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THE EDITORIAL BOARD
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FOREWORD BY HENRY YEOMANS

I vividly remember how impressed I was when Dr Colin Mackie first pitched the idea of launching this journal to the School of Law. I was Director of Postgraduate Research Studies at the time, and I thought its creation would provide valuable opportunities for PhD students to gain experience of editing a journal. Reading through this volume, I am struck by the fact that, as well as providing precisely these opportunities, the *Leeds Student Law and Criminal Justice Review* also does a superb job of showcasing some of the truly outstanding research that our undergraduate and taught postgraduate students complete. I am therefore very happy to see the third volume of the *Leeds Student Law and Criminal Justice Review* published and delighted to provide this Foreword.

Research is, of course, at the heart of what we do at the University of Leeds. We are widely regarded as one of the top research universities in the UK and one of the leading centres for research on law and criminal justice in the world. We are known especially for producing critical and robust research that addresses real-world issues and seeks to make a positive difference to the world in which we live. These research activities are deeply connected to the teaching and learning that takes place in the School. Our research informs the content that School of Law students study and shapes the teaching practices through which we support learning. We also support students in developing the critical and research skills needed to question received wisdom and seek to build new knowledge and new perspectives through their own research projects and enquiries. The results of this symbiosis of teaching and research are perfectly demonstrated by the papers contained in this volume. They address contemporary global challenges, using empirical and doctrinal methods to further our collective understandings and contribute towards the development of more effective and more just legal and policy responses.

The volume begins with an article by Noah Robinson which addresses the highly prescient issue of cryptocurrencies (or cryptoassets) and how to regulate them. Robinson's discussion concentrates on stablecoins in particular and, finding the UK regulatory approach to be unsatisfactory, provides insightful discussion of alternative approaches entailing bank and deposit regulation.

The next article is by Lydia Kelly and addresses a similarly contemporary issue: the tension between an employee's right to privacy and the power of employers to dismiss staff for social media misconduct. Finding reasons to be concerned about the current situation, Kelly's article culminates with a considered and incisive analysis of how greater protection for the privacy of employees can be provided.

The next three papers are motivated by a concern for how certain social groups are treated – or mistreated - by the law. Lily Proudfoot examines the law's interactions with asexual and intersex people and argues that there is a 'legal silence' around these groups. Engaging with queer theory and queer politics, Proudfoot makes a

compelling argument for legal reform and advocates for a set of measures that would remedy this silence.

Next, Rinda Desarapu provides a fascinating assessment of uneven access to justice as one of the lingering effects of the caste system in India. In particular, Desarapu analyses the situation of Dalit (or 'untouchable') women who are victims of sexual violence and explores how the combination of their female gender and low caste status makes them extremely vulnerable to injustice.

Finally, Alicia Jane Grassom concentrates on the policies that govern the entry of refugees and migrants into the UK. Taking inspiration from criminological writings on 'crimmigration' (or the tendency for migration to be constructed as a crime problem), Grassom's careful analysis of relevant policy finds that recent UK policies on migration and asylum have been heavily influenced by Australian policies and proposes that a more humanitarian approach should be adopted instead.

The contributions to this volume thus exemplify the sort of critical and impactful research that we at the School of Law prides ourselves on creating. They also encapsulate the range of subject expertise that is present in the School; from business law to social justice to criminal justice. But, more than that, the volume is comprised of five outstanding and highly readable pieces of research. The authors deserve immense credit for producing such high-quality articles and, as a school, we could not be more proud of them. We are also extremely proud of the editorial team, which is comprised of postgraduate researchers. They have done a tremendous job of bringing together this volume.

Many congratulations to the authors and editors alike. To all others, happy reading!

Professor Henry Yeomans

Director of Research and Innovation
School of Law, University of Leeds.

INTRODUCTION TO THE THIRD ISSUE

This is the third issue of the Student Law and Criminal Justice Review. This journal was the idea of Dr Colin Mackie, and over the last three years it has been developed by teams of Postgraduate Researchers within the School of Law at the University of Leeds

The board is fortunate to have access to such a high level of undergraduate and taught postgraduate research from which to select the papers included in the journal. This issue features papers by four of our undergraduate students and one taught postgraduate student. The papers selected are based on dissertations written by students and engage with a wide variety of topics, reflective of the research centers of the Law School: the Center for Criminal Justice Studies, the Centre for Law and Social Justice, and the Center for Business Law and Practice.

This journal represents a collaborative project between the postgraduate editors and the taught students, working together to produce a journal available on HeinOnline and a small number of printed copies. This project provides a valuable opportunity for all involved; the postgraduate editors gain experience of editing and project managing, and the taught students get an opportunity to finesse already outstanding work and have an opportunity see their work published.

For the first time, the third issue's editorial board is an all-women team, bringing together expertise in many subfields of the discipline and regions of the globe. This is representative of the structural and cultural changes we can see emerging in law and criminal justice more generally regarding the diversification of contributions in terms of gender, ethnicity, and sexuality. It is also reflected in this issue's featured authors, four out of five of whom are women; as well as the topics of the papers which raise important issues such as challenging homonormativity through the lens of the intersex and asexuality movement, and exploring barriers to justice for Dalit women who are survivors of sexual violence in India.

We would like to thank all those involved, including Colin Mackie for his advice and assistance, as well as the Management Support staff in the School of Law, assisting with the administration necessary for the printing of the journal. Finally, we would like to thank Professor Henry Yeomans for providing this issue's foreword.

We hope that you enjoy the third issue of the Leeds Student Law and Criminal Justice Review.

The Editorial Board March 2023

AUTHOR BIOS

Noah Robinson

Noah recently graduated from the University of Leeds with a distinction in International Banking and Finance Law LLM, having also been awarded the Head of Law School Dissertation Prize. His postgraduate degree was motivated by his undergraduate Economics BSc degree for which he was awarded first class honors, (also at the University of Leeds) and his engagement with the functioning of financial systems. Noah has since begun a career as an Underwriting Assistant at IQUW – which operates as a syndicate in the Lloyd's of London Insurance Market. Here he has found that the knowledge which he acquired throughout his time in Leeds, as well as the broader skills and relationship s which he has also developed, have enabled him to transition smoothly into working life.

Lydia Kelly

Lydia graduated with a first-class degree in Law from the University of Leeds in July 2022. She chose to write her final year dissertation on how employees' posting online may affect their employment relationships, as she believes this is a question that will only become more prevalent as social media ingrains into our daily lives. For this, Lydia was awarded the Hughes Dissertation Prize for submitting one of the best dissertations in her cohort. Since graduating, Lydia has been working as an intellectual property and marketing paralegal at Tesco whilst looking to attain a training contract at a commercial law firm. She hopes to further explore her interest in the law around social media in her future legal career.

Lily Proudfoot

Lily graduated from the University of Leeds in 2022 at the top of the LLB Law cohort and returned to the School of Law as a Graduate Teaching Assistant the following academic year. Forming an integral part of the School of Law's community, she currently teaches on the following modules: Company Law, Torts, Land Law and Foundations of Law. Lily has really enjoyed teaching on undergraduate modules and aims to continue challenging homonormativity in her prospective career as a solicitor.

Rinda Desarapu

Rinda recently graduated from the University of Leeds, School of Law with an upper 2:1 LLB. For her final year dissertation, she chose to write on the topic of gender and the law, a topic which has always interested her. She was awarded the Hughes Dissertation prize for this work. After graduating, Rinda moved back to India and started working in a corporate law firm. She aims to clear her Bar examination and be enrolled on the Indian Bar Council in 2023.

Alicia Grassom

Alicia Grassom is a BA Criminal Justice and Criminology (International)(Honours) graduate from the University of Leeds. Her research interests in transnational crime and human rights was actualized during her studies at university. Whilst presenting her travel show on Leeds Student Radio, she learnt of the Australian offshore immigration detention policies. She was inspired to research international criminology further, going on to complete a virtual study abroad year at Griffith University, Gold Coast, Australia. Her comparative research reflects her academic experiences and a passion for human rights, specifically in places of detention. Currently, Alicia continues to pursue this interest, aspiring to be a researcher for HM Inspectorate of Prisons.

Contents

**Content Warning: This paper contains references to sexual violence that might be difficult for some to read.*

Regulating Stablecoins: A Proposed Revision to the UK's Approach Given the Monetary and Financial Stability Risks Conferred by Stablecoins of Systemic Size.

NOAH ROBINSON

Abstract

Shortly after stablecoins' inception as a 'safe haven' from cryptoasset investment, Meta's 'Libra' proposal demonstrated stablecoins' potential for broader market adoption. This development has duly prompted a spate of independent analyses into a prospective systemic stablecoin's interaction with established monetary systems. These analyses have examined the monetary and financial stability risks which such an interaction would present, concurrently proposing appropriate regulatory responses. Simultaneously, governments have also begun to respond with varied proposed regulatory responses. This paper seeks to critically evaluate the UK's proposed regulatory response to the risks posed by stablecoins. Finding the UK approach to be restrictive and inadequate in its prescription of e-money regulation when considering the monetary and financial stability risks posed by stablecoins of a systemic size, this paper will advocate for the incorporation into bank and deposit regulation in such instances.

1. *Introduction*

There is no doubting money's integral role within modern economies. Money operates as a yardstick for the disparate value of goods, services and assets whilst also enabling transactions to be made and recorded between parties.[1] Simply put, sound money operates as a unit of account, store of value and a medium of exchange.[2] Indeed, a well-functioning monetary system forms the 'cornerstone' of well-functioning economies.[3] Such a system is dependent on money which is accepted by all parties, 'no questions asked' and is typically created privately by commercial banks' fractional reserve banking which is itself influenced publicly, through central

[1] Jon Frost, Hyun Song Shin and Peter Wierts , 'An Early Stablecoin? The Bank of Amsterdam and the Governance of Money'(2020) 902 BIS Working Papers 1. See also Claudio Borio, 'On Money, Debt, Trust and Central Banking' (2019) 763 BIS Working Papers 1, 2 who refers to money as an 'immutable unit of measurement'; Barry Eichengreen, 'From Commodity to Fiat and Now to Crypto: What Does History Tell Us?' (2019) 25426 NBER Working Papers 1 who refers more broadly to money enabling economic activity.

[2] The Bank of England, 'New Forms of Digital Money' (*Bank of England Discussion Paper,* 7 June 2021) < https://www.bankofengland.co.uk/paper/2021/new-forms-of-digital-money > accessed 8 July 2022.

[3] See Borio (n 1), 16 . See also Gary B. Gorton, Chase P. Ross and Sharon Y. Ross, 'Making Money' (2022) 29710 NBER Working Paper Series 1, 2 who themselves refer to the 'bedrock' of well-functioning economies.

bank monetary policy.[4] Central banks also issue money through cash. Central bank money which is held on behalf of financial institutions in the form of reserves performs the unit of account function, whilst commercial bank money functions as a store of value and a medium of exchange.[5]

Ontologically, money can be described as both a social convention and a legal phenomenon. It requires an effective regulatory framework to uphold its otherwise self-sustaining role in supporting economic activity and ,[6] as such, can be succinctly described as a social institution.[7] It is in this way that technological innovations which threaten to disrupt the established monetary order confer monetary and financial stability risks in the broader economy, thus presenting a legal problem.[8] A legal framework must be implemented through legislation and upheld through regulation which mitigates these threats.

One such innovation is stablecoins, a recent evolution of cryptoassets. Cryptoassets emerged in the wake of the 2008 crash as a form of tokenised currency which record transactions using distributed ledger technology (DLT).[9] This means that transactions are publicly available and often publicly verified, rendering cryptoassets to be a 'token-based' form of money dependent on verification of the token itself. This process could be contrasted with the case of account-based money where the counterparty to a transaction is verified.[10] Stablecoins have adopted these features of cryptoassets.

By design, cryptoassets have also been characterised by a freedom from any sovereign, or other issuer's, influence. This freedom from influence, which in turn

[4] See Gorton, Ross and Ross (n 3) for the importance of NQA money. See also Michael McLeay, Amar Radia and Ryland Thomas, 'Money Creation in the Modern Economy' (2014) 2014 Q1 Bank of England Quarterly Bulletin 14, for the money creation process.

[5] The Bank of England (n 2).

[6] See Raphael A. Auer, Cyril Monnet and Hyun Song Shin, 'Permissioned Distributed Ledgers and the Governance of Money' (2021) University of Bern Discussion Papers 1. See also Frost, Shin and Wierts (n 1) for money as a social convention; Dan Awrey, 'Bad Money' (2020) 106(1) Cornell Law Review 1 for money as a 'legal phenomenon'; Agustin Carstens, 'The Future of Money and the Payment System: What Role for Central Banks?' (Princeton University Lecture, New Jersey, 5 December 2019) < https://www.bis.org/speeches/sp191205.pdf > accessed 12 July 2022 for acknowledgement of both; Borio (n 1) who explores and explains the relationship between money and regulation and money and economic activity very succinctly. The role of the state and regulation is said to be critical.

[7] See Curzio Gianni, *The Age of Central Banks* (Edward Elgar Publishing 2011), 8 who combines these 'legal phenomenon' and 'social convention' classifications of money.

[8] Douglas Arner, Raphael Auer and Jon Frost, 'Stablecoins: Risks, Potential and Regulation' (2020) 905 BIS Working Papers 1. See also Kathryn T. Petralia and others, *Banking Disrupted? Financial Intermediation in an Era of Transformational Technology, Geneva Report on the World Economy, no 22* (International Centre for Monetary and Banking Studies 2019).

[9] Kristin N. Johnson, 'Decentralized Finance: Regulating Cryptocurrency Exchanges' (2021) 62 William and Mary Law Review 1911, 1919.

[10] See Charles M. Kahn, 'How are Payment Accounts Special?' (2016) Payments Innovation Symposium, Federal Reserve Bank of Chicago 1 for this distinction. See also Joseph Lee and Florian L'Heureux, 'A Regulatory Framework for Cryptocurrency' (2020) European Business Law Review 31 for a comment on cryptoassets generally.

limits trust,[11] has led to the value of cryptoassets fluctuating significantly, undermining their ability to act as a store of value or medium of exchange.[12] Conversely, stablecoins' value is pegged by issuers to that of a fiat currency, or basket of currencies.[13] As such, stablecoins theoretically provide these store of value and medium of exchange monetary functions.[14] In this way, single currency-backed stablecoins are merely a 'tokenisation of funds' and not a new form of asset.[15]

In order to fulfil the pegging function, private issuers of stablecoins must commit to governance of stablecoins. Such commitments must address issuance, redemption, stabilisation and provisions for the transfer and storage of coins, so that stablecoins may act as a viable medium of exchange or store of value.[16] If such provisions are met, a stablecoin 'arrangement' is created.[17] Creation of such arrangements qualifies stablecoins as a 'financial market infrastructure' (FMI), a qualification which allows financial transactions to occur.[18]

Immediately, this assessment raises concerns as FMIs are public goods.[19] Any growth in stablecoin FMIs which displace established FMIs may disrupt the role of these infrastructures and, in turn, the role of commercial banks who operate within them. Banks engage in maturity transformation, safety transformation, liquidity provision

[11] See Borio (n 1) who describes currencies' dependency on trust for stability.

[12] Alex Tapscott and Don Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin is changing Money, Business and the World* (Penguin 2016) describe the cryptoasset mission, which is widely to perform this function, conversely. See also Gerald Dwyer, 'The Economics of Bitcoin and Similar Private Digital Currencies' (2014) 17 Journal of Financial Stability 81; Amani Moin, Kevin Sekniqi and Emin Gun Sirer, 'A Classification Framework for Stablecoin Designs' (2020) International Conference on Financial Cryptography and Data Security 1; Eichengreen (n 1); Lee and L'Heureux (n 10) – all of whom have identified cryptoassets not meeting this criteria.

[13] Kahn (n 10).

[14] See Alexander Berensten and Fabian Schar, 'Stablecoins: The Quest for a Low Volatility Cryptocurrency' in Antonio Fatas (ed.) *The Economics of FinTech and Digital Currencies* (Centre for Economic Policy Research 2019), 65. See also Erica Stanford, 'The Instability of Stablecoins: We'll Likely See More Failures Before They're Safe' (2022) Crypto A.M (a City A.M magazine) 53 who suggests that stablecoins have successfully done so.

[15] Dirk Bullmann, Jonas Klemm and Andrea Pinna, 'In Search for Stability in Crypto-Assets: Are Stablecoins the Solution?' (2019) European Central Bank Occasional Paper Series 1, 39. See also Alexander Lipton and others, 'Stablecoins, Digital Currency and the Future of Money' (2020) 11 Works in Progress – Building the New Economy 1 who refer to stablecoin holdings simply as commercial bank money.

[16] Financial Stability Board, 'Addressing the Regulatory, Supervisory and Oversight Challenges Raised by "Global Stablecoin" Arrangements' (2020), 14 April Financial Stability Board Press Release 1. See also Committee on Payments and Market Infrastructures and Board of the International Organization of Securities Commissions, 'Application of the Principles for Financial Market Infrastructures to Stablecoin Arrangements – IOSCO and CPMI' (2021) CPMI-IOSCO Consultative Report 1; Bullmann, Klemm and Pinna (n 15).

[17] HM Treasury, 'UK Regulatory Approach to Cryptoassets, Stablecoins, and Distributed Ledger Technology in Financial Markets: Response to the Consultation and Call for Evidence' (2022) April 2022 Policy Paper 1. See also Financial Stability Board (n 16); CPMI and IOSCO (n 16).

[18] See CPMI and IOSCO (n 16) who are globally recognised to assess criteria for qualification as an FMI.

[19] Angela Walch, 'The Bitcoin Blockchain as a Financial Market Infrastructure: A Consideration of Operational Risk' (2015) 18 New York University Journal of Legislation and Public Policy 837.

and risk pooling, whilst also directly providing payment services and diversifying credit risk.[20] They have long been recognised as economic middlemen, connecting lenders with borrowers, and promoting capital accumulation.[21] Numerous studies have empirically confirmed banks' broad advantages to society.[22] Any effects of arrangements on financial instability should thus be mitigated.

Commercial banks also have an integral role in transmitting monetary policy as set by central banks.[23] Prudent monetary control has broad effects on economic stability;[24] it is thus paramount that any negative effects of arrangements on monetary stability are evaluated and mitigated where appropriate. Indeed, monetary and financial stability is the 'prize' of a well-functioning monetary system.[25]

As such, and in response to recent developments, this paper will assess the monetary and financial stability risks of stablecoin arrangements, and use the resulting findings to analyse His Majesty's Treasury's (HMT) 'UK Regulatory Approach to Cryptoassets, Stablecoins, and Distributed Ledger Technology in Financial Markets' ('the Approach'). The Approach was confirmed as the government's legislative response aimed to bring stablecoin activities inside the UK's regulatory perimeter in April 2022, and subsequently introduced to parliament in July 2022 as codified by the Financial Services and Markets Bill ('the Bill').[26] This paper will then suggest incorporating banking regulation into the Approach to more adequately reflect the identified monetary and financial stability risks of systemic stablecoin arrangements.

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[20] Ross Levine, 'Finance and Growth: Theory and Evidence' (2005) 10766 National Bureau of Economic Research Working Papers 1. See also Larry D. Wall, 'Fractional Reserve Cryptocurrency Banks' (*Federal Reserve Bank of Atlanta,* April 2019) <https://www.atlantafed.org/cenfis/publications/notesfromthevault/04-fractional-reserve-cryptocurrency-banks-2019-04-25> accessed 15 July 2022 who makes a similar allusion; Petralia and others (n 8).

[21] Joseph Schumpeter, *The Theory of Economic Development* (New Brunswick 1912), 74. See also Walter Bagehot, *Lombard Street: A Description of the Money Market* (Hyperion Press Inc 1873), 7 who compares credit allocation by banks to 'water running to find its level'; Douglas W. Diamond and Phillip H. Dybvig, 'Bank Runs, Deposit Insurance, and Liquidity' (1983) 91(3) The Journal of Political Economy 401 who provide perhaps the seminal work in legitimating this theory.

[22] See Robert G. King and Ross Levine, 'Finance and Growth: Schumpeter Might Be Right' (1993) 108(3) *The Quarterly Journal of Economics* 717 for a seminal empirical support. See also Phillipe Aghion, Peter Howitt and David Mayer-Foulkes, 'The Effect of Financial Development on Convergence: Theory and Evidence' (2005) 10358 NBER Working Papers 1; Thorsten Beck, Hans Degryse and Christiane Kneer, 'Is More Finance Better? Disentangling Intermediation and Size Effects of Financial Systems' (2014) 10(C) Journal of Financial Stability 50; Jean Louis Arcand, Enrico Berkes and Ugo Panizza, 'Too Much Finance?' (2015) 20 Journal of Economic Growth 105 for later papers which test these results in different ways, finding this relationship to hold in almost all situations, adding robustness; Thorsten Beck, Asli Demirgüç-Kunt and Ross Levine, 'Finance, Inequality and the Poor' (2007) 12(1) Journal of Economic Growth 27, who find traditional finance to have an ameliorative effect on poverty and inequality.

[23] McLeay, Radia and Thomas (n 4).

[24] See Charles A.E Goodhart, *The Central Bank and the Financial System* (1st edn, Macmillan Press Ltd 1995) for a collection of these accounts.

[25] Borio (n 1), 18. See also Petralia and others (n 8) who consider financial stability to be critical to the permissibility of any financial innovation.

[26] HM Treasury (n 17). See also Financial Services and Markets Bill 2022, ss 21 and 22; see also sch 6.

The remainder of this contribution is structured as follows: section 2 provides working definitions for financial and monetary stability before section 3 explores the literature on the development of stablecoins and contextualises movements towards regulatory response. Section 4 outlines the Approach before section 5 provides a review of the monetary and financial stability risks of stablecoins literature, using these findings to evaluate the Approach. Section 6 will then review the literature in relation to regulatory recommendations, assessing the reconcilability of these recommendations to the Approach, before section 7 provides a comprehensive regulatory revision of the Approach, in consideration of sections 5 and 6, which incorporates banking regulation. Section 8 will present points for discussion before section 9 concludes.

2. *Definitions*

A. Financial stability

In defining financial stability, the Bank of England ('the Bank') considers a stable system to be one which 'can provide crucial services to households and businesses in both good times and bad', stating that the term just describes the financial system 'when it's fulfilling its basic roles'.[27] This interpretation is supported by the literature with repeated reference to 'soundness' of the financial system, which is reconcilable with the Bank's definition.[28]

Whilst many may implicitly refer to financial stability as relating to an absence of financial collapse, activities which lead to distortion of the financial system, such as disintermediation of commercial banks, would likely lead to collapse regardless. Moreover, it is not sufficient in developed economies, such as the UK, for financial systems to be free from failure. Any assessment of the condition of the financial system should be made in reference to a hypothetical status quo in which the financial system supports the real economy. As such, this paper will consider a 'stable' financial system to be one which serves the functions which were highlighted as the role of finance in section 1.[29]

[27] The Bank of England, 'What is Financial Stability?' (*Bank of England,* 3 December 2020) <https://www.bankofengland.co.uk/knowledgebank/what-is-financial-stability> accessed 2 June 2022 . For application of this definition see Financial Conduct Authority, 'Resilience of Money Market Funds' (2022) 22/1 Discussion Paper 1, 3, which refers to the financial system fulfilling its role in 'good and bad times' and responding to, rather than amplifying, a series of shocks.

[28] See The Bank for International Settlements, 'BigTech in Finance: Opportunities and Risks' (2019) BIS Annual Economic Report 55, 68. See also Petralia and others (n 8), 56.

[29] See Petralia and others (n 8), 56 who broadly echo this interpretation.

B. Monetary stability

The Bank defines the maintenance of monetary stability as the maintenance of price stability, achieved through the 'monetary transmission mechanism'.[30] As such, interest rate setting through the bank rate and alterations to the monetary supply contribute to monetary stability. Logically, maintenance of price stability may also include exchange rate targeting.

3. Overview

Before assessing the UK Approach to regulating stablecoins, the justification for regulation should first be established so as to better inform the regulation itself. Such a justification can only be made following a dissection of arrangements' mechanism for stabilisation, issuance, redemption, and provisions for the transfer and storage of coins.

A. Stablecoin governance

Firstly, the literature to date is inconsistent in its assessment of the relevant stablecoin stabilisation mechanisms. Stabilisation typically occurs through arbitration, or a direct right for stablecoin holders to receive underlying assets held by issuers in reserves.[31] Some have suggested an approach which is similar to that undertaken by currency boards in which issuers trade tokens against reserves to influence price.[32] However, such an approach is inefficient given that it is characterised by large fluctuations in reserves and quantities of issued stablecoin being held in stagnant custody by issuers.

Whilst many have advocated an arbitrage mechanism, such a mechanism remains an unsatisfactory solution given that, due to its reliance on the demand-driven flows of opportunistic market makers in secondary markets, it involves a time delay before stabilisation.[33] Additionally, market imperfections and arbitrator incentive

[30] The Bank of England, 'Bank of England Market Operations Guide: Our Objectives' (*Bank of England,* 19 May 2022) <https://www.bankofengland.co.uk/markets/bank-of-england-market-operations-guide/our-objectives> accessed 16 July 2022. See also International Monetary Fund, 'Monetary Policy and Central Banking' (*IMF,* 3 March 2022) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/20/Monetary-Policy-and-Central-Banking> accessed 16 July 2022.

[31] Financial Stability Board (n 16).

[32] Ye Li and Simon Mayer, 'Money Creation in Decentralized Finance: A Dynamic Model of Stablecoin and Crypto Shadow Banking' Fisher College of Business Working Paper Series 1. See also Tobias Adrian and Tommaso Mancini-Griffoli, 'The Rise of Digital Money' (2019) 13 Annual Review of Financial Economics' 1.

[33] See Richard K. Lyons and Ganesh Viswanath-Natraj, 'What Keeps Stablecoins Stable?' (2020) 27136 NBER Working Papers 1 who identify this time-delay. See also Ariah Klages-Mundt and others, 'Stablecoins 2.0: Economic Foundations and Risk-based Models' (2020) Proceedings of the 2nd ACM Conference on Advances in Financial Technologies 1; Craig Calcaterra, Wulf A. Kaal and Vadhindran Rao, 'Stable Cryptocurrencies: First Order Principles' (2020) 61 Washington Journal of Law and Policy 193; Moin, Sekniqi and Sirer (n 12) who all advocate an arbitration mechanism; Martin M. Bojaj and

imperfections could conceivably disrupt the arbitration process. Any stablecoin which achieves widespread circulation will likely maintain its peg through the simpler mechanism of issuer commitments to redeem at par, without reliance on secondary market trading. Indeed, there are few advantages to be conferred by structures which allow stablecoins to be traded on secondary markets in the first place, as price discovery is clearly not advantageous.

As such, the issuance and redemption functions of an arrangement will also likely operate as its stabilisation function. When issuing stablecoins, a transfer of fiat funds is made to the issuer's custodian before issuers then 'mint' tokens by allocating the equivalent stablecoin.[34] The reverse process occurs when stablecoins are redeemed or 'burned'.[35] In order to achieve profitability and support operations, issuers typically rely on fees attached to redemptions.[36] A transfer of funds, as payment, is initiated by the sender with network participants validating the transfer, as with cryptoassets.[37] This validation mechanism necessitates a centralised and permissioned ledger, with remuneration needed for validators.[38] 'Wallet providers' also now enable the storage and transfer of stablecoins so as to create the stablecoin 'arrangement',[39] transforming stablecoins into account-based money.

B. The potential of stablecoins

Examining now the potential of stablecoins to disrupt established financial systems, in practice the role of stablecoins has so far been limited to providing a safe haven and hedge from cryptoassets.[40] However, market capitalisation and value have risen rapidly.[41] For money to move toward 'no questions asked' status, improved

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others, 'Forecasting Macroeconomic Effects of Stablecoin Adoption: A Bayesian Approach' (2022) 109 Economic Modelling 1, who in 2022 still conduct an empirical study on the assumption of arbitration.

[34] Bullmann,Klemm and Pinna (n 15), 12. See also Calcaterra, Kaal and Rao (n 33), 202 who both describe the 'minting' process; Financial Stability Board (n 16) which also mentions the importance of custodians for safe keeping.

[35] Bullmann, Klemm and Pinna (n 15), 13. See also Calcaterra, Kaal and Rao (n 33), 202 who both describe the 'burning' process.

[36] Bullmann, Klemm and Pinna (n 15). See also Moin, Sekniqi and Sirer (n 12).

[37] Bullmann, Klemm and Pinna (n 15). See also Financial Stability Board (n 16).

[38] Auer, Monnet and Shin (n 6). See also Sirio Aramonte, Wenqian Huang and Andreas Schrimpf, 'DeFi risks and the decentralisation illusion' (2021) BIS Quarterly Review, December, 21 who refer to the 'decentralisation illusion' – indicating that some level of centralisation is essential.

[39] Dirk A. Zetzsche, Ross P. Buckley and Douglas W. Arner, 'Regulating Libra: The Transformative Potential of Facebook's Cryptocurrency and Possible Regulatory Responses' (2019) 2019/44 European Banking Institute Working Paper Series 1.

[40] See Gang-Jin Wang, Xin-Yu Ma and Hao-Yu Win, 'Are Stablecoins Truly Diversifiers, Hedges, or Safe Havens Against Traditional Cryptocurrencies as Their Name Suggests?' (2020) Research in International Business and Finance 1 who discuss this central purpose of stablecoins. See also Calcaterra, Kaal and Rao (n 33); Aramonte, Huang and Schrimpf (n 38); Bojaj and others (n 33) which, in 2022, assumes stablecoins' main use to still be as a hedging instrument.

[41] See Arthur E. Wilmarth Jr, 'It's Time to Regulate Stablecoins as Deposits and Require Their Providers to Be FDIC-Insured Banks' (2022) 41(2) Banking and Financial Services Policy Report, 1. See also Arner, Auer and Frost (n 8); Berensten and Schar (n 14); HM Treasury (n 17); Aramonte, Huang

reputation is required.[42] Indeed, most of cryptoassets' practical failures beyond their volatility pertain to a lack of an established, accountable, and sophisticated responsible entity to perform oversight.[43] Stablecoins appear to remedy the deficiencies of cryptoassets in that regard. Indeed, the Approach deems them to have a mainstream usability which distinguishes them from cryptoassets.[44]

It is also true that there is precedent for such innovations. Privately issued banknotes achieved 'no questions asked' status in America for some years and,[45] whilst these banknotes did often circulate at a value below par,[46] the explanatory deficiencies of these banknotes are alleviated by the digital nature of stablecoins. The Bank of Amsterdam also flourished as a private currency issuer, with issued currency backed by equivalent assets for some centuries.[47]

Furthermore, DLT presents the most transformative alteration to payment systems of any emerging technology,[48] with the potential to completely replace traditional clearing and settlement methods.[49] Those non-DLT digital payment platforms which have achieved success to date (such as Alipay and WePay in China, and M-Pesa in Kenya) have done so by implementing 'closed-loop systems' which provide both the 'front end' and 'back end' elements of systems.[50] Inherently, stablecoin arrangements

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and Schrimpf (n 38); Lipton and others (n 15) who implicitly credit this shift to the entrance of MNCs in the market.

[42] Gorton, Ross and Ross (n 3).

[43] Walch (n 19).

[44] HM Treasury (n 17).

[45] See Gorton, Ross and Ross (n 3). See also Awrey (n 6).

[46] See Tri Vi Dang, Gary B. Gorton and Bengt R. Holmstrom, 'The Information View of Financial Crises' (2019) 26074 NBER Working Papers 1 who describe the inter-state differences and informational problems which led to them trading below par, which do not apply in a digitised scenario. See also Arthur J. Rolnick and Warren E. Weber, 'Free Banking, Wildcat Banking, and Shinplasters' (1982) Federal Reserve Bank of Minneapolis Quarterly Review No. 3, 10; Joshua S. Gans and Hanna Halaburda, 'Some Economics of Private Digital Currency' in Avi Goldfarb and other authors (eds), *Economic Analysis of the Digital Economy* (University of Chicago Press 2015), 257 who also describe flaws associated with 'wildcat banking', primarily over-issuance followed by using remote and changing locations to avoid redemption, which stablecoins would also not be able to emulate.

[47] Frost, Shin and Wierts (n 1).

[48] Agustin Carstens, 'Shaping the Future of Payments' (2020) BIS Quarterly Review, March, 17. See also Crypto A.M, 'Interview with John Tottie' (2022) Crypto A.M (a City A.M magazine) 16; Walch (n 19); Jared Favole, 'Stability and Regulation are Needed Now More than Ever in Crypto' (2022) Crypto A.M (a City A.M magazine) 43 which describes a 'reshaping' of the financial system.

[49] Douglas W. Arner, **Jànos Barberis** and Ross P. Buckley, 'FinTech, RegTech and the Reconceptualization of Financial Regulation' (2017) 37 North-Western Journal of International Law and Business 371. See also Iris H-Y. Chiu, *Regulating the Crypto Economy : Business Transformations and Financialisation* (Bloomsbury Publishing 2021) who refers to economic mobilisation and wealth creation; Raphael Auer, 'Embedded Supervision: How to Build Regulation into Decentralised Finance' (2019) 811 BIS Working Papers 1 who posits that decentralised finance will drive financial market development.

[50] Morten Bech and Jenny Hancock, 'Innovations in Payments' (2020) BIS Quarterly Review, March, 21.

also perform these functions. Moreover, all digital payment platforms have the potential to bundle traditionally distinct activities with payments.[51]

Academics, regulators, and international bodies alike have then observed several benefits and opportunities relating to stablecoins in particular. Oft-cited are a boost in economic activity,[52] improvement in market functioning,[53] elimination of service and intermediation costs,[54] quicker and, axiomatically, more efficient transactions in real-time,[55] improved financial inclusion,[56] trust,[57] convenience,[58] resilience,[59] and a build-up of network effects.[60] Stablecoins' DLT architecture could also allow the potential benefits of smart contracts (a self-executing contract which is written through code and stored on the ledger) and micropayments (transactions involving very small sums) to be exploited in a retail setting.[61]

C. Shortcomings of stablecoins

However, there are market imperfections which such assessments do not account for. For example, to achieve the efficiencies above, the requisite growth in stablecoins would also require widespread acceptance, which is a bootstrap process in the case of money.[62] Growth in stablecoins which would subsequently confer efficiencies would also have disruptive effects on existing FMIs and, by association, on banks and financial systems more broadly.[63] The consequences that this would have for financial and monetary stability is the subject of this paper. As additional drawbacks, a low interest environment would also reduce returns on reserves and lead to profitability

[51] Marcus Brunnermeier, Harold James and Jean-Pierre Landau, 'The Digitalization of Money' (2019) 26300 NBER Working Papers 1.
[52] The Bank of England (n 2). See also HM Treasury (n 17).
[53] Arner, **Barberis** and Buckley (n 49).
[54] Tobias Adrian, 'Stablecoins, Central Bank Digital Currencies, and Cross-Border Payments: A New Look at the International Monetary System' (speech given at the IMF-Swiss National Bank Conference, Zurich, May 2019). See also The Bank of England (n 2).
[55] G7, 'Investigating the impact of global stablecoins' (2019) G7 Working Group Paper on Stablecoins 1. See also Mitsutoshi Adachi and others, 'A Regulatory and Financial Stability Perspective on Global Stablecoins' (2020) European Central Bank Macroprudential Bulletin 1; Frost, Shin and Wierts (n 1); HM Treasury (n 17).
[56] Anastasia Melachrinos and Christian Pfister, 'Stablecoins: A Brave New World?' (2020) Banque de France Working Papers 1. See also Arner, Auer and Frost (n 8); HM Treasury (n 17); Zetzsche, Buckley and Arner (n 39).
[57] Petralia and others (n 8). See also Adrian and Mancini-Griffoli (n 32); Melachrinos and Pfister (n 56).
[58] The Bank of England (n 2). See also Adrian (n 54).
[59] HM Treasury (n 17).
[60] Adrian and Mancini-Griffoli (n 32).
[61] Arner, Auer and Frost (n 8). See also Berensten and Schar (n 14).
[62] Kahn (n 10). See also John M. Keynes, *A Treatise on Money. Volume 1* (8th edn, Macmillan 1971) who referred to purchasing power as the key determinant in being classifiable as money; Gans and Halaburda (n 46) who describe how network effects make this 'all or nothing' level of adoption more pronounced.
[63] Arner, Auer and Frost (n 8). See also Zetzsche, Buckley and Arner (n 39).

problems for arrangements.[64] To date, those stablecoins which have enabled arbitrage have also fluctuated in value.[65]

D. Intra-stablecoin design features

It is also worth noting that differences exist between stablecoins which, as a result, render a composite analysis challenging. The primary distinction is whether stablecoins are aimed at wholesale or retail payments.[66] In considering recent market developments (which will be explored), as well as the potential benefits of stablecoins listed above and expectations in the industry,[67] a retail stablecoin appears to present greater opportunity to be meaningfully deployed within existing financial frameworks. Indeed, wholesale payment systems already enable gross, real-time settlement, aided by access to central bank reserves.[68]

Any prospective analysis is also influenced by whether a single currency or basket of currencies is used to peg.[69] This would, in turn, determine the degree of currency competition between the pound and a given stablecoin.[70] One final distinction is whether an arrangement is 'systemic' or not. Broadly this status relates to: size and whether a stablecoin is a principal payment or settlement mechanism; the nature and risk profile of stablecoin activity; interconnectedness; substitutability.[71] Beyond this, HMT also considers disruption to the UK financial system and the role of the Bank as the economy's monetary authority in its assessment of systemic size.[72] It is systemic stablecoins which pose significant risk to monetary and financial stability.[73]

The dominant player in stablecoins' current iteration as a cryptoasset diversifier is 'Tether'.[74] Tether's value is pegged to the US Dollar but has fluctuated due to lags in

[64] Berensten and Schar (n 14). See also Melachrinos and Pfister (n 56).
[65] Gorton, Ross and Ross (n 3). See also Arner, Auer and Frost (n 8); Bullmann, Klemm and Pinna (n 15). Large depreciations in value were seen in 2022 – see Rosa Lastra and Arthur E. Wilmarth Jr, 'We Must Regulate Stablecoin Providers as Banks' (*The Hill,* 6 June 2022) <https://thehill.com/opinion/finance/3513011-we-must-regulate-stablecoin-providers-as-banks/> accessed 15 July 2022; Stanford (n 14).
[66] Melachrinos and Pfister (n 56).
[67] See Petralia and others (n 8) for the results of a survey given to banks which reflects their expectations of payment services and retail lending to be areas which are particularly vulnerable to disruption. Commercial (wholesale) lending was ranked last amongst banking activities which were vulnerable to disruption from innovations.
[68] For a presentation of current settlement methods see The Bank of England, 'A Brief Introduction to RTGS and CHAPS' (2021) Bank of England Information Paper 1. See also Bech and Hancock (n 50) who highlight this ; Chiu (n 49), 271 who further supposes that a wholesale stablecoin (such as JPM coin) may be largely useless in the UK.
[69] See Melachrinos and Pfister (n 56) for comments on the more disruptive effects of a currency basket.
[70] Brunnermeier, James and Landau (n 51), 8 describe 'full' and 'reduced' competition – also mentioning the 'independence' of money which depends on whether there is a differing unit of account and on direct convertibility.
[71] CPMI and IOSCO (n 16).
[72] HM Treasury (n 17).
[73] Arner, Auer and Frost (n 8).
[74] Frost, Shin and Wierts (n 1).

the arbitration mechanism for stabilisation.[75] Under the UK's current regulatory architecture - or lack thereof- Tether faces no legal requirements to redeem coins at par or regarding the size or composition of its reserve assets. Tether claims to disclose its reserve composition through published 'attestation reports' but these audits are not externally verified.[76] Part of Tether's assets are also composed of unspecified 'non-US' government bonds and commercial paper of an unknown quality.[77]

The evolutionary scope of stablecoins, however, was evidenced by the attempted introduction of 'Libra' (later named 'Diem') by Meta. Libra was originally a proposed 'global' stablecoin, pegged to the value of a basket of major fiat currencies, with a similar composition to the IMF's 'special drawing rights' (SDR).[78] Deposited currency or highly liquid sovereign bonds were to be held as reserves with a reliable repository, and members of the Libra 'Association' would verify transactions.[79] The Libra Association would have been the sole issuer of Libra, although holders would have an account with an authorised exchange or custodian through whom Libra would operate.[80] A subsidiary of Meta, 'Calibra', was created to act as a wallet holder. Authors have disagreed about the associated mechanism for stabilisation, with Libra's two white papers providing little insight.[81] Had it not been abandoned, it seems likely that Libra would have reached systemic size and Meta's implicit confirmation of the

[75] Lyons and Viswanath-Natraj (n 33). See also Lastra and Wilmarth Jr (n 65) for a commentary on continued fluctuations in value.

[76] Ryan Browne, 'Tether claims that its stablecoin is now partially backed by non-US government bonds' (*CNBC,* 19 May 2022) < https://www.cnbc.com/2022/05/19/tether-claims-usdt-stablecoin-is-backed-by-non-us-bonds.html#:~:text=Investing%20Club-,Tether%20claims%20its%20stablecoin%20is%20now,by%20non%2DU.S.%20government%20bonds&text=Tether%20said%20its%20holdings%20of,in%20non%2DU.S.%20government%20bonds > accessed 11 July 2022. See also Berensten and Schar (n 14) for concerns over this lack of transparency; Stanford (n 14) allusion to the comparability of this opacity to other stablecoins.

[77] See Browne (n 76) for reference to non-US government bonds. See also Li and Mayer (n 32) for reference to commercial paper of an unknown quality.

[78] Hannah Murphy and Kiran Stacey, 'Facebook Libra: the inside story of how the company's cryptocurrency dream died' (*Financial Times,* 10 March 2022) < https://www.ft.com/content/a88fb591-72d5-4b6b-bb5d-223adfb893f3 > accessed 12 June 2022. See also Ross P. Buckley and others, 'Ukraine, Sanctions and Central Bank Digital Currencies: The Weaponization of Digital Finance and the End of Global Monetary Hegemony' (2022) 19 University of New South Wales Law Research Stories 1 for an SDR comparison.

[79] Zetzsche, Buckley and Arner (n 39).

[80] Ibid.

[81] See Antonio Fatas and Beatrice Weder Di Mauro, 'The Benefits of a Global Digital Currency' (*Vox EU,* 30 August 2019) <https://cepr.org/voxeu/columns/benefits-global-digital-currency> accessed 13 July 2022 who assume that value is stabilised solely through a redemption mechanism; conversely see Chiu (n 49), 203 who considers a secondary market arbitration mechanism to exist. Libra themselves do not refer to stabilisation mechanism in either the original or the revised white paper. As has been discussed, it is the opinion of this essay that secondary market trading in stablecoin for the purpose of arbitrage is needless. See also Libra, 'Libra White Paper' (2019) Statement from the Libra Association Members 1; Libra, 'Libra White Paper 2.0' (2020) Statement from the Libra Association Members 1.

viability of such a project means that similar proposals are certain to follow.[82] As demonstrated by Libra, whilst regulators can present 'speedbumps', they have no direct means to prevent development.[83]

Evolutions in stablecoins have thus necessitated robust and considered regulatory responses.[84] As currently stands, stablecoin issuance is a form of shadow banking which provides unregulated safety transformation.[85] There is also a conflict of interest between stablecoin arrangements, who would rather maximise payoffs through risky activity, and holders who have a strong preference for stability.[86] Regulation is therefore needed to align incentives in arrangements, and there are also a host of monetary and financial stability risks to consider. Far from stifling innovation, warranted regulatory scrutiny and recognition could encourage uptake where appropriate in coherence with 'regulatory capitalism' theory.[87]

4. UK Regulatory Approach

In light of such considerations, the UK presented its regulatory approach to stablecoins in April 2022, which this paper will now explore. Effective regulation of

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[82] Petralia and others (n 8). See also Zetzsche, Buckley and. Arner (n 39); Buckley and others (n 78) who also refer to Libra's announcement as a 'key date' in 'monetary history'; Elizabeth Dwoskin and Gerrit de Vynck, 'Facebook's Cryptocurrency Failure Came After Internal Conflict and Regulator Pushback' (*Washington Post,* 28 January 2022) < https://www.washingtonpost.com/technology/2022/01/28/facebook-cryptocurrency-diem/> accessed 15 June 2022 who describe increasingly concerted efforts for stablecoin research from Google; Wilmarth Jr (n 41), who describes how with 'Novi', Meta are trying to bypass previous failures by providing a global platform for pre-existing stablecoins.

[83] Murphy and Stacey (n 78) describe the reaction in the US. See also Clare Duffy, 'Libra's Future Could be Threatened Before it Even Gets Off the Ground' (*CNN,* 8 October 2019) <https://edition.cnn.com/2019/10/08/tech/facebook-libra-lawmaker-concerns/index.html> accessed 15 June 2022; Dwoskin and de Vynck (n 82) – US regulators responded with widespread apprehension, which was exacerbated by contempt for Meta. They responded by setting a stringent set of criteria which Libra would have to meet for authorisation, throwing down a series of regulatory 'speedbumps'. In the end Meta considered the project to no longer be worthwhile in a climate of regulator contempt and internal dispute, eventually selling its assets; Mark Carney, 'The Growing Challenges for Monetary Policy in the Current International Monetary and Financial System' (speech given at the Jackson Hole Symposium, 23 August 2019) < https://www.bis.org/review/r190827b.pdf >accessed 27 July 2022, for the Bank of England Governor at the time – Mark Carney's similar reaction.

[84] Arner, Auer and Frost (n 8). See also Chiu (n 49).

[85] Li and Mayer (n 32). See also Wilmarth Jr (n 41), 6 who also refers to stablecoin issuance as 'shadow deposits'.

[86] Eichengreen (n 1). See also Arner, Auer and Frost (n 8); Berensten and Schar (n 14); Li and Mayer (n 32); Carstens (n 6) who describes how debasement is linked to profit maximisation in this way.

[87] Lee and L'Heureux (n 10). See also Bullmann, Klemm and Pinna (n 15); Crypto A.M (n 48) who considers regulation to have a legitimating effect; Favole (n 48) who considers regulation to promote responsible innovation; Chiu (n 49) who suggests that 'regulatory capitalism' is vital in the crypto economy; Raphael Auer and Stijn Claessens, 'Cryptocurrency Market Reactions to Regulatory News' (2020) 381 Federal Reserve Bank of Dallas, Globalization Institute Working Papers 1 who, perhaps relatedly, find cryptoasset market value to rise in response to regulatory announcements .

financial markets transforms risky legal claims into 'safe assets' and makes 'bad' money 'good', whilst also allowing regulators to steer the design elements of innovations such as stablecoins.[88] Indeed, whilst no economy has been exposed to stablecoins of systemic size, China initially followed a laissez-faire regulatory approach to the growth of FinTechs which, given the domination of FinTech over its financial landscape, is widely seen to have failed.[89] To date, the US, the EU, and Switzerland have also provided advanced proposals for the regulation of stablecoins.[90]

A. Regulatory strategies

Exploring now the dominant regulatory strategy, the principle of 'same risk, same regulatory outcome' governs the regulation of innovations in financial markets globally.[91] In line with this principle, regulators identify the risks which are posed by innovations before identifying how similar risks are already regulated, adapting legislation accordingly. This 'same risk' approach was embraced by the UK some years ago to circumvent regulatory arbitrage.[92] International governing bodies and

[88] See Dan Awrey and Kristin van Zwieten, 'Mapping the Shadow Payment System' (2019) 2019-001 SWIFT Institute Working Paper 1, who describe how this has already been achieved with bank regulation. See also Awrey (n 6); Chiu (n 49) who highlight this importance of regulation; Arner, Auer and Frost (n 8) who describe how regulation can steer the industry's design.

[89] Arner, **Barberis** and Buckley (n 49).

[90] Lummis-Gillibrand Responsible Financial Innovation Act 2022 (US) (introduced to Congress). See also European Union, 'A Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets and Amending Directive EU 2019/1937' (2020) European Union Regulation Proposal 1; FINMA, 'Supplement to the Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (ICOs)' (2019) FINMA Regulation Guidelines 1.

[91] HM Treasury, 'UK Regulatory Approach to Cryptoassets, Stablecoins, and Distributed Ledger Technology in Financial Markets: Consultation and Call for Evidence' (2022) January 2022 Policy Paper 1. See also Arner, Auer and Frost (n 8) who discuss the importance of the principle in the context of innovation.

[92] See Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) The Modern Law Review 181 for reference to the established UK approach. See also Agustin Carstens and others, 'Regulating BigTech in Finance' (2021) 45 BIS Bulletin 1; Financial Stability Board (n 16); HM Treasury (n 17); The Bank for International Settlements(n 28) for comments on mitigating regulatory arbitrage.

standard setters also advocate a 'same risk' approach to regulating stablecoins,[93] alongside other advocacies,[94] likely influencing the Approach.[95]

Interestingly, the Financial Policy Committee (FPC) describes a set of 'expectations' and standards which stablecoins should meet within the UK financial infrastructure.[96] Whilst the FPC also simultaneously advocates a 'same risk' approach, an 'expectations' approach should perhaps have crucial differences in practice. Such an approach seems more goal-driven and more dynamic, whilst also potentially necessitating greater adaptations to existing legislation, or new legislation entirely. The dominant discourse, however, strongly favours a 'same risk' approach.

B. Outline of the Approach

The Approach duly follows the 'same risk' principle, so as to avoid regulatory arbitrage, maintain delineation of activities, as well as providing a proportionate and agile regulatory framework.[97] Technological neutrality is also prioritised, the focus of the regulation being instead on activity.[98] With regard to its objectives, the Approach intends to bring stablecoin issuers and wallet providers within the UK's regulatory perimeter so as to protect financial market integrity and stability, as well as consumers, whilst supporting competition, innovation and global competitiveness.[99] There is no explicit mention of monetary stability. Existing legislation will be adapted to accommodate tokenisation and will apply to both single currency and basket-backed stablecoins.[100]

The rationale for this approach is that stablecoins have the capacity to become a widespread means of retail payment, driving consumer choice and efficiencies, and that current e-money regulation duly recognises stablecoins' potential to become a widespread medium of exchange and store of value.[101] Moreover, the Approach

[93] See Financial Stability Board (n 16) who advocate a 'same risk' approach as one of its principles for stablecoin regulation. See also CPMI and IOSCO (n 16) who advocate this approach in regulating stablecoin arrangements as FMIs.

[94] Arner, Auer and Frost (n 8). See also G7 (n 55); Melachrinos and Pfister (n 56). Others then advocate this same approach, referring to it as an 'activities approach' see: The Bank for International Settlements (n 28); Buckley and others (n 78); Auer and Claessens (n 87); Carstens and others (n 92). Others also refer to it as a 'proportionate' or 'equivalence' approach, see Financial Policy Committee, 'Financial Stability Report, Financial Policy Committee Record and Stress Testing Results - December 2019' (*Bank of England*, 16 December 2019) < https://www.bankofengland.co.uk/financial-stability-report/2019/december-2019 > accessed 1 July 2022; The Bank of England (n 2); Adrian and Mancini-Griffoli (n 32). In each instance it is merely a different labelling of the same underlying regulatory principle.

[95] HM Treasury (n 17) – the Approach claims consistency with the FSB and CPFMI-IOSCO.

[96] Financial Policy Committee (n 94).

[97] HM Treasury (n 17).

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid.

considers the risks of single currency referenced stablecoins to be similar to those of e-money.[102]

As such, the definition of 'e-money' and 'payment system' in The Electronic Money Regulations 2011 (EMR), the Financial Services Act 2013 and Payment Services Regulation 2017 will be expanded, to account for issuers and wallet providers respectively.[103] The Bill does so through the terminological inclusion of 'digital settlement asset' and 'payment service provider' respectively.[104] As such, the Financial Conduct Authority (FCA) will authorise, before prudently regulating and supervising, arrangements.[105] Part 5 of the Banking Act 2009 will also be extended to include stablecoin activities, bringing systemic arrangements, as identified by HMT, under the Bank's prudential regulatory supervision.[106] The Bank may then establish principles, codes of practice, system rules or directions.[107] Any stablecoin arrangement in which payment activities are conducted in the UK would be subject to this regulation.[108]

C. Implications of the Approach

To examine the Approach in practice, extension of the EMR will ensure convertibility of stablecoin into fiat currency at par and on demand.[109] As such, holders will have a legal claim over the issuer and/or third-party custodians.[110] Convertibility requirements would contribute to establishing interoperability between platforms, although no specific reference is made. Inclusion within the EMR will also mean that liabilities of stablecoin issuers (issued coin) must at all times be fully backed by the deposits which were received in issuance.[111] These funds must be placed in a separate account or invested in secure and low-risk (high quality), liquid assets (HQLA), either of which must be held by a custodian.[112] Additionally, stablecoin issuers will be required to hold a given percentage of either the previous year's fixed overheads, payment volume or income as its 'own funds'. 'Own funds' would comprise tier one and tier two capital as specified in the Basel Accords (the international standard for banking supervision),[113] whilst also including securities of intermediate duration,

[102] HM Treasury (n 17). See also Lily Russel-Jones, 'The Crypto Revolution is Happening, Interview with Matt Hancock' (2022) Crypto A.M (a City A.M magazine) 18; Chiu (n 49); Lastra and Wilmarth Jr (n 65) who identify the UK's desire to bring stablecoins within the UK's payment system architecture.
[103] HM Treasury (n 17). See also The Electronic Money Regulations 2011; Financial Services Act 2013; Payment Services Regulation 2017.
[104] Financial Services and Markets Bill 2022, ss 21 and 22.
[105] HM Treasury (n 17).
[106] HM Treasury (n 17); Financial Services and Markets Bill 2022, sch 6, pt 1; Banking Act 2009, pt 5.
[107] Banking Act 2009, pt 5, ss 188-191.
[108] HM Treasury (n 17).
[109] The Electronic Money Regulations 2011, pt 5, reg 39.
[110] HM Treasury (n 17).
[111] The Electronic Money Regulations 2011, pt 3, regs 21 and 22.
[112] Ibid.
[113] See Iris H-Y. Chiu and Joanna Wilson, *Banking Law and Regulation* (23rd edn, Oxford University Press 2019) for a breakdown of the capital accords.

cumulative preferential shares and legal commitments of borrowers or members (in the case of a cooperative).[114]

Moving forward, the Approach acknowledges that further incremental changes to the regulatory regime may be needed as stablecoins proliferate into mainstream payments.[115] This will likely include regulation of stablecoins as a means of investment.[116] Practically, for future regulation, objectives and principles will be set by the government and HMT, with firm-facing rules introduced by regulators, in line with the Future Regulatory Framework (FRF).[117] The FRF also advocates a system of increased HMT recommendations, as well as requests for regulator publishment of mandatory rule reviews and cost-benefit analyses, alongside a greater accountability to parliament.[118]

D. Critique of the Approach

Before the Approach is analysed in relation to the monetary and financial stability risks it poses, it is worth considering some of the contradictions, omissions, inconsistencies, and practical shortcomings which mitigate its applicability.

Contradictions

The Approach's repeated reference to regulation which accounts for stablecoins' potential as a 'widespread store of value' in retail settings implicitly considers arrangements to pose economic functions beyond those of e-money, which operate as a medium of exchange. In the UK, banks have largely seemed to retain their monopoly on money's 'store of value' function. If the Approach's assessment is correct, arrangements would provide functions, and present risks, beyond those of e-money. Moreover, whilst these contingencies of 'widespread' adoption in retail settings are supposedly catered for by the Approach, with 'flexibility' advocated to account for these contingencies including systemic importance, the Approach also contradictory advocates future legislation if stablecoins were to transgress their current role as a safe haven from cryptoassets.[119] Future adaptations to legislation to include regulation of stablecoins as a means of investment also contradicts important commitments to ensure redeemability at par.

Omissions

Furthermore, the Approach does not list monetary stability maintenance as one of its objectives before identifying an obstruction to monetary policy transmission as a qualifying factor for regulation as a systemic risk. The sharpest tool which is then

[114] The Electronic Money Regulations 2011, sch 2, pt 2.
[115] HM Treasury (n 17).
[116] Ibid.
[117] Ibid. Financial Services and Markets Bill 2022, s 22 then broadly codifies this power.
[118] HM Treasury, 'Financial Services Future Regulatory Framework Review: Proposals for Reform' (2021) November 2021 Policy Paper 1.
[119] HM Treasury (n 17).

available to the Bank is 'directions', through which the Bank can 'require or prohibit the taking of a specified action' or 'set standards' on an individual and *ad hoc* basis.[120] The Bill does not then substantially alter the content of the Banking Act.[121] In contrast, HMT consider that the Bank should impose one of the regulatory models which it suggests in its discussion paper.[122] These suggestions are stylised, by the Bank's design, and include subjecting arrangements to the banking regime and requiring issuers to back their liabilities with central bank reserves.[123] At present, such suggestions are unreconcilable with the soft legislation and are not reflective of a concerted effort for coherence or practicality from the Approach.

Inconsistencies

On top of this, the Approach is inconsistent in its distinction of single currency and basket-backed stablecoins. When considering various arrangements, the Approach specifies that stablecoins which are referenced to a *single* currency should qualify for regulatory equivalence with e-money, before proposing that both single currency and basket-backed stablecoins be subject to this regulation.[124] The Approach implicitly identifies the higher risk of basket-backed stablecoins in the UK, before disregarding its own assessment. The Approach also specifies that regulation should relate to activity, without consideration of technology. No adjustment is made, however, for the fact that the nature of stablecoin technology may present benefits and opportunities which mean that stablecoins' activity is, in reality, differentiated from that of current forms of e-money in the UK, as explored in section 3. Reference to the 'store of value' capabilities and 'systemic' potential of stablecoins do this implicitly, but without consequence for the Approach.

Practical shortcomings

Finally, it is also worth considering whether HMT is best placed to set the objectives and principles of stablecoin regulation, which will be established through alterations of the regulatory perimeter moving forward. Indeed, the Bank, and other regulators, likely have informational and technical advantages in assessing the risks of arrangements. Currently, material regulatory powers relate to the setting of the regulatory perimeter, achieved through legislation, rather than through firm-facing rules – given the preparatory nature of stablecoin regulation. Further, the unpredictable growth of arrangements in the adolescence of their development may then warrant additional legislative adaptation. The FRF would then also strengthen HMT's power in affecting firm-facing rules, leading to uncertainty and operational inefficiencies for regulators (in their increased requirement to justify decisions to government). This, in turn, limits reactivity and flexibility (which the Approach itself advocates).

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[120] Banking Act 2009.
[121] Financial Services and Markets Bill 2022, schedule 6. Directions are unchanged, rules are modified slightly but still only relate to rules which issuers would set themselves for operation.
[122] HM Treasury (n 17).
[123] See The Bank of England (n 2) for these stylised regulatory models.
[124] HM Treasury (n 17).

5. *Review of the Monetary and Financial Stability Literature*

Section 1 has already established the instrumental role of monetary and financial stability in supporting the macroeconomy and the inexorable link between the monetary system and such stability. As such, the paper will move to review the assessment of the effects of arrangements on monetary and financial stability as discussed in pre-existing literature. The findings will then be considered alongside the substantive content of the Approach. Whilst only stablecoins of a systemic size pose significant stability risk,[125] Meta is unlikely to be the last BigTech to attempt to create a form of private stablecoin, as demonstrated in section 3. Indeed, BigTechs will likely leverage their size and access to self-perpetuating network effects to grow rapidly.[126] Such a development has already been seen in China outside the sphere of stablecoins.[127]

A. Financial stability risks

Considering first financial stability risks, beyond traditional risks which stablecoins replicate,[128] theorists have widely warned of commercial bank disintermediation risk as consumers choose to hold funds in stablecoin rather than in bank deposits.[129] Issued stablecoin would be backed by liquid assets, such as bonds, rather than loans to the real economy.[130] In order to perform the vital function of maturity transformation, banks are likely to rely on more costly and volatile wholesale funding which will be passed on to borrowers.[131] Alternatively, banks may engage in riskier lending, further damaging stability.[132] In the event of full disintermediation, lending could only be conducted by non-bank financial institutions who are at an inherent informational and competitive disadvantage, lowering both the quality and quantity of credit

[125] Arner, Auer and Frost (n 8).

[126] See Arner, Auer and Frost (n 8). See also Zetzsche, Buckley and Arner (n 39); Carstens and others (n 92). See finally The Bank for International Settlements (n 28) who also mention BigTech's screening and monitoring advantages.

[127] Marcus Brunnermeier and Dirk Niepelt, 'On the Equivalence of Public and Private Money' (2019) 106 Journal of Monetary Economics 27. See also Petralia and others (n 8).

[128] HM Treasury (n 17).

[129] David Tercero-Lucas, 'A Global Digital Currency to Rule Them All? A Monetary-Financial View of the Facebook's LIBRA for the Euro Area' (2020) 2020-06 GEAR Working Paper 1; See also The Bank of England (n 2) who refer to a 'displacement'; Brunnermeier, James and Landau (n 51), 23 who more elaborately refer to intermediation 'turn(ing) on its head'; Arner, Auer and Frost (n 8); Adachi and others (n 55); G7 (n 55).

[130] The Bank of England (n 2).

[131] See The Bank of England (n 2) which provides a considered model of this transition. See also Arner and other authors (n 8); Kahn (n 10); G7 (n 55).

[132] Adachi and others (n 55). See also G7 (n 55).

allocation.[133] These consequences are more manageable under a system of coexistence, but full disintermediation would have transformational consequences.[134]

It may, admittedly, be challenging to prevent disintermediation beyond a benefit-destroying outright ban. However, without additional steps to maintain banks' intermediary function or to encourage some form of stablecoin intermediation, the Approach's narrow focus on regulation of stablecoins as e-money would not curtail disintermediation risk at all. The Approach also does not mitigate the financial stability risk of bank runs into stablecoin which would be similarly enabled by the use of stablecoin as an alternative store of value.[135] As well as mirroring the consequences of disintermediation, volatile capital flows could also have adverse effects on exchange rates.[136] It is challenging here, however, to conceive of an adequate regulatory response, given extant deposit insurance on bank deposits to disincentivise such runs.

From the opposite perspective, there are financial stability risks in relation to stablecoins' prospective inadequacy as a store of value. Issuers may 'debase' stablecoins, consequently causing them to fall in value in relation to their peg, perhaps in response to profitability problems and/or default.[137] Additionally, market makers may withdraw liquidity in an arbitration dependent mechanism for stabilisation, also leading to debasement,[138] although such an eventuality would be design dependent. A debasement could then destabilise the real economy through a subsequent loss of wealth for holders.[139] This would, in turn, spread through the real economy, similar to a negative multiplier effect, destroying fiat money.

Debasement may also be precipitated by, or itself contribute to, a run on stablecoin.[140] These two risks feed each other cyclically, compounding wealth effects, increasing the chance of default and further destabilising the real economy.[141] Comparatively low or non-existent remuneration of holdings and high fees could similarly contribute to a run.[142] If a given stablecoin were denominated, at least partially, in pound sterling, this would then be analogous to a run on UK short-term funding markets as backing

[133] See The Bank of England (n 2). See also Jesús Fernández-Villaverde and others, 'Central Bank Digital Currency: Central Banking for All?' (2020) 26753 National Bureau of Economic Research 1 who reach this conclusion empirically for disintermediation due to the introduction of a central bank digital currency. However, none of the assumptions which are made render these conclusions to then be inapplicable to the case of stablecoins.
[134] See Adrian and Mancini-Griffoli (n 32) who describe this distinction. See also Melachrinos and Pfister (n 56) who suppose that partial competition may even be beneficial.
[135] The Bank of England (n 2). See also Financial Stability Board (n 16); G7 (n 55).
[136] Financial Stability Board (n 16).
[137] Melachrinos and Pfister (n 56).
[138] Financial Stability Board (n 16). See also G7 (n 55).
[139] Financial Conduct Authority (n 27). See also Adrian (n 54); G7 (n 55).
[140] Wilmarth Jr (n 41). See also Melachrinos and Pfister (n 56); Aramonte, Huang and Schrimpf (n 38) who describe the 'liquidity mismatch' for stablecoin issuers which creates this process.
[141] Financial Stability Board (n 16).
[142] Melachrinos and Pfister (n 56).

assets are liquidated.[143] Worryingly, instability in short-term funding markets has led to financial collapse in the past.[144]

Guaranteeing redeemability at par and on demand is an effective means for eliminating the risk of debasement from the Approach. Without the option to debase, however, issuers would instead default and enter liquidation.[145] Unless deposit insurance is provided, holders are still at risk of losing wealth and runs on stablecoin may still occur if holders fear issuer default. If consumers deemed stablecoins to be a meaningful store of value, a two-pronged regulatory attack (comprised of redeemability at par and deposit insurance) would be required to ensure the robustness of this monetary function. Here there may be a trade-off, however, as stablecoin deposit insurance increases the attractiveness of stablecoin – contributing to disintermediation risk.

In addition to this liquidity risk, stablecoin issuers are also exposed to the credit and investment risk of assets held in their reserves.[146] Similar to any investment, reserve assets may fall in value or issuers of those assets (such as bond issuers) may default altogether, prompting stablecoin redemption issues.[147] In this way, long-term sustainability of arrangements is dependent on good governance and the prudent management of reserves.[148]

Beyond this, reserve management activities of stablecoin issuers may create linkages with the broader financial system.[149] If reserve balances are large, changing the composition of such reserves would transmit stress to financial markets through the purchase and sale of underlying assets.[150] In responding to broader macroeconomic fluctuations, changing reserve compositions may simply reflect *prudent* reserve management, or even just a change in the composition of the basket of currencies which backs a given stablecoin. Such linkages would prove even more problematic following large-scale stablecoin redemptions.[151] In relation to basket-backed stablecoins, shocks in the developing world which lead to mass redemption or issuance could also then lead to contagion effects in economies whose currencies compose the basket (such as the UK).[152] As an additional effect, increased stablecoin holdings of HQLAs could reduce available collateral elsewhere in the economy.[153]

Under the Approach, the FCA would have oversight powers to ensure the prudent management of reserves, although prudent management could transmit stress to the

[143] Adachi and others (n 55) make this point but in reference, instead, to the EU.
[144] Dang, Gorton and Holmstrom (n 46).
[145] Awrey (n 6).
[146] CPMI and IOSCO (n 16). See also Adrian and Mancini-Griffoli (n 32); Adachi and others (n 55).
[147] G7 (n 55).
[148] Carstens (n 6). See also Melachrinos and Pfister (n 56).
[149] Financial Stability Board (n 16). See also Adachi and others (n 55).
[150] Financial Stability Board (n 16). See also G7 (n 55).
[151] Financial Stability Board (n 16). See also Adachi and others (n 55).
[152] Adachi and others (n 55).
[153] G7 (n 55).

broader financial system, as demonstrated. Inherently, any reserve management activity will create spillover effects which cannot be removed. Full backing by fiat currency may also be impossible from a profitability standpoint and the Approach would already ensure full stablecoin backing by HQLAs at all times. Increased capital requirements (more restrictive than the EMR's 'own funds') or more diverse holdings, however, could perhaps increase loss absorption capacity and decrease reserve management requirements respectively.

B. Monetary stability risks

Considering now monetary stability risks, academics have warned of the effects of stablecoins on central bank monetary policy transmission and an associated monetary instability.[154] All else being equal, a disintermediation of commercial banks would weaken the Bank's ability to affect monetary policy through the bank rate.[155] The size of this effect would depend for a single currency backed stablecoin on the corresponding level of disintermediation.[156] It is likely that some level of monetary policy transmission weakening would occur unless stablecoin holdings were remunerated,[157] although this would likely promote further disintermediation.

With a basket-backed stablecoin, however, any stablecoin which was denominated in a separate unit of account and widely held as a store of value would weaken monetary policy transmission mechanisms as the stablecoin would compete with fiat currency.[158] In this way, a basket-backed stablecoin presents the consequences of full currency substitution. Indeed, a crowding out of domestic currency would *eliminate* monetary control and sovereignty where substitution has taken place.[159]

Beyond this, substitution would lead to a large fiat drainage into stablecoin reserves.[160] This would act as an independent monetary mechanism, disrupting assessments of monetary supply. Moreover, substitution would not be solely motivated by currency stability and could thus occur in all economies.[161] Indeed,

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[154] See Adrian and Mancini-Griffoli (n 32). See also Buckley and others (n 78).
[155] Arner, Auer and Frost (n 8).
[156] Melachrinos and Pfister (n 56) also refer to potential contrary effects from the credit and asset price channel. However, such references are dependent on strong stablecoin design assumptions and disregard the greater importance of the interest rate channel.
[157] The Bank of England (n 2). See also G7 (n 55).
[158] Brunnermeier, James and Landau (n 51). See also G7 (n 55).
[159] Frost, Shin and Wierts (n 1). See also Adrian and Mancini-Griffoli (n 32); G7 (n 55); Melachrinos and Pfister (n 56). A similar effect is that of 'dollarisation' in which developing economies have increasingly appropriated US Dollars as a means for exchange and store of value over domestic currency – see Guillermo A. Calvo and Carlos A. Vegh, 'Currency Substitution in Developing Countries: An Introduction' (1992) 92/40 IMF Working Paper Series 1 who provide a succinct introduction to this process in developing economies. It is worth noting that stablecoins would be even more capable of travelling cross-border.
[160] Zetzsche, Buckley and Arner (n 39).
[161] G7 (n 55). See also Brunnermeier, James and Landau (n 51) who describe how dollarisation, in contrast to stablecoins, typically occurs due to the instability of domestic currency.

substitution may often be incidental.[162] Through eased cross-border capital flows, as a result of the effective removal of barriers to capital flight, responses to domestic interest rates would also be made stronger, undermining the scope for monetary control still further.[163]

If a basket-backed stablecoin became an international unit of account, exchange rates would likely become largely redundant.[164] However, if this was not the case, capital inflows would likely lead to a relative appreciation in the value of the pound,[165] presenting its own macroeconomic consequences. There is also, then, an inherent exchange rate risk between the pound and a basket-backed stablecoin. The value of the basket will swing relative to the pound, in line with the pound's relative strength versus other currencies within the basket.[166] Indeed, the value of the SDR against its largest component, the Dollar, has fluctuated throughout its lifetime.[167]

Not only would the pound present a smaller composite share of the basket, but the pound has also seen consistent depreciation against other major currencies since the Brexit vote and has been compared to an emerging market currency.[168] This would enlarge the fluctuation in value effect, whilst also incentivising UK consumers to use a basket-backed stablecoin as a store of value, even if holdings were then reconverted to pounds for the purpose of exchange, weakening monetary policy transmission further. It duly follows that relative fluctuations of other currencies within the basket may similarly affect the attractiveness of basket-backed stablecoins as stores of value, with monetary consequences.

There are additional monetary effects to consider which themselves relate to financial stability effects. Indeed, the relationship between monetary and financial stability is often underestimated.[169] Disintermediation could have inflationary effects on interest rates as increased commercial bank demand for reserves forces up the price of said reserves and reduced commercial bank loans then forces up interest rates from a

[162] Buckley and others (n 78) describe how substitution may be necessitated by commonplace transactions– making substitution incidental.
[163] Zetzsche, Buckley and Arner (n 39). See also Brunnermeier, James and Landau (n 51); Adrian (n 54).
[164] Ibid.
[165] Adachi and others (n 55).
[166] Zetzsche, Buckley and Arner (n 39). See also Melachrinos and Pfister (n 56), Tercero-Lucas (n 129) who describes fluctuations in purchasing power.
[167] Fatas and Weder Di Mauro (n 81). See also Paolo Giudici, Thomas Leach and Paolo Pagnottoni, 'Libra or Librae? Basket Based Stablecoins to Mitigate Foreign Exchange Volatility Spillovers' (2022) 44(upcoming) Finance Research Letters 1 who then propose a basket composition which is aimed at limiting volatility over prioritising economic significance.
[168] Elliot Smith, 'British Pound is Taking on 'Emerging Market' Characteristics, Bank of America Says' (*CNBC*, 31 May 2022) < https://www.cnbc.com/2022/05/31/sterling-is-taking-on-emerging-market-characteristics-bank-of-america.html#:~:text=LONDON%20%E2%80%93%20Sterling%20is%20in%20danger,according%20to%20Bank%20of%20America > accessed 20 July 2022.
[169] Borio (n 1).

supply perspective.[170] The equilibrium interest rate would then fall, reducing the ability of monetary policy to combat inflation.[171] In the case of a basket-backed stablecoin, holders indirectly demand a bundle of short term debt with a denomination proportional to that of the basket.[172] This then leads to capital inflows for economies such as the UK, whose currency is typically included in baskets, leading to a lowering of market interest rates.[173] Manipulation of stablecoin reserves would also affect short-term government debt markets, further inhibiting monetary policy transmission in those who compose the basket.[174]

There are, however, flaws in the monetary stability literature. It has been theorised that any single currency-backed stablecoin, for which the unit of account is unchanged, would not lead to a breakdown in monetary policy transmission given the Bank's ability to influence the overnight rate.[175] Such an assumption, however, is dependent on stablecoin issuers borrowing overnight from the Bank, or at all, should disintermediation occur. Conversely, it has also been theorised that commercial banks would restructure their own assets in accordance with a basket-backed stablecoin, drastically reducing borrowing from central banks and further weakening monetary policy transmission.[176] This would only occur if commercial banks were directly involved in the arrangement. In both instances it is worth remembering that arrangements which have been supposed to date are operationally distinct from the established financial system (which is not to say that there are no spillover effects).

This monetary stability analysis has consistently demonstrated that basket-backed stablecoins would pose greater risk to monetary stability than single-currency backed stablecoins. As illustrated earlier, monetary stability is not one of the Approach's stated regulatory aims, despite the observable risks and its own appreciation for disruption of the UK's monetary architecture in categorising systemic stablecoins. Subsequently, no provision within the Approach does anything to mitigate these risks. The Approach does mention bringing stablecoin reserves onto the Bank's balance sheet. However, whilst such a suggestion is a conceivable solution, as it will be illustrated below, this possesses little substance in the current regulatory proposal..

6. *Recommendations*

The literature presents a burgeoning account of potential regulatory responses which could mitigate the monetary and financial stability risks mentioned in the previous section. However, only some are embodied by the Approach, as will now be explored.

[170] The Bank of England (n 2).
[171] Ibid.
[172] Tercero-Lucas (n 129).
[173] G7 (n 55)
[174] Ibid.
[175] Brunnermeier, James and Landau (n 51); in the UK this would be transmitted through the Bank's Operational Standing Facility – see The Bank of England, 'Sterling Monetary Framework – SMF Operating Procedures' (2022) Bank of England Policy Paper 1.
[176] Tercero-Lucas (n 129).

A. Financial stability recommendations

To ensure financial stability, the literature agrees that outstanding stablecoin holdings should be redeemable at par and on demand,[177] a so called 'convertibility arrangement' which maintains the exchangeability and uniformity of money.[178] To enforce convertibility, the literature also provides a unanimous promotion of reserves which fully back issued and outstanding coin.[179]

Relatedly, the literature advocates for interoperability with other stores of money due to its potential for promoting competition and innovation, as well as its possible role in reducing the threat of arrangements attaining 'too big to fail' status and maintaining the well-functioning of the financial system.[180] Whilst the Bank has explored promoting such targets through its own 'central bank digital currency' (CBDC),[181] which is a publicly issued alternative to private stablecoins, no allusion to interoperability is made by the Approach. This distinction may, in fact, evidence regulators' competitive risk assessment advantages over HMT. Duly, though, the Approach ensures convertibility through commitments for full backing and redeemability at par and on demand, which is a key step toward direct interoperability.

Proposed requirements for the composition of the reserve assets which are used to maintain the peg vital for redeemability at par are, however, slightly more diverse. Some suggest full backing by fiat currency,[182] or by cash equivalents.[183] However, such restrictions may limit the operational viability of stablecoins. The prevailing sentiment is then for enforced backing by HQLAs,[184] a stance which the Approach also adopts.[185]

[177] Frost, Shin and Wierts (n 1). See also Lyons and Viswanath-Natraj (n 33).
[178] Brunnermeier, James and Landau (n 51).
[179] See Frost, Shin and Wierts (n 1). See also The Bank of England (n 2); Arner, Auer and Frost (n 8); Adrian (n 54); G7 (n 55).
[180] See The Bank of England (n 2). See also Arner, Auer and Frost (n 8); Bullmann, Klemm and Pinna (n 15); Adrian and Mancini-Griffoli (n 32); Brunnermeier, James and Landau (n 51); Adrian (n 54); G7 (n 55); Buckley and others (n 78).
[181] See The Bank of England, 'Central Bank Digital Currency Opportunities, Challenges and Design' (2020) Bank of England Discussion Papers 1 for this discussion. See also Ulrich Bindseil, 'Tiered CBDC and the Financial System' (2020) 2351 European Central Bank Working Paper Series 1; Raphael Auer and others, 'Central Bank Digital Currencies: Motives, Economic Implications and the Research Frontier' (2021) 976 BIS Working Papers 1 who also discuss these benefits in relation to the CBDC debate.
[182] See Adrian (n 54).
[183] See Awrey (n 6). See also Gary Gorton and Jeffery Y. Zhang, 'Taming Wildcat Stablecoins' (2021) 90(forthcoming) University of Chicago Law Review 1 who refer to treasury bills as well as cash.
[184] See The Bank of England (n 2). See also CPMI and IOSCO (n 16); Adrian and Mancini-Griffoli (n 32); G7 (n 55).
[185] HM Treasury (n 17), full backing by fiat currency is also permitted, but unlikely.

Beyond this, the literature also identifies the advantages which deposit insurance confers for commercial banks.[186] As such, many advocate deposit insurance to reduce the risk of runs,[187] including the US Treasury,[188] contrary to the Approach. Finally, whilst transparency of reserves is broadly advocated,[189] Dang et al. consider such transparency to worsen stability through increased incentivisation of runs, and to lower liquidity through increased likelihood of merchants' reluctance to accept stablecoins.[190] As such, there is uncertainty over the desirability of disclosure requirements.

B. Monetary stability recommendations

In terms of monetary stability, proposed solutions are limited, with the prominent suggestion being stablecoin issuer access to central bank reserves, as a means to promote transmission of the bank rate to holders.[191] Indeed, should arrangements attempt to extract less considerable profit than commercial banks, they may provide for more efficient transmission of the bank rate, assuming that they remunerate. This aspect may, ultimately, depend on the attractiveness of stablecoin holdings relative to bank deposits in the absence of remuneration. This solution has been referred to as a 'synthetic CBDC' which presents a form of the narrow banking hypothesis which gained theoretical traction as an alternative to fractional reserve banking in the 1930s.[192] Under this hypothesis, reserves would be *fully* backed by the central bank. Such a solution would perhaps run alongside traditional forms of banking in a tiered system.[193]

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[186] See Wall (n 20). See also Diamond and Dybvig (n 21) who test resistance to runs empirically – strongly advocating deposit insurance; Brunnermeier and Niepelt (n 127) who advocate deposit insurance for promoting the equivalence of money.

[187] Stephen Williamson, 'Libra: Financial Inclusion for the World's Poor, or Scam?' *(New Monetarist Blog,* 21 June 2019) < http://newmonetarism.blogspot.com/2019/06/libra-financial-inclusion-for-worlds.html > accessed 8 July 2022. See also Wilmarth Jr (n 41), Gorton and Zhang (n 183).

[188] The Treasury Department, 'Report on Stablecoins' (2021) The President's Working Group on Financial Markets, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency Policy Paper 1. The advice of this paper seems to have been adopted by the preceding Lummis-Gillibrand Act, whereas not for the Stablecoin TRUST Act 2022 (US) – alluded to later.

[189] See Berensten and Schar (n 14). See also Lyons and Viswanath-Natraj (n 33); G7 (n 55).

[190] These interpretations can be derived from Dang, Gorton and Holmstrom (n 46); Tri Vi Dang and others, 'Banks as Secret Keepers' (2014) 20255 NBER Working Paper Series 1 respectively. The papers refer to information sensitivity and opacity in MMFs and banks respectively but are also applicable to the case of stablecoins. See also Eichengreen (n 1) who advocates stablecoin information insensitivity but without theoretical expansion.

[191] See The Bank of England (n 2). See also Adrian and Mancini-Griffoli (n 32); Tercero-Lucas (n 129).

[192] See The Bank of England (n 2). See also Adrian and Mancini-Griffoli (n 32); Adrian (n 54) for reference to a 'synthetic CBDC'; Tercero-Lucas (n 129); Gorton and Zhang (n 183); Williamson (n 187) for reference to a 'narrow bank'. For the narrow bank theory, see Irving Fisher, *100% Money* (2nd edn, Adelphi Company 1936) – which was part of a discourse proposing a radical restructuring of financial markets in the wake of the Great Depression.

[193] A similar system was suggested by Emilios Avgouleas, 'The Reform of 'Too-Big-To-Fail' Bank: A New Regulatory Model for the Institutional Separation of 'Casino' from 'Utility' Banking' (2010) University of Manchester Research Papers 1, in the wake of the financial crisis.

Beyond this, the Bank would also be a safer store of reserve assets as it is always able to meet its liabilities.[194] Access to central bank reserves could directly enable interoperability and settlement liquidity, whilst also alleviating the risk of systemic bank runs.[195] With that being said, whilst access to central bank reserves would mitigate risks related to debt markets and fiat drainage for *basket-backed* stablecoins, the aforementioned direct monetary policy transmission benefits would be less pertinent than with single currency backed stablecoins.

C. Specific regulatory framework recommendations

In relation to broad regulatory classifications and assuming a 'same risk' approach, several classifications have been suggested as fitting for stablecoins to mitigate monetary and financial stability risks. Many implicitly concur with the Approach in its supposition of an e-money classification - considering stablecoin and e-money to be analogous in relation to their undertaken activities of transfer and redemption- without explicitly referring to regulation.[196] It must be said, however, that alignment of activities does not necessarily imply alignment of risks. With specific regard to regulation, Tercero-Lucas assimilates the Financial Stability Board's regulatory recommendations to an e-money classification.[197] Moreover, Bullmann et al. consider tokenised funds to be regulatable as e-money.[198] However, the prospective future functions and risks of systemic stablecoins, explored in section 5, limit the generalisability of theses stances and, as a result, limit e-money's status as a *ubiquitous* and long-term comparator for stablecoin.

Alternatively, many have provided justification for a regulatory money market fund (MMF) classification in relation to stablecoins' functions of issuance and investment, and their similarity from an institutional perspective in creating 'non-deposit deposits'.[199] From a more advanced perspective, MMFs have no price system and issue debt which is itself backed by debt,[200] factors which are replicated by stablecoins. Moreover, stablecoin issuers create money in the same way as MMFs through accumulation in the value of reserve holdings.[201]

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[194] Garreth Rule, 'Understanding the Central Bank Balance Sheet' (2015) Centre for Central Bank Studies Paper 1.

[195] For settlement liquidity see Adrian and Mancini-Griffoli (n 32); Adrian (n 54). For run safety see Frost, Shin and Wierts (n 1); Carstens (n 6); Tercero-Lucas (n 129).

[196] See Adrian (n 54). See also Chiu (n 49); Adrian and Mancini-Griffoli (n 32); Lipton and others (n 15) who use the same simplified five branch classification of money, considering stablecoins to fall into an e-money category (as opposed to bank deposits). See Financial Stability Board (n 16); G7 (n 55) which both list e-money as a possible category without an associated advocacy. Finally see Zetzsche, Buckley and Arner (n 39); Awrey and van Zwieten (n 88), both of whom consider the regulatory classification to be *likely* without passing judgement or further explaining.

[197] Tercero-Lucas (n 129). See also Financial Stability Board (n 16) for these recommendations.

[198] Bullmann, Klemm and Pinna and other authors (n 15).

[199] Awrey (n 6), 35. See also Financial Conduct Authority (n 27) which describes these MMF characteristics; Melachrinos and Pfister (n 56) who consider MMF classification to be an option; Wilmarth Jr (n 41) who says that stablecoins could evolve to become analogous to MMFs.

[200] Dang, Gorton and Holmstrom (n 46).

[201] Arner, Auer and Frost (n 8).

Nonetheless, current MMF regulation failed to prevent widespread runs in 2008 and 2020, and MMF regulation does not guarantee redeemability at par.[202] There also exists an implicit and inefficient government commitment to back MMFs, and many proposed UK MMF regulatory changes, such as removal of stable net asset value MMFs which guarantee redeemability at par,[203] are untenable in the field of stablecoins. Some have proposed a complete upheaval of money market regulation in response to shortcomings,[204] although such suggestions would likely meet resistance.

Whilst MMFs do present some similar risks to stablecoins, which are related to sudden redemptions and a widespread sale of assets,[205] stablecoins' function as a payment mechanism perhaps makes such risks more pronounced. Systemic stablecoins would combine the store of value function of MMFs with the medium of exchange function of e-money. It is dubious whether stablecoins should be regulated as MMFs, especially if such regulation were not fit for purpose. Whilst some have then suggested stablecoin regulation as financial products or securities,[206] such regulation is negated by the desirability of a stable value. This would be the case unless stablecoins were foreign and used to hedge the value of domestic currency falling; backed by a basket of currencies; or traded on secondary markets.

Lastly, whilst many of MMFs' practical distinctions with banks, such as no central bank liquidity facility or guarantee of the principal,[207] are *currently* upheld in the case of stablecoins, regulation could remove these distinctions to improve the financial and monetary stability properties of arrangements in the process. In the case of regulation as banks, the literature has acknowledged the idea of incorporating Basel III banking standards and requirements into stablecoin regulation without, however, advocating such an approach.[208] Others have suggested that closed-loop services, which do not include basic e-money providers such as PayPal, should be subject to bank regulation, or that stablecoin issuance is economically analogous to deposit creation.[209] Indeed, it

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[202] Financial Conduct Authority (n 27). See also Lastra and Wilmarth Jr (n 65) who describe stablecoin runs as similar to the aforementioned MMF runs.

[203] See Wilmarth Jr (n 41) for an inefficient government commitment to back. See also Financial Conduct Authority (n 27) for proposed changes to UK MMF regulation.

[204] Morgan Ricks, *The Money Problem: Rethinking Financial Regulation* (University of Chicago Press 2016), similar to Fisher (n 197), Ricks advocates a radical restructuring of financial markets in response to the perceived causal factor behind a large financial crash. As opposed to fractional reserve banking, Ricks sought to effectively eliminate MMFs. See also Gorton and Zhang (n 183) who recommend regulating MMFs as banks.

[205] Financial Conduct Authority (n 27).

[206] The Treasury Department (n 188). See also Managed Stablecoins are Securities Act 2019 (US); Financial Stability Board (n 16); G7 (n 55) who acknowledge such a classification is possible; Wilmarth Jr (n 41) who advocates such a classification as a stop gap.

[207] See Financial Conduct Authority (n 27) who describe these distinguishing features between MMFs and banks.

[208] See Awrey (n 6). See also G7 (n 55) who both make allusions to Basel III.

[209] See Petralia and others (n 8) for closed-loop service-bank regulation analogy. See also Wilmarth Jr (n 41); Williamson (n 187) who compare stablecoin issuance to deposit creation; Gorton and Zhang (n 183) who say stablecoin issuance is certainly deposit creation from an economic; Morten Bech and Rodney Garratt, 'Central Bank Cryptocurrencies' (2017) BIS Quarterly Review 2017 1, who create the

is the opinion of this paper that regulation as banks, which incorporates many of the specific features listed in this section, is an appropriate response to the monetary and financial stability risks which systemic stablecoins pose. The reasons which motivate this opinion will be explored next.

7. The Revision

A. Reasoning

Before outlining this regulatory response, this section will justify revisions to the Approach from a non-technical standpoint. The literature widely considers that any prospective regulatory framework should adequately cater for the prospective risks of arrangements before they manifest themselves. These opinions are held not only by academics, but also by the G7, the Bank and the HMT themselves.[210] The Approach does contradict itself in this regard, however.

Whilst the inherent contradictions of the Approach have already been visited, a number of ancillary points should be made. Whilst the FCA would bare the main authorisation and oversight responsibilities under the Approach, it is the PRA who has the mandate to maintain financial stability in the UK.[211] Moreover, to reiterate, whilst the Bank's mandate includes monetary stability, such stability is not a stated aim of the Approach and the Bank's powers are unclear regardless. Typically, financial regulators in the UK have held broad regulatory decision-making authority, but the Approach and its adherence to the FRF mean that legislation must be amended to combat emerging risks.[212] Moving forward, this would delay appropriate responses to the monetary and financial stability risks highlighted in this paper.

In assessing a 'same risk' framework, the Approach has also focused on activities without regard to the differing risks which similar activities confer. Thus, the Approach lacks responsiveness and fails to account for the behaviour of regulated firms and the institutional environment in which they operate.[213] Additionally, the UK has been guilty of an overly light regulatory touch in the past and, historically, repeated financial market tendencies for short-sighted mistakes which have worsened financial stability.[214]

BIS 'money flower' – the BIS taxonomy of money in which stablecoins and deposits would be in the same section.

[210] For academics see Arner, Auer and Frost (n 8). See also Bullmann, Klemm and Pinna (n 15); Adachi and others (n 55); Lastra and Wilmarth Jr (n 65). For the Bank see Carney (n 83); See also Financial Policy Committee (n 94). For the G7, see G7 (n 55). See then HM Treasury (n 17) whose contradictions were explored in section 4.

[211] HM Treasury, *A New Approach to Financial Regulation: Building a Stronger Future* (Stationary Office Limited 2011).

[212] Black and Baldwin (n 92) – this has traditionally been the case in the UK.

[213] See Black and Baldwin (n 92) who make this point in relation to the UK more generally.

[214] Black and Baldwin (n 92). See also Carmen M Reinhart and Kenneth S Rogoff, 'The Aftermath of Financial Crises' (2009) 99(2) American Economic Review 466 who identify this tendency following the financial crash; Hyman P. Minsky, 'The Financial Instability Hypothesis' (1992) 74 Levy

Given these shortcomings, this paper suggests following a properly conducted 'expectations' approach. This approach must more accurately determine threats to the UK's monetary and financial order than the FPC's 'expectations' approach. It could be recalled that the FPC's 'expectations' approach was limited in the case of systemic stablecoins to expectations over the maintenance of stability in value, redeemability at par, and the robustness of holders' legal claims. In reality, few regulatory approaches which have been adopted in the UK have been wholly successful, but an 'expectations' approach is, to date, unique.[215] The 'expectations' of this paper are that neither systemic nor non-systemic arrangements should threaten UK monetary and financial stability. As such, any imposed regulatory framework should provide the latitude to meet such expectations in consideration of all foreseeable developments.

The EU, the US, and Switzerland are preparing to adopt frameworks which are more comparable to this approach. The EU approach will treat stablecoins as a *suis generis* financial product, incorporating each arrangement onto a 'bespoke' framework in consultation with extensive criteria.[216] This approach may over-emphasise adaptiveness, however, lacking coherence and predictability, which could have consequences for the industry's development. Conversely, Switzerland's 'same risk' approach will take 'into account the specific features of each project' in determining a pre-existing regulatory classification.[217] Accompanying guidance for the Swiss approach *implies* a deposit taking regulatory framework, a stance which is similar to the US.[218] However, neither present scope for adaptiveness in regulatory response to unpredictable market developments.

Regulation as e-money in the UK may suffice if stablecoins are not used as a store of value. This is because, as transfers into e-money are made solely 'for the purpose of making future payments', the monetary and financial stability risks highlighted in this

Economics Institute of Bard College Working Papers 1 who explains this tendency in detail and whose ideas have been belatedly lauded.

[215] See Julia Black, 'Paradoxes and Failures: 'New Governance 'Techniques and the Financial Crisis' (2012) 75(6) Modern Law Review 1037 who analyses the UK's approaches to date – none of which are comparable to an 'expectations' approach.

[216] European Union (n 90), 8 – this is the Commission's 'preferred option'; see also Chiu (n 49), 205 who refers to this approach as 'merit vetting'.

[217] FINMA (n 90), 2 this includes regulation as payment systems, MMFs or banks.

[218] Over some years, bills have been introduced to the US senate which would each have given stablecoins a different regulatory classification; see Managed Stablecoins are Securities Act 2019 (US) for a securities classification; see Stablecoin Classification and Regulation Act 2020 (US) for a banking classification; see Stablecoin TRUST Act 2022 (US) which advocated a money transmitting business classification (analogous to e-money – see Favole (n 48)). **Conversely, the recent Lummis-Gillibrand act seems to have achieved implicit advocacy; see Allen and Overy, 'Lummis-Gillibrand Responsible Financial Innovation Act Proposes Comprehensive Regulatory Framework for Digital Assets in the United States' (*Allen and Overy*, 14 June 2022) <** https://www.allenovery.com/en-gb/global/news-and-insights/publications/lummis-gillibrand-responsible-financial-innovation-act **> accessed 14 August 2022. Under this act, only authorised depository institutions may issue 'payment stablecoins', although they must fully back this issuance with HQLAs.**

paper would not occur.[219] Many, however, believe that systemic stablecoins will also provide the store of value function of money, perhaps as its most salient function.[220] Indeed, should disintermediation occur, a stablecoin store of value function is implied. Suddenly, such stablecoins would provide a greater role than that of e-money or MMFs, ultimately fulfilling a role akin to that of banks – with many similar risks and several additional risks which this paper has highlighted.[221]

Functionally, there are then several established similarities between systemic stablecoins and banks which mean that bank-based regulation is permissible. Both balance sheets are comprised of outstanding liabilities, alongside interest-baring assets and equity.[222] Similar to banks, arrangements would also be made more secure by capital and liquidity requirements.[223] Significantly, if stablecoins function effectively and also provide a store of value, there is no clear economic distinction between stablecoin issuance and bank deposits,[224] it just remains for legal definitions to be adapted accordingly. Crucially, the functions and safety of banks can be attributed to regulation;[225] applying such regulation to systemic stablecoins may thus mitigate risks whilst also negating regulatory arbitrage.

As such, under the amended Approach advanced in this paper, stablecoins will be regulated as e-money until they are deemed to have reached systemic size, at which point they will undergo a gradual transition to a new bank-style regulatory regime. As well as commitments to fully back issued coin and to redeem at par and on demand, a system which incorporates systemic arrangements into the Bank's reserves is posited. Systemic, and perhaps all, stablecoins should also be included in the deposit insurance scheme. Finally, a restructuring of the issuer's balance sheet should also be made possible to limit the consequences of disintermediation and to increase said issuer's loss absorption capacity.

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[219] Awrey and van Zwieten (n 88), 16. See also Hal S. Scott, 'The Importance of the Retail Payment System' (2015) Retail Payment Systems Conference, Harvard Law School Program on International Financial Systems 1 – no function reconcilable to a store of value function is mentioned amongst the functions of e-money.

[220] See Buckley and others (n 78). See also Fatas and Weder Di Mauro (n 81); Tercero-Lucas (n 129) who consider that Libra would have become a widespread store of value and replaced bank deposits; Adachi and others (n 55) who reiterate this view and conduct empirical tests which suppose this store of value function replacing bank deposits; see then The Bank of England (n 2); HM Treasury (n 17) who both cite regulatory requirements to uphold a prospective store of value function; Moin, Sekniqi and Sirer (n 12) who consider the store of value function to be the most salient function of money.

[221] HM Treasury (n 17) identified these same risks, this essay has also identified additional risks.

[222] Zetzsche, Buckley and Arner (n 39) – Libra would have issued equity to the Libra Association.

[223] Li and Mayer (n 32) show this empirically. See also Adrian and Mancini-Griffoli (n 32); Lastra and Wilmarth Jr (n 65) who mention this same effect.

[224] See footnote 209 for these comparisons. See also Brunnermeier, James and Landau (n 51) who refer to the 'convertibility arrangement' (to which stablecoins and deposits would both apply) in their taxonomy of money.

[225] Awrey and van Zwieten (n 88).

B. Legislative adjustments

This subsection will now outline the required legislative amendments by taking the Approach as a starting point. Firstly, part 5 of the Banking Act would no longer be amended to include systemic stablecoins in payment system regulation. Next, whilst the Financial Services and Markets Act 2000 (FSMA) already creates the PRA's financial stability mandate,[226] the PRA-regulated Activities Order 2013 should be adjusted so as to explicitly incorporate systemic stablecoin issuance in the deposit taking activity which is regulated by the PRA.[227] Accordingly, section 5 of the Regulated Activities Order 2001 should also be expanded so as to include systemic stablecoin issuance within those activities which are regulated, in this instance as deposits.[228]

In general, the PRA exercises broad discretion in the capital and liquidity requirements which it imposes, although the PRA's rulebook may need adapting should the principles for exercising this discretion be affected by the induction of stablecoin issuance into its regulated activities.[229] Capital requirements which the PRA may make relate predominantly to Title 7, Chapter 4 of the Directive 2013/36/EU, as per the Capital Requirements Regulation 2013, which are in keeping with the third Basel Accord.[230] Possible requirements include a variety of capital buffers, as well as

[226] Financial Services and Markets Act 2000, pt 1A, s 2B.
[227] Financial Services and Markets Act 2000 (PRA-regulated Activities) Order 2013, art 2A.
[228] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, s5.
[229] See Prudential Regulation Authority, 'Capital Requirements Directive V' (2020) 29/20 PRA Policy Statement 1, the most recent capital requirements directive in which the PRA establishes and updates its own policy regarding capital requirements – outlining updates to its rulebook in response. See Prudential Regulation Authority, 'PRA Rulebook' (*PRA*) < https://www.prarulebook.co.uk/ > accessed 13 August 2022.
[230] See Regulation (EU) No 36/2013 of the European Parliament and the Council, s7, ch4; see also Capital Requirements Regulation 2013. Regulation (EU) 36/2013 was also transposed into UK law by The Financial Holding Companies and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020. For Basel capital requirements see The Bank for International Settlements, 'High-Level Summary of Level III Basel Reforms' (2017) Basel Committee on Banking Supervision Policy Paper 1 – which provides a detailed and updated methodological analysis of the standards – including the recently added 'leverage ratio buffer'; The Bank for International Settlements, 'Basel III Summary Table' (*The Bank for International Settlements*, December 2017) <https://www.bis.org/bcbs/basel3/b3_bank_sup_reforms.pdf> accessed 1 August 2022, for a simplified account of those requirements imposed by the reforms.

additional liquidity coverage requirements.[231] By regularly publishing its methodologies for its approach,[232] the PRA improves predictability.

Beyond this, the Bank sets its own 'minimum requirements for own funds and eligible liabilities' (MREL) which also imposes capital requirements.[233] By amending the FSMA, section 3 of the Banking Act 2009 will already confer a mandate for the Bank to impose requirements on systemic arrangements. In sum, systemic stablecoins would be brought under 'twin peaks' regulation, with the FCA continuing to regulate the functioning of the market similar to the case of e-money, with the PRA and the Bank then conducting prudential regulation in collaboration.[234]

Firstly, such amendments should improve arrangements' loss absorption capacity in the event of runs, and level the playing field between banks and arrangements, simultaneously increasing competition as a positive externality. Further, these amendments should enable arrangements to engage in maturity transformation and remuneration of holdings due to a loosening of asset composition requirements and prohibitions against lending.[235] As an aside, intermediation is practically enabled by the transformation of stablecoin holdings into account-based money through wallet providers, but exclusion of systemic stablecoins from the Payment Services Regulations would then be required. In this way, by broadening the incentives facing arrangements, intermediation could theoretically be maintained in a different form. Indeed, the PRA and the Bank could even require a specific level of funding to come from retail loans if required.

Moreover, beyond lowering disintermediation risks, such regulation would also lower susceptibility to runs and default through perceived and actual consumer deposit safeness, similar to the approach used for banks. By enabling arrangements to be backed by a diversified range of assets and by imposing capital requirements, there may also be smaller routine changes in backing asset composition outside of runs.

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[231] Prudential Regulation Authority, 'PRA Rulebook: CRR Firms: Internal Liquidity Adequacy Assessment' (2015) 2015/49 PRA Rulebook 1. See Chiu and Wilson (n 113), 401 and 422, prior to Basel III, the UK had provision for liquidity requirements – mandated (as were prior capital requirements) for the PRA by the Financial Services and Markets Act 2000, ss 137G and 137T. Regulation (EU) No 575/2013 of the European Parliament and the Council, as well as Regulation (EU) No 36/2013, were then adopted by the UK with discretionary additions in line with Basel III. Similar to as with capital requirements, The Financial Holding Companies and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020 directly transposed liquidity requirements into UK law.

[232] See for example Prudential Regulation Authority, 'The PRA's Methodologies for Setting Pillar 2 Capital' (2021) PRA Policy Statement 1. See also Prudential Regulation Authority, 'Liquidity and Funding Permission' (2021) PRA Policy Statement 1.

[233] See The Bank of England, 'The Bank of England's Approach to Setting a Minimum Requirement for Own Funds and Eligible Liabilities (MREL)' (2021) Bank of England Policy Statement 1 for the Bank's approach. See Banking Act 2009, s3 which gives the Bank its MREL mandate.

[234] Chiu and Wilson (n 113), 248 describe 'twin peak' regulation.

[235] This is attributable to full backing with capital buffers but an accompanying ability to hold loans as assets.

Regardless, however, there is no obvious reasoning for inclusion of non-systemic stablecoins in such regulation, given their differentiated economic function.

Resistance to runs and arrangements' intermediary function can also be further enforced by providing systemic stablecoin holders with deposit insurance. Through inclusion of systemic stablecoins within the regulated activity of 'deposits', the PRA would automatically hold the sole ability to determine whether systemic stablecoins qualify for inclusion in the Financial Services Compensation Scheme.[236] An adjustment to the PRA's rulebook which classifies systemic stablecoins amongst 'deposit guarantee scheme members', in line with adjustments to the FSMA's definition of 'deposits', is all that is required. Regardless, redeemability at par and on demand would be protected by the inclusion of stablecoins in the definition of 'deposit' in the Regulated Activities Order 2001.[237]

Whilst such an amendment may encourage the prospective disintermediation of commercial banks further, it will only present an issue if systemic disintermediation nonetheless occurs. Furthermore, requirements for consumer monitoring will also be reduced. Indeed, there is no robust reason to not extend such revisions to non-systemic stablecoins, although more technical legislative changes would be required.

In relation to monetary stability, the Approach should be revised to explicitly state this as a regulatory goal. Specifically, stablecoin issuers should be inducted into the Bank's reserves to aid monetary policy transmission, as well as to extract other benefits, with amendments to extant legislation required, as alluded to in section 4 of this paper. By expanding the definition of 'deposit-taker' in the Banking Act 1998, and in accordance with definitional amendments to other legislation, systemic stablecoins would be deemed 'eligible institutions' for participation in the 'Sterling Monetary Framework' (SMF).[238]

The Bank would then be able to specify a required holding within its reserves for systemic stablecoin issuers on an *ad hoc* basis.[239] This would allow the Bank to impose a degree of narrow banking which it deemed prudent to address monetary stability and other concerns. *Full* narrow banking may be undesirable, however, given the mutual exclusivity between the systems of full fractional-reserve bank regulation and

[236] Financial Services and Markets Act 2000, pt.15 designates powers to set the rules for the Financial Services Compensation Scheme to the PRA and FCA for all regulated activities. See Financial Conduct Authority, 'Compensation Handbook' (2022) Release 22, which says that the PRA alone sets rules for claims related to deposits. Stablecoin induction into The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 mean that only the PRA rulebook's (n 229) criteria for deposit guarantee scheme members must be amended in accordance with that of the deposit itself.
[237] The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, s 5.
[238] Banking Act 1998, sch 2; See also The Bank of England (n 2), 3 which outlines the Bank's own criteria for *permitting* financial institutions to hold central bank reserves.
[239] See Andrew Campbell and Judith Dahlgreen, 'The Future Role of the Bank of England: Role and Power of Bank of England from 2013' in Justin O'Brien and George Gilligan, *Integrity, Risk and Accountability in Capital Markets* (eds) (Hart Publishing 2013), 143 for the broad latitude which is has always exercised since its informal emergence; see also The Bank of England (n 2) for specific reference to its use of discretion.

enforced full narrow banking in their stablecoin backing asset requirements. Stablecoin issuers would be unable to sufficiently offset bank disintermediation under a full narrow banking system, regardless of increased deposit safety.

Incorporation into the SMF could also enable the Bank's lender of last resort function, indeed the Approach itself acknowledges the need for a 'backstop'.[240] Hypothetically, access to the Bank's reserves could also allow settlement between stablecoin and commercial banks, aiding interoperability. Indeed, reserves could be transferred to other financial institutions which held reserves at the Bank, with the corresponding stablecoin holdings then 'burned'. However, arrangements were designed to be operationally distinct from established finance and their dependency on redemption fees raises logistical concerns which necessitates further research, and perhaps legislation. It should also be noted that there is no ostensible reasoning for also including non-systemic stablecoins in the SMF.

8. *Discussion of the Revision*

To summarise, this revision to the Approach ('the Revision') has attempted to cater for technical shortcomings of the Approach, as well as the monetary and financial stability risks which were also not originally accommodated for. However, it should be noted that the Revision has not addressed concerns relating to interoperability concerns, or several of the monetary stability implications of basket-backed stablecoins. However, it could be argued that diversified balance sheet requirements and central bank reserve requirements could mitigate risks to an extent, as mentioned in section 6. Such solutions are challenging to identify and require future research.

An issue which has been highlighted by the literature is the requirement of a changing regulatory classification as stablecoins develop.[241] In contrast to Switzerland and the US, the Revision has attempted to provide a flexible and complete framework in that regard, although future adaptation cannot be ruled out. The Revision has endeavoured to do so whilst also providing clarity and without overcomplicating the regulatory framework, which could otherwise disincentivise innovation *ex ante* by creating uncertainty. Conversely, the EU regime is ambiguous. Indeed, the different activities which arrangements undertake may be regulated separately in the EU.[242]

The Revision's simple two-layer framework with a transition from e-money to bank classification as arrangements reach systemic levels also aims to pre-provide regulators with the appropriate discretion to proactively determine when systemic levels are reached, and how such systemic arrangements should be prudently regulated to mitigate monetary and financial stability risks. Such flexibility also

[240] HM Treasury (n 17), 22.
[241] Zetzsche, Buckley and Arner (n 39).
[242] See Chiu (n 49) who posits that activities may be regulated separately; See also Financial Stability Board (n 16), 19 which identified a lack of clarity over classification as a problem which should be mitigated.

ameliorates issues which are related to the uncertainty over prospective systemic stablecoin risk and, further, the differing risks of single currency and basket-backed stablecoins, in contrast to the Approach. The laxness in the Approach is likely a reflection of the UK's desire to become a digital asset hub,[243] but a more comprehensive, coherent, and agile framework could foster such growth. Indeed, this principle of agility was advocated by the Approach. The UK's DLT sandbox will also provide a competitive advantage in this regard. All this is not to say, however, that the Revision does not raise some further final points for discussion.

A. Further points for discussion

The Revision has referred to the enablement of stablecoin intermediation, although more research is required to understand and design this shift in a crucial function of the financial system. The Bank of Amsterdam, stablecoins' closest historical analogy, did itself incur into lending functions before subsequent failure, debasement, and the development of sovereign backed alternatives.[244] The informational advantages of arrangements, which relate to their data stores, do create a unique dynamic and the opportunity for targeted credit.[245] Such developments should be investigated as they present an opportunity for profit maximisation and may thus be associated with imprudent behaviour.[246] Access to central bank reserves may enable a system of 'pass-through' funding in which commercial banks' intermediary function is preserved,[247] although this would require arrangements' backing assets to consist largely of funding for commercial banks, leading to a 'symbiotic relationship' and financial contagion risk.[248]

Whilst the Revision is fairly comprehensive, there are also conceivable developments which would necessitate greater change. For example, there is animosity amongst businesses for the rent-seeking practices of incumbent financial services companies.[249] As arrangements only extract fees from coin redemption, businesses may be incentivised to list lower prices in stablecoin, sharing benefits with consumers and encouraging purchases in stablecoin, whilst also contributing to its proliferation. Additionally, holders may be disincentivised from redeeming stablecoin, contributing further to its store of value function. Moreover, some academics have theorised drastic

[243] Lastra and Wilmarth Jr (n 65). See also Russel-Jones (n 102) who also refers to how such desires are influencing the UK response.
[244] See Frost, Shin and Wierts (n 1) for failure and debasement. See also Arner, Auer and Frost (n 8) for reference to sovereign-backed alternatives.
[245] Adrian and Mancini-Griffoli (n 32).
[246] For the relationship between lending activities, profit maximisation and imprudence see Frost, Shin and Wierts (n 1). See also G7 (n 55); Melachrinos and Pfister (n 56).
[247] See Brunnermeier and Niepelt (n 127) who provide this theory in reference to a CBDC, although access to central bank reserves should lead to theoretical equivalence if pass-through funding was enforced.
[248] See The Bank of England (n 2) which warns against a 'symbiotic relationship'.
[249] The Economist, 'Can the Visa-Mastercard Duopoly be Broken?' (*The Economist,* 17 August 2022) < https://www.economist.com/finance-and-economics/2022/08/17/can-the-visa-mastercard-duopoly-be-broken > accessed 24 August 2022.

changes to the established financial order, with an associated reshuffle of power.[250] Such an eventuality may necessitate a complete overthrow of the UK's financial regulatory framework. The Revision has also assumed no secondary market trading of stablecoin, although legislation should certainly be introduced if systemic stablecoins allowed such activity as, beyond consequences for price stability, secondary market trading may undermine stablecoin's prospective intermediary function.

Finally, it is worth mentioning that, whilst this paper has drawn on the literature available, much of this literature's provenance is flawed. Works lack cohesion and are drawn from a small pool of sources, with a likely bias towards the operation of central banks and/or an overly theoretical monetary grounding. In contrast, stablecoins themselves are a salient topic. This renders the lack of available evidence to be troublesome.[251] Moreover, the literature is often highly charged. Williamson refers simplistically to 'bad people' in a BigTech-directed tirade,[252] whilst stablecoin advocates tend to largely ignore or underplay shortcomings.[253] Further, the topic is fast-moving and the theories of many early works are inadmissible.[254] Money, in general, is a topic which has received insufficient academic attention,[255] the unique nature of the stablecoin debate exacerbates this issue.

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[250] See Brunnermeier, James and Landau (n 51), 14 who allude to a 'platform-based' financial system with payments operating at the centre of the system, leading to a full unbundling of money's functions. See also Fatas and Weder Di Mauro (n 81) who describe a pricing of financial assets in basket-backed stablecoin; Saule T Omarova, 'The People's Ledger how to Democratise Finance' (2021) 74(5) Vanderbilt Law Review 1231; Petralia and others (n 8); Wilmarth Jr (n 41); Brunnermeier ,James and Landau (n 51) all of whom refer to a restructuring of power in relation to new dynamics between public and private money. See finally Lipton and others (n 15), 9 whose application of 'disruptive innovation theory' aligns with a systemic stablecoin.

[251] See The Bank of England (n 2) which cautions against the applicability of its findings in relation to a lack of evidence.

[252] See Williamson (n 187) who is an accomplished and highly regarded monetary economist.

[253] See Stanford (n 14); Crypto A.M (n 48); Favole (n 48); Russel-Jones (n 102) who all write in 'Crypto A.M' magazine's 2022 edition and who all provide glowing stablecoin accounts, prefacing any shortcomings with reference to stablecoins' transformative potential. Stablecoins would also be popular with market fundamentalists who deplore state intervention. See Friedrich Hayek, *Denationalism of Money: An Analysis of the Theory and Practice of Concurrent Currencies* (The Institute of Economic Affairs 1976), 78-81 who claims that the private sector would serve the public better through its own 'striving for gain' and that private actors should be allowed to compete in money issuance, displacing central banks, with money instead being regulated solely by the market. These ideas, however, exist in an alternate theoretical space to that in which this essay has been written and have not been considered as part of this essay's argument.

[254] See for example the difference in standpoint between Christian Pfister, 'Monetary Policy and Digital Currencies: Much Ado about Nothing?' (2017) 642 Banque de France Working Papers 1 and Melachrinos and Pfister (n 56). Only three years separate the two papers, written by the same author (with an additional author in the second). The stance shifts from a statement of all digital currencies' benign nature to a detailed theoretical account of potential mitigation strategies in the face of widespread monetary and financial stability risks presented by stablecoins. See also Gans and Halaburda (n 46) who, in a highly cited and coherent piece, predict that digital currencies such as Libra would not emerge.

[255] Borio (n 1). See also Gans and Halaburda (n 46), 273 who describe frameworks for monetary analysis as 'imperfect', before digitisation is even considered.

B. Areas for future research

Beyond the basket-backed stablecoin monetary stability risks, as well as the stablecoin intermediation and interoperability concerns, which the Revision has not addressed, this paper has ignored two areas of importance, for simplicity. These areas must be considered for the arguments advanced throughout this paper to be fully considered. Several governments, such as the UK, have given extensive theoretical appreciation to CBDCs,[256] and it is likely that development of any systemic stablecoin would hasten their development as a form of pragmatic regulation.[257] Indeed, CBDCs may confer fewer monetary and financial stability risks than stablecoins.[258] Future research should compare the two, as opposed to analysing them separately, as has been the case to date.[259]

Beyond this, one of the key benefits of stablecoins which this paper has ignored is their use in expediting cross-border payments.[260] Many of stablecoins' risks also have a cross-border element, and a spate of academics have considered cross-border regulatory collaboration to be a key factor in legitimating arrangements.[261] There are also a series of ancillary risks which the literature identifies and which this paper has

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[256] Andrew Usher and others, 'The Positive Case for a CBDC' 2021-11 Bank of Canada Staff Discussion Papers 1; see also The Bank of England (n 191).

[257] Zetzsche, Buckley and Arner (n 39). See also Gans and Halaburda (n 46); Brunnermeier, James and Landau (n 51); Gorton and Zhang (n 183) who advocate a CBDC should stablecoin regulation be ineffectual.

[258] See Brunnermeier and Niepelt (n 127) who establish a system for public and private money equivalence which removes disintermediation. See also Bindseil (n 181) who describes caps on CBDC holdings and the potential for negative interest rates for improved monetary policy transmission; Auer and others (n 181) who propose a system for incorporating commercial banks and who also refers to the removal of the zero lower bound on interest rates; Omarova (n 250) who describes how the attractiveness of a prospective CBDC could be varied for the purpose of limiting transformative risks.

[259] Only Arner, Auer and Frost (n 8) make a brief comparison. See also The Bank of England (n 2) which mentions a concurrent CBDC but stops short of analysis. Buckley and other authors (n 78) analyse both but entirely separately. The CBDC literature is equally sparse in its appreciation for stablecoin.

[260] See Tara Rice, Goetz von Peter and Codruta Boar, 'On the Global Retreat of Correspondent Banks' (2020) BIS Quarterly Review, March 37 who identify the global disappearance of correspondent banks, advocating private sector initiatives to combat this; for reference to the cross-border benefits of stablecoins see Financial Stability Board, 'Enhancing Cross-Border Payments. Stage 3 Roadmap' (2020) 13 October 1 – who include stablecoins as part of the FSB's roadmap to enhance cross-border payments; Petralia and others (n 8); CPMI and IOSCO (n 16); Carstens (n 48); Favole (n 48); Bech and Hancock (n 50); G7 (n 55). See finally Bullmann, Klemm and Pinna (n 15) who describe how stablecoins can subsequently deepen international trade.

[261] For such stances see Hernández de Cos, 'Central banks, Financial Inclusion and Digitalization: Harnessing Technology for Inclusive Growth', (speech at the 'Financial integration and inclusive development: A view from the Mediterranean Countries' conference, Madrid, 13 December 2019) <https://www.bis.org/review/r191213f.pdf>accessed 3 July 2022. See also Frost, Shin and Wierts (n 1); Petralia and others (n 8); Lee and L'Heureux (n 10); Financial Stability Board (n 16); HM Treasury (n 17); Zetzsche, Buckley and Arner s (n 39); Melachrinos and Pfister (n 56); G7 (n 55); Fatas and Weder Di Mauro (n 81).

not discussed. These include consumer protection,[262] data protection,[263] antitrust,[264] anti-money-laundering,[265] and taxation.[266] For a composite view of the benefits, risks, and *full* regulatory framework required for stablecoins other factors must be duly considered.

9. Concluding Remarks

To conclude, this paper has examined the emergence of stablecoins, identifying trends and drawing practical inferences. It has then applied these inferences to explore the UK's Approach to regulating stablecoins, finding its substantive provisions to be, at times, contradictory and inconsistent – leading to technical shortcomings. By exploring the relevant literature, it has then found the regulatory regime which it would implement to be insufficiently catered for the monetary and financial stability risks of a stablecoin iteration which involved entrance into the financial mainstream. This paper has also considered such an iteration to be, at the very least, a tangible possibility which should be pre-emptively accounted for. In further consulting and collating the literature, the paper has suggested a revision to the Approach which more comprehensively, but not entirely, mitigates these problems by incorporating banking regulation for stablecoins of a systemic size. For any such revision to be fully considered, however, additional conflating risks and solutions must first be catered for. It is paramount that such considerations are made before systemic stablecoins propagate, as may happen rapidly.

[262] Frost, Shin and Wierts (n 1). See also Arner, Auer and Frost (n 8); Financial Stability Board (n 16). It is also worth noting that this is one of the Approach's stated goals, see HM Treasury (n 17).
[263] Zetzsche, Buckley and Arner (n 39); Melachrinos and Pfister (n 56).
[264] Frost, Shin and Wierts (n 1); See also Arner, Auer and Frost (n 8); Financial Stability Board (n 16); see also G7 (n 55).
[265] Zetzsche, Buckley and Arner (n 39); G7 (n 55); Melachrinos and Pfister (n 56).
[266] Frost, Shin and Wierts (n 1). See also Financial Stability Board (n 16).

Privacy vs Reputation: How Should the Law Balance an Employee's Right to Privacy with an Employer's Power to Dismiss for Social Media Misconduct?

LYDIA KELLY

Abstract

As social media has developed and become an integral part of daily life for millions around the globe, several questions have materialised about how privacy can be protected when using social media sites. This paper seeks to address one specific sub-question within this wider debate, namely how an employee's right to privacy on social media should be balanced with their employer's desire to access and monitor their social media activity. The paper will begin by analysing how the law currently balances employees' privacy and employers' right to dismiss for social media misconduct, discussing the meaning of the fundamental principles, their treatment in case law, and the extent to which the current balance could be said to give equal weight to all interests at stake. Focusing on the specific changes brought by social media and novel working conditions, the paper will provide a contextual analysis of the adequacy of the current approach in ensuring that employers would not interfere with employees' right to privacy without adequate justification. Concluding that reform is necessary, the paper will advance the introduction of legislative guidance to employers on how to carry out investigation of social media, and/or a new common law test that specifically applies to cases of dismissal for social media activity as potential solutions capable of giving more weight to employees' privacy concerns.

1. *Introduction*

Social media has become an integral part of life for people worldwide, with 4 billion active users.[1] 'Social media' refers to websites where users create and view content and engage in social networking with other users.[2] Beyond changing the nature of human interactions, the proliferation of social media has led to numerous questions about how the right to privacy under Article 8 of the European Convention on Human Rights (ECHR)[3] should be enforced in the new digital era. Social media's effect on privacy generally could constitute a substantial discussion in and of itself and several

[1] Dave Chaffey, 'Global social media statistics research summary 2022' (*Smart Insights*, 27 January 2022) https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/ accessed 1 February 2022.

[2] Andreas M. Kaplan and Michael Haenlein, 'Users of the world, unite! The challenges and opportunities of Social Media' (2010) 53(1) Business Horizons 59. Examples of social media websites include Facebook and Twitter.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950 European Convention on Human Rights) available <https://www.echr.coe.int/Documents/Convention_ENG.pdf?msclkid=6d66f9a0af6d11ecabe7b2cf8fef5ce7> accessed 29 March 2022.

works have explored this.[4] A brief summary of that effect in relation to the issues explored in this paper is that employees' off-duty conduct which would have previously been unknown to employers is now becoming accessible because of the permanence of things posted on social media.[5] Employees often believe that what they do on social media will be kept private from their employer.[6] However, as Christie observed, 'an employer's desire to protect itself from what it may regard as objectionable online material may lie on a collision course with employees' expectations of privacy' in modern workplaces.[7]

An employee's social media use could negatively affect their employer in multiple ways, such as employees talking negatively about company practice online, or posts breaching confidentiality agreements or sharing information that damages the company's interests or brand image,[8] for example making derogatory comments.[9] These problems arise due to a blurred boundary between private and professional life caused by the lack of available guidance about what of an employee's online activity is considered part of their private life under Article 8, especially in recent years with the popularisation of working from home during COVID-19 which removed the spatial distinction between work and private life.[10]

English law has been rather static in regard to unfair dismissal, progressing in 'inches rather than miles.'[11] The courts have relied on the 'range of reasonable responses' (RORR) test since 1982,[12] which asks whether dismissal was an action a reasonable employer could have taken in the circumstances[13] Thus, given this stagnancy, courts

[4] Examples of works include Karl-Nikolaus Peifer, 'Personal privacy rights in the 21st century: logic and challenges' (2014) 9(3) Journal of Intellectual Property Law and Practice 231; Joanne Kuzma, 'Empirical study of privacy issues among social networking sites' (2011) 6(2) Journal of International Commercial Law and Technology 74; and P. Yapp, 'Privacy and technology: can you stay connected and retain your privacy?' (2021) Dec, Computers & Law 36.

[5] Layla McCay, 'The Internet Never Forgets: How to Live in the 21st Century' (*Huffpost*, 30 April 2012) < https://www.huffpost.com/entry/the-internet-never-forgets_b_1460110> accessed 1 May 2022.

[6] Patricia Sanchez Abril, Avner Levin & Alissa Del Riego, 'Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee' (2012) 49 Am Bus LJ 63.

[7] David Christie, 'Online profiles and unfair dismissal' (2009) 94(Dec) Employment Law Bulletin 2.

[8] Frank Rojas, 'The Modern Workplace: Tips For Creating An Employee Social Media Policy' *Forbes* (17 April 2020) < https://www.forbes.com/sites/forbesagencycouncil/2020/04/17/the-modern-workplace-tips-for-creating-an-employee-social-media-policy/?sh=4ecd30af1f1c> accessed 4 January 2022.

[9] Sean Seadon, 'Estate agent who 'targeted England players with racist abuse online' is sacked' *The Metro* (9 September 2021) < https://metro.co.uk/2021/09/09/euro-2020-racism-savills-estate-agent-sacked-over-alleged-online-hate-15231617/> accessed 22 February 2022.

[10] See section three, subsection B, n 107-122.

[11] K. D. Ewing, 'The Human Rights Act and Labour Law' (1998) 27 ILJ 275.

[12] *Iceland Frozen Foods v Jones* [1982] IRLR 439.

[13] Ibid 442.

continue to use a test developed prior to the digital age to let employers set the bar of what constitutes social media misconduct.[14]

Notwithstanding the courts' preference for the current approach, the framework used in deciding whether dismissals were fair has been the subject of numerous criticisms. For example, Matouvalou has been critical of the current approach on the basis that the courts have set very low threshold.[15] Moreover, prior to social media's popularisation, the same author has also criticised the law's approach to 'private life', arguing that employees were inadequately protected from dismissal for off-duty activities.[16] The discretion given to employers fails to adequately protect the privacy rights of employees contained within Article 8 ECHR and implemented into English law through the Human Rights Act 1998.[17]

More recently, while assessing the current judicial approach to off-duty conduct, Sanders mentioned the worsening of pre-existing problems due to social media.[18] However, aside from Sanders' paper, scholarship specifically addressing employees' online activity has failed to critically analyse the adequacy of the current approach. Instead, scholars have focused on outlining the balance as indicated by the case law and using this to make recommendations for what should be included in employers' social media policies.[19] In addition, due to its focus on the problems with the RORR test generally rather than social media cases, even Sanders' paper fails to provide a comprehensive analysis of whether the solutions advanced could improve the specific challenges brought by the widespread use of social media, or changes to working conditions.[20] Lastly, while the right to privacy is inextricably linked to freedom of expression due to dismissals often concerning expression an employee made on their personal social media,[21] the former has yet to provide insight into how it should be protected by the law in the context of online activity due to a complex academic debate

[14] Phillipa Collins, 'The inadequate protection of human rights in unfair dismissal law' (2018) 47(4) I.L.J 504.

[15] Virginia Mantouvalou, "Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912.

[16] Mantouvalou (n 16).

[17] Human Rights Act 1993, Section 3(1) requires legislation to be interpreted in a way compatible with the ECHR as far as possible.

[18] Astrid Sanders, 'The Law of Unfair Dismissal and Behaviour Outside Work' (2014) 34(2) Legal Studies 328.

[19] See for example Kathryn Dooks and Elizabeth Kirk, 'Ownership and use of social media by employees in the UK' in *Employment and Employee Benefits Multi-Jurisdictional Guide 2013/14* (Practical Law Company 2013); 'Protecting an employer's reputation' (2018) 1098 IDS Emp. L. Brief 12; Dominic McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13(1) HRLR 125; Andrea Broughton, Tom Higgins, Ben Hicks and Annette Cox, 'Workplaces and Social Networking: The Implications for Employment Relations' (ACAS 2010).

[20] Sanders (n 19).

[21] Examples of such cases include *Omooba v Michael Garret Associates Ltd (t/a Global Artists)* ET Case No. 2202946/19; *Crisp v Apple Retail (UK) Ltd* ET Case No.1500258/11; *Preece v JD Wetherspoons plc ET* Case No.2104806/10.

surrounding its meaning and purpose.[22] While the debate has led to a 'privacy paradox, whereby employees share private information publicly through social media but expect that the information will remain private from their employer,[23] there has been little scholarship examining the legal implications of employees sharing more online than they would wish for their employers to see. One American study examined this,[24] but English scholars have remained quiet regarding the paradox's significance, or how it may be resolved.

This contribution aims to identify how the law should balance employees' privacy rights with employers' rights to dismiss for online activity. Aiming to fill in the gaps left by pre-existing scholarship, this contribution seeks to not only establish the current approach, but also go beyond by analysing why the favour shown to employers is unsatisfactory and what change is needed to adequately protect employees' privacy in light of the changes brought by the current social climate. As privacy is a fundamental freedom critical for preserving the dignity and autonomy of individuals, there is a need to set clear limits as to where employers can access, and dismiss for, employees' personal social media use.[25] It is important to discuss how privacy can be better protected in unfair dismissal, as it arguably intended to protect the same values as privacy by preventing employers from taking away employees' livelihoods without good reason.[26]

To conduct this analysis, the paper will adopt the following structure. Section two will examine the principles of law that govern employees' privacy rights and employers' rights to dismiss to identify the current employer-centric balance in social media cases. Building on this analysis, section three will focus on demonstrating how this balance does not adequately address issues in the current social climate. Finally, section four will make recommendations for reform which could resolve the problems identified in section three, and re-level the balance identified in section two. Throughout this paper, it will be argued that the heavy favour currently shown to employers is

[22] Many academics have grappled with the meaning of privacy, for example Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193; Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 MLR 806; Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) OJLS 303.

[23] The privacy paradox has been identified by a number of sociological and legal scholars, see for example Nadine Barrett-Maitland & Jenice Lynch, 'Social Media, Ethics and the Privacy Paradox' in Christos Kallionatis and Carlos Travieso-Gonzales (eds), *Security and privacy from a legal, ethical, and technical perspective* (IntechOpen 2019); Monica Taddicken, 'The 'Privacy Paradox' in the Social Web: The Impact of Privacy Concerns, Individual Characteristics, and the Perceived Social Relevance on Different Forms of Self-Disclosure' (2014) 19 Journal of Computer-Mediated Communication 248; Sanchez Abril, Levin & Del Riego (n 6).

[24] Sanchez Abril, Levin & Del Riego (n 6).

[25] Hugh Collins, 'An emerging human right to protection against unjustified dismissal' (2021) 50(1) Industrial Law Journal 36; Christie (n 7).

[26] Tor Brodtkorb, 'Employee misconduct and UK unfair dismissal law: does the range of reasonable responses test require reform?' (2010) 52(6) Int. J.L.M. 429, and Hugh Collins, *Justice in Dismissal* (Clarendon Press 1993).

unsatisfactory because the right to privacy is a fundamental freedom which should always be balanced with employers' interest in protecting their reputation from unsavoury posts made and shared with ease by their employees when engaging in personal online activity.[27]

Finally, before turning to the discussion, it should be highlighted that the term 'employee' used throughout this contribution refers only to those considered employees under Section 230(1) of the Employment Rights Act 1996. Under this section, an 'employee' is defined as someone who works under a contract of employment.[28] This choice is justified on the basis that it is only employees meeting the criteria of Section 230 who have the right not be unfairly dismissed under Section 94(1) of the Employment Rights Act 1996.

2. What is the current balance? An analysis of how the law currently balances employees' rights to privacy with employers' power to dismiss for social media misconduct

This section will establish the fundamental principles the courts have used thus far to strike the balance between employees' privacy and employers' right to dismiss for social media misconduct. Understanding these principles is important because they are the standard used to assess the likely success of an employee's claim. Consequently, this section will, in turn, discuss the rights to privacy and freedom of expression, gross misconduct, employers' powers of dismissal, and how these intersect through exploration of the case law that has balanced these principles thus far. It will be concluded that the current judicial approach heavily favours employers due to the generous application of the RORR test established in *Iceland Frozen Foods v Jones.*[29] The courts so far have been reluctant to accept arguments that the rights to privacy and freedom of expression granted by Articles 8 and 10 ECHR protect employees' speech online. This is undesirable because 'employer intrusion into an employee's personal life threatens the employee's freedom, dignity, and privacy.'[30]

A. The Right to Privacy

The UK does not grant a specific right to privacy. Instead, privacy is governed by Article 8 ECHR which, in turn, is implemented into English law through the Human Rights Act 1998.[31] Article 8(1) states that everyone has the right to respect for their private life.[32] Article 8(2) details that public authorities may only interfere with this in accordance with the law and where interference is democratically necessary, for example to protect public safety.[33] Mummery LJ in *X v Y*[34] stated it would be difficult

[27] Hugh Collins, 'The protection of civil liberties in the workplace' (2006) 69(4) MLR 619.
[28] Employment Rights Act 1996, s 230(1).
[29] [1982] IRLR 439.
[30] Sanchez Abril, Levin & Del Riego (n 6).
[31] Human Rights Act 1993, Section 3(1) requires legislation to be interpreted in a way compatible with the ECHR as far as possible.
[32] European Convention on Human Rights (n 3).
[33] Ibid.
[34] [2004] ICR 1634.

to apply a different standard to 'private' as opposed to public employers, therefore the ECHR will have the same horizontal effect in all cases and judges can consider the rights within it in cases involving private employers.[35] Consequently, while claims of human rights interference cannot be brought against private employers, a human rights violation can be argued in claims for unfair dismissal.

It was observed in *Pay v United Kingdom,*[36] a case concerning online activity, that 'private life' under Article 8 was a broad term which 'protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world'.[37] However, despite the statement that privacy is a 'broad term', employees have struggled to prove their right to privacy was engaged in claims of unfair dismissal for online activity. This difficulty was demonstrated in *Creighton v Together Housing Association Ltd*,[38] where a dismissal for tweets about the employer was held to be fair because the comments were made on a public account despite the posts being three years old and unlikely for the casual social media user to come across.

Sanders has argued that the approach taken by the courts in modern breach of confidence cases post-HRA indicates that the right to privacy should be more easily engaged in cases of unfair dismissal for social media use.[39] This, the author argues, results from the similarity between the facts of cases, interests at stake, and values underpinning both areas of law.[40] Furthermore, the current struggle faced by employees seem to be at odds with the position taken by the European Court of Human Rights (ECtHR) in *Von Hannover v Germany (No 2).*[41] In this case, the ECtHR appears to indicate that Article 8 should be engaged in all cases concerning ordinary activities.[42] It follows that, considering its widespread and global nature, social media use could be considered as an 'ordinary activity'. This hypothesis is supported by Delaney, who argues the UK courts' narrow approach to the right to privacy in unfair dismissal appears contrary to the approach advocated by the ECtHR in *Von Hannover*.[43] Consequently, the harshness of the English approach to privacy as compared to the approach of the ECtHR demonstrates why the severe restriction placed upon the circumstances in which the right to privacy is engaged is unsatisfactory.

B. Freedom of Expression

Privacy is intimately linked in this context to freedom of expression because dismissals are most commonly disputed where an employer has disapproved of an

[35] Ibid [57(4)].

[36] (2009) 48 EHRR SE2.

[37] Ibid p.24.

[38] ET/2400978/2016.

[39] Sanders (n 19).

[40] Ibid.

[41] (2012) 55 EEHRR 15.

[42] Ibid.

[43] A. Delaney, 'Online misconduct' (2008) 84(Apr) Emp. L.B. 4.

employee's online speech.[44] Article 10(1) of the ECHR grants the right to freedom of expression, to hold opinions, and to impart and receive ideas without interference from public authorities, which can include private employers in unfair dismissal.[45] Article 10(2) allows restriction of this right where it is democratically necessary, such as protecting the rights of others.[46] An example of justifiable interference was given in *Teggart v TeleTech UK Ltd*,[47] where an employee could not rely on freedom of expression to protect a post that damaged the reputation of a colleague and infringed her right to be free from harassment.[48] It was also held that, despite the privacy settings on his account, by posting his opinions online Teggart had 'abandoned any right to consider his comments as being private' because his posts could still be disseminated by others. [49]

This observation implies there are relatively few occasions where the right to privacy will be available as a defence to dismissal for online activity, since implementing privacy settings does not appear to influence the courts' decisions. It can be inferred that employees will struggle to prove their right to privacy was engaged because the courts do not consider social media activity in itself to be private, contrary to interpretations of *Von Hannover* mentioned previously,[50] and it cannot be rendered as such by an employee's prudence. This is undesirable because social media is an integral part of many people's lives and constitutes part of how they form the social relationships the ECtHR in *Pay* intended privacy to protect.[51] The right to privacy is necessary for the protection of autonomy and dignity,[52] and so to heavily restrict the situations in which it applies to employees' personal social media is to restrict the dignity and autonomy that privacy and unfair dismissal intended to protect[53] in favour of the reputational interests of the employer. Employers have no 'right' to their reputation, so to favour reputational interests over privacy rights is unsatisfactory.[54]

C. Gross Misconduct

Having, thus far, discussed the rights which employees may mistakenly believe protect their social media posts, the paper will now turn to analyse gross misconduct, and how posts may constitute it.

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[44] See for example *Crisp v Apple Retail (UK) Ltd* ET Case No.1500258/11; *Game Retail Ltd v Laws* [2014] 11 WLUK 18; *Preece v JD Wetherspoons plc* ET Case No.2104806/10.

[45] *X v Y* (n 35).

[46] Other examples given in Article 10(2) of justified interference include for the purposes of protecting national security, territorial integrity or public safety, for the prevention of disorder or crime, for maintaining the impartiality and authority of the judiciary, and for the protection of health or morals

[47] NIIT 00704/11.

[48] The right to be free from harassment is contained within the Protection From Harassment Act 1997.

[49] *Teggart v TeleTech UK Ltd* (n 48) [17(a)].

[50] See n 40-44.

[51] *Pay v United Kingdom* (n 37).

[52] Mantoulavou (n 16).

[53] Hugh Collins, *Justice in Dismissal* (Clarendon Press 1993).

[54] Collins (n 28).

The ACAS Code of Practice on Disciplinary and Grievance Procedures[55] defines gross misconduct as acts which 'are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence'.[56] There is no statutory definition of gross misconduct, and whilst ACAS gives examples of violence, theft, fraud and gross negligence,[57] employers can choose what constitutes gross misconduct within their organisation. This permits employers wide discretion and therefore they can set the benchmark for what they classify as 'gross misconduct' very low in the context of social media because there is no legal guidance yet.[58] Baker argues the RORR test grants this discretion, because the courts feel obliged to uphold dismissals due to the insinuation that a tribunal could believe a dismissal to be unfair but should at the same time find it to be reasonable and fair due to a 'hypothetical "employer reasonableness"' that has yet to be defined.[59] Further analysis of the RORR test will be conducted in the following subsection.

It is clear why employers want to avoid inappropriate use of company social media, since the company is liable for it.[60] However, it is more complicated when considering material posted to an employee's personal account.[61] If an employer has a social media policy, the most common ways employees may breach it are posting unlawful material, posting offensive or inappropriate material about work, or posting inappropriate or offensive material unrelated to work.[62] This list of behaviour constituting misconduct is vague, which explains how employers are able to receive such wide discretionary power from the courts because the employer could argue many things to be 'inappropriate material unrelated to work' and, therefore, justify dismissal.

If an employer wishes to dismiss an employee for gross misconduct, the requirements of the *British Homes Stores Ltd v Burchell* test must be met.[63] This test renders a dismissal unfair under Section 98 ERA unless the employer can show they genuinely believed the employee was guilty of the alleged misconduct, they had genuine

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[55] ACAS, 'ACAS Code on Disciplinary and Grievance Procedures' (March 2015), accessible at < https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html> (last accessed 10 February 2022) (ACAS Code). The code is issued under S199 Trade Union and Labour Relations (Consolidation) Act 1992 and came into effect by order of the Secretary of State in March 2015, replacing the previous Code from 2009.

[56] Ibid section 23.

[57] Ibid section 24.

[58] This will be elaborated on in the subsequent section when discussing *Game Retail Ltd v Laws* [2014] UKEAT/0188/14.

[59] Aaron Baker, 'The "range of reasonable responses" test: a poor substitution for the statutory language' (2021) 50(2) ILJ 226.

[60] *Monir v Wood* [2018] EWHC 3525 (QB).

[61] Michael O'Doherty, 'Social media posts as grounds for dismissal' (*Michael O'Doherty BL*, 14 July 2021) < https://michaelodohertybl.com/social-media-posts-as-grounds-for-dismissal/> accessed 16 November 2021.

[62] Ibid.

[63] [1978] ICR 303.

grounds to suspect the employee was guilty, and a reasonable investigation was carried out before making a final decision.[64] This test was examined in *Reilly v Sandwell Metropolitan Borough Council,*[65] where Lady Hale questioned whether a dismissal can be fair if the employee's conduct does not breach their employment contract, and whether *Burchell* remains good law.[66] No common law change came as a result, which demonstrates the lack of judicial action against unsatisfactory law in unfair dismissal that has prevented progression past the RORR test in an era where the test is no longer fit for purpose.[67] This judicial resistance will be returned to in section four of this paper.[68]

If the law were to change in line with Lady Hale's comments and allow only breaches of contract as reasons for dismissal, employers would have to include the terms of their social media policy in their employees' contracts in order to rely on them. While this approach would more adequately represent the intentions of unfair dismissal law to '[protect] autonomy and dignity against the potential abuse of bureaucratic power',[69] it would still allow employers to set a low benchmark of what constitutes gross misconduct within their organisation.[70]

D. The Current Judicial Approach

Employment Tribunals will not consider the employee's guilt in unfair dismissal claims.[71] Under Section 98(4) ERA, the crucial question to be asked is whether the employer acted reasonably in treating the reason as sufficient for dismissing the employee. The RORR test in *Iceland Frozen Foods*[72] elaborates on this – the employer must respond in a way a reasonable employer would,[73] creating a 'band of fairness' which recognises that one employer may dismiss where another would not but both courses of action are reasonable.[74] Mummery LJ in *Foley v Post Office*[75] instructed employment tribunals to compare employers' actions to 'the hypothetical reasonable employer', which is unhelpful because this standard is vague and undefined. This has resulted in tribunals applying a standard of reasonableness which is 'below their own absolute floor of reasonableness' because it is assumed that employers are experts in acceptable conduct whilst judges are not, and therefore any disciplinary action short of indefensible must be reasonable.[76] This grants too much deference to the employer to decide what constitutes reasonable action.

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[64] Ibid 304, section D.

[65] [2018] UKSC 16.

[66] Ibid [32].

[67] Baker (n 60).

[68] See section four n 209-213.

[69] Collins (n 15).

[70] Baker (n 60); O'Doherty (n 62).

[71] *British Home Stores v. Burchell* [1978] IRLR 379, 380 (Arnold J).

[72] *Iceland Frozen Foods v Jones* (n 13).

[73] Ibid 442.

[74] Ibid.

[75] [2000] ICR 1283.

[76] Baker (n 60).

The leading case of dismissal related to social media is *Game Retail Ltd v Laws*.[77] The Employment Tribunal held an employee, L, was unfairly dismissed for posts made to his personal Twitter account because the employer did not have a policy detailing how inappropriate social media activity could result in dismissal. The Employment Appeals Tribunal (EAT) disagreed, stating the Tribunal had substituted its own views for those of the employer.[78]

This demonstrates another problem with the RORR test. The condition that a tribunal must not substitute their views for that of the employer[79] has permitted higher courts with harsher views to overturn decisions they disagree with by accusing the lower court of a 'substitution mindset'.[80] This has permitted the bar for employers' conduct to be set extremely low, since whenever a lower court renders a dismissal unfair, the higher courts can disagree and overturn it.[81] The EAT here is a perfect example. It weighed L's freedom of expression against his employer's desire to avoid reputational damage and found fair dismissal. There was little actual reputational damage caused, since the Twitter account had no visible link to the employer,[82] and L had deleted it when the employer identified an issue.[83] However, the EAT conducted little analysis of whether the actual harm justified the dismissal, instead deferring to the employer's view.[84] This reflects how '[t]he standard of fairness has (…) become reflective of the lowest common denominator of current employer practice, rather than a detailed analysis of the legitimacy of the employer's reason to dismiss'[85] because if tribunals made an assessment of fairness based on the desired standard of employee treatment, higher courts would reverse the decision due to a 'substitution mindset'.[86]

The EAT in *Game Retail* declined to set guidance for social media cases, instead reinforcing that the RORR test was to be applied in all unfair dismissal cases.[87] The criticisms the EAT made of the ET show how tribunals are expected to accept employers' decisions as reasonable and exemplifies why it is important to provide guidance about where social media use constitutes misconduct to avoid employers being able to justify unnecessary interference with an employee's privacy. How to provide such guidance will be discussed in section four of this paper.[88]

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[77] [2014] UKEAT/0188/14.

[78] Ibid [47].

[79] See n 74.

[80] Baker (n 60); the term 'substitution mindset' was coined by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 [43].

[81] Examples of where higher courts have overturned a lower court decision on the substitution mindset principle include *GM Packaging (UK) Limited v Haslem* UKEAT/0259/13; *London Sovereign Ltd v Gallon* UKEAT/0333/15/LA; *Leeds Teaching Hospital NHS Trust v Blake* UKEAT/0430/14/BA.

[82] *Game Retail Ltd v Laws* (n 78) [14].

[83] Ibid [9].

[84] Collins (n 15).

[85] Ibid.

[86] Ibid.

[87] *Game Retail Ltd v Laws* (n 78) [52].

[88] See section four n 169 onwards.

Aside from *Game Retail*, there are a few other important cases concerning dismissal for social media use. One such case is *Omooba v Michael Garret Associates Ltd (t/a Global Artists)*,[89] wherein an actress was removed from a production due to the public discovering historic homophobic comments made on her Twitter account. This case is seemingly the first instance where the primary justification for dismissal was backlash from social media users[90] who opposed her employment.[91] The case is interesting because it introduced a third variable into the courts' consideration, public opinion, which may affect how an employee's claim is viewed if there is significant online response to their post.[92] Consequently, given the potential implications affording weight to the opinions of general users of social media could have in tipping the balance even further in the employer's favour, the case of *Omooba* will benefit from a separate and more in-depth discussion as part of the analysis conducted in section three of this paper.[93]

The final noteworthy cases are *Crisp v Apple Retail (UK) Ltd*[94] and *Preece v JD Wetherspoons plc*,[95] where employees were dismissed for posting derogatory comments on Facebook about the employer's products and customers respectively. Both cases attempted to rely on interference with Article 10 to render the dismissals unfair. Ultimately, both dismissals were upheld and justified under Article 10(2) because of the risk of damage to the employer's reputation. These cases are indicative of the narrow approach taken by the court to human rights in cases of social media use, as neither claimant had posted to a particularly large audience, yet the employer's reputational interest justified dismissal.

E. Conclusion

Overall, the current balance between employees' rights to privacy and employers' rights to dismiss for social media misconduct is heavily weighted in favour of the employer. The RORR test permits wide discretion for employers to decide what constitutes gross misconduct, since tribunals are encouraged to apply the standard of the harshest employer to avoid the risk of a higher court overturning the decision due to a 'substitution mindset'.[96] The implication of the current balance is that employees are being denied their Convention rights in cases where there is merely a potential risk to an employer's business,[97] which is unacceptable due to the important role of

[89] ET Case No. 2202946/19.

[90] Ibid [106].

[91] O'Doherty (n 62).

[92] This will be returned to in section three, subsection C, see n.124-144.

[93] See section three n 127.

[94] ET Case No.1500258/11.

[95] ET Case No.2104806/10.

[96] Collins (n 15).

[97] See *Creighton v Together Housing Association Ltd* (n 39); *Crisp v Apple Retail (UK) Ltd* (n 95); *Preece v JD Wetherspoon plc* (n 96).

ECHR rights in preserving an employee's dignity and autonomy,[98] principles which should, in theory, also be protected by unfair dismissal.[99]

3. Is the law unsatisfactory in the current social climate? An analysis of the current balance between the right to privacy and grounds of dismissal for social media activity.

Having established in the previous section that the balance between an employee's right to privacy and an employer's right to dismiss for social media misconduct heavily favours employers, this paper will move to critically analyse this balance in the context of the current social climate. A social climate is defined as how the population feels about certain subjects given the economic, political, and social state of society at the given time.[100] To conduct this assessment, the section will begin by discussing the concept of 'privacy paradox', focusing on defining the term and highlighting how its effects are becoming an overarching issue for the law. Using this assessment as background for analysis, the paper will move to analyse three particular issues: working from home as a result of COVID-19, 'trial by social media'[101] and whether online backlash should justify dismissal, and the role played by the disagreement about the meaning and purpose of 'privacy' in preventing employees from enjoying their Article 8 right to privacy.[102] Finally, the section will conclude that the balance established previously in offline cases is inadequate in the current social climate given that it does not provide enough guidance about how privacy should protect employees' online activity.

A. The Privacy Paradox

A 'privacy paradox' has been identified by several legal and sociological scholars[103] to manifest in situations where employees are willing to share significant personal information online, knowing it is accessible to employers, but believe employers

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[98] Mantouvalou (n 16).

[99] Collins (n 54).

[100] 'What is Social Climate?' (*Reference*, 27 March 2020) < https://www.reference.com/world-view/social-climate-a1518d95f5628dcd> accessed 30 October 2022.

[101] Bethan Rogers, 'The Dangers of Trial by Social Media' (*Law Society Gazette*, 10 February 2022) <https://www.lawgazette.co.uk/commentary-and-opinion/the-dangers-of-trial-by-social-media/5111441.article> accessed 22 February 2022.

[102] Many academics have grappled with the idea of privacy generally. Examples include Daniel J. Solove, *Understanding Privacy* (Harvard University Press, 2008); Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193; Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 MLR 806; Joseph Raz, 'Free Expression and Personal Identification' (1991) 11(3) OJLS 303.

[103] Nadine Barrett-Maitland & Jenice Lynch, 'Social Media, Ethics and the Privacy Paradox' in Christos Kallionatis and Carlos Travieso-Gonzales (eds), *Security and privacy from a legal, ethical, and technical perspective* (IntechOpen 2019); Monica Taddicken, 'The 'Privacy Paradox' in the Social Web: The Impact of Privacy Concerns, Individual Characteristics, and the Perceived Social Relevance on Different Forms of Self-Disclosure' (2014) 19 Journal of Computer-Mediated Communication 248; Sanchez Abril, Levin & Del Riego (n 6).

should not view it because 'work life and private life should be generally segregated and (…) actions in one domain should not affect the other.'[104] This belief creates issues for the legal framework because employees expect stricter boundaries than employers are legally required to set.[105] Social media users read, share, and react to what they see online, and yet it is contested what employers should see or react to.

The current route for dealing with this situation is through employers enforcing their own social media policies. However, according to Sanchez Abril, Levin and Del Rigo, only 22% of employees in organisations with a social media policy pay attention to it,[106] this arguably permits employers to set restrictions as stringently as they wish. This is inadequate for dealing with the paradox given that the incongruence between where employees believe the boundaries are, and where they actually are, remains.

B. Working from Home

On March 23rd, 2020, the UK entered a national lockdown as a result of COVID-19,[107] which necessitated that anyone whose job did not require their presence in the workplace should work from home. As a result, 46.6% of the workforce reported doing at least some work from home during April 2020, with 80% citing the pandemic as the reason why.[108] A further nine million were also 'furloughed' for at least one 3-week period, meaning they were employed but not actively working.[109] The result of the working from home mandate was that employees had more time to spend doing things other than working, including participating on social media, due to reduced hours and avoiding the workplace commute.[110] Axios found social media use in the USA increased from 20% to 25% of all time users spent on their phones during the

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[104] Sanchez Abril, Levin & Del Riego (n 6).

[105] Employers can monitor their employees' social media as long as it is justified under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.
on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, Article 6(1)(f).

[106] Sanchez Abril, Levin & Del Riego (n 6).

[107] Boris Johnson, 'Prime Minister's Statement on Coronavirus (COVID-19)' (23 March 2020) available at < https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020> accessed 11 March 2022.

[108] Office for National Statistics, 'Coronavirus and homeworking in the UK: April 2020' (8 July 2020) available at < https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/coronavirusandhomeworkingintheuk/april2020> accessed 11 March 2022.

[109] Daniel Tomlinson, 'The Government is not paying nine million people's wages' (*Resolution Foundation*, 1 August 2020) < https://www.resolutionfoundation.org/publications/the-government-is-not-paying-nine-million-peoples-wages/#:~:text=Although%20it%20is%20true%20to%20say%20that%20in,figure%20does%20not%20reflect%20what%E2%80%99s%20happening%20right%20now.> accessed 11 March 2022.

[110] Helen Lyons, ''An Entertainment Escape': Pandemic causes spike in social media usage' *The Brussels Times* (1 July 2021) < https://www.brusselstimes.com/news/business/175504/an-entertainment-escape-pandemic-causes-spike-in-social-media-usage> accessed 8 March 2022.

USA's national lockdown.[111] This shows a correlation between the introduction of lockdowns and increased social media use.

As these changes occurred relatively recently, there have not yet been studies about whether dismissals for social media misconduct have increased as a result. However, because more employees have been working from home, employers have increased the monitoring of their activities, which in some cases included monitoring social media use.[112] Increased monitoring may be due to employees being away from physical supervision, which may concern employers due to the potential for employees to spend more time on social media during working hours.
According to a Trades Union Congress study, 15% of employees reported increased monitoring between March and November 2020, and 10% were aware their off-duty social media activity was being monitored.[113] Furthermore, 47% of companies implemented monitoring since the pandemic began, and a third of managers reported they would willingly overstep legal boundaries when it came to monitoring employees.[114] This is clearly disconnected from the employees' expectation that their off-duty social media use would be private from their employer, further exacerbating the 'privacy paradox' because employers are implementing more intrusive policies due to the spatial separation from their employees while employees' expectations of privacy remain unchanged.

These changes are significant in demonstrating why the current favour of employers' powers of dismissal over employees' privacy is inadequate. The relationship of domination, where employers wield significant power over their employees,[115] is problematic in a social media context because employers can unduly influence their employees' choice to post something by granting them little privacy through routine monitoring policies, thus restricting their freedom of speech. The ECHR describes the freedoms within it as 'fundamental' and 'the foundation of justice and peace',[116] so allowing employers to limit employees' access to those rights seems contrary to the objective of protection. It will be elaborated in subsequent discussion why the courts have been unwilling to prevent employers doing this.[117]

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[111] Sara Fischer, 'Social media use spikes during pandemic' (*Axios*, 24 April 2020) <https://www.axios.com/social-media-overuse-spikes-in-coronavirus-pandemic-764b384d-a0ee-4787-bd19-7e7297f6d6ec.html?msclkid=19a7ce15af6b11ec860ecedb74bb5173> accessed 29 March 2022.

[112] Trades Union Congress, 'Technology managing people: The worker experience' (2020) < https://www.tuc.org.uk/sites/default/files/2020-11/Technology_Managing_People_Report_2020_AW_Optimised.pdf> accessed 17 March 2022.

[113] Ibid.

[114] Sonia Navarrete, 'A third of managers admit to willingly overstepping legal boundaries when using monitoring tools' (*GetApp*, 31 March 2021) < https://www.getapp.co.uk/blog/1973/managers-admit-overstepping-legal-boundaries-with-monitoring-tools> accessed 17 March 2022.

[115] Mantouvalou (n 16).

[116] European Convention on Human Rights (n 3).

[117] See n 151-163.

The problem of employers being permitted to set the boundary of what activity is considered reasonable due to courts deferring to employers' views[118] is particularly noteworthy in a novel situation, such as widespread remote working. As there is no established level of what constitutes 'reasonable' monitoring whilst employees work from home, employers enjoy the freedom to set the bar extremely low and subsequently be allowed by the courts to carry out invasive monitoring of employees' social media. Constant social media monitoring must be justified,[119] and the work from home mandate has provided employers an excuse for routine monitoring, namely ensuring paid working time is not misused whilst offices are closed. Routine monitoring policies mean employers are more likely to challenge employees' social media activity, thus increasing the chance of dismissal for online misconduct. This is problematic for the 'privacy paradox' because there are no certain or agreed boundaries between employees and employers about where employer monitoring stops being justified and begins to be overly intrusive. Therefore, employers would likely be given the power to determine this through their own policies by the courts, furthering the disconnect between employees' expectations and employers' actions.[120] This solidifies the current balance to favour employers and does not provide enough protection to the privacy rights of employees[121] where invasive routine monitoring is becoming more popular as a result of working from home.[122]

C. Social Media Backlash

Increased use of social media[123] has created the phenomenon of 'social media backlash', whereby social media users express their outrage at the actions of a particular person or organisation.[124] This creates a challenge for the law, as the general public is increasingly likely to protest against things they see online and openly voice their opinions, yet employees continue to expect employers not to react to their posts, even as working from home has increased use of social media.[125] This section will examine whether social media backlash against employees poses enough reputational risk to employers to justify dismissal. By conducting this analysis, the paper aims to assess whether permitting dismissals interferes too much with the employee's privacy and freedom of expression which, ultimately, could have a negative impact on people's willingness to post on social media because of the remote chance they may experience backlash and lose their job.

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[118] See section two n 6o and n 80-81.

[119] General Data Protection Regulations, Article 6(1)(f).

[120] See section two n 60.

[121] See section two subsection A, n 35-44.

[122] See n 114-115.

[123] There are 4.62 billion users of social media around the world as of January 20222, an increase of 424 million since January 2021 and equal to 58.4% of the world's population ('Global social media stats' (*Datareportal*, 2022) < https://datareportal.com/social-media-users?msclkid=08c1a3c0b0d311ecbc0c0abacbf90929> accessed 31 March 2022.

[124] John Foley, 'Beware of Social Media Backlash' (*Huffpost*, 25 August 2015) < https://www.huffpost.com/entry/beware-of-social-media-ba_b_8039358> accessed 30 October 2022.

[125] Lyons (n 111).

Omooba demonstrates how cases of dismissal resulting from social media backlash have been treated thus far.[126] It could be recalled that, in this case, threats from social media users of boycotting and disrupting the production the claimant was involved in were held to justify dismissal.[127] One problem with this approach is whether these threats would have realistically materialised.[128] Is it genuinely likely that every person threatening a boycott was intending to buy a ticket before the claimant's tweets resurfaced? Or was this an instance of 'mob mentality',[129] where users with no connection to the production felt the need to band together and hold her accountable?[130] If the latter, the claimant was arguably dismissed over threats which were unlikely to materialise. However, this is problematic because it means the dismissal was fair despite minimal damage to the employer, contrary to the definition of gross misconduct which refers to acts that are 'so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence'.[131] Thus, where an employee has exercised their right to freedom of speech in a way that has not caused serious consequences for their employer, a dismissal should not be considered justifiable.

Often when posts go viral it is in a 'social warming' effect where a post escalates quickly and reaches far wider than the poster intended.[132] Justine Sacco went from an ordinary Twitter user with 170 followers to #1 trending in a matter of hours, losing her job at IAC for tweeting 'Going to Africa. Hope I don't get AIDS. Just kidding, I'm white!'[133] As a result, permitting dismissals for online backlash stemming from unintended virality could indirectly impede upon an employee's freedom of speech and privacy by discouraging them from expressing opinions on their personal profiles due to concerns about going viral and losing their job. It can be argued unintentional virality is not a necessary circumstance because the effects of backlash usually only last a few days. Sacco has stayed 'mostly out of the spotlight' since her experience, and anyone who did not use Twitter in 2013 would likely be unaware of her

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[126] *Omooba v Michael Garret Associates Ltd (t/a Global Artists)* (n 90).

[127] Ibid [106].

[128] O'Doherty (n 62).

[129] Mob mentality, also known as herd mentality, describes how people are influenced to adopt certain behaviours by their peers (Dan Brennan, 'What is Mob Mentality?' (*WebMD*, 25 October 2021) < https://www.webmd.com/mental-health/what-is-a-mob-mentality> accessed 11 March 2022.

[130] Joan Nugent, 'What the Seyi Omooba case teaches the world about homophobia, social media and the arts' (*Medium*, 19 February 2021) <https://joannugent.medium.com/what-the-seyi-omooba-case-teaches-the-world-about-homophobia-social-media-and-the-arts-7c36d7185a9f> accessed 13 March 2022.

[131] ACAS Code (n 56), section 23.

[132] Charles Arthur, *Social Warming: The Dangerous and Polarising Effects of Social Media* (Oneworld Publications 2021).

[133] Ali Vingiano, 'This is how a woman's offence tweet became the world's top story' (*Buzzfeed*, 22 December 2013) <https://www.buzzfeednews.com/article/alisonvingiano/this-is-how-a-womans-offensive-tweet-became-the-worlds-top-s> accessed 13 March 2021; Jon Ronson, *So You've Been Publicly Shamed* (Riverhead Books 2015).

comment.[134] In her case, backlash resulted from the racist undertones of her tweet, so it is understandable why she would be dismissed.[135] However, where posts do not exhibit hate speech[136] it could be unfair to permit dismissals when backlash will not have significant lasting effects, especially since Article 10 is supposed to protect speech which is intended to 'offend, shock or disturb'.[137]

Online backlash could justify dismissal under Article 10(2) by sufficiently damaging an employer's reputation. The courts in *Crisp*[138] and *Preece*[139] found reputational risk was enough to justify dismissal despite no evidence of actual harm, likely as a means to avoid higher courts overturning the decision on a 'substitution mindset' basis.[140] This shows the difficulty faced by courts in applying the RORR test to social media cases, because the uncertainty around how realistically damaging online comments are leads to the conclusion that dismissals are reasonable, even where dismissal is harsh in comparison to the actual harm caused.

Social media backlash should be considered in unfair dismissal claims because it can exacerbate the effects of a post, particularly where the employer is easily linked to the poster.[141] However, this consideration should be limited in the interests of preserving free speech. Thus, backlash should only be justifiable under Article 10(2)[142] where there is evidence of actual reputational damage to the employer in to avoid the balance favouring employers' reputational concerns over employees' human rights. How the law can ensure this will be explored in section four.[143]

D. Misunderstanding Privacy

It has been established that in two particular contexts, namely working from home and instances of social media backlash, employers can currently restrict the rights of privacy and freedom of expression of their employees. This section aims to analyse why judges have been reluctant to intervene or provide guidance about how, when,

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[134] Jennifer Roback, 'The 2013 Tweet: Who is Justine Sacco and what did she say?' *The Sun* (4 October 2021) < https://www.the-sun.com/news/3790849/who-justine-sacco-what-say-tweet/ > accessed 4 April 2022.

[135] Many employers have a zero-tolerance policy for racism, which would justify dismissal on the basis of a breach of that policy.

[136] Some offensive speech can be justifiably interfered with under Article 10 as hate speech if it concerns a protected characteristic (disability, sexuality, race, religion, or transgender identity) and is intended to be threatening, abusive, or cause harm, alarm, or distress. Hate speech is protected under a variety of statutes including the Public Order Act 1986, the Criminal Justice and Public Order Act 1994, the Racial and Religious Hatred Act 2009, the Criminal Justice and Immigration Act 2008, s37 Malicious Communications Act 1988 and s127 Communications Act 2003.

[137] *Handyside v United Kindgom* [1976] ECHR 5 [49].

[138] *Crisp v Apple Retail (UK) Ltd* (n 95).

[139] *Preece v JD Wetherspoons plc* (n 96).

[140] Brodtkorb (n 27).

[141] Seadon (n 9).

[142] For examples of where interference is justified see n 47.

[143] See section four n 176-177 and 197-200.

and why employers should be able to restrict employees' privacy and freedom of expression on social media.

Studies have shown employees generally think it unethical for employers to access certain areas of their lives.[144] One study found 75% of respondents thought employers accessing or monitoring their social media to be 'somewhat' or 'very inappropriate'.[145] It should be acknowledged that, by only surveying American students, the sample in this study was limited and may not be representative of the entire workforce. However, the fact that those from the 'millennial' generation, who have grown up sharing much of their lives on social networks, are uncomfortable with the employers surveying their social media exemplifies the disconnect between employees' desire for privacy and the protection granted in reality. One commentator opined that modern teens are 'exhibitionists' who do not appreciate the value of privacy,[146] however the aforementioned study and a second study found that actually young people are very concerned about their privacy online, so the sweeping statement that modern teens do not appreciate privacy is incorrect.[147] It may be that growing up with the internet has made young people savvier about the potential consequences of their online activity and, therefore, increased their desire to keep such activity private from employers. This expectation of privacy is misguided, though, as currently there is nothing to prevent employers from monitoring social media in ways the study participants described as an invasion of privacy, such as discovering an employee lied about being sick because of social media posts,[148] which constituted fair dismissal in *Gill v SAS Ground Services UK*.[149]

Educating the workforce about what they should reasonably expect will be kept private online is challenging, because of debate over what privacy should protect. The court in *Teggart*[150] took the view that comments made in the public domain cannot be entitled to privacy, regardless of how small of a circle they are intended to be seen by.[151] This view, however, appears to contradict the statement in the Information Commissioner's Office Employment Practices Code that 'workers have legitimate

[144] Jeffrey M. Stanton, 'Traditional and Electronic Monitoring from an Organizational justice Perspective' (2000) 15 J. Bus. & Psychol. 129.

[145] Sanchez, Levin & Del Riego (n 6).

[146] Robert J. Samuelson, 'A Web of exhibitionists' *Washington Post* (20 September 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/19/AR2006091901439.html> accessed 5 April 2022.

[147] Raynes-Goldie, 'Aliases, creeping, and wall cleaning: Understanding privacy in the age of Facebook' (2010) 15(1) First Monday <https://doi.org/10.5210/fm.v15i1.2775> accessed 7 January 2022.

[148] Sanchez Abril, Levin & Del Riego (n 6).

[149] *Gill v SAS Ground Services UK Ltd* ET Case No 2705021/09.

[150] *Teggart v TeleTech UK* (n 48).

[151] Ibid [6(17(a))].

expectations that they can keep their personal lives private'.[152] Furthermore, if *Teggart* is taken to mean that something posted online cannot be regarded as 'private', this would also seemingly contradict the statement in *Pay v United Kingdom* that the right to privacy involves the right to make social connections.[153] Social media is a significant part of how people form social connections in the modern age, particularly as a result of the pandemic and reduced in-person socialising,[154] so it seems controversial to exclude social media use from the protection intended by the ECtHR.

These conflicting statements make it difficult for an employee to ascertain, or be educated on, when their employer is invading their online privacy. The lack of agreed boundaries of privacy protection on social media is creating a grey area which allows the 'privacy paradox' to thrive, and where judges arguably do not know where to draw the line between appropriate monitoring and privacy invasion. The RORR test therefore grants employers very wide discretion,[155] leading to a criteria that is narrow and, as Mantouvalou argues, 'remarkably unsuccessful in capturing the importance of privacy to the individual' in deciding what constitutes unfair dismissal.[156] The concern for privacy shown by the participants in the aforementioned studies supports this argument.[157]

Judges also struggle to balance freedom of speech and privacy with the risk of damage to an employer's reputation, with reputational risk becoming a trump card. The court has stated employees should 'exercise [freedom of expression] in a way […] necessary [to protect] the reputation and rights of others',[158] making decisions that indicate any risk of damage to an employer's reputation capable of defeating a claim of unfair dismissal.[159] Wragg argued this is 'deeply problematic (…) it is akin to finding that the strength of an employee's right to speak is linked to some independent assessment of whether it was prudent to exercise that right in the circumstances.'[160] Allowing employers to mitigate freedom of speech by arguing a risk of reputational damage undermines the very meaning of freedom of speech, which is freedom to impart opinions.[161] Consequently, this shows why the lack of understanding about what activity is considered 'private' is a key problem to address in order to restrike a

[152] Information Commissioner's Office Employment Practices Code (2005) Section 3.1 < https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf> accessed 15 February 2022.

[153] *Pay v United Kingdom* (n 37) 24.

[154] Lyons (n 111).

[155] The range of reasonable responses test derives from *Iceland Frozen Foods v Jones* (n 13).

[156] Mantouvalou (n 16).

[157] See Sanchez Abril, Levin & Del Riego (n 6); Raynes-Goldie (n 148).

[158] Teggart, *v TeleTech UK* (n 48) [6(17(c))].

[159] *Crisp v Apple Retail (UK) Ltd* (n 95); *Preece v JD Wetherspoons plc* (n 96).

[160] Paul Wragg, 'Free speech rights at work: resolving the differences between practice and liberal principle' (2015) 44(1) I.L.J. 1.

[161] European Convention on Human Rights (n 3), Article 10(1).

balance that adequately protects employees' freedom of expression online. How this can be resolved will be further discussed in the next section.[162]

E. Conclusion

In conclusion, the current favour shown to employers' rights to dismiss over employees' rights to privacy and freedom of expression in the context of social media is unsatisfactory in the current social climate. It has been shown how pressing the problem of the 'privacy paradox' is, as employees expect their employer should not view, react, or take action against social media posts, but this is not the case. Working from home has allowed employers to implement intrusive social media monitoring policies, providing the tool to justify almost any dismissal for social media misconduct. Social media backlash allows the public to comment on a person's online activity, however employees still expect their employer not to do this. The court should assess actual reputational damage caused by backlash against an employee in order to prevent upholding dismissals which unnecessarily restrict employees' freedom of speech. Another hinderance to achieving a satisfactory balance is the lack of understanding about what 'privacy' protects, resulting in confusion evidenced by the 'privacy paradox'.[163] The courts do not appear to know what protection to give an employee's human rights in online activity so give very little, deferring mostly to the opinions of the employer.[164] Thus, employers are given wide-ranging powers of dismissal whilst employees arguably have their rights to privacy and freedom of expression shrunk. Consequently, it becomes vital to discuss how this balance could be levelled to prevent employers from having almost unrestricted powers of dismissal that interfere unnecessarily with human rights.

4. How should the law change? Suggestions of reforms to re-strike the balance between an employee's right to privacy and an employer's power to dismiss for misconduct occurring on social media.

Previous sections have identified and analysed the current law, demonstrating how the balance between an employee's right to privacy and an employer's right to dismiss for gross misconduct occurring on social media is heavily in favour of employers.[165] Moreover, it has been explained why this approach could be considered unsatisfactory in the 'increasingly invasive social environment' experienced by employees in modern work environments.[166] Consequently, in light of these arguments, this section will propose reforms aimed at increasing the protection of employees' privacy and addressing the specific problems identified in section three. As this discussion concerns the intersection of two areas of law – employment law in regulating employee-employer relationships, and media law in examining how social

[162] See section four n 176-177 and 197-200.

[163] See n 104-106.

[164] Examples of cases where this happened include *Crisp v Apple Retail (UK) Ltd* (n 95); *Preece v JD Wetherspoons plc* (n 96); and *Teggart, v TeleTech UK* (n 48).

[165] See section two n 97-100.

[166] *Douglas v Hello! (No 1)* [2001] QB 967 [111] (Sedley LJ).

media fits into the current legal framework - the two reforms advanced as part of this section will correspond to each area respectively. The reforms to be considered are the introduction of a social-media specific ACAS Code, and a new common law test for establishing where online posts are entitled to protection under Article 8. Finally, it will be concluded that, whilst each reform has drawbacks, in unity they could tackle the problems identified previously and find cohesion between these spheres of law. It is acknowledged that this would require a substantial upheaval of the law, and parallel reforms may be too radical considering judicial resistance to change in this area.[167]

A. A New ACAS Code

The first reform draws from employment law and proposes either adding social media-specific guidance into the ACAS Code on Disciplinary and Grievance Procedures,[168] or devising a new social media Code. ACAS could require that employers have a social media policy, recommend what to include in the policy, give examples of where dismissal for social media activity is appropriate, and require annual employee training on the policy. This would prevent employers setting a low benchmark for social media misconduct and tackle the issue of employees not understanding what privacy rights they are entitled to,[169] resolving the 'privacy paradox' by increasing awareness of what employees can keep private from their employer.[170]

Multiple authors have suggested what to include in employers' social media policies;[171] if these suggestions were codified by ACAS, employers would likely implement them to avoid the 25% increase in award in successful claims where there is non-compliance with the Code.[172] Examples of suggested clauses include breaches and disciplinary consequences,[173] and making sure employers consider the nature, seriousness, and likely consequences of misconduct before taking disciplinary action.[174]

This proposal could codify the privacy rights employees are entitled to, which would help resolve the 'privacy paradox' because employees are made aware of what of their

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[167] The court expressed this reluctance when refusing to provide social media-specific guidance in *Game Retail Ltd v Laws* (n 78) [52].

[168] ACAS Code (n 56).

[169] See section three n 104-106 and n 145-149.

[170] See section three n 106.

[171] Examples include Kathryn Dooks and Elizabeth Kirk, 'Ownership and use of social media by employees in the UK' in *Employment and Employee Benefits Multi-Jurisdictional Guide 2013/14* (Practical Law Company 2013); Delaney (n 45); Dominic McGoldrick, "The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13(1) HRLR 125.

[172] Foreword to the ACAS Code of Practice on Disciplinary and Grievance Procedures, (March 2015) <https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html> accessed 10 February 2022.

[173] Kathryn Dooks and Elizabeth Kirk, 'Ownership and use of social media by employees in the UK' in *Employment and Employee Benefits Multi-Jurisdictional Guide 2013/14* (Practical Law Company 2013)

[174] 'Social Media and the Workplace – 1' (2012) 957 IDS Employment Law Brief 13.

social media their employer can view.[175] It would also prevent reputational risk being a trump card by laying out criteria the employer should consider when examining the damage an employee's post caused.[176] This could resolve the problem of courts permitting employers wide discretion under the RORR test[177] because they would be given clear criteria to consider for determining the reasonableness of an employer's actions, some examples being whether the employer could be identified from the comment, and how many people saw the post.[178] This links to the previous argument that employers should only consider the actual reputational damage caused by a post when social media backlash occurs.[179] Considering a list of factors such as how many saw the post, whether the employer was easily identifiable from the post, and whether any customers or colleagues complained about the post[180] will help offset the problem that backlash is often short-lived, empty words,[181] because significant connection to the employer or evidence of complaints would be required to prove damage to the employer's reputation.

Notwithstanding its potential merits, this approach presents certain drawbacks. Firstly, the ACAS Code of Practice on Disciplinary and Grievance Procedures intended to increase employee-employer communication and reduce the number of tribunal claims. However, in practice, the ACAS Code 'formalis[ed] disputes at an early stage, leaving little or no room for informal resolution'.[182] Consequently, a new social media Code runs the risk of further reducing the chance to resolve investigations internally, potentially resulting in more dismissals and more claims of unfair dismissal.

Secondly, as ACAS Codes are not legally enforceable, an employee would be unable to bring an unfair dismissal claim on the basis that their employer's policies did not comply with the Code. 'Employers (…) can shape expectations of privacy through contractual provisions and organisational policies',[183] so to provide legislative guidance only through a non-enforceable Code may not be enough because '[l]aws that clearly interfere with rights to privacy and freedom of expression (…) need to be accessible and foreseeable so that individuals can know and understand, or at least get advice on, the risks they run'.[184] ACAS Codes are easily accessible online, and are

[175] See section three, n 104-106.

[176] 'Social media and the workplace – 1' (n 175).

[177] Baker (n 60); O'Doherty (n 62).

[178] 'Social media and the workplace – 1' (n 175).

[179] See section three n 143-144.

[180] 'Social media and the workplace -1' (n 175).

[181] See section three n 129-132 and n 135.

[182] 'ACAS Code of Practice on Disciplinary and Grievance Procedures - Q&A' (2009) 871 IDS Employment Law Brief 14.

[183] Graeme Lockwood & Vandana Nath, 'The monitoring of tele-homeworkers in the UK: legal and managerial implications' (2021) 63(4) Int. J.L.M 396.

[184] Dominic McGoldrick, "The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13(1) HRLR 125.

considered in court, for example in *Taylor v Somerfield Stores*[185] where the dismissal was unfair because of an investigation which did not meet the standard of the Code.[186] However, because employees cannot bring a claim for policies that breach an ACAS Code, it is not foreseeable from the Code whether their claim for unfair dismissal due to privacy infringement would be successful. To offset the lack of legal enforceability, the following section will suggest a parallel reform to give enforceable protection to employees' online privacy.

Thirdly, the Code would need to require employee training in conjunction with its policy recommendations to ensure employees understand what of their online activity will be considered private. This education is needed because, as previously discussed, only 22% of employees in an organisation with a social media policy pay attention to the policy,[187] and many employees fall victim to the privacy paradox due to 'fail[ing] to appreciate, or underestimat[ing], the potential ramifications of their online conduct'.[188] As a result, any new social media Code should require employers to run training sessions on their policy at least annually, plus whenever the policy is updated, to ensure employees have ample opportunity to read and understand their employer's expectations of their online conduct. Employer education was proven successful following the #MeToo movement where, after guidance was provided to employers on reducing workplace sexual harassment,[189] 80% of employees felt their employer implemented a clear and accessible policy.[190] This shows providing guidance on how to implement a 'good' policy and educate employees can help employers improve their processes.

B. A New Common Law Test

The second proposal draws from media law and suggests developing a common law test for unfair dismissal concerning social media using the two-stage framework of the misuse of private information test (MOPI).[191] Changing the common law is important because, as Morison J in *Haddon v Van Den Bergh Foods* observed,[192] the RORR test only renders dismissals for perverse reasons unfair.[193] In addition, a change is necessary given the current lack of guidance about what should be considered

[185] ET Case No.S/107487/07.

[186] Ibid [45]-[51].

[187] Sanchez Abril, Levin & Del Riego (n 6).

[188] 'Social media and the workplace – 1' (n 175).

[189] Equality and Human Rights Commission, *Sexual harassment and harassment at work* (Equality and Human Rights Commission 2020) <https://www.pdpjournals.com/docs/99027.pdf> accessed 14 April 2022.

[190] Government Equalities Office, '2020 Sexual Harassment Survey' (*gov.uk*, 2020) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002873/2021-07-12_Sexual_Harassment_Report_FINAL.pdf> accessed 12 April 2022.

[191] The MOPI test was developed in *Campbell v MGN* [2004] UKHL 22.

[192] *Haddon v Van Den Bergh Foods* [1999] ICR 1150.

[193] Ibid [25].

private which, as demonstrated in this paper, pushes courts to accept employers' determinations as to what is a reasonable dismissal for social media activity.[194]

MOPI consists of a threshold test, where the claimant must establish a reasonable expectation of privacy, followed by a balancing test where that expectation is weighed against freedom of expression.[195] Consequently, under this framework, cases of unfair dismissals for social media posts by would be decided by, first, establishing whether the post alleged of misconduct was entitled to a reasonable expectation of privacy and, secondly, by balancing that against the reputational risk to the employer.

Establishing what posts are entitled to privacy will help sharpen the boundary between an individual's personal and public life on social media, preventing users from '[exposing] views and information about themselves that they would withhold in a professional environment' as they do currently.[196] If employees know what activity the law considers private, they can be mindful about posting when they aren't protected by Article 8. Mantouvalou proposed that all activity in an individual's 'private life' (outside the workplace and/or working hours) should carry a presumed expectation of privacy unless it has a real and present impact, or high likelihood of such impact, on the employee's performance or the employer's reputation.[197] However, this could be problematic as a threshold test because the risk of damage to an employer's reputation has often been regarded by the courts as a reasonable justification for dismissal without assessment of the actual harm caused.[198]

Instead, posts should carry an assumed reasonable expectation of privacy unless they directly impact the employee's performance or reveal details of criminal activity, and reputational risk should be considered at the balancing stage. Moreover, this assumption of privacy should be preferred due to its potential to help resolve the 'substitution mindset' problem because judges would not be asking themselves if there is a strong reason for dismissing, but instead whether the employer has shown that they thought they had a strong reason for dismissing.[199]

Social media backlash would be considered at the balancing stage, as it is relevant to assessing reputational damage. One benefit of this approach is that it would prevent an employee from losing their right to privacy if the actual reputational harm caused by backlash is insignificant.[200] Furthermore, this proposal fits with the current ACAS guidance,[201] which states disciplinary action should only be taken for off-duty conduct where it is 'sufficiently serious' and has 'employment implications', which reflects

[194] See section three n 151-155.

[195] *Campbell v MGN* (n 192) [134].

[196] Steven James, 'Social networking sites: Regulating the online 'Wild west' of the Web 2.0' (2008) 19(2) Ent. L.R. 47.

[197] Mantouvalou (n 16).

[198] See n 141.

[199] Sanders (n 19).

[200] *Game Retail Ltd v Laws* (n 78) [14].

[201] ACAS Code (n 56).

why employers should only be able to offset the assumption of privacy where there is strong reason for believing the employee's conduct will harm their business.[202]

Nevertheless, the balancing test in MOPI is considered controversial. It has been argued the courts are not 'balancing', but instead public interest always trumps the reasonable expectation of privacy.[203] However, to avoid an employer's reputational interests becoming a trump card in similar fashion, the balancing stage would also have to ask whether the interference with the employee's privacy pursued a legitimate aim and was strictly necessary in the circumstances.[204] The permissible legitimate aims would be those contained within Article 8(2) given that, as human rights are 'stringent entitlements that have been afforded a distinct position in our legal system',[205] the only justifiable interferences with privacy should be those explicitly prescribed by the ECHR. Activity that affects the employee's performance or harms the employer's business could be legitimate grounds, as dismissal could be in the interests of the economic well-being of the country.[206] Asking if the action was strictly necessary in the circumstances creates a test of proportionality, which reduces the risk of an employee expressing views to a small audience being dismissed for gross misconduct despite it being unlikely the company will be harmed by their 'personal expressions of view'.[207]

One obstacle to implementing this proposal is that a case would have to reach the Court of Appeal or Supreme Court for there to be change, since the Employment Appeals Tribunal made clear in *Game Retail* it would not create social media-specific guidance.[208] This is problematic because even if a case reaches the higher courts, there is resistance to changing unfair dismissal despite identified problems with current approach, such as Lady Hale's questioning of the *Burchell* test in *Reilly*.[209] Many academics have recognised the need to modernise unfair dismissal,[210] but it appears the RORR test is so entrenched that judges do not wish to amend it, with Lindsay J stating 'no court short of the Court of Appeal' could make alterations to it.[211] As a result, the entrenchment of the RORR test will make it difficult to persuade judges to implement common law changes in this area. However, this obstacle may be overcome when focusing on social media specifically since social media's

[202] Sanders (n 19).

[203] Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2016) 7(2) Journal of Media Law 225.

[204] Mantouvalou (n 16).

[205] Ibid.

[206] Ibid.

[207] Chris Bryden and Michael Salter, 'Beware of the web' (2013) 163 NLJ 7569, 9.

[208] *Game Retail Ltd v Laws* (n 78) [52].

[209] *Reilly v Sandwell Metropolitan Borough Council* (n 66) [32].

[210] See for example Sanders (n 19); McGoldrick (n 185); Mantouvalou (n 16).

[211] *Midland Bank plc v Madden* [2000] IRLR 288, 295 (Lindsey J).

development occurred after the RORR test was created and therefore could be distinguished as requiring its own guidance.[212]

C. Finding Cohesion

Whilst each approach has its drawbacks, these reforms in combination could create a coherent body of law. The ACAS Code would invite judges to explore the possibility of social media-specific law, and the common law would explain the privacy employees are entitled to by establishing what criteria must be met in order for a post to pass the threshold test for being considered 'private'. The clarifications provided by the common law on the subject of privacy would allow the Code to focus on giving recommendations for policies and training which would facilitate understanding of the privacy protections in place.

Thus far, employment and media law have been treated as separate spheres, with courts shoehorning social media cases into the RORR test which grants employers too much power to issue dismissals without consideration of how they may interfere with privacy.[213] It is important to find cohesion to create clarity and predictability for employees who believe their right to privacy has been unjustifiably restricted.[214]

The suggestion of parallel reforms is radical, particularly with the judicial resistance to changing unfair dismissal law.[215] To create a more digestible single proposal, the ACAS Code could subsume the threshold test and specify what activities carry an expectation of privacy, so employers know what is part of an employee's private life and cannot be used to justify dismissal. Judges already know how to consider ACAS Codes when making decisions, so specific address of social media within a Code could provide judges with the guidance they did not want to set themselves.[216]

The balancing test, however, would be harder to include and would likely be left to the judges to decide how to weigh the risk to an employer's reputation. This approach is preferrable considering that each case would be highly fact-specific, so providing effective general guidance would be difficult. Therefore, it would be simpler to instruct employers through the ACAS Code on how to create a good social media policy and leave balancing to the judiciary.

Nevertheless, this risks the problems with the RORR test persisting, namely that judges will feel obligated to consider an employer's actions as 'reasonable' even where they believe they were not to reduce the risk of a higher court overturning the decision due to the 'substitution mindset'.[217] While attempting to resolve the problems with

[212] The RORR test derived from *Iceland Frozen Foods v Jones* (n 13) in 1982, whilst the popularisation of modern social media did not occur until the late 1990s and early 2000s.

[213] See section three n 165.

[214] McGoldrick (n 185).

[215] See section two n 67-68 and section four n 209-213.

[216] *Game Retail Ltd v Laws* (n 78) [52].

[217] See section two n 80-81.

the RORR test generally is beyond the scope of this dissertation, it suffices to say that ACAS guidance may become an effective tool in persuading the judiciary to avoid deferring to employers' views, given the fact that it would provide examples of unjustifiable privacy interferences.

D. Conclusion

In conclusion, these reforms would work most optimally if implemented together. They could effectively tackle the issue of the 'privacy paradox' which has caused problems particularly in the era of working from home where the line between what is private and what the employer can access has become blurred,[218] and social media backlash where there is currently no guidance as to how to assess the harm caused by such backlash and therefore whether dismissal on that basis is justifiable.[219] It has been argued that these problems could be resolved through laying down specific guidance on what social media activity constitutes part of an employee's 'private life' and cannot be used justify dismissal, and using a proportionality test to determine where interference with employee's privacy is justifiable on the basis of the harm caused to the employer's reputation. Acknowledging that this suggestion is possibly too radical for the current law's minimalistic approach, this section has also explored a more digestible proposal based on subsuming the threshold test of expectation of privacy into the proposed ACAS Code, and leaving the balancing test to the judges.

5. Conclusion

In conclusion, the law should afford more protection to employees' privacy rights than is currently granted to prevent a balance which is overly sympathetic to the reputational concerns of employers. It has been argued that the current balance between employees' privacy rights and employers' rights to dismiss for gross misconduct occurring on social media is too favourable to employers, with courts granting organisations wide discretion for dismissing employees based on their online activity.[220] It has been discerned that the likely cause of this is that judges have not been given guidance by legislation or common law as to what the right to privacy entails in the digital context, and so the RORR test has been applied generously.

It has been demonstrated that, when applied to the current social climate, this approach is unsatisfactory. Working from home has blurred the boundaries between private and professional life due to a lack of spatial separation between home and the workplace, resulting in increased monitoring of employees' online activity and a reduction of employees' privacy when using social media.[221] The current approach also fails to address how the law should handle cases where posts have gone viral, as there is little understanding of at what point a post intended for only a few eyes is no longer protected by Articles 8 and 10 due to the harm caused to the employer's reputation.

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[218] See section three n 114-115 and n 121-123.

[219] See section three n 142-144.

[220] See section two n 60 , n 65 and n 93-96.

[221] See section three n 114-115.

Striking the correct balance is not something the courts have as of yet explored, specifically declining to provide guidance in *Game Retail v Laws*,[222] likely due to the resistance to change the judiciary has exhibited in the area of unfair dismissal.[223] Therefore, this paper has proposed two potential reforms capable of resolving the issues identified and restriking the balance between employees' and employers' interests. The legislative suggestion of amending the current ACAS Code would be easier to implement as it only requires amending, or imitating the form of, existing guidance, and would direct employers as to where monitoring of social media breaches an employee's privacy, which would be particularly useful in the era of working from home where physical monitoring is less possible. However, employees would not be able to bring a claim against their employer for breaching the Code. Consequently, a second proposal has been made to introduce a new common law test which would assign an automatic expectation of privacy to social media activity that employers would have to justify their interference with according to a proportionality test. This would help improve the balance, as the burden would shift from the employee proving their right to privacy was engaged, to the employer proving their interference with their employee's privacy was justified. This would prevent the wide discretion currently granted to employers from being permitted by the courts.
Throughout this paper two particular obstacles to progression have emerged, which are judicial resistance to change, and the debate surrounding the concept of privacy. These themes complement each other, as a lack of definition of 'privacy' prevents judges from knowing where the right to privacy deserves consideration, and the judicial avoidance of attaching a meaning to privacy enables the debate to thrive and continue.

This area would benefit from research into why judges are particularly resistant to change in the area of unfair dismissal, since there are many identified problems with the RORR test which no judge appears ready to resolve. Despite the debate surrounding privacy, the judiciary post-HRA developed the breach of confidence notion to create MOPI,[224] so it is not the lack of understanding of privacy which is keeping the judiciary firmly attached to the RORR test. This research would be particularly useful for strengthening or adapting the suggestion for common law reform as it would shed light on how to persuade judges to take steps towards change. The suggestion of amending the current ACAS Code could also benefit from further research. This could, for example, take the form of an analysis of the objective success of existing ACAS Codes in governing employers, or even research that acts as an extension of this proposal by looking at what kinds of social media activity should be specifically protected as private. Such research could be conducted through surveying employees and what they believe should be protected, although because previous research has shown more than three-quarters of employees feel uncomfortable with

[222] *Game Retail Ltd v Laws* (n 78) [52].

[223] See section two n 67-68 and section four n 209-213.

[224] *Campbell v MGN* (n 192).

employers viewing any of their social media,[225] an objective analysis of the reputational and financial effects of different types of social media posts on employers may be more informative. A final point for further research would be at what point historic posts cease to pose risk to an employer's reputation, as this would help judges discern where action was reasonable in the context of harm caused.[226]

The focus this paper has given to exploring the current balance in depth to ascertain that it is unsatisfactory, and the suggestions it has made for improving the current law, differentiates it from the existing scholarship referenced throughout. Focus was given to one specific human right – privacy – and how the growing social media climate has affected, and will likely continue to affect, employment relations concerning privacy in the context of posts made by employees. Pre-existing scholarship focused mostly on discerning the current approach, without providing an in-depth assessment about the adequacy of that approach.[227] Moreover, existing research took an employer-centric view, making recommendations to employers of how to create a social media policy that ensures success in unfair dismissal claims concerning an employee's social media use.[228] As a result, the employee perspective of how much online activity it should be acceptable for employers to view has remained an under-researched area. Consequently, this dissertation has contributed to the existing scholarship by identifying the weaknesses of the current law, the particular problems that arise when it is applied to real-world contexts and delving into what an adequate law governing unfair dismissal for social media activity might look like.

[225] Sanchez Abril, Levin & Del Riego (n 6).

[226] Christie (n 7).

[227] See section one, n 17-21.

[228] See section four n 172-175 and n 181-182.

Homonormativity: A Critical Exploration into Legal Silence Regarding Intersex and Asexuality

LILY PROUDFOOT

Abstract

While scholarship discussing law's interaction with the LGBT+ community is plentiful, there are gaps in critical attention regarding law's lack of involvement with intersex and asexuality, which reside at the bottom of the hierarchy within the LGBT+ community. This paper explores the nascent intersex and asexuality movements and seeks to understand legal silence by challenging homonormativity: the ubiquitous theme. Investigating intersex and asexuality's standing on multiple levels through the lens of queer theory will reveal how societal misunderstanding, queer theoretical representation and queer political misconstruction have contributed to this lacuna in law. Focusing on intersex, this paper argues that while queer theory and queer politics' homonormative potential could re-entrench pathologisation, if redirected, these would be beneficial instruments through which to campaign for substantive change. Status-based intersex reforms will be critically analysed before concluding that third sex markers and leaving sex blank on birth certificates could have greater alienating effects. This paper also contends that banning non-consensual gender-normalising surgeries would positively safeguard intersex individuals and implementing gender-neutral language and decertifying legal gender would boost the intersex community's resilience. Regarding asexuality, queer theory's hyper-sexual nature and queer politics' negligent approach will be scrutinised for erasing asexuality and contributing to its ostracisation. Furthermore, this paper argues that asexuality and intersex should constitute protected characteristics within anti-discrimination legislation. The paper concludes that novel queer constructions of intersex and asexuality eradicating dominant medical and LGBT+ narratives are essential for bottom-up legal reform, which must prioritise the communities' lived experiences.

1. Introduction

It is widely agreed that law's involvement with the LGBT+ community is a highly contentious area meriting extensive academic and political discussion.[1] However, a homonormative paucity of critical reflection persists regarding law's interaction with (or neglect of) certain queer minorities. This paper focuses on intersex and asexuality, which remain heavily stigmatised within society and unjustly exist within medical frameworks. While law and society have to some extent, heard LGBT+ voices, this paper focuses on the lacunas in law regarding LGBT+ issues. Law remains deaf to intersex and asexual voices; the absence of specific, substantive laws creates injustice, as intersex and asexual individuals lack essential institutional support and societal inclusion. Although these groups have not been victims of historic legal punishment as LGBT groups have, social punishment, which legal silence entrenches, has acutely

[1] The term 'LGBT+' is used to refer to all lesbian, gay, bisexual, transgender, queer, intersex and asexual individuals, and the wider community of queer minorities.

damaged the resilience of these communities.[2] While pre-existing literature has thoroughly investigated the struggles and triumphs of LGBT individuals, only recently have scholars have given intersex and asexuality focused consideration. Offering novel contributions to the field, this paper conducts parallel investigations into the burgeoning intersex and asexuality movements. Critically exploring the homonormative theoretical and political constructions of intersex and asexuality is a prerequisite for understanding their neglect by law and shunning by society. The problematic issues and the potential utility of queer theory, queer politics and law will be tackled individually, before being re-addressed in the contexts of intersex and asexuality. The purpose of this paper is threefold: to generate greater awareness of intersex and asexuality; to stimulate meaningful academic discussion challenging homonormativity; and to advocate for bottom-up reform prioritising the communities' lived experiences.

Queer theory will be utilised as the dominant lens to analyse societal failings and investigate what institutional responses these communities require. Furthermore, a queer deconstruction of queer theory, queer politics and law will be accomplished through a nuanced analysis of a myriad of academic and legislative sources. Part 2 will delineate key concepts including homonormativity, which will then be applied to rigorous discussions of queer theory, queer politics, and law. It will be maintained that these phenomena have entrenched a homonormative hierarchy within the LGBT+ community, and intersex and asexual individuals reside at the bottom. Part 3 will critically analyse queer theoretical and political approaches to a tripartite of intersex issues: gender-normalising surgeries; the place of post-surgical bodies; and deselection and abortion of intersex variants following in utero screening. Potential legal reforms of both formal and substantive natures will be analysed for their potential to combat the ways biological rationalisations have cemented damaging gender binaries. Asexuality is the focus of part 4; the reasons behind the persistent framing of asexual people (aces) as 'disordered' will be analysed.[3] Queer theory's hyper-sexual nature and queer politics' negligent approach will be scrutinised for erasing asexuality. Law's failure to recognise and protect asexuality will be criticised and it will be argued that asexuality should constitute a protected characteristic under the Equality Act 2010. The paper will conclude that legal failings to address LGBT+ issues, and consequent social invisibility, are contributing to pre-existing LGBT-phobia and homonormativity. Novel queer constructions of intersex and asexuality which eradicate the dominant medical and LGBT+ lenses, coupled with an intersectional restructuring of queer politics and legal reform, are needed to effectively recognise and protect England and Wales' gender and sexual diversity.

[2] The term 'LGBT' is used to refer only to lesbian, gay, bisexual and transgender individuals.

[3] 'Ace' is the phonetic shortening of 'asexual' and within the asexual community, the term 'aces' is predominantly preferred when referring to people falling under the umbrella of asexuality. Therefore, this paper adopts the term 'aces' when referring to asexual people. Emily McCarty, 'What It Means to Be on the Asexuality Spectrum' (*Allure*, 3 June 2019) <https://www.allure.com/story/asexuality-spectrum-asexual-people-explain-what-it-means> accessed 25 April 2022.

2. *Homonormativity*

A. Queering queer theory

Materialising in the 1990s alongside contemporary gay identity politics, queer theory sought to further feminist dialogue by destabilising binary male/female and gay/straight oppositions to encourage gender and sexual liberation.[4] Before critical engagement can commence, queer definitions of key terms are needed to clarify queer theory's nonnormative positionality. 'Queer' encompasses anyone non-conforming to sex, gender and/or sexuality norms. While generally conceded that 'sex' is predetermined at birth by biological factors including chromosomes, genitals and reproductive capacity,[5] queer theorists such as Butler assert 'gender' is socially constructed through performative characteristics which fluidly and inexorably oscillate along the male/female spectrum.[6] Similarly, queer theory postulates that 'sexuality' is a culturally determined phenomenon which can fall within or even outside the gay/straight spectrum.[7] By deconstructing these binary norms, queer theory as a critical discourse can be effectively utilised 'as a lens for analysing the cracks' in law's construction of sex, gender and sexuality and resultant injustices.[8] In other words, queer theory can successfully be harnessed to critique law's failure to recognise and protect those alienated from conventional social categories. Furthermore, queer theory's ontological investigations are especially valuable for reflecting upon the entrenchment of historical norms from which heteronormativity, institutionalised social division and queerphobia originate.[9]

Challenging heteronormativity has been queer theory's predominant focus. Heteronormativity is the normalisation of heterosexuality as universal; this has attracted extensive queer scholarship as it renders heterosexuality compulsory and ostracises sex, gender and sexual divergents.[10] By defining those outside conventional norms as 'marginal and abnormal', serious social and legal implications ensue, which queer theorists have sought to confront.[11] If Warner is correct in identifying that queer communities want acknowledgement, representation and inclusion, rather than mere tolerance, queer theory's attack on heteronormativity is well-founded as the invisibility of queerness has 'naturalized a heterosexual society'.[12] As Berlant and

[4] Patrick McCreery, 'Beyond Gay: "Deviant" Sex and the Politics of the ENDA Workplace' (1999) 17(61) *Duke University Press* 39, 54.
[5] cf Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 6.
[6] ibid.
[7] Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 13.
[8] Kendall Thomas, 'Practicing Queer Legal Theory Critically' (2019) 6(1) *Queer Legal Studies* 8, 14.
[9] Stevi Jackson, 'Interchanges: Gender, sexuality and heterosexuality: The heteronormativity' (2006) 7(1) *Feminist Theory* 105, 107.
[10] Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience* (Onlywomen Press 1981).
[11] Angela Dwyer, ''It's Not Like We're Going to Jump Them': How Transgressing Heteronormativity Shapes Police Interaction with LGBT Young People' (2011) 11(3) *Youth Justice* 203, 204.
[12] Michael Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press 1993) vii.

Warner persuasively identify, '[h]eteronormativity is more than ideology, or prejudice, or phobia against gays and lesbians; it is produced in almost every aspect of… social life: nationality, the state, and the law; commerce; medicine; and education'.[13] Therefore, queer theory's condemnation of law's institutional favouring of heterosexuality is especially valuable and will be discussed in due course. According to Rubin, a 'hierarchical system of sexual value' exists in society with married, reproductive heterosexuals at the top.[14] This is especially convincing, as Rubin explains how those at the top of the 'erotic pyramid' are 'rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits', while those at the bottom are abandoned.[15] While queer theory's critique of heteronormativity is strong, there has been some valid critique of queer theory itself for failing to address hierarchies persisting within the LGBT+ community which, arguably, some queer theorists have perpetuated.

While queer theorists have rightly attacked heteronormativity, some can be criticised for being *homonormative* and contributing to the marginalisation of certain groups. Homonormativity is the privileging of homosexuality, which creates a hierarchy within the LGBT+ community itself, with gender conventional, monogamous, cisgender gay men at the top.[16] Furthermore, homonormativity involves the assimilation of heteronormative ideals onto LGBT+ culture which, as Vitulli convincingly argues, 'ultimately re-entrenches interlocking systems of normative sexuality and gender'.[17] This assimilation with heterosexuality ostracises intersex and asexuality and confirms society will only condone 'good gays' conforming to heteronormative ideals. Puar poignantly exemplifies this, stating gay marriage campaigns revealed queer theory's 'demand for equality with heterosexual norms'.[18] Berlant and Warner's quote refers only to 'gays and lesbians'.[19] Although written 24 years ago, it is representative of some of queer theory's short-sighted focus on lesbian and gay issues and sustained failure to recognise its increasingly diverse constituents. This highlights the need for greater academic and societal recognition that the LGBT+ community encompasses a multitude of queer personalities deserving recognition and acceptance. Queer theory must be reflective and acknowledge its own potential for homonormativity, otherwise intersex and asexuality issues will remain dormant.

B. Queering queer politics

To decipher *why* law is homonormative, the construction of LGBT+ issues by activists and policymakers must be analysed, as it dictates the course of queer politics and thus legislative responses. Although many LGBT+ individuals may not realise politics' relevance to their communities' needs, and as Bersani recognises, 'want[ing] sex with

[13] Lauren Berlant and Michael Warner, 'Sex in Public' (1998) 24(2) *University of Chicago Press* 547, 554.
[14] Gayle Rubin, *Deviations* (Duke University Press 2011) 151.
[15] ibid.
[16] Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life* (Routledge 2002) 133.
[17] Elias Vitulli, 'A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, trans-inclusion, and homonormativity' (2010) 7(3) *Sexuality Research & Social Policy* 155, 156.
[18] Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007) 29.
[19] Berlant and Warner (n 13) 554.

another man is not exactly a credential for political radicalism,' the relationship between politics and law is paramount for instigating change.[20] As politics shape legal agendas, queer politics must be representative of the entire queer community. Discussing campaigns for same-sex marriage in the US, Franke accurately states the campaigns rebranded gay communities by 'cleaving the sex out of homosexuality'.[21] This is analogous to some campaigns in England and Wales, which represented a narrow, homogenised group of gay identities, barring intersex and asexuality groups. For example, the LGB Alliance, whose stated purpose is to 'advance lesbian, gay and bisexual rights' only,[22] has been heavily criticised by the charity Mermaids, who stated 'the LGB Alliance's real purpose is the denigration of trans people' as they campaigned against advising government bodies and schools on transgender rights.[23] Warner's suggestion that the LGBT+ movement is 'enthralled by respectability' is therefore accurate, as by omitting groups which society will find harder to accept, gays and lesbians attempted to normalise their own existence.[24] Furthermore, queer politics was largely constructed as a single-issue politics centred around sexuality.[25] This is highly problematic and illuminates queer politics' homonormativity.

Instead, an intersectional approach is needed to recognise 'the roles that race, class, and gender play in defining people's differing relations to dominant and normalizing power'.[26] This, according to Cohen, has been queer politics' greatest failing.[27] By exclusively focusing on 'the dichotomy of straight versus everything else,' Cohen argues queer politics failed to consider power structures on other axes.[28] This is convincing from an intersectional perspective and reveals the need for reconceptualisation eradicating homonormativity. Broader political battles can only be fought if the lived experiences of minority groups including intersex and asexuality are investigated.[29] The state and law are responsible for responding to society's needs but may only do so in the face of harmonised, cohesive political agendas. Warner supplements this, stating queer culture 'is not autochthonous' and 'queer politics does not obey the member/non-member logics of race and gender'.[30] This reveals how queer politics must embrace the overlapping categories of sex, gender, sexuality, race and class in order to campaign for transformative politics with a representative agenda, rather than reinforcing 'simple dichotomies between queerness and

[20] Leo Bersani, 'Is the Rectum a Grave?' (1987) 43 *October* 197, 205.
[21] Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (New York University Press 2015) 60.
[22] The LGB Alliance, 'Purpose' (*LGB Alliance*) <https://lgballiance.org.uk/policies/> accessed 2 February 2022.
[23] Mermaids, 'Mermaids, leading UK LGBTQ+ charities and Good Law Project appeal the LGB Alliance's charity status' (*Mermaids*) <https://mermaidsuk.org.uk/amplifying-your-voice/18638-2/> accessed 2 February 2022.
[24] Michael Warner, *The Trouble With Normal: Sex Politics, and the Ethics of Queer Life* (Harvard University Press 2000) 24.
[25] Cathy Cohen, 'Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?' (1997) 3(4) *GLQ* 437, 441.
[26] ibid 457.
[27] ibid.
[28] ibid 452.
[29] ibid 482.
[30] Warner, *Fear of a Queer Planet* (n 12) xvii.

heterosexuality' by omitting LGBT+ groups.[31] However, Franke's assertion that the campaigns only succeeded due to a 'conscious strategy of radically refiguring the meaning of homosexuality' is correct.[32] While the rebranding and non-inclusivity were evidently problematic, it was a tactical move resulting in equal marriage rights and non-discrimination protections for the LGBT+ community's upper echelons. English and Welsh campaigns would not have succeeded otherwise due to society's willingness to only grant legal acceptability to those conforming to heteronormative ideals. However, moving forward this campaign angle must shift to successfully destabilise societal sex and gender binaries and accept LGBT+ minorities.

As emphasised by Foucault, addressing the 'economy of power relations' is essential for a truly critical analysis of law.[33] Therefore, we must investigate who funds the LGBT+ community and reflect on the conditions which facilitated reforms to understand why queer politics can be so homonormative. The hegemony of middle-class, white, cisgender gay men in queer politics and the significance of their capital contributions cannot be understated and explains the homonormative agendas pursued. This can be evidenced by comparing Bowen's discovery that grant making by US foundations to support LGBT+ issues was $1 million in 1984 before the AIDS epidemic,[34] with Kan, Maulbeck and Wallace's findings that in 2017, funding reached $185.8 million.[35] While the AIDS epidemic undoubtedly increased homophobia and stigmatisation, Chaudhry recognises it increased funding as 'potential funders went from seeing… a small group of marginalized angry voices… to an aggrieved population in need of a specific philanthropic response'.[36] Due to analogously large-scale funding for LGBT+ groups in England and Wales from a similar demographic – irrespective of potential underlying rainbow capitalist agendas – it is in LGBT+ minorities' interest to form alliances with LGBT+ groups to benefit from their funding and fall inside 'law's protective sphere'.[37] However, as intersex and asexuality groups have been consistently excluded from political agendas and continue to lack participative voices, they remain legally invisible. These homonormative power structures translate into legislation and case law as the legal agenda is dictated by those who fund it, namely, gay, wealthy, white, cisgender men.[38] Therefore, more scholarship is needed to raise awareness of intersex and asexuality groups and investigate what institutional responses they require. This will combat assimilation into broader LGBT+ agendas. Furthermore, queer politics would benefit from

[31] Cohen (n 25) 438.
[32] Franke (n 21) 61.
[33] Michel Foucault, 'The Subject and Power' (1982) 8 *Critical Inquiry* 777, 779.
[34] Anthony Bowen, 'Forty Years of LGBTQ Philanthropy' (*Funders for LGBTQ Issues*, 5 January 2012) <https://lgbtfunders.org/research-item/forty-years-lgbtq-philanthropy/> accessed 27 January 2022.
[35] Lyle Matthew Kan, Ben Francisco Maulbeck and Andrew Wallace, 'Infographic: 2017 Tracking Report' (*Funders for LGBTQ Issues,* 19 March 2019) <https://lgbtfunders.org/research-item/infographic-2017-tracking-report/> accessed 27 January 2022.
[36] V Varun Chaudhry, 'Centering the "Evil Twin": Rethinking Transgender in Queer Theory' (2019) 25(1) *GLQ* 45, 47.
[37] Mitchell Travis and Fae Garland, 'Queering the Queer/Non-Queer Binary: Problematising the 'I' in LGBTI+' in Senthorun Raj and Peter Dunne (eds), *The Queer Outside in Law* (Springer International Publishing 2020) 165, 172.
[38] Warner, *Fear of a Queer Planet* (n 12) xvii.

realigning itself with queer theory's nonnormative stance to effectively represent the queer demographic.

C. Queering law

Despite queer theory's faults, its criticisms of law's heteronormativity are highly pertinent, as law's unwillingness to recognise gender and sexual diversity reveals its glorification of heterosexuality and fear of the 'other.' To illuminate this, law's representation of sex, gender and sexuality must be deconstructed.[39] Law operates on a strictly binary basis, evidenced by persistent use of gendered language in both statutes and judgments. As Griffin accurately explains, law's embeddedness within binary, socio-biological explanations of gender has nurtured heteronormativity.[40] There are inestimable examples demonstrating law entrenching pre-existing prejudice against queer communities; this is especially apparent when transgender issues come before courts. For example, *McNally* is highly efficacious in evidencing law's refusal to recognise gender and sexuality flexibility.[41] *McNally,* a case concerning gender fraud, involved a successful conviction of assault by penetration after the Court of Appeal held that gender deception vitiates consent to sexual activity.[42] The judges' antiquated framing of McNally as female (their biological sex at birth) and the claimant as heterosexual (law's presumed default sexual orientation), reveals how law only recognises these concepts through its own rigid, archaic statutes. Travis' statement that being transgender is only legal after institutional processes instigated by the Gender Recognition Act 2004 is especially accurate and its inaccessibility reveals law's closed-mindedness to gender diversity.[43] Therefore, to avoid unjust outcomes, law must depart from its antiquated, self-constructed definitions to avoid 'dogmatic, inflexible and homophobic' judgments which reinforce heteronormativity on a legal platform.[44]

While law is obviously heteronormative, it is also homonormative and exacerbates the erotic hierarchy by pursuing a limited LGBT+ agenda. It would be inaccurate to denounce law for failing to introduce any substantive reforms benefitting LGBT+ individuals. Sexual orientation became a protected characteristic under the Equality Act 2010 and the Marriage (Same Sex Couples) Act 2013 momentously equalised marriage rights. These reforms are highly welcomed; however, they purely focus on formal equality, rather than substantive, protectionist reforms. The introduction of same-sex marriage in fact exposed law's homonormativity, as it legally assimilated the heteronormative ideal of marriage onto queer people.[45] Despite this, LGBT

[39] Foucault (n 33) 777.
[40] Penny Griffin, 'Sexing the Economy in a Neo-liberal World Order: Neo-liberal Discourse and the (Re)Production of Heteronormative Heterosexuality' (2007) 9(2) *British Journal of Politics and International Relations* 220, 225.
[41] *R v McNally* [2013] EWCA Crim 1051, [2013] 2 Cr App R 28.
[42] Sexual Offences Act 2003, s 2.
[43] Mitchell Travis, 'The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment' (2019) 28(3) *Social & Legal Studies* 303, 308.
[44] ibid 310.
[45] Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2014).

demands have undeniably been heard and granted, unlike intersex and asexuality demands. While law's approach to transgender issues is highly problematic, as the Gender Recognition Act 2004 'perpetuates a mental illness model for understanding transgender desires' and re-entrenches the gender binary,[46] it is undeniably 'an enormous step forward', revealing law has heard trans voices and enacted trans-specific reforms.[47] While individual issues remain for each group within the LGBT acronym, they are outside the scope of this paper, which mirrors its commitment to promote legal recognition of intersex and asexuality groups.

The absence of substantive laws providing recognition and institutional support to intersex and asexual communities is creating injustice. These will be discussed at length in subsequent sections. However, the reasons *why* legal recognition and protection are so essential will now be addressed. Gender and sexual deviants residing at the bottom of the erotic hierarchy are absent from legal discourse and consequently lack recognition and legal protection. Broadly speaking, individuals need legal protection to enjoy their human rights and freedoms. This is especially paramount for 'the sexual underworlds [who] have been marginal and impoverished… [and] subjected to stress and exploitation.'[48] Firstly, following Hequembourg and Arditi's declaration that assimilation connotates sameness rather than whole-hearted acceptance, when sexual minorities assimilate into norms – for example, dressing conventionally and presenting mannerisms aligned with their assigned sex at birth – they render themselves politically powerless.[49] Robinson's case study of The Netherlands is extremely useful for evidencing that 'the danger of acceptance is invisibility for those who assimilate and marginalization for those who do not conform'.[50] Robinson is rightly cautious as to whether legal recognition should be the main strategy for queer communities seeking acceptance.[51] However, without formal equality initially recognising these groups, they lack the foothold to campaign for substantive reforms. Legal recognition must be the first step. Secondly, legal protection can increase resilience. Fineman's vulnerability theory is useful for emphasising law's social pervasiveness and the need to focus on the role of institutions.[52] Vulnerability theory asserts vulnerability is the primal, inevitable human condition, and individuals are embedded in social and institutional relationships structured through culture and law.[53] While vulnerability is the constant, resilience is the variable. Resilience is not distributed evenly but is developed over time depending on access to resources; it is society's structural

[46] Andrew Sharpe, 'A Critique of the Gender Recognition Act 2004' (2007) 4(1) *Journal of Bioethical Inquiry* 33, 33.
[47] ibid 40.
[48] Rubin (n 14) 162.
[49] Amy Hequembourq and Jorge Arditi, 'Fractured Resistances: The Debate over Assimilationism among Gays and Lesbians in the United States' (1999) 40(4) *The Sociological Quarterly* 663, 663.
[50] Brandon Robinson, 'Is This What Equality Looks Like?: How Assimilation Marginalizes the Dutch LGBT Community' (2012) 9(4) *Sexuality Research & Social Policy* 327, 327.
[51] ibid 328.
[52] Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 1.
[53] ibid.

inequality which perpetuates systematic disadvantage.[54] There are currently no laws or protections directly addressing intersex or asexuality and this lack of institutional support is decreasing resilience. Therefore, law must stop invisibilising these groups and instead raise their voice to an equitable level. The misdirection of queer politics has created this lacuna in law. Therefore, moving forward formal equality must be accompanied by effective substantive reforms targeting a holistic development of resources, such as healthcare and education, to alleviate these communities from stigma.

By analysing queer theory, queer politics, and law, it is evident that homonormativity persistently compromises the representation and resilience of LGBT+ minorities, as all levels of queer discourse are dominated by gay, cisgender, privileged, white men, who resultantly dictate political and legal agendas. Law's attempts to embrace an inclusive LGBT+ agenda have failed, as intersex and asexuality remain absent and only LGBT individuals have felt the benefits of law reform. This is a result of the construction of queer politics as a single-issue politics explicitly focused on sexuality, rather than queer more broadly, which alienates these communities. The absence of substantive laws relating to intersex and asexual issues is creating injustice as they lack essential institutional support. Therefore, by reigniting queer theory's destabilisation of societal norms, archaic binary conceptions of sex, gender and sexuality must be eradicated, and the specific reforms anticipated by intersex and asexuality groups must be investigated.

3. *Intersex*

A. Queering intersex

As intersex has fallen victim to multi-layer homonormativity and legal silence, it resides at the bottom of the sex hierarchy. As defined by Travis and others, '[i]ntersex is an umbrella term referring to a diverse range of congenital bodily variations that at the chromosomal, gonadal, hormonal and/or anatomical level do not neatly fit into the binary categories of male or female.'[55] These variations can be discovered in utero, after birth or in later life, especially around puberty.[56] The most common genetic intersex variations are Turner Syndrome, Klinefelter Syndrome, Androgen Insensitivity Syndrome and Congenital Adrenal Hyperplasia.[57] Following a freedom of information request to 134 National Health Service bodies, Travis and others estimate 1 in 3000 are born intersex.[58] For centuries, the medical profession has played an intrusive, paternalistic role in not only defining intersex as a 'medical and social

[54] ibid.

[55] Mitchell Travis and others, 'Management of 'disorders of sex development'/intersex variations in children: Results from a freedom of information exercise' (2021) 21(2) *Medical Law International* 116, 119.

[56] Morgan Holmes, 'Mind the Gaps: Intersex and (Re-productive) Spaces in Disability Studies and Bioethics' (2008) 5(2-3) *Journal of Bioethical Inquiry* 169, 177.

[57] InterACT, 'Intersex Definitions' (*InterACT*) <https://interactadvocates.org/intersex-definitions/> accessed 12 April 2022.

[58] Travis and others, 'Management of 'disorders of sex development'' (n 55) 133.

emergency', but also deciding people's 'true sex' through gender-normalising surgeries, which constitute infant genital mutilation (IGM).[59] This practice undoubtedly stems from cultural ideas that there are only two genders and, that shoehorning intersex people into a sex will combat concerns that 'unstable gender identity will precipitate homosexual desire'.[60] As there is no intersex-specific legislation in England and Wales, intersex issues are deferred to the medical profession. Intersex variations resulting in atypical genital appearance are subjected to non-consensual medical interventions, pioneered at Johns Hopkins Hospital, which problematise and invisibilise intersex at a cultural level.[61] Although most intersex conditions pose no physical risk, invasive surgeries prioritising bodily aesthetics over function alter genitalia so bodies conform to the sex binary norm. There is no evidence supporting these heteronormative surgeries which can result in traumatic physical and mental consequences including sterilisation, anorgasmia, vaginal stenosis, sepsis, death,[62] social alienation, stigma and trauma.[63] Furthermore, Cohen-Kettenis found in 39-64% of cases, intersex children departed from their assigned gender.[64] This significant statistic can be understood as intersex infants are predominantly assigned female regardless of chromosomes: 'you can make a hole, but you can't build a pole'.[65] This quote typifies medical approaches to intersex and reveals how individuals are surgically altered to fit into a binary society.

Banning these irreversible, unnecessary surgeries is imperative to halt these extreme injustices. As children cannot give informed consent, autonomy and bodily integrity are crucial elements of the intersex movement. However, in 2006 a Consensus Statement by influential paediatricians sought to change 'intersex' to 'disorders of sex development' (DSD).[66] This further pathologised intersex and justified interventions, 'serv[ing] as a perfect vehicle for medical professionals to… maintain their exclusive jurisdiction.'[67] Davis continues, 'DSD nomenclature reifies the essentialist understandings of sex, gender, and sexuality… by constructing sex as a binary phenomenon explained by science'.[68] The construction of a medico-legal narrative can be seen through law's condoning of the destruction of intersex embryos. The Human Fertilisation and Embryology Act 2008 devolves power to the Human Fertilisation and Embryology Authority (HFEA) which allows deselection and abortions of intersex

[59] Hüsoyin Özbey and others, 'Gender assignment in female congenital adrenal hyperplasia: a difficult experience' (2004) 94(3) *British Journal of Urology International* 388, 388.
[60] Myra Hird, 'Considerations for a psychoanalytic theory of gender identity and sexual desire: the case of intersex' (2003) 28(4) *Signs* 1068, 1069.
[61] Morgan Carpenter, 'The "Normalisation" of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15(4) *Journal of Bioethical Inquiry* 487, 488.
[62] Travis and others, 'Management of 'disorders of sex development'' (n 55) 122.
[63] Stefan Timmermans and others, 'Gender Destinies: Assigning Gender in Disorders of Sex Development-Intersex Clinics' (2019) 41(8) *Sociology of Health & Illness* 1520, 1527.
[64] Peggy T Cohen-Kettenis, 'Gender Change in 46,XY Persons with 5a-Reductase-2 Deficiency and 17b-Hydroxysteriod Dehydrogenase-3 Deficiency' (2005) 34(4) *Archives of Sexual Behavior* 399, 399.
[65] Melissa Hendricks, 'Is it a boy or a girl?' (1993) 45(6) *Johns Hopkins Magazine* 10, 10.
[66] Peter Lee and others, 'Consensus Statement on the Management of Intersex Disorders' (2006) 118(2) *Paediatrics* 488.
[67] Georgiann Davis, *Contesting Intersex: The Dubious Diagnosis* (New York University Press 2015) 70.
[68] ibid 84-85.

variants up until birth due to its misunderstanding of intersex as a physical disability. This is severely problematic as framing intersex as a physical disability will contribute towards stigmatisation and continue to rationalise surgical intervention.[69] Queer theory must push against this medical lens and empower the intersex community to campaign for substantive reforms by combatting the sex binary.

B. Intersex and queer theory

Traditionally, the relationship between intersex and queer theory involved intersex being utilised theoretically and homonormatively to add weight to arguments for rupturing sex binaries and supporting sex, gender, and sexuality as spectrums. However, Travis and Garland acknowledge that fixating on 'the *concept* rather than the *experience* of being intersex' is damaging and fails to benefit the community.[70] Travis and Garland are prime examples of queer theorists specifically investigating intersex issues through empirical research. Their perception on how queer theory can be beneficially harnessed to argue against medical interventions must be prioritised among scholarly platforms: '[q]ueer theory, at least at a philosophical level, enables individuals to challenge [medical] authenticity… by questioning the naturalness of the sex binary allowing intersex embodied people a voice'.[71] Similarly, Morland pushes against a homonormative lens and cautions that post-surgical intersex bodies 'cannot be accounted for by queer discourse in which sexual pleasure is a form of hedonistic activism'.[72] Queer theory's fixation on 'a sensorial basis to cultural' falters in the context of desensitised intersex bodies.[73] While queer theory's glorification of pleasure does incidentally critique the normalisation of genital desensitisation, it is imperative that queer theory departs from sexualised outlooks to end the alienation of post-surgical intersex individuals from the discourse.[74]

A preliminary problem is whether intersex is queer. On the one hand, Morland recognises intersex people may not have queer desires,[75] and Travis and Garland's empirical research discovered most intersex people identify strongly with the sex binary and distinguish themselves from queer.[76] If queer theory interprets queer as a ''doing' rather than a 'being'', this argument is supported if intersex people are not 'doing' queer.[77] On the other hand, intersex bodies can be considered 'queer in their deviation from norms of embodiment.'[78] The medical profession would agree, regarding intersex bodies so inherently queer that they need surgical modification. Taking this further, Holmes argues genital surgeries render bodies *more* queer.[79] This

[69] ibid 73.
[70] Travis and Garland, 'Queering the Queer/Non-Queer Binary' (n 37) 177.
[71] ibid 170.
[72] Iain Morland, 'What Can Queer Theory Do for Intersex?' (2009) 15(2) *GLQ* 285, 287.
[73] ibid.
[74] ibid 289.
[75] ibid.
[76] Travis and Garland, 'Queering the Queer/Non-Queer Binary' (n 37) 166.
[77] ibid.
[78] Morland (n 72) 289.
[79] Morgan Holmes, 'Rethinking the Meaning and Management of Intersexuality' (2002) 5(2) *Sexualities* 159, 174.

is convincing considering consequent genital desensitisation which pushes intersex people even further away from sexualised society. Moreover, one Australian study found only 48% of 272 intersex participants identified as heterosexual, therefore the remaining 52% considered themselves queer.[80] After confirming that intersex is queer, query theory, '[b]y deconstructing the norms surrounding sex and gender… can work to dismantle (and redistribute) medical power/knowledge so that intersex embodied people can… understand their bodies'.[81] Queer theory will only achieve this if, using Sedgwick's terminology, its previous homonormative, 'minoritizing' approach shifts towards Morland, Travis and Garland's 'universalizing' approach.[82] This approach can fight for universal recognition of the importance of abolishing the pathologisation of intersex and resultant medical interference. Otherwise, as Morland cautions, 'queer theory may echo the medical attempt to normalize bodies as markers of dichotomously sexed heterosexual desire by attempting to locate in bodies the nonheteronormative sensations of minority.'[83] Morland continues, asserting queer theory can aid intersex by 'critiqu[ing] genital surgery without presuming to know in advance what comes after surgery, after desensitization, or even after queer theory'.[84] This holistic approach must not only be prioritised among queer theoretical circles, but also be adopted in political campaigns if the intersex community is ever to benefit from substantive legal reform.

C. Intersex and queer politics

In the 1990s, the underfunded intersex movement found solidarity with the LGBT movement, as LGBT organisations perceived intersex's destabilisation of binary norms politically useful.[85] By building these strategic alliances, intersex activists received the support and resources necessary to successfully vocalise the community and work towards ending invisibility and banning IGM on a higher platform. This approach culminated in Malta, where ground-breaking legislation prohibiting non-consensual surgeries arose after dialogue between activists and policymakers at an International Intersex Forum funded by the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA-Europe).[86] England and Wales should follow this approach. However, while LGBT strategic support remains vital, coalitions have significant impacts on social and political understandings of intersex, which feed into legislative reform. A ubiquitous construction of intersex as an LGBT offshoot could result in the problematic collation of intersex and LGBT at policy level. This has been seen in England and Wales, where homonormativity can marginalise intersex by conflating intersex with transgender. For example, intersex children are referred to Gender Development Identity Services and immediately discharged when they do not

[80] Tiffany Jones and others, *Intersex: Stories and Statistics from Australia* (Open Book Publishers 2016) 5.
[81] Travis and Garland, 'Queering the Queer/Non-Queer Binary' (n 37) 171.
[82] Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990) 40.
[83] Morland (n 72) 305.
[84] ibid.
[85] Dan Christian Ghattas, 'Standing Up For The Human Rights Of Intersex People – How Can You Help?' (*ILGA-Europe and OII Europe*, December 2015) <https://www.ilga-europe.org/sites/default/files/how_to_be_a_great_intersex_ally_a_toolkit_for_ngos_and_decision_makers_december_2015_updated.pdf> accessed 8 April 2022, 17.
[86] Gender Identity, Gender Expression and Sex Characteristics Act 2015.

display gender dysphoria.[87] While overlapping concerns exist about binary ideologies and medicalisation as harmful forms of social control, transgender and intersex groups have different priorities.[88] Greenberg identifies that while the intersex movement aims to ban IGM, the transgender movement aims to 'eliminate discriminatory practices that deny transexuals the right to be treated as their self-identified sex.'[89] Therefore, queer politics must stop ambiguating intersex and downplaying their serious issues by claiming transgender policies are applicable.[90]

Moving forward, a distinct intersex narrative is vital. The Government claims to be tackling intersex issues, yet its 2018 LGBT Action Plan simply pledges to 'improve our understanding of the issues facing people who are intersex' and fails to offer anything of substance.[91] According to Travis and Garland, the construction of intersex as LGBT in fact reifies medical frameworks.[92] This rings true as fear of 'difference' pressurises parents into rejecting LGBT association, deferring to medical interventions and thus shrouding serious human rights abuses.[93] European intersex organisations ILGA-Europe and Organisation Intersex International Europe (OII Europe) adopt human rights angles and outline the violations suffered by intersex people at all stages of life.[94] They rightly take serious issue with 'pre-implantation genetic diagnosis, pre-natal screening and treatment, and selective abortion of intersex foetuses' caused by intersex's classification as a disorder.[95] However, as Ammaturo cautions, human rights approaches risk characterising intersex as intrinsically vulnerable, which could 'further objectify intersex persons, rather than enabling their self-determination.'[96] Carpenter's application of Fricker's hermeneutical injustice to intersex is extremely poignant here.[97] Hermeneutical injustice prevents individuals 'making sense of their own lived experience due to a lacuna in social understanding.'[98] The 'relative powerlessness' of intersex groups has arisen through 'clinical secrecy' and 'societal discourse on identity', which can only be remedied by structural change.[99] Ending the stigmatisation of intersex bodies and eradicating queer politics' homonormativity must be the starting point for substantive justice. Reducing stigma will increase the

[87] Travis and others, 'Management of 'disorders of sex development'' (n 55) 137-138.
[88] Julie Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York University Press 2012) 4.
[89] ibid.
[90] Mitchell Travis and Fae Garland, *Intersex Embodiment: Legal Frameworks Beyond Identity and Disorder* (Bristol University Press 2022) 3.
[91] Government Equalities Office, 'LGBT Action Plan' (July 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721367/GEO-LGBT-Action-Plan.pdf> accessed 1 March 2022, 22.
[92] Travis and Garland, *Intersex Embodiment* (n 90) 24.
[93] ibid.
[94] Ghattas (n 85) 13.
[95] ibid.
[96] Francesca Ammaturo, 'Intersexuality and the 'Right to Bodily Integrity': Critical Reflections on Female Genital Cutting, Circumcision, and Intersex 'Normalising Surgeries' in Europe' (2016) 25(5) *Social & Legal Studies* 591, 605.
[97] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007).
[98] Morgan Carpenter, 'The human rights of intersex people: addressing harmful practices and rhetoric of change' (2016) 24(47) *Reproductive Health Matters* 74, 79.
[99] ibid.

movement's mobilisation as fewer people will fear ostracisation after exposing themselves. Distinctive intersex campaigns are needed in England and Wales which shift political focus towards bodily autonomy, anti-discrimination and depathologisation. The UK Intersex Association has rightly regarded the Consensus Statement's term 'disorders' as 'cruelly – and completely unnecessarily – pathologising and stigmatising… perfectly natural variations in human development.'[100] Developing this, if a transformative politics which emancipates LGBT+ minorities from hermeneutical injustice is to arise from queer activism, we must attack the homonormative power structure in both the medical profession and the LGBT+ community itself, and realign with Morland, Travis and Garland's queer theory.

D. Intersex and law

Presently, law is failing the intersex population by not formally recognising them and allowing IGM to continue by conceding to informal medical narratives which continue to surgically 'fix' 'disordered' bodies. Travis and Garland are at the forefront of legal intersex scholarship, arguing '[l]egal silence effectively legitimises the medical account of intersex'[101] and invisibilises intersex at 'institutional and political levels as well as perpetuating bodily harms.'[102] Currently, intersex is not a protected characteristic in English and Welsh anti-discrimination law as the Equality Act 2010 repressively defines 'sex' as 'a reference to a man or to a woman', wholly disregarding intersex.[103] Protecting intersex from discrimination is vital for enjoying human rights and freedoms and avoiding assimilation, as discussed in section 1. The imperative need for legal recognition to boost resilience via anti-discrimination legislation will be discussed in detail in section 3. Now, intersex-specific status-based and substantive reforms will be critically evaluated, followed by an investigation into gender-neutral legal drafting and decertifying legal gender.

Status-based reforms represent a symbolic shift and starting point for substantive reforms as seen in Australia, where a third sex model prevailed offering a third gender option, 'X', on birth certificates and passports.[104] At face value, this appears promising as it alleviates the need to shoehorn intersex infants into the gender binary with surgeries. Knouse praises this approach, considering it 'a positive first step' 'liberat[ing] intersex individuals from the normalizing and constricting sex stereotypes'.[105] Similarly, another option occurring in Germany is leaving birth certificates blank when sex is indeterminate.[106] In theory, this also removes pressure

[100] UK Intersex Association, 'Why Not "Disorders of Sex Development"?' (*UK Intersex Association*) <http://www.ukia.co.uk/ukia/dsd.html> accessed 11 April 2022.
[101] Mitchell Travis and Fae Garland, 'Legislating intersex equality: building the resilience of intersex people through law' (2018) 38(4) *Legal Studies* 587, 589.
[102] ibid 588.
[103] The Equality Act 2010, s 11(a).
[104] Travis and Garland, 'Legislating intersex equality' (n 101) 602.
[105] Jessica Knouse, 'Intersexuality and the Social Construction of Anatomical Sex' (2006) 12(1) *Cardozo Journal of Law & Gender* 135, 153.
[106] Gesetz zur Änderung personenstandsrechtlicher Vorschriften (Personenstandsrechts-Änderungsgesetz - PStRÄanG) 2013, s 22(3).

for IGM as sex can be left blank. However, both approaches necessitate caution; presenting individuals as 'other' could ostracise them at cultural and institutional levels.[107] Travis and Garland argue '[l]aws that position intersex children as "queer" may lower their resilience as they encourage parents to "normalise" them'.[108] Therefore, 'depicting intersex individuals as a queer outsider in law' could actually increase the likelihood of IGM as parents feel pressurised into deferring to medical expertise.[109] The intersex organisations ILGA-Europe and OII Europe argue neither reform should be compulsory for intersex children and unavailable to other children, as it would constitute 'another label that segregates them from the rest of society.'[110] To promote equality, the organisations recommend giving all parents the option to leave sex blank and giving everyone options other than male and female.[111] This approach successfully facilitates self-determination. Moreover, as most intersex people would not adopt 'X' markers and most parents would not allow their child's sex to remain blank for long, these reforms lack convincing practical weight.[112] Considering Holmes' statement that *'recognition* of… third genders is not equal to *valuing* the presence of those who were neither male nor female',[113] status-based approaches ultimately fail to ameliorate lived experiences, address systemic disadvantage or 'tackle the day-to-day concerns of intersex people'.[114] Therefore, more substantive measures, such as banning both non-consensual gender-normalising surgeries and the deselection of intersex embryos, must be sought out which could accompany updated anti-discrimination provisions.

As substantive inequalities are insuperable in the face of the aforementioned status-based endeavours alone, legal reform must seek out the responses required by the intersex community and pursue them. Malta's introduction of the Gender Identity, Gender Expression and Sex Characteristics Act 2015 is a positive example of laws protecting bodily autonomy, as it outlaws sex assignment surgery on intersex minors.[115] This autonomy-led approach ends the medical 'rhetoric of secrecy' by reallocating decision-making power to intersex individuals.[116] Scholars have considered Malta's reforms especially successful as policymakers engaged in meaningful conversations at the International Intersex Forum to uncover the legal remedies required to increase intersex resilience.[117] However, the Maltese legislation has not escaped criticism. Doctors who conduct these surgeries will only face a fine of up to €1000[118] and parents are not prohibited from seeking surgeries in other jurisdictions where the practices are not criminalised.[119] Nonetheless, Travis and

[107] Travis and Garland, 'Legislating intersex equality' (n 101) 599.
[108] Travis and Garland, 'Queering the Queer/Non-Queer Binary' (n 37) 175.
[109] ibid 176.
[110] Ghattas (n 85) 22.
[111] ibid.
[112] Travis and Garland, 'Legislating intersex equality' (n 101) 596.
[113] Morgan Holmes, 'Locating Third Sexes' (2004) 8 *Transformations* 1, 1.
[114] Travis and Garland, 'Legislating intersex equality' (n 101) 596.
[115] Gender Identity, Gender Expression and Sex Characteristics Act 2015, s 15.
[116] Travis and Garland, 'Legislating intersex equality' (n 101) 595.
[117] ibid 593.
[118] Gender Identity, Gender Expression and Sex Characteristics Act 2015, s 11(3).
[119] Travis and Garland, 'Legislating intersex equality' (n 101) 604.

Garland's qualitative study revealed prohibiting non-therapeutic interventions 'was understood to be the key method to achieving equality' by intersex participants.[120] Therefore, it is paramount that England and Wales follow the exemplary Maltese approach to halt injustices against intersex infants, as well as supporting greater psychosocial care for post-surgical individuals. Additionally, queer theorists, intersex activists and legislators must begin questioning the legality of in utero screening for the purposes of post-screening deselection and abortion of intersex variations. The misconception of intersex as a disability has undoubtedly contributed to the normalisation of this practice. While the right to access abortion is fundamentally important, whether this extends to a right to choose the type of child you have is debatable. The turbulent debate over sex-selective abortion, which is not permitted in England and Wales, should be refocused around intersex variants, an area in desperate need of significant academic scholarship and empirical research into the HFEA's practices. Once queer theory and queer politics successfully depathologise intersex, law will be able to affirm intersex's lawfulness and deliberate on the legality of in utero screening for intersex variations.

Substantive reforms should be coupled with inclusive gender-neutral legal drafting and could even be supplemented with a decertification of legal gender. While England and Wales have gender-neutral legal drafting, legislation and common law still use masculine language. Under the Interpretation Act 1978, 'words importing the masculine gender include the feminine' and vice versa, context permitting.[121] Lord Scott of Foscote believes gender-neutral drafting 'is not only unacceptable and unnecessary but… an insult to the lovely English language'.[122] Lord Scott is missing the point. Persistent he/him pronouns reinforce patriarchal, heteronormative society and exclude intersex and non-binary individuals not using gendered pronouns. Gender-neutral drafting would significantly dampen law's ostracisation of anyone not identifying with masculine pronouns by avoiding gendered language. Additionally, Cooper and Renz advocate for decertifying legal gender, stating that eradicating the state's role in assigning gender status could be achieved by stopping the need to legally assign gender at birth altogether.[123] This would facilitate the self-determination of gender identity for the entire population. Through both mechanisms, society could retain the concept of gender, yet law could move away from it. In Ammaturo's words, 'creating a more 'gender-neutral' society will dramatically improve the human rights of intersex persons, since this would challenge the core of societal stereotypes about sex and gender'.[124] While gender-neutral legal drafting undoubtedly constitutes a progressive step forward, greater legal scholarship investigating the decertification of legal gender is needed to confirm its benefit to law and society.

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[120] ibid 587.
[121] Interpretation Act 1978, s 6.
[122] Hansard HL Deb 12 December 2013, vol 750, col 1007.
[123] Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43(4) *Journal of Law and Society* 483, 484.
[124] Ammaturo (n 96) 606.

A critical discussion of intersex within the differing societal cosmoses has revealed that queer theory and queer politics must elevate intersex onto a legal platform to successfully challenge medical authority and ameliorate community resilience. As intersex is inherently queer, queer theory must depart from sexualised outlooks and adopt a universalising approach capable of safeguarding desensitised, post-surgical bodies, dismantling gender norms and granting intersex individuals' autonomy. While political association with LGBT was a fundamental stepping-stone in gaining stature and capacity to achieve these aims, exclusively intersex agendas must surface if autonomy-led, anti-paternalistic state responses are to materialise. As law is capable of heightening resilience by influencing social attitudes, legal recognition and anti-discrimination protections are needed to combat the dominant medical narrative. Third markers should not be compulsory for intersex individuals; instead, options other than male and female should be available for everyone if formal equality is truly to be achieved.[125] This could be coupled with gender-neutral drafting and even decertifying gender. Policymakers must work closely with intersex communities on substantive reforms as in Malta, but first policymakers, and the wider population, must be educated to eradicate the damaging misconceptions and lack of transparency which have harmfully pathologised natural intersex variations.

4. Asexuality

A. Queering asexuality

Asexuality is the 'invisible' sexual orientation which remains persistently under-discussed and misunderstood in social and legal circles.[126] The most prominent international asexuality organisation, the Asexual Visibility and Education Network (AVEN), simply defines that '[a]n asexual person does not experience sexual attraction'.[127] However, there are countless misconceptions about asexuality which hinder societal understanding and visibility. For instance, asexuality is erroneously conflated with celibacy: a behavioural choice to abstain from sexual activity which inherently implies sexual desire.[128] Some aces do have sex and masturbate for reasons other than erotic attraction,[129] and as Emens accurately emphasises, 'it is a choice whether to *do* sex, but it is not a choice whether to *want* sex.'[130] Furthermore, Swankivy's 'Asexuality Top Ten' highlights common misconceptions: aces have hormonal issues, have been sexually abused, cannot get partners, are gay or afraid of commitment.[131] These myths must be eradicated for asexuality to enjoy widespread

[125] Ghattas (n 85) 22.
[126] Jessica Klein, 'Asexuality: The ascent of the 'invisible' sexual orientation' (*BBC*, 11 May 2021) <https://www.bbc.com/worklife/article/20210507-asexuality-the-ascent-of-the-invisible-sexual-orientation> accessed 22 November 2021.
[127] AVEN, 'Overview' (*AVEN*) <https://www.asexuality.org/?q=overview.html> accessed 1 March 2022.
[128] Klein (n 126).
[129] Lori Brotto and others, 'Asexuality: A Mixed-Methods Approach' (2008) 39(3) *Archives of Sexual Behaviour* 599, 611.
[130] Elizabeth Emens, 'Compulsory Sexuality' (2014) 66(2) *Stanford Law Review* 303, 318.
[131] Swankivy, 'Asexuality Top Ten' (*swankivy.com*) <http://swankivy.com/writing/essays/philosophy/asexual.html> accessed 1 March 2022.

legitimacy as a sexual orientation. While the infant movement is yet to gain significant traction, Bogaert's empirical research which analysed 18,000 British residents found 1% to be asexual.[132] According to population estimates, England and Wales host at least 597,200 aces,[133] while the world contains over 79 million.[134] Therefore, queer theory, queer politics and law must start listening to the ascending population to banish the misconceptions and legitimise asexuality.

Asexuality is routinely pathologised as hormonal issues or alternatively dismissed as general disinterest in sex. Both attitudes fail to accept asexuality as a legitimate sexual orientation; progress towards this was significantly hindered by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V), which misconstrues asexuality as hypoactive sexual desire disorder (HSDD) if it causes significant distress.[135] This is problematic as it denounces asexuality as a disorder in need of correction, analogously to intersex. In light of this, the asexuality movement's primary goals include visibility and education.[136] Asexuality agendas remain invisible in political, legal and social arenas: asexuality was not mentioned in the Government's 2018 LGBT Action Plan, asexuality is absent from legal discourse and even members of the LGBT+ community do not accept asexuality as a queer identity.[137] This cements asexuality's position at the bottom of Rubin's 'erotic pyramid' alongside intersex.[138] Therefore, as Alcaire acknowledges, education is vital for 'building cultural competence' alongside knowledge and empathy.[139] For Klein, '[i]ncreased representation is key for enabling people to recognise and understand asexuality as well as normalise the orientation.'[140] Moreover, the Government's 2018 LGBT Survey Report found the average life satisfaction for the UK population was 7.7 out of 10, but only 5.9 for aces.[141] This is extremely concerning and necessitates imminent legal and institutional change to increase resilience. Therefore, queer

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[132] Anthony Bogaert, 'Asexuality: Prevalence and associated factors in a national probability sample' (2004) 41(3) *Journal of Sex Research* 279, 279.
[133] Office for National Statistics, 'Population Estimates', (*Office for National Statistics*, 25 June 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates> accessed 15 April 2022.
[134] Worldometer, 'Current World Population' (*Worldometer*) <https://www.worldometers.info/world-population/> accessed 21 April 2022.
[135] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-V* (5th edn, American Psychiatric Association 2013) <https://dsm.psychiatryonline.org/doi/full/10.1176/appi.books.9780890425596.dsm13> accessed 1 March 2022.
[136] Karli Cerankowski and Megan Milks, 'New Orientations: Asexuality and its implication for theory and practice' (2010) 36(3) *Feminist Studies* 650, 657.
[137] Government Equalities Office, 'LGBT Action Plan' (n 91).
[138] Rubin (n 14) 151.
[139] Rita Alcaire, 'LGBTQI+ Healthcare (in)Equalities in Portugal: What Can We Learn From Asexuality?' (2021) 9(5) *Healthcare (Basel)* 583, 583 <https://www.mdpi.com/2227-9032/9/5/583> accessed 11 February 2022.
[140] Klein (n 126).
[141] Government Equalities Office, 'National LGBT Survey: Summary report' (July 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722314/GEO-LGBT-Survey-Report.pdf> accessed 1 March 2022.

theory, queer politics and law must be reformed if the nascent asexuality movement is to depart from pathologisation and achieve its goals.

B. Asexuality and queer theory

Queer theory is a beneficial lens which can aid asexuality in its quest for legitimacy and acceptance. According to McCreery, '[i]n rejecting the naturalness of sexual categories, queer theory encourages a form of sexual liberation based on feelings of pleasure and desire that may change over time'.[142] This is highly accurate, however asexuality is not always recognised as compatible with this. The difficulty, as identified by Cerankowski and Milks, is how 'asexuality as an identity meets and potentially challenges feminist conceptions of sex and female sexuality.'[143] Many queer theorists fixate on sex, which potentially posits asexuality at odds with queer theory and its sexual homonormativity. For example, Dean recognises how queer theory insists 'on the specificity of genital contact as the basis for all political work,' which inherently ostracises aces.[144] This can be evidenced by Warner who questions, '[i]f we were not sexual, would we be more human, or less?'[145] This is representative of much of queer theory's overwhelming fixation on sex and neglect of asexuality, which is unrelated to their plight for sexual liberation. However, McCreery's aforementioned understanding of queer theory's encouragement of sexual liberation can be applied to asexuality, as it is a sexual category experiencing low, or no, feelings of pleasure and desire which can fluctuate over time. The underlying issue is whether asexuality is queer. Speaking from personal experience, asexuality activist Paramo complains aces are 'perceived as wholly *unqueer*' and are thus excluded from queer spaces.[146] This attitude from the wider LGBT+ community is revealed in Bersani's concern that if 'queer' became a blanket term for any variation of the norm, it would desexualise the gay and lesbian movement, disrupting how 'the sexual specificity of being queer… gives queers a special aptitude' in challenging social institutions.[147] This argument lacks convincing weight; desexualisation is crucial in order for asexuality to be included within the LGBT+ movement. Bersani's narrow definition of queer as 'an erotic desire for the same' is outdated, homonormative and ultimately hypocritical.[148] Queer theory's failure to include asexuality in its entourage is nonsensical considering its advocation for the nonnormative and rejection of heteronormative society. Arguably, it does not get more nonnormative than the total rejection of sex, and asexuality's deviations from norms of embodiment merit inclusion within queer discourse.

Contributing to this discussion, Cerankowski and Milks' approach is highly convincing. Despite acknowledging the 'palpable ambivalence between queerness and

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[142] McCreery (n 4) 54.
[143] Cerankowski and Milks (n 136) 655.
[144] Tim Dean, *Beyond Sexuality* (University of Chicago Press 2000) 172.
[145] Warner, *The Trouble With Normal* (n 24) 16.
[146] Michael Paramo, 'On the concept of Queer Asexuality' (*Medium*, 19 December 2017) <https://medium.com/@Michael_Paramo/why-i-say-im-a-queer-asexual-on-the-concept-of-queer-asexuality-8b1a52f0c3b3> accessed 28 February 2022.
[147] Leo Bersani, *Homos* (Harvard University Press 1995) 72-73.
[148] ibid.

asexuality',[149] they assert asexuality informs, and is informed by, queer theory.[150] This stance is furthered by Bogaert, who affirms 'asexuality is construable as a separate, unique category within a sexual orientation framework'.[151] If all queer theorists embraced this approach, asexuality would find solace within LGBT+ discourse and reap the benefits of positive scholarship. Queer theory is especially useful for validating asexuality, as it asserts sexuality is socially constructed, rather than biologically predetermined. Although AVEN declares asexuality is not a choice but rather biologically engineered,[152] and Brotto and others' empirical study revealed 'all asexuals interviewed believed that asexuality was biologic',[153] it must be remembered that these beliefs are unaccompanied by conclusive scientific proof. Vance's declaration that 'sexual desire is itself constructed by culture and history from the energies and capacities of the body' is more persuasive, as individuals are arguably products of their cultural surroundings.[154] By using 'queer' as a verb, Dwyer supports this argument: 'to queer is to disrupt heteronormativity by embodying diverse sexuality and/or gender'.[155] Applying this to asexuality posits aces as queering heteronormativity by lacking heterosexual attraction, therefore aces can be regarded as queer. To elevate asexuality from the bottom of Rubin's 'hierarchical system of sexual value,' combat invisibilisation and distance pathologisation, queer theory must position asexuality onto a sturdy scholarly platform.[156] In turn, asexuality can improve queer theory by decentralising sex from the discourse and shifting the focus onto substantive issues such as education and depathologisation.

C. Asexuality and queer politics

As previously established, politics plays a vital role in promoting and achieving goals for sexual minorities. However, the construction of queer politics has also negatively affected aces, whose issues are neglected as they do not neatly fit into a politics singly focused on sexuality. As Cohen recognises, '[a] reconceptualization of the politics of marginal groups allows us… to privilege the specific lived experiences of distinct communities'.[157] Thus far, asexuality has not been heavily politicised.[158] However, as sexuality 'is organized into systems of power, which reward and encourage some individuals and activities, while punishing and suppressing others', asexuality, as a sexual orientation, inadvertently possesses political potential.[159] Whether queer politics and aces themselves accept this is questionable. Analysing the homonormative power structures within the LGBT+ community is useful for

[149] Cerankowski and Milks (n 136) 659.
[150] ibid 662.
[151] Anthony Bogaert, 'Asexuality: What It Is and Why It Matters' (2015) 52(4) *The Journal of Sex Research* 362, 366.
[152] AVEN (n 127).
[153] Brotto (n 129) 615.
[154] Carol Vance, 'Anthropology Rediscovers Sexuality: A Theoretical Comment' (1991) 33(8) *Social Science and Medicine* 875, 878.
[155] Dwyer (n 11) 207.
[156] Rubin (n 14) 151.
[157] Cohen (n 25) 482.
[158] Cerankowski and Milks (n 136) 657.
[159] Rubin (n 14) 171.

understanding asexuality's desertion. Only recently is asexuality being recognised as a sexual orientation and as open asexuality lacks prominence in society, asexuality-specific charities and donations are infrequent. While it is undoubtedly in asexuality groups' interest to form alliances with LGBT+ groups to take advantage of their funding, it is crucial that asexuality-specific agendas are not drowned under a sea of broader LGBT+ aims. As aces are 'prime candidates to support the movement to abandon marriage as a legal institution,' it is crucial that they are not exploited purely to support the eradication of legal marriage.[160] However, avoiding assimilation is easier said than done, therefore, it is imperative that academic scholarship exposes queer politics for its homonormativity and investigates the asexual community's lived experiences and specifically what institutional responses they require.

As Warner explained in 2000, '[a]lready, the movement has been forced to add "bisexual" and, occasionally, "transgendered" to its self-description. These gestures are… half-hearted gestures at being politically correct.'[161] Further, Warner accurately recognises that 'even an expanded catalog of identities can remain blind to the ways people suffer, often indiscriminately, from… norms of sexual practice'.[162] Therefore, in order to remedy this 'structural distortion in queer politics', asexuality needs to stop being perceived as a threat to the LGBT+ movement.[163] As expanded on by Cerankowski and Milks, 'asexuality as a practice and a politics radically challenges the prevailing sex-normative culture.'[164] This is highly accurate and can be evidenced by the fact that asexuality significantly challenges Kinsey's one-dimensional scale between heterosexuality and homosexuality and sits outside the sexuality spectrum.[165] This concerns the homonormative LGBT+ movement as asexuality threatens to remove sex from politics and calls for a rethinking of desire in queer communities.[166] Despite these concerns, the arguments for aces belonging within the LGBT+ community are strong. As succinctly phrased by Galop, the UK's LGBT+ anti-abuse charity, '[a]sexuality is a part of sexual diversity, and aromanticism is a valid romantic orientation. Therefore, they belong within the LGBT+ community'.[167] Stychin takes this further, asserting identity categories need updating for queer politics to keep up with its own diversifying culture: '[c]entral to a queer identity… is the problematisation of categories of sexual identity and boundaries of sexual propriety, as they have been historically constituted.[168] As Herman understands, '[l]esbians and gay men are granted legitimacy… on the basis that they constitute a

[160] Emens (n 130) 352.
[161] Warner, *The Trouble With Normal* (n 24) 38.
[162] ibid 39.
[163] Warner, *Fear of a Queer Planet* (n 12) xvii.
[164] Cerankowski and Milks (n 136) 661.
[165] Alfred Kinsey, Wardell Pomeroy and Clyde Martin, *Sexual Behaviour in the Human Male* (Saunders 1948).
[166] Cerankowski and Milks (n 136) 661.
[167] Galop, 'Acephobia and anti-asexual hate crime' (*Galop*, 10 June 2021) <https://galop.org.uk/resource/acephobia-and-anti-asexual-hate-crime/> accessed 22 November 2021.
[168] Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge 1995) 141.

fixed group of "others" who need and deserve protection.'[169] This should include aces, as excluding them from the LGBT+ community would ostracise them, cut off both funding and support networks, and ultimately invisibilise asexuality further. The role of organisations for minority groups cannot be overstated. AVEN's International Asexuality Conference 2021 was the largest asexuality conference to date, but unlike the International Intersex Forum, this conference involved virtual panel discussions and workshops, rather than conversations with policymakers.[170] Nonetheless, it is a 'universalizing' rather than 'minoritizing' step and to advance this, queer politics must reflect upon its potential for homonormativity and amend its agendas to meaningfully include and empower aces.[171]

D. Asexuality and law

Once queer theory and queer politics assert asexuality's legitimacy, fruitful legal campaigns can commence. As stated by Emens, 'law is a powerful tool for validating the identity claims of marginal groups.'[172] At surface level and without recognising intersectionality, aces appear less prone to discrimination than other sexual minorities as they do not violate religious teachings and are less likely to provoke repulsion at the idea of deviant sexual practices.[173] In contrast, intersex people whose gender appearance does not visibly fit within the gender binary norm are evidently at greater risk of discrimination. However, MacInnis and Hodson's empirical research revealed aces experience comparable or even greater bias than other LGBT+ individuals.[174] This bias is especially pertinent in the sense that aces are not viewed as human; MacInnis and Hodson found '[s]exuality appears to be perceived as a key component of humanness.'[175] Recalling Fineman's vulnerability theory, institutions including law are vital in order to build resilience.[176] Law reinforces the dehumanisation of asexual people by privileging sexual people, especially by awarding benefits through the legal marriage regime. Bogaert found only 33.3% of aces were married or cohabiting, and are less likely to have long term, or any, relationships.[177] This is significantly lower than the 50.4% of England and Wales' population who are married or in civil partnerships and receive state and legal benefits on the basis of these unions.[178] As

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[169] Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (University of Toronto Press 1994) 44.
[170] Asexuality Conference, 'International Asexuality Conference 2021' (*Asexuality Conference*) <https://asexualityconference.org> accessed 12 April 2022.
[171] Sedgwick (n 82) 40.
[172] Emens (n 130) 369.
[173] ibid 367.
[174] Cara MacInnis and Gordon Hodson, 'IntergroupBias Toward "GroupX": Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination Against Asexuals' (2012) 15(6) *Group Processes & Intergroup Relations* 725, 725 <https://journals.sagepub.com/doi/10.1177/1368430212442419> accessed 4 March 2022.
[175] ibid 734.
[176] Fineman (n 52).
[177] Bogaert, 'Asexuality: Prevalence and associated factors' (n 133) 282.
[178] Office for National Statistics, 'Population estimates by marital status and living arrangements, England and Wales: 2019' (*Office for National Statistics*, 17 July 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populatione

Thomas explains, the '[m]arriage licence operates as a badge of social belonging and state recognition of the equivalence of hetero- and homo-conjugality'.[179] The nature of asexuality means there is a lower chance of obtaining this badge and the accompanying legal benefits. This justifies Emens' conclusion that having 'legal benefits depend on sexual activity could be a substantial burden on many asexuals'.[180] Additionally, the fact that marriage is voidable on the ground of not consummating marriage, but is not voidable on the ground of infertility,[181] suggests 'sex per se matters more to marriage than reproduction.'[182] This reveals institutional support for sex and blatant disregard of asexuality. To fight against these discriminations and increase resilience, legal recognition and anti-discrimination protections must be the first step before substantive asexuality-specific reforms.

The Equality Act 2010 protects individuals from discrimination based on certain personal characteristics including sexual orientation. Although asexuality is a sexual orientation, the statute's definition excludes asexuality by not accounting for individuals experiencing no sexual attraction: 'Sexual orientation means a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex.'[183] This reiterates how law narrow-mindedly recognises sexuality through its own provisions and how asexuality remains excluded from the legal system. Including asexuality as a protected characteristic would constitute a positive starting point, from which new empirical investigations can be conducted, as Travis and Garland forefronted for the intersex population.[184] However, there are positive and negative considerations to legal recognition of asexuality, which correspondingly apply to intersex. According to Emens, there are many benefits to legal recognition: it would 'substantiate asexuality as a minority identity,' reduce stigma by 'generat[ing] publicity for asexuality and thus begin to crystallize the identity in the public imagination' and help people recognise it in themselves.[185] Furthermore, anti-discrimination law would provide basic social protections, for example in workplaces and schools. These reasons are highly convincing, however, there are drawbacks to legal recognition which necessitate proceeding with caution. Anti-discrimination law constitutes surface-level management which cannot eradicate human rights abuses and would not meaningfully impact day-to-day life. Additionally, Emens appreciates recognition could 'ossify the group identity' in a narrow, intransigent manner and provoke litigation to determine who falls inside this identity category.[186] Travis and Garland are similarly cautious, stating 'legal recognition is not always a liberating experience'[187] and formal equality provisions

stimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2019> accessed 28 February 2022.

[179] Thomas (n 8) 11.

[180] Emens (n 130) 350.

[181] Matrimonial Causes Act 1973, s 12.

[182] Emens (n 130) 351.

[183] Equality Act 2020, s 12(1).

[184] Travis and Garland, 'Legislating intersex equality' (n 101).

[185] Emens (n 130) 370.

[186] ibid 370-371.

[187] Travis and Garland, 'Legislating intersex equality' (n 101) 588.

could 'entrench vulnerability rather than enhance resilience' if constructed in terms of recognition rather than redistribution.[188] Fineman agrees, stating formal equality 'leaves undisturbed–and may even serve to validate–existing institutional arrangements that privilege some and disadvantage others' as it 'does not challenge existing allocation of resources and power'.[189] Emens questions whether specifying asexuality as a protected characteristic would even result in many, or any cases.[190] This is largely insignificant, as it is the principle of recognition which is significant. Despite the validity of these concerns, legal recognition is crucial to enable protection against discrimination and alleviate asexual and intersex groups from being entrenched in their vulnerability.

While asexuality is undoubtedly further behind intersex in its quest for whole-hearted acceptance from society, by prioritising the voices of asexuality scholars such as Emens, Cerankowski and Milks, queer theory can successfully validate asexuality as a sexual orientation. Queer politics must work to dispel the asexuality myths by campaigning for a distinct asexuality agenda which is not shrouded by wider LGBT+ aims. Law's institutional queerphobia, which has prevented the recognition and protection of sexual diversity, must be eradicated by raising asexuality to an equitable level. Banishing the legal hierarchy within the LGBT+ community through formal equality must be the first step before investigations into aces' needs can result in successful, substantive reforms. Anti-discrimination protections are a positive starting point from which the asexuality movement will have the platform it requires to build its community's resilience.

5. Conclusion

This paper has highlighted how law is failing intersex and asexual individuals, who need greater institutional support to improve their resilience. Part 2 firstly tackled queer theory, praising its capacity to deconstruct binary norms, yet cautioning its homonormative potential. A new intersectional approach acknowledging race and class and rejecting assimilation with heteronormative ideals would more successfully represent the plethora of existing queer personalities.[191] Although queer politics was triumphant in securing LGBT reforms and offering financial and emotional support to intersex and asexuality groups, these minorities were routinely eradicated from homonormative political discourses. The gays and lesbians at the top of the LGBT+ hierarchy viewed them as unrelated and potentially disruptive to their singular-issue, pro-sex aims, such as same-sex marriage. Moving forward, queer politics must realign itself with queer theory's nonnormative positionality. A starting point to combatting homonormativity would be to increase the representation of intersex and asexuality voices within LGBT+ charities and organisations and redirect funding to ensure their experiences are understood. Law's unwaning binary, biological outlook is exposed

[188] ibid 590.
[189] Martha Fineman, ''Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(1) *Elder Law Journal* 71, 102.
[190] Emens (n 130) 371.
[191] Cohen (n 25) 482.

through its treatment of transgender issues and although law has been receptive to LGBT+ demands to an extent, considered attention to intersex and asexuality remains lacking. Legal recognition is a vital first step towards promoting widespread acceptance on an institutional platform which removes the need for damaging assimilation. Furthermore, legal protections are capable of increasing resilience by developing beneficial resources and expediating the enjoyment of legal freedoms.

Part 3 revealed that intersex communities desperately need substantive reforms curtailing the normalised human rights abuses occurring via IGM, which violently shoehorn individuals into a sex regardless of chromosomes or consent. Queer theory must focus on the experience of being intersex, rather than the concept, and depart from sexualised outlooks which are incompatible with post-surgical, desensitised bodies.[192] If intersex scholars continue working towards depathologisation and understanding intersex as a natural variation rather than a disorder, this will create an environment more readily critical of both IGM and in utero screening for intersex variations for the purposes of deselection and abortion. Queer politics must cognise that constructing intersex as LGBT may increase medical jurisdiction and must stop collating intersex issues with LGBT issues, as this heightens their powerlessness by muffling intersex voices.[193] Empowering distinctively intersex organisations and fighting against stigma will increase intersex representation and elevate them onto a platform capable of challenging pathologisation and legal silence. To recuperate community resilience, law must reallocate power away from the medical profession by accompanying formal equality with substantive provisions. Despite the benefits of reforms in other jurisdictions, namely, third sex markers in Australia and leaving sex blank on birth certificates in Germany, these are ultimately inefficient and could have injurious effects. Presenting intersex people as 'other' could ostracise them further, lower resilience and even increase the prevalence of IGM.[194] Moreover, as both reforms continually deny sex and gender as spectrums, they are not progressive. However, including intersex as a protected characteristic in anti-discrimination law would be a positive, symbolic shift setting the scene for substantive reforms. Following Malta's approach, non-therapeutic medical surgeries should be prohibited until informed consent can be provided. Any medical treatment received must be closely monitored and psychosocial care should be guaranteed. These approaches would decrease pathologisation and stigma, which would be beneficial in the fight against deselection and abortion of intersex variations, an area in need of deeper investigation. These approaches also successfully safeguard bodily autonomy and facilitate self-determination, which should be furthered by implementing gender-neutral language at institutional levels and potentially even a decertification of legal gender.

Part 4 revealed the same structural problems of homonormativity and medicalisation have caused comparable issues for the asexual community, who remain shunned by

[192] Travis and Garland, 'Queering the Queer/Non-Queer Binary' (n 37) 177.
[193] Travis and Garland, *Intersex Embodiment* (n 90) 24.
[194] Travis and Garland, 'Legislating intersex equality' (n 101) 599.

both law and society. Queer theory has the potential to aid aces in their quest for understanding and acceptance if it reignites its nonnormative flair. By validating asexuality as a sexual orientation and unpicking biological explanations, queer theory can promote the acceptance of asexuality and subsequently increase its standing within queer spaces. Greater scholarship will provoke wider discussion capable of eradicating the damaging, dismissive myths and help the movement gain traction. By decentralising sex from the discourse and including asexuality rather than being wary of it, queer politics can alleviate asexuality from policy level invisibility. As with intersex, asexuality-specific agendas must be promoted, and asexuality organisations such as AVEN meaningfully supported to diminish homonormativity. Greater political criticism of construing asexuality as HSDD could beneficially prompt the Government towards improving their understanding of asexuality by engaging with the community. Despite the noteworthy limitations of formal equality, including asexuality as a protected characteristic in the Equality Act 2010 by expanding its narrow definition of sex could positively influence societal attitudes away from discrimination and dehumanisation. This would validate and protect asexuality, alongside promoting societal acceptance. Law must also be reflective and reconsider its appraisal of sex per se and its system of legal benefits dependant on sexual relationships, which ostracises aces and decreases their resilience by restricting access to resources. As the asexuality movement remains at the recognition stage, queer empirical scholarship is needed to investigate the community's experiences and needs before substantive reforms can be campaigned for.

Although both movements have indubitably been growing, more must be done to prevent intersex and asexual individuals experiencing hermeneutical injustice. The problem does not lie with these individuals but in society's unwillingness to embrace sex, gender, and sexuality diversity. However, only the state and law possess the power to initiate institutional change capable of bolstering long-term resilience. Unfortunately, the enactment of radical overnight change from the Conservative Government is doubtful. To move towards achieving bottom-up reforms, queer theory and queer politics are the key mechanisms which must precede legal change. Both must reflect on their potential for homonormativity and prioritise the voices of those campaigning specifically for intersex and asexuality justice. If homonormativity is ever to be ousted, updating anti-discrimination provisions cannot be seen as a means to an end. Substantive developments must include educational reform combatting binary understandings of sex, gender, and sexuality. Gender-neutral language across institutional platforms and a decertification of legal gender would contribute towards a gender-neutral society, which would be of significant benefit to everyone, not just queer minorities.[195] Lastly, a complete banishing of pathologisation is paramount to ensure intersex and asexual individuals escape the dominant medical narrative and enjoy inclusion and acceptance within a society free from homonormativity.

[195] Cooper and Renz (n 123) 484.

Critical Analysis of the barriers to justice faced by Dalit Women who have suffered sexual violence in India

RINDA DESARAPU

Abstract

Even after 75 years of Independence, the caste system, which divides individuals into social groups with dedicated rights and social status, remains prevalent in India. Dalits, also known as Scheduled Castes or 'Untouchables', fall outside the caste system and are at the bottom of the hierarchy. This increases the vulnerability of Dalit women, due to the intersection of their female gender and low caste. They are often the victims of sexual violence and are not allowed the same pathways to dignity and justice that other women receive. Using an empirical research method and case analysis, this paper will critically analyse the structural barriers faced by Dalit women when accessing the Indian Justice system and highlight the role played by caste and patriarchy. It will highlight how, despite the enactment of specific laws and affirmative actions by the Indian Government to protect Dalit women, the laws are poorly implemented resulting in more crimes against them. The paper will conclude that the position of Dalit women can only be improved when equality is truly achieved, which requires a social change in society.

1. Introduction

Patriarchy has been deep-rooted in society worldwide where, even today, women face many challenges in their attempts to attain equal status to men, be it in social, economic, political rights or personal lives. This paper aims to draw attention to and critically understand how the patriarchal system and caste hierarchy in India have resulted in Dalit women becoming victims of sexual violence and the challenges and institutional barriers that they face while accessing the justice system. Despite the abolition of Caste-based discrimination in India, it is still prevalent and practised in many parts of the country, leading to oppression of the Dalit community, as they fall at the bottom of the caste hierarchy. This increases the vulnerability of Dalit women due to the intersection of their female gender and low caste.

Using an empirical research method, this paper draws attention to the statistics of sexual offences committed against Dalit women in India and argues that many cases are unreported - the official numbers are just the tip of the iceberg. Using case analysis, the objective is to critically apprehend why the structural barriers that Dalit women face when seeking justice in India are distinctive, despite the framing of specific laws prohibiting caste discrimination for their protection. Section two examines how patriarchy has resulted in women being placed at a subordinate level to men across the globe and discusses the specificity of patriarchy in India. It argues that patriarchy

coupled with the caste system increases the susceptibility of Dalit women, where they are subjected to many atrocities like untouchability, the Devadasi system (Temple Prostitution) and various sexual offences. The third section briefly outlines the international and domestic legal framework for protecting women against sexual violence and the laws enacted in India to address the atrocities committed against the backward castes. The fourth section critically analyses the various institutional barriers that Dalit women face when reporting a sexual offence case. These include poor policing where there are huge delays in filing a First Information Report, impunity enjoyed by the Dominant caste, lack of effective victim protection and problems associated with the medical examination. Section five concentrates on certain sexist and casteist statements made by prominent judges in India and their effect on Dalit women cases. Some recommendations will be put forward that could improve the position of Dalit women in society. Overall, it will be concluded that vulnerable people will continue to face discrimination unless there is a radical change in society.

2. *Effect of Patriarchy and caste on Dalit women*

This section will begin by analysing how patriarchy has resulted in the worldwide oppression of women, placing them at a subordinate level. It will then examine the specificity of their position in India and how caste plays a significant role in categorising people and placing them in the dominant and subordinate societal positions. It will then focus on the position of Dalit women in India and analyse the oppression they have been facing for decades due to the intersection of two forms of low status: their female gender and low caste.

A. Worldwide oppression of Women

Patriarchy, which rests on and naturalises discrimination against women, has been described as the most fundamental characteristic of human society, resulting in women occupying a subordinated, stigmatised position and lacking in rights and autonomy.[1] Writing in the 1980s, Walter S. Fahey[2] showed that even though in the United Kingdom the proportion of married women outside work increased by 52% from 1931 to 1981, they were often employed in jobs involving food, catering, cleaning, and other menial personal services. This was due to not having the same employment opportunities as men.[3] Fahey's description of women as tending to be employed in repetitive jobs 'serving those socially and economically above them, usually men' and being paid far less than men despite the advent of the 'Equal pay' and 'Sex discrimination legislation' remains true 40 years later.[4] For instance, recent

[1] Pierre Bourdieu, 'Masculine Domination' (2022) < https://www.sup.org/books/title/?id=1279 > accessed 2 February 2022.
[2] Walter S. Fahey, 'The Subordination of British Women – some causes and consequences' (1983) 7 Journal of Consumer Studies and Home Economics, p 150. < https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1470-6431.1983.tb00620.x?saml_referrer > accessed 10 January 2022.
[3] Ibid 150.
[4] Ibid 150.

government data revealed that women are paid a median hourly rate of 10.2% less than their male colleagues in 2021, despite the Equalities Act 2010.[5] Other work demonstrates the global nature of gender inequality, and its different manifestations. For instance, in South Africa, Shaina Hutson has argued that because polygamy is still common, women are at the beck and call of just one man.[6] If a woman cannot have a child, her husband would marry another woman to carry on the family lines.[7] Her research indicates how women are treated merely as objects, whose purpose is to have children and manage the household work.

Patriarchy has also resulted in the systematic use of violence to control women. As Jill Radford and Elizabeth A. Stanko point out, feminism explains the universality of male violence as a necessary mechanism in maintaining the system of gender subordination.[8] This interpretation is supported by Abeda Sultana, who highlights how men in the system of patriarchy use different kinds of violence to control and subjugate women, including rape, dowry murders, domestic violence, and other forms of sexual abuse. She argues that normalising these crimes had instilled fear and insecurity in women, which resulted in them being 'homebound, economically exploited and socially suppressed.'[9] Furthermore, Kelly and Radford argue that women adopt distinct 'silencing' mechanisms to invalidate the violence experienced by them.[10] This reinforces the argument that years of oppression and violence have instilled such fear that women may choose to remain silent rather than raise their voices and fight for their rights. Hence, it can be seen how patriarchy has made women, worldwide, occupy submissive positions, whether in the private sphere of a family or the public sphere of employment.

B. Specificity of Patriarchy in India

Given the universality of gender discrimination, it is unsurprising that in India it is one of the major issues that the country is struggling to tackle. Indian women's subordination has deep roots and remains normalised in many parts of the country.

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[5] Office for National Statistics, 'Gender Pay Gap In The UK: 2021' (Office for National Statistics 2022) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2021> accessed 15 April 2022.

[6] Shaina Hutson, 'Gender Oppression and Discrimination In South Africa' (2007) 5 ESSAI < https://dc.cod.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1026&context=essai > accessed 15 January 2022.

[7] Ibid.

[8] Kevin Martin Stenson and David Cowell, *The Politics Of Crime Control* (SAGE 1991) <https://books.google.co.in/books?hl=en&lr=&id=RDEizalgFy8C&oi=fnd&pg=PA186&dq=patriarchy+violence+against+women+in+uk&ots=XfnSGBekOD&sig=nbgnaQ12JvxYB6Mty7QpUEDTOKw&redir_esc=y#v=onepage&q=patriarchy%20violence%20against%20women%20in%20uk&f=false> accessed 15 January 2022.

[9] Abeda Sultana, 'Patriarchy And Women's Subordination: A Theoretical Analysis' [2012] Arts Faculty Journal < https://www.researchgate.net/publication/270175197_Patriarchy_and_Women's_Subordination_A_Theoretical_Analysis, p 10> accessed 15 January 2022.

[10] Liz Kelly and Jill Radford, 'Nothing Really Happened': The Invalidation Of Women's Experiences Of Sexual Violence' (1990) 10 Critical Social Policy < https://journals.sagepub.com/doi/pdf/10.1177/026101839001003003 > accessed 10 January 2022.

Most family hierarchies are structured in a way whereby men are considered the dominant heads and female members occupy a submissive position. Their opinions are not even considered when making decisions on family matters. Andrey Shastri argues that gendering in India starts right from the birth of the child.[11] The birth of a boy is celebrated lavishly. However, when a girl is born, she is treated as a burden to the family until she gets married.[12]

This practice of discrimination is also evident through the sex-selective abortion which is still prevalent in India,[13] despite being abolished by the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act in 1994.[14] Moreover, mothers who give birth to a female child are looked down on and mistreated. In the past, it has also been a practice for the female child to be murdered because the family did not want to carry the 'burden/liability' of having a girl. Preference for a son over a daughter is one of the major reasons for female infanticide. A study by the Lancet Global Health in 2018 revealed that gender discrimination kills around 239,000 girls annually in India.[15]

Gender discrimination can also be seen in the Prohibition of Child Marriage Act 2006, which lays down the legal age for marriage for women as 18, whereas for men, it is 21 years.[16] This has recently received many criticisms, and the Law Commission has recommended reform, arguing that this disparity contributes to the stereotype that the wife should be younger than the husband.[17] Finally, in December 2021, the government decided to accept the proposal for reform in the law to make the legal age for marriage equal irrespective of gender.[18] Analysing the position of married women in India, Chelliah and Dominic argue that 'the concept of Indian societies formulated by the patriarchal system is that women are created for household work and to serve men.'[19] Thus, most of their life is restricted to managing the house and children.[20] They also highlight the system of dowry that is widespread in India. They argue that it represents a curse for Indian society and point out how many married women are either 'murdered or driven to suicide due to continuous harassment and torture by

[11] Andrey Shastri, 'Gender Inequality And Women Discrimination' (*Citeseerx.ist.psu.edu*, 2014) < http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1077.219&rep=rep1&type=pdf > accessed 20 January 2022.
[12] Ibid.
[13] Parvathi S and Thamizhchelvi P, 'GENDER DISCRIMINATION IN INDIA - A STUDY' (2022) XII Xi'an University of Architecture & Technology < https://www.xajzkjdx.cn/gallery/276-april2020.pdf > accessed 15 January 2022.
[14] Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act 1994.
[15] Christophe Z Guilmoto and others, 'Excess Under-5 Female Mortality Across India: A Spatial Analysis Using 2011 Census Data' (2018) 6 The Lancet Global Health < https://doi.org/10.1016/S2214-109X(18)30184-0 > accessed 20 January 2022.
[16] Prohibition of Child Marriage Act 2006.
[17] Apurva Vishwanath, 'India Proposes to Raise Legal Marriage Age For Women' *The Indian Express* (2019) < https://indianexpress.com/article/explained/why-is-age-of-marriage-different-for-men-and-women-the-law-the-debate-5925004/ > accessed 16 January 2022.
[18] Ibid.
[19] Chelliah S and Dominic K. V, 'Gender Discrimination In India: An Overview' [2022] Language in India <http://languageinindia.com/sep2019/mkuliterature2019/drchelliahanddominic.pdf > accessed 15 January 2022.
[20] Ibid 108.

the husband and in-laws over the issue of insufficient dowry.' [21] Jeyaseelan Visalakshi and others argue that even though the husbands are usually the perpetrators of domestic violence, the role of the mothers-in-law in instigating and exacerbating such violence should not be ignored.[22] In their study about domestic violence against pregnant women, Muthal Rathore and others highlight that the mother-in-law was the perpetrator in 36.9% of the cases.[23] This demonstrates that it is not only men who are perpetrators of domestic violence – some women play an instrumental role in inflicting violence on other women. For instance, in January 2022, a 20-year-old married Sikh woman was allegedly kidnapped, gang-raped and paraded in the streets of Kasturba Nagar, Delhi. The perpetrators were the family members of the boy who fell in love with the Sikh woman and killed himself last year after she refused consent.[24] Blaming her for the boy's death, his family members blackened her face, cut her hair, and garlanded her with shoes in retaliation.[25] The incident was captured in a video which revealed that out of the eleven perpetrators, seven were women.[26] This case maintains the argument that apart from men, even women play a role in causing violence against other women.

In summary, there are various forms of discriminatory practices against women in India; the focus of this paper will be the specific vulnerability of the Dalit women facing sexual violence in India due to the intersection[27] of low caste and female gender.

C. The position of Dalit women and the role of caste

Even though masculine domination is ubiquitous, certain groups of women in India are especially vulnerable due to intersections with caste. Speaking of the position of women in India, Srinivas argues that it is impossible to generalise their position due to the existence of considerable variations among regions, religious, ethnic and caste groups.[28] The caste system divides people into social groups with predetermined

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[21] Ibid 109.

[22] Visalakshi Jeyaseelan and others, 'Dowry demand and harassment: Prevalence and risk factors in India' (2015) 47 Journal of Biosocial Science < https://www.cambridge.org/core/journals/journal-of-biosocial-science/article/dowry-demand-and-harassment-prevalence-and-risk-factors-in-india/E15A780DE2FF9CE60435C2F39D24C25A > accessed 9 March 2022.

[23] A. Muthal-Rathore, R. Tripathi and R. Arora, 'Domestic Violence Against Pregnant Women Interviewed At A Hospital In New Delhi' (2002) 76 International Journal of Gynecology & Obstetrics <https://obgyn.onlinelibrary.wiley.com/doi/epdf/10.1016/S0020-7292%2801%2900533-1?saml_referrer> accessed 21 March 2022.

[24] ThePrint, '7 Women Among 9 Held After Woman Who Was 'Gang-Raped' Was Assaulted, Paraded In Delhi On R-Day' (2022) < http://7 women among 9 held after woman who was 'gang-raped' was assaulted, paraded in Delhi on R-Day > accessed 21 March 2022.

[25] Ibid.

[26] Ibid.

[27] Nidhi Sadana Sabharwal and Wandana Sonalkar, 'Dalit Women In India: At The Crossroads Of Gender, Class, And Caste' (2015) 8 Global Justice : Theory Practice Rhetoric < https://www.theglobaljusticenetwork.org/index.php/gjn/article/view/54/85 > accessed 15 January 2022.

[28] Manoranjan Mohanty, *Class, Caste, Gender* (Sage Publications 2004) <https://books.google.co.uk/books?hl=en&lr=&id=msyGAwAAQBAJ&oi=fnd&pg=PA296&dq=rape+cases+of+lower+caste+women+in+india&ots=q1QZ_Vxj4h&sig=DLnuCgzdgXyKumJpHEKd9dKievI&redir_esc=y#v=onepage&q&f=false > accessed 15 January 2022.

economic and social rights inherited by each individual of the group at birth. The rights awarded to individuals serve to create hierarchies both between and within these groups. Within this hierarchy, the Brahmins occupy the highest position in society and enjoy many privileges in terms of education, civil and other cultural rights. In contrast, the Dalits, who are placed outside the caste system, occupy the lowest level and are often completely deprived of education, social and economic rights. Further, Dalits' exclusion from the traditional Hindu caste hierarchy not only facilitated their exploitation by high caste Hindus but was also used to legitimatise it.[29] They were treated as 'Untouchables' or 'Achhoot' in society and were considered to be impure and polluting, resulting in them suffering physical and social segregation and isolation.[30] However, as noted above, the low value attributed to Indian women in general, together with the stigma of Dalit status, positions Dalit women at the bottom of India's social hierarchy, making them the most vulnerable of all social groups.

Despite the outlawing of caste-based discrimination by Article 15 of the Constitution of India in 1950, Dalit women are more likely to be the victims of caste-based violence in the form of rape and sexual abuse. In its report, Equality Now stated that almost 10 Dalit women or girls are raped every day across the country. [31] This is still an underestimate since most cases are not reported because the victims are systemically silenced due to family pressure, poor policing and threats from other communities.[32] Most of these crimes against Dalit women are committed by Dominant upper caste members to oppress them and reinforce the structural gender and caste hierarchy.[33] Furthermore, Dalit women were often the victims under the Devadasi system, which is a Hindu religious practice that offers girls in marriage to deities as 'servants', who would manage the temple work and provide music and dance performances as offerings to the deity. Over the years, they were forced to offer sexual favours to temple patrons and higher caste members upon attaining puberty and were thus sexually exploited under the name of religion.[34] Most of the Devadasis are identified as Dalits, reflecting the systemic socio-economic oppression that has been practised against Dalit women. The National Commission of India reports that there are around 400,000 Devadasis in India.[35] Although this practice was outlawed in India in 1988, it

[29] Nidhi Sadana Sabharwal and Wandana Sonalkar, 'Dalit Women In India: At The Crossroads Of Gender, Class, And Caste' (2015) 8 Global Justice : Theory Practice Rhetoric < https://www.theglobaljusticenetwork.org/index.php/gjn/article/view/54/85 > accessed 15 January 2022.
[30] Ibid, 45.
[31] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.
[32] Ibid.
[33] Ibid.
[34] Hyun Jin Lee, 'Temple Prostitutes: Devadasi Practice and Human Trafficking in India' (2011) 8 Regent J Int'l L 1<https://heinonline.org/HOL/Page?handle=hein.journals/regjil8&div=4&g_sent=1&casa_token=&collection=journals> accessed 11 March 2022.
[35] The Collector, 'The Ancient Practice Of Temple Prostitution In India' (2020) < https://www.theguardian.com/lifeandstyle/2011/jan/21/devadasi-india-sex-work-religion > accessed 11 January 2022.

remains prevalent in the states of Karnataka, Andhra Pradesh and Maharashtra.[36] Moreover, the Karnataka law penalises the women dedicated as devadasis even though they have not given their consent meaningfully or have not attained the age to give consent.[37] The law thus fails to protect the victims of such practice.

This section has provided a brief outline of the position of women worldwide, identifying how they are, as a social category, universally positioned as subordinate to men in all spheres of life. It has then commented on the specificity of Indian patriarchy and the role of caste in determining the rights and privileges enjoyed by different social groups. Finally, it examined that the Dalit women are systemically oppressed due to the intersection of caste and gender. Thus, they are placed in an exceptional vulnerable position in the society, resulting from the imposition of the sexual violence. The next section shall outline the laws that address the challenges faced by Dalit women.

3. Legal framework governing protection of Dalit women

This section will discuss the domestic laws that have been introduced by India in its Constitution. Specifically, the enactment of laws that address the issues faced by the Scheduled Castes (Dalits) and Scheduled Tribes will be discussed. As Dalit women are more vulnerable than women belonging to higher castes and often the victims of sexual violence, this part will particularly focus on the laws for rape under the Indian Penal Code (IPC). It will examine how, after the 2012 Nirbhaya case, criticisms about the punishment for sexual assault caused the government to bring amendments by making the punishments more stringent and broadening the definition of sexual assault. It will conclude by examining India's obligation under the international framework and criticism over its poor implementation of laws.

A. National Framework

Constitution: Article 15 of the Constitution deals with equality and prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth. [38] It also encourages the States to make special provisions for the upliftment of citizens in socially or educationally backward classes or who belong to the Scheduled Castes and Scheduled Tribes.[39] In addition to Article 15, the government has also introduced Article 17 to specifically address and abolish the issue of Untouchability against

[36] National Commission for Women, 'Exploitation Of Women As Devadasis And Its Associated Evils' (National Commission for Women 2022) < http://ncwapps.nic.in/pdfReports/Exploitation_of_Women_as_Devadasis_and_its_Associated_Evils_Report.pdf > accessed 21 March 2022.

[37] Srujana Bej, "Tackling India's Devadasi System – A Matter of Policing and Public Order?" (OxHRH Blog, 5 October 2018) < https://ohrh.law.ox.ac.uk/tackling-indias-devadasi-system-a-matter-of-policing-and-public-order > accessed 16 January 2022.

[38] Constitution of India, article 15 < https://legislative.gov.in/sites/default/files/COI...pdf > accessed 15 February 2022.

[39] Ibid.

Dalits.[40] The article states that its practice in any form is forbidden and shall be a punishable offence.[41] As discussed in the previous section, untouchability is one of the major discriminatory practices against the Dalits in India, leading them to be isolated and marginalised. By introducing Article 17, the government has taken a revolutionary step to protect the Dalits from discrimination.

The Protection of Civil Rights Act, 1955: The Indian Government has also enacted the Protection of Civil Rights Act to enforce the abolition of Untouchability under Article 17 of the Constitution. However, it was criticised that there were no convictions under the Act until 1973. As a response, the Protection of Civil Rights (PCR) Cell was established.[42] In a conversation with the Human Rights Watch, T. K. Chaudary, the inspector general of police for the PCR cell in Maharashtra, commented that the reason for no convictions was that 'it was controlled by the police officers who never took action if the defendant belonged to a dominant caste.'[43] He added that from 1975 'the Cell played a coordinating role and heard as many cases as possible but hardly were there any convictions as the victims turned hostile.'[44] Therefore, despite efforts being made to implement the law effectively, it was hindered due to the deep-rooted caste bias existing in the police department.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989: One of the drawbacks of the Protection of Civil Rights Act was that it only included offences such as denying entry into temples and public spaces or prohibiting verbal abuses.[45] It originally failed to acknowledge that Dalits are quite often the victims of violence and not just Untouchability. To address this, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was introduced in 1989, which includes the acts of violence committed against this group.[46] Under this Act, stricter provisions are imposed against the police who are negligent, and the complainant's voice is given more weight.[47] All cases under this Act are to be investigated by a police officer, not below the rank of a Deputy Superintendent of Police (DSP) and it also requires the setting up of special courts for speedy disposal of cases.[48] However, this Act has also been poorly implemented. For instance, Haryana has demarcated the

[40] Constitution of India, article 17 < < https://legislative.gov.in/sites/default/files/COI...pdf > accessed 15 February 2022.
[41] Ibid.
[42] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-13.htm > accessed 11 February 2022.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
[47] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-13.htm > accessed 11 February 2022.
[48] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022; Rule 7(1), The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

existing sessions courts as special courts instead of setting up new ones.[49] Swabhiman Society's report argues that these courts do not exclusively try cases of caste-based atrocities, which eventually delays adjudicating cases, affecting the prioritisation of Dalit cases.[50] The Indian Government has admitted its failure in its 2001-2002 Annual Report that only 2.31 per cent of cases under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act resulted in convictions.[51] This low rate of convictions under the Act reflects the caste bias and barriers that exist while seeking justice in India, carrying greater ramifications for Dalit women due to the intersection between their gender and low caste.[52]

Laws for Sexual Offences: The laws governing rape under the Indian Penal Code have substantially changed in 2013 following the Nirbhaya case.[53] The case concerned a 23-year-old woman who was brutally assaulted and gang-raped. Her body was mutilated beyond human imagination in a moving bus by 6 men in the National Capital, New Delhi.[54] After fighting for her life for eleven days, she succumbed to her injuries. This incident shocked the entire country, leading to outrage and protests to make the law more stringent to protect the country's women and increase the term of punishment for perpetrators of sexual violence.

Until 2012, the definition of rape was restricted to sexual intercourse. The Criminal Law (Amendment) Act 2013 widened the definition of rape and encompassed new offences in its recognition of the gradation of sexual offences.[55] The law incorporated new forms of aggravated rape, introduced a clear definition of consent and made changes to evidentiary and procedural laws with a view to improve access to justice for victims.[56] Furthermore, the 2013 Act increased the punishment for most sexual assault cases and imposed minimum imprisonment of 20 years for rape if it causes the death of the victim or leaves her in a vegetative state.[57] It has also increased the minimum jail term from 10 years to 20 years, extending to life imprisonment for gang rape cases.[58] It is disturbing that it took a brutal case and nationwide protests for the

[49] Ibid.
[50] Ibid.
[51] Human Rights Watch and Center for Human Rights and Global Justice, 'Caste Discrimination Against Dalits' (Human Rights Watch and Center for Human Rights and Global Justice 2007) < https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_NGO_Ind_70_9036_E.pdf > accessed 11 March 2022.
[52] Ibid.
[53] *Mukesh v. State (NCT of Delhi)* [2017] 6 SCC 1.
[54] Soma Singh, 'FACTS OF THE CASE (NIRBHAYA CASE STUDY) - Law Times Journal' (*Law Times Journal*, 2020) < https://lawtimesjournal.in/facts-of-the-case-nirbhaya-case-study/ > accessed 19 March 2022.
[55] Criminal Law Amendment Act 2013.
[56] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.
[57] 376A Indian Penal Code < https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf> accessed 12 March 2022.
[58] 376D Indian Penal Code < https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf> accessed 12 March 2022.

Indian Government to at last bring the amendments that address the severity of sexual crimes committed against women and impose stricter punishments.

B. International Framework

India is a party to many Human Rights Treaties, one of them being the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which is one of the major Human Rights Treaty Bodies concerning the protection of women. Article 2 of the CEDAW requires the Member States to create legal protection for women's rights on an equal footing with men's rights and ensure adequate protection of women against discrimination through competent national tribunals and other public institutions.[59] In 2007, the CEDAW raised the alarm over continuous crimes against Dalit women in India, and the culture of impunity enjoyed by perpetrators despite the enactment of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.[60] It also pointed out the propensity of the Indian Government to provide very old data relating to the statistics of discrimination based on caste and gender.[61] Its failure to maintain information concerning the human rights issues of Dalits is evident of India's lack of attention to the prevailing caste discrimination.

In 1996, the Committee for Elimination of Racial Discrimination (CERD) acknowledged that 'the situation of Scheduled Castes and Scheduled Tribes falls within its scope.'[62] However, in 2006, in response to the Committee's request to submit data concerning the issues of Scheduled Castes and Scheduled Tribes, India's periodic report stated that 'Caste' cannot be equated with 'Race' or covered under 'descent' under article 1, and thus it included no information related to these castes in its report.[63] In its 2007 Concluding Observations, the CERD Committee had also expressed concern over the growing number of complaints of sexual abuse against Dalit women in India, perpetrated predominantly by dominant caste men.[64] Despite the Indian Government's measures for the protection of the Scheduled Castes, Scheduled tribes and other backward minorities, the Human Rights Committee noted

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[59] Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 2.

[60] Human Rights Watch and Center for Human Rights and Global Justice, 'Caste Discrimination Against Dalits' (Human Rights Watch and Center for Human Rights and Global Justice 2007) < https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_NGO_Ind_70_9036_E.pdf > accessed 11 March 2022.

[61] Ibid 16.

[62] Report of the Committee on the Elimination of Racial Discrimination, A/51/18, 1996, < https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=dtYoAzPhJ4NMy4Lu1TOebATo2R%2b%2bkfWYmXjbFaueWZDl33iwWejjp14Cir6fsW2G3KFQOITsUk%2blLmtljVGjAtxjI5vYzyB7fCmyJcP0LhU%3d > (accessed March 11, 2022), para. 352.

[63] Human Rights Watch and Center for Human Rights and Global Justice, 'Caste Discrimination Against Dalits' (Human Rights Watch and Center for Human Rights and Global Justice 2007) < https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_NGO_Ind_70_9036_E.pdf > accessed 11 March 2022.

[64] International Dalit Solidarity Network, Dalit Women - Facing Multiple Forms of Discrimination, IDSN Briefing Paper: Dalit Women, (2022) < http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/Key_Issues/Dalit_Women/DALIT_WOMEN_-_IDSN_briefing_paper.pdf > accessed 19 March 2022.

that these groups continue to suffer extreme social discrimination.[65] They also disproportionately suffer from numerous violations of their rights under the International Covenant on Civil and Political Rights (ICCPR), including inter-caste violence and bonded labour.[66] It has further added that these violations are caused by the caste system's prominent presence, which gives rise to the root cause of social disparities.[67]

This section has examined the effectiveness of the implementation of the said laws to be sub-optimal despite the enactment of special laws relating to the issues faced prominently by the Dalit community. It also analysed the implications of the substantial amendments of the law post the 2012 Nirbhaya's case especially in imposing stricter punishments to the offenders.

4. Barriers to justice

This section will briefly discuss the statistics on the sexual offences committed against Dalit women in India. Noting that many cases are under-reported, it will examine the reasons behind this by drawing upon a few case studies and survivor stories to understand the structural barriers Dalit women face when accessing the criminal justice system in India. Such barriers include poor policing, the impunity enjoyed by the Dominant caste members, victim shaming, lack of diversity in the police, and problems associated with medical treatment of these offences.

A. Statistics of sexual offences committed against women

Despite introducing new laws to address the issues faced by Dalits and imposing stringent punishments for sexual offences committed against women, the vulnerability of Dalit women has persisted due to their position at the intersection of caste, gender, and economic standing in society. In 2006, Aloysius and others conducted a survey on 500 Dalit women across four states in India to examine the forms, effects, and responses to violence against this group. The report revealed that the majority of them, i.e., 62 per cent and 54 per cent had experienced Verbal abuse and Physical assault respectively and 46% were sexually assaulted.[68] The National Crime Record Bureau (NCRB) in 2019 reported that there were over 405,861 cases of assaults on women, out of which, 13,273 assaults, including 3,486 cases of rape, were committed against Dalit Women.[69] Moreover, the Government data indicates that the

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[65] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.

[66] Ibid.

[67] Ibid.

[68] Aloysius Irudayam, Jayshree Mangubhai and Joel Lee, 'Dalit Women Speak Out: Violence Against Dalit Women In India' (International Dalit Solidarity Network 2006) < http://idsn.org/uploads/media/Violence_against_Dalit_Woment.pdf > accessed 21 February 2022.

[69] Stella Paul, 'The Rape Of India's Dalit Women: It'S All About Gender & Class Subordination' (*Inter Press Service*, 2020) < http://www.ipsnews.net/2020/11/the-rape-of-indias-dalit-women-its-all-about-gender-class-subordination/ > accessed 11 February 2022.

number of reported cases of rape against Dalit women has drastically gone up, increasing by 50% between 2014 and 2019.[70] This upward trend in crimes committed against this group raises questions around the effectiveness of the laws that have been specifically enacted in the name of their protection.

However, it is crucial to also point out that the number of cases reported is much less than the actual figure. It is just the tip of the iceberg, the reasons for which will be discussed throughout this section. Since many cases are underreported, the survivor stories which will be discussed are not officially reported and their names have been anonymised to protect the identity of the victims.

B. Poor Policing

One of the major challenges, and perhaps the first hurdle, that Dalit women are confronted with when taking the first step to access justice is poor policing. In India, there is a general perception that much of the police department, as a public institution, is corrupt, resulting in citizens not trusting the organisation. According to the Common Cause report about the Status of Policing in India in 2019, only three out of ten people had significant trust levels in the senior police and only two in every ten in the local police.[71] The report also pointed out that the level of trust was inversely proportional to the class hierarchy.[72] This inverse relationship interestingly coincides with the caste groups, wherein it was found that the Scheduled Tribes and Scheduled Castes were the most distrustful of the police, among other castes.[73] Given the intersection of their gender, caste, and economic standing, the Dalit women's level of trust in the police is the lowest. This section will discuss various cases and survivor stories to demonstrate their difficulties.

Meena case: A Human Rights Watch report analysed the case of Meena, a twelve-year-old Dalit girl who was raped by a twenty-one-year-old boy belonging to the Thevar dominant caste.[74] The police were informed, and the girl was asked to come to the station to file a complaint. However, the accused family members paid a bribe of ten thousand rupees (£100) to the police officers and threatened the girl's father if he filed a complaint. The pressure from the accused's family led the police to file a complaint under s.75 of the Madras City Police Act[75], which is an offence referring to the creation of a nuisance in a public place which carries the punishment of a simple fine. Instead

[70] Divya Arya, 'The Dalit Activist Fighting For Rape Survivors' *BBC* (2021) < https://www.bbc.co.uk/news/world-asia-india-58647706 > accessed 11 February 2022.
[71] Common Cause & Lokniti - Centre for the Study Developing Societies (CSDS), 'Status Of Policing In India Report' (Common Cause & Lokniti - Centre for the Study Developing Societies (CSDS) 2018) < https://commoncause.in/pdf/SPIR2018.pdf > accessed 11 February 2022.
[72] Ibid 60.
[73] Ibid 60.
[74] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.
[75] Madras City Police Act 1888.

of filing a case under s.375 under IPC[76] for rape, the crime was registered as a reduced offence of public nuisance. With the help of a social worker, the family was finally able to get a case registered under s.375, after the police kept them waiting for 6 hours to file a First Information Report (FIR). However, without reason, the police refused to register a simultaneous complaint under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. As discussed in the previous section, the Act was explicitly enacted to deal with cases concerning the Dalits and Scheduled Tribes. The accused was imprisoned for just forty-five days. Soon after his release, he assaulted the husband of the social worker. Later there were no charges against the accused and he was released on bail. This case depicts how the police were easily bribed by the dominant caste family and denied justice against the victim. They had deliberately delayed filing an FIR and had not kept the victim updated with the ongoing status of the case, leading to the victim to be unaware of whether there was indeed a trial against the accused and finally punished.

Badaun case: This involved two Dalit girls who were cousins, aged 14 and 15 years. They were allegedly gang-raped, murdered and left hanging from a tree. This case sparked many protests because of the negligence of the police in handling the case. It all started when the girls asked their dominant caste employer for an increase in their wages. The victim's family alleged that when they went to the police station for help in finding their missing daughters the police were negligent. They claimed that the police mocked their Dalit family and refused to file an FIR, instead stating that the girls would return on their own soon. The next morning, the two girls were found hanging from a tree. During the investigation, two police constables were suspended for criminal conspiracy and three other suspects, who were the upper caste employers, were arrested. Two of them confessed to committing rape and murder.[77] However, the case was transferred to the Central Bureau of Investigation (CBI) which provided a closure report stating that the girls committed suicide and were not raped and murdered. This provoked mass outrage across the country, and allegations were made by the opposition party that the case was transferred to the CBI by the state government as a cover-up to avoid worldwide humiliation about the poor law and order status in Uttar Pradesh.[78] The case finally reached the Protection of Children Against Sexual Offences (POCSO) Court in 2015 where the judge rejected the CBI's closure report and summoned the accused to imprisonment.[79] This alarming case shows negligence by the police officers and the irony that the police are the ones hindering the investigation process and endeavouring to frame it as an honour killing.

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[76] 375 Indian Penal Code; Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.

[77] Shubhangi Mishra, '5 Yrs On, Case Of Badaun Girls Found Hanging From Tree Still Murky' (*TheQuint*, 2019) < https://www.thequint.com/explainers/badaun-alleged-gang-rape-and-murder-case-explained#read-more > accessed 12 February 2022.

[78] Aam Aadmi Party, 'CBI Badaun Findings Are Shamefully Wrong' (2014) < https://web.archive.org/web/20141202081021/http://aamaadmiparty.org/cbi-badaun-findings-are-shamefully-wrong > accessed 13 March 2022.

[79] Ibid.

C. Forms of violence exercised by and impunity enjoyed by the Dominant Caste

Another conclusion drawn from the Badaun case is that the girls had been hung from the tree (instead of hiding and disposing of the bodies) to show the Dalit community 'their place'[80] if they happened to protest again. For many years, the Dalits have been and continue to be oppressed by the dominant caste because they fall at the bottom of the caste hierarchy and are economically deprived. Contentions frequently arise between the upper caste and Dalit community due to disputes over land, which the Dalits do not generally own. Instead, they work on the lands owned by the dominant caste, who are thus Dalits' employers.[81] Often, they are deprived of the minimum wage and made to work for long hours without adequate compensation. According to Untouchability in Rural India survey, in 36 per cent of the villages studied, Dalits were denied wage paid employment, and in 26 per cent of the villages, they were paid less than the market wage rate.[82] If any disputes ever arise, the dominant caste members resort to sexually assaulting the Dalit women to teach the Dalit men 'a lesson'.[83] They are treated as objects to show the entire Dalit community their place. According to the study conducted by the Swabhiman society on sexual offences committed against Dalit women in Haryana, 80% of crimes against Dalit women are committed by people belonging to the dominant caste and in 90% of the cases at least one of the accused belongs to the dominant caste.[84] The report also highlighted that 62.5% of the cases were gang rapes. Their findings reveal how Dalit women and girls are victims of more aggravated forms of violence in the form not only of gang rape but also of rape with murder as compared with all women and girls in Haryana.[85]

One of the prominent cases illustrating this argument is the Khairlanji massacre which involved the murder of four family members belonging to the Scheduled Caste.[86] In September 2006, Surekha Abhotmange, her daughