of indirect victimisation or *Dr. Mohiuddin Farooque v. Bangladesh*,¹⁶³ Laid the foundation for public interest standing. However, such developments fall far short of addressing transnational algorithmic harms, such as selective recruitment, extraction of personal information, and impenetrable profiling by overseas tech firms operating within Bangladesh. Although the jurisdiction of writs outlined in Article 102 is remarkable in its scope, it was never designed to cover harms to rights involved with algorithmic regimes managed or geographically located overseas.¹⁶⁴

In this particular context, the value of a constitutional framework is emphasised. Legislative proposals hold inherent value; however, they often seem disjointed, improvised, and prone to political agendas and regulatory capture.¹⁶⁵ Moreover, proposals often lack normative richness and interpretative consistency, possibly forcing the judiciary to decide complex violations of algorithmic rights. The integration of digital rights into the Constitution, independent of an individual chapter or as particular clauses in the fundamental rights clause, would make possible the recognition of harms stemming from artificial intelligence as justiciable constitutional issues, consistent with principles of due process, anti-discrimination, and human dignity.¹⁶⁶ Moreover, since courts in the Global South have traditionally incorporated international best practices to make domestic legal codes superior, documents such as the U.S. 2022 Blueprint for an AI Bill of Rights could serve as powerful interpretative tools to inform Bangladeshi courts and constitutional institutions.¹⁶⁷ Alongside the need for doctrinal innovation, there is a vital need for institutional innovation. One such solution lies in the creation of a constitutionally entrenched Digital Rights Commission or AI Ombudsman with the remit to oversee algorithmic accountability and enforce remedies for breach of digital

¹⁵⁹ Kavenna J, "Shoshana Zuboff: 'Surveillance Capitalism Is an Assault on Human Autonomy'" *The Guardian* (October 29, 2019) <<https://www.theguardian.com/books/2019/oct/04/shoshana-zuboff-surveillance-capitalism-assault-human-automomy-digital-privacy>> accessed 7 October 2024

¹⁶⁰ "Possible elements of a legal framework on artificial" < <https://rm.coe.int/possible-elements-of-a-legal-framework-on-artificial-intelligence/1680a5ae6b>> accessed 17 October 2024

¹⁶¹ *Bangladesh Beverage Industries Ltd v Rowshan Ara Begum* (2005) 57 DLR (AD) 47.

¹⁶² *Shela v Bangladesh*, Writ Petition No 9989 of 2016 (High Court Division).

¹⁶³ *Dr. Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1

¹⁶⁴ Constitution of the People's Republic of Bangladesh 1972, art 102.

¹⁶⁵ Martin Eisingerich and others, 'Regulatory Capture and the Governance of Artificial Intelligence' (2021) 64 *California Management Review* 117.

¹⁶⁶ Giovanni De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (2021) 37(1) *Computer Law & Security Review* 105613.

¹⁶⁷ The White House, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (October 2022) <https://www.whitehouse.gov/ostp/ai-bill-of-rights> accessed 28 April 2025.

rights.¹⁶⁸ On the other hand, the judiciary can respond to this evolving framework by constituting a specialised digital rights chamber or bench within the Supreme Court, thus ensuring innovative constitutional questions involving AI are resolved in a structured way. Such steps will assist in the constitutional goal of substantively engaging with domestic and transnational algorithmic governance, thus foregrounding rights and ensuring democratic accountability.

5. Proposed Constitutional Embeddings: Towards a Future-Proof Constitution

The use of technology among people in the world is increasing at a breakneck pace. Maybe in the next 50 years, we will see advances in information technology that we can't even imagine yet; robots guided by autonomous intelligence will speak for their rights, robots will claim their legal personality, and humans will sit at the same table. Demands should be heard seriously. Advances in technology, as a blessing to human civilisation, can turn into a curse in just the same way. For example, medical surgery can be performed by artificial intelligence robots. No doubt it will make a much more complicated operation more manageable, but who will bear the liability if there is any danger in this operation? Recently, we have seen cars driven by artificial intelligence hitting the market, and people are buying these cars. Tesla has launched an AI-driven taxi that can operate without human intervention. Have we ever wondered who would be held liable if such a car ever suffers an accident in autopilot mode or fails to respond appropriately while the driver is driving? In addition to Algorithmic Discrimination and digital Rights, there is a lot of discussion on various dangerous aspects of Artificial Intelligence; in this light, in this article, we have discussed what is Artificial Intelligence and Algorithm, the legal provisions of Artificial Intelligence in the present world and Bangladesh, how to connect Artificial Intelligence and Constitution, why Constitutional Provisions is better rather than legislative provisions, in this part of the article we will discuss how to add provisions for Artificial Intelligence in the Constitution of Bangladesh. Some of the constitutional embeddings that may be considered for framing a future-proof Constitution of Bangladesh, as artificial intelligence continues to pervade every aspect of society, both political, economic, and social, it is essential that the Constitution of Bangladesh actively address challenges arising in the context of democratic government and basic rights. The process of making the Constitution future-ready does not require rigidity or making provisions unamendable. Rather, it requires making a progressive constitutional framework that has the ability to adjust to changing technologies and maintain human dignity and accountability. With consideration of international and domestic developments, the following proposals to amend the Constitution to advance an effective and rights-based framework of AI governance are made:

5.1 A New Fundamental Right Relating to Cyber Integrity

The Constitution should include another fundamental right under Part III that guarantees digital integrity, including the right to data protection, algorithmic fairness, and the right to an explanation of automated decision-making. A draft provision could be framed as follows:

“Every person shall have the right to digital integrity, including the rights to data protection, algorithmic transparency, and to receive meaningful explanations of decisions made by automated systems affecting their rights or interests.”

This section aims to acknowledge increasing AI control of personal autonomy as well as safeguard against unjust algorithmic harm inflicted by both state and private actors.

¹⁶⁸ Julie Cohen, ‘Turning Privacy Inside Out’ (2019) 20(1) *Theoretical Inquiries in Law* 1.

Human oversight and accountability regarding Artificial Intelligence Systems:

The application of artificial intelligence to government, business, or service-related activities requires significant human oversight. The Constitution must strongly mandate human accountability in cases where decisions come out of AI use, ensuring that both institutions and individuals using these technologies remain accountable. Such provisions would reduce the risk of an "accountability vacuum" in algorithmic rule and improve democratic control of automated decision mechanisms.

Clarifying Horizontal Application of Fundamental Rights:

The Supreme Court of Bangladesh has recognised a limited horizontal effect of fundamental rights, especially those concerning workplace and environmental issues; however, the implications of large private tech firms enforcing the algorithmic rule of law on individuals call for further regulatory legislation. The Constitution needs to clearly articulate the application of fundamental rights to both the State and powerful private institutions that dominate individual rights in cyberspace. Such specificity would enable courts to hold transnational and local corporate actors to account, making Bangladesh's legislation consistent with similar developments in India, the European Union, and the UK.

Creation of a Bangladesh Digital Rights Commission (BDRC):

To enforce constitutional guarantees, it is suggested that a Bangladesh Digital Rights Commission be established as a constitutionally mandated body, with powers equivalent to those of the Election Commission or the NHRC. This independent body would:

- Oversee AI systems and assess whether they comply with principles of fairness and transparency.
- Investigate grievances relating to algorithmic bias or discrimination.
- Provide recommendations to legislative or executive bodies
- Operate as an instrument to settle grievances concerning violations of digital rights.

The suggested institution would work to bridge the fields of technological governance and court supervision, especially regarding transboundary digital threats.

Protection Against Algorithmic Discrimination:

The Constitution should include express protections against algorithmic discrimination, recognising that biased datasets or opaque algorithms can perpetuate and intensify existing socio-economic inequalities. Such provisions would extend anti-discrimination principles to AI-based determinations in areas like employment, education, criminal justice, and welfare distribution, and thereby secure constitutional equality in the context of developments in digital technology.

Right to Digital Self-Determination:

The principle of digital self-determination would best be framed in the larger context of the intrinsic right to digital integrity. This principle guarantees individuals control over the gathering, use, and monetisation of personal information by artificial intelligence technologies, either by explicit agreement or by structural regulatory provisions. The principle supports informational autonomy and responds to problems posed by exploitative data-driven business models that often proceed with limited end-user awareness and, in many cases, minimal oversight.

6. Conclusion

It is aptly evident from the deliberation that human civilisation has relied on the Constitution, which uses a variety of decision-making processes enmeshed in a complex institutional

structure of checks and balances rather than morals and ethics. The algorithmic constitutionalism framework provides an alternative strategy for tackling the problem of constitutionalising AI within the framework of digital platforms. To enable the constitutional system in Bangladesh to function simultaneously at the two levels of monitoring and verifying, and possibly correcting operations in real time if they deviate from the principles safeguarded by the Constitution, algorithmic constitutionalism will aim to protect the fundamental tenets of constitutional governance from algorithmically initiated changes. Humanity's lengthy history of taming power is the foundation of our research. Algorithmic constitutionalism develops an algorithmic understanding of the Constitution that does not exhaust constitutional justice's universality. Attempting to subject the AI algorithm to internalising constitutional control allows the AI to potentially embed the algorithmic justice goals. We think the conflict between algorithmic and societal constitutionalism presents a fresh, significant obstacle to constitutional law.

Human rights and freedoms have benefited from the new avenues for innovation that algorithmic constitutionalism has helped open up for society. Constitutional democracies can also benefit from technology. Artificial intelligence can potentially enhance public service performance and improve legal enforcement systems. However, the realm of unfathomable algorithms that define modern society calls into question the defence of fundamental liberties and democratic principles.¹⁶⁹ While pushing policymakers to develop a constitutional framework that strikes a balance between risk and innovation, while considering the obligations of society under algorithmic constitutionalism. Free speech, privacy, and data protection are not the only issues brought up by artificial intelligence technologies. Because automated decision-making systems might collectively impact democratic principles, constitutional democracies are pressured to guarantee legal certainty by embedding algorithmic constitutionalism predictability. The AI systems surrounding people are becoming increasingly pervasive, but this does not always mean people can comprehend and manage the underlying technologies. Permitting the actors in charge of these automated systems to arbitrarily decide the amount of protection of rights and freedoms in Bangladesh at the national level by leaving algorithms unprotected would pave the road for algorithmic authoritarianism.

Thus, it is an effort to reinterpret constitutional democracies' function in the algorithmic world. The ascendance of algorithmic constitutionalism is to defend democratic principles and fundamental human rights against the allure of digital liberalism based on digital capitalism and the threats posed by AI platform powers. Furthermore, it offers a normative framework that analyses the degree to which algorithmic constitutionalism provides a foundation for safeguarding rights and limiting the use of unaccountable powers in an algorithmic society. Therefore, AI technologies are being incorporated into the legal field, marking a revolutionary change towards more accurate, accessible, and efficient legal procedures. This technical advancement implies that integrating AI into constitutional decision-making is inevitable. The legal community is responsible for ensuring AI systems uphold justice, equity, and the rule of law rather than undercutting them as they are used to making decisions. To preserve constitutional principles and equity, legal practitioners must thus get a more profound comprehension of AI technology and actively engage in the planning, creation, implementation, and oversight of algorithmic constitutionalism, a reality in Bangladesh's constitutional way of life.

¹⁶⁹ Ahmad, N., 'Refugees and Algorithmic Humanitarianism: Applying Artificial Intelligence to RSD Procedures and Immigration Decisions and Making Global Human Rights Obligations Relevant to AI Governance' (Nafees Ahmad, 2021) *International Journal on Minority and Group Rights* <<https://doi.org/10.1163/15718115-BJA10007>>

Book Review

“What Is Legal Education For? Re-Assessing the Purposes of Early Twenty-First Century Learning and Law Schools”

Rachel Ann Dunn, Paul Maharg and Victoria Roper (eds), Routledge, 2022

Emmanuel Chukwufumnaya Chukwueloke*

This book brings back our attention to the need to critically reconsider what legal education represents in the 21st century. The book reintroduces the strong academic rhetorical question that captures the mind and thought of readers at first glance of what legal education should be all about in the 21st century. To make the most of the answer correctly requires assessing the roles academics play either as leaders, tutors, instructors, consultant or as a researcher in legal education.

Although the book does not clarify in simple terms what legal education is all about, it brings a new perspective in nine different chapters to what students think about their experience in law school, the way and manner in which law academics with an interest in legal education frame the field, and identify any besetting problems. It does not matter whether the law schools are different because it creates room for academic creativity and variety offered to students beneath surface similarity.

However, despite the level of curricular diversity, Elaine Hall and Samantha Rasiah opine that the law school, on one hand, serves to erase inequalities within the academy and the profession¹ and on the other hand, it presents a uniform platform to harness knowledge of the law from law students from different higher institutions. Elaine Hall and Samantha Rasiah, in the first chapter begins with a historical antecedence of the unitary idea of how the law school was defined in the previous century and how it should be defined in legal education of the 21st century. Legal scholars alike see the law school as a conservative institution that conserves and pass on legal academic culture committed to critiquing the way we think about law and justice, whilst striving to achieve change especially with the digitalization of teaching in Higher Education during post covid-19 era which presented a crossroad for academics to reflect upon their responsibility to find ways to recover their identities and values.²

In the second chapter, Maribel Canto Lopez contemplates whether the voices of law teachers can be more loudly heard through the Teaching Excellence Framework TEF especially within the Higher Education sector in England. Whether the TEF is the right instrument to audit excellence in teaching in Higher Education Institutions, Maribel Canto Lopez is not too sure

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¹ Tina Mckee and others, ‘The Fairness Project: The Role of Legal Educators as Catalysts for Change. Engaging in Difficult Dialogues on the Impact of Diversity Barriers to Entry and Progression in the Legal Profession’ (2020) 55 *The Law Teacher* 283.

² ‘Getting through Covid-19 Means Rethinking Resilience’ (*Wonkhe*) accessed 30 March 2025.

as the author expands that the TEF is only but an increased burden of overload on Higher Education Institutions through bureaucracy and market principles that see students as consumers³ as a result of government control over law teachers' activities related to teaching and learning practices and their quality assurance. Arguably, the absence of academic and law teachers' voices from governmental and HEIs' policies will always create a gap in the HE sectors.

Whilst the credibility of the undergraduate law degree must meet the standard of education for global citizenship, Chloe Wallace, in chapter three, highlights the failures of the discipline to respond effectively to internationalise the law degree only at the master's degree level.⁴ In such circumstances, legal education can begin to drive in the direction of intercultural models to accommodate questions of race and decolonialization of the legal curriculum. Foluke Ifejola Adebisi and Katie Bales, in the fourth chapter speaks more on the linkage between race relations and decolonial scholarship that is still absent in higher education, with its negative impacts felt more heavily amongst racial minoritised groups from historical times until the present. It might be that the role of law is limited, thereby causing such harms on both national and global scales in producing and maintaining global inequalities, extreme poverty and exploitation of labour, environmental degradation, torture, oppression, physical destruction of lives and livelihoods, immediate or gradual death, as Foluke Adebisi puts it, the law has not always been innocent.⁵

Foluke Adebisi and Katie Bales debunk the need for legal education to address the issues of the appropriateness of law and law schools in given circumstances, especially when it has to do with race, racism and inequalities. The chapter fails to capture how to decolonise the law curriculum. However, in situations where student participation is encouraged through teaching and research, colonial traits can be destroyed.⁶ Jessica Guth and Doug Morrison posit that decolonising might simply mean adding a few 'alternative' sources to the reading lists, changing lectures to specifically consider indigenous rights, or maybe having a seminar on slavery during black history month, advancing beyond these may require an inculcation into the legal curriculum.

The discussions from chapter five were not far away from the central theme of this book, where, in trying to know who the law schools are meant for, issues of class and gender must be given a definite description. Jessica Guth and Doug Morrison further contends that the law schools have always been quite similar, staffed by the best legal minds focused on a narrowly defined discipline and to accentuate that before this time less consideration were given to women from a gender bias further buttresses some of the cogent issues raised in the previous chapter where diversification of law schools to include majority of working class and ethnic minority is not encouraged because in perspective it creates further problem to legal practice.

Hence, the law school should be precise only for those who want to be lawyers, solicitors and barristers, law students and staff alike, with social and financial capital to access and understand different complexities. Emma Jones, in chapter six, drawing from the writings of Toddington's conceptualisation of legal enterprise model, expands that what constitutes an authentic, legal skills in the 21st century must be one where institutions must be able to inhibit and resolve

³ Louise Bunce, Baird, Amy and Siân E and Jones, 'The Student-as-Consumer Approach in Higher Education and Its Effects on Academic Performance' (2017) 42 *Studies in Higher Education* 1958.

⁴ Ana Speed, 'Academic Perspectives on Teaching International Family Law in Higher Education Institutions in England and Wales' (2020) 54 *The Law Teacher* 69.

⁵ Foluke Ifejola Adebisi, 'Decolonising the Law School: Presences, Absences, Silences... and Hope' (Social Science Research Network, 1 December 2020) <<https://papers.ssrn.com/abstract=3762558>> accessed 31 March 2025.

⁶ *ibid.*

disputes, coordinate policy, foster participation, and inhibit conflict.⁷ Furthermore, legal skills should incorporate a combination of digital skills and soft skills, building on emotional literacy and emotional intelligence, thereby creating a platform for legal education to remain largely committed to legal skills created by the legal profession, with good citizenship.

Paul Maharg described how in the eleventh century, the newly discovered Justinianic Codes and texts, voluminous, exotic, and arcane, were collated, understood and put into practice along complex codes of canon laws. The author explains that what makes legal education uneasy spans from having to apparent place in the foundational methods and knowledge structure of the legal academy. In the penultimate chapter of this book, while in search of phenomenology of learning and technology, ranging from intersecting issues that are essential to technology and legal education within the context of digital legal educational intervention.

Three authors, Lydia Bleasdale, Paul Maharg and Craig Newbery-Jones discussed the implications for a phenomenological approach to learning and technology. They explore the effect of digital education on community identity, especially within a post pandemic dispensation where the space and time of learning changed. In the concluding chapter, the Australian legal scholar Margaret Thornton tries to elucidate what law school is for in a post-pandemic world. Higher education in Australia is facing a financial crisis arising from the loss of international students because of border closures.⁸ The author recognised that preparing students for practice and job readiness is one of the reasons for what the law school is for, and as long as students maintain a high-flying status in their pursuits, they contribute to human capital development of any community.

It is not without saying that the various sessions of this book, in concrete rather than in nascent terms, have attempted to debunk Birks' collection in not only what the twenty-first century law school learning and education is for but have also reassessed the purposeful relevance evidenced within the context of present-day legal education reality. Where traditional legal education focused on doctrinal mastery and preparation for courtroom practice is not enough for the legal profession to withstand new patterns of globalisation, technology in solving the problem of social injustice. Going forward will require a redefinition of purpose in line with pedagogical innovation that can guarantee open access and diversity to accommodate new technology in future legal practice with a more nuanced approach to strengthen and preserve the already existing doctrinal foundations in the 21st century.

⁷ Stuart Toddington, 'The Emperor's New Skills: The Academy, The Profession And The Idea of Legal Education' in PBH Birks (ed), *What are Law Schools For? Pressing Problems in the Law, Volume 2* (Oxford University Press 1996) <<https://doi.org/10.1093/oso/9780198522553.003.0006>> accessed 4 April 2025.

⁸ Kanishka Jayasuriya, 'COVID-19, Markets and the Crisis of the Higher Education Regulatory State: The Case of Australia' (2021) 18 *Globalizations* 584.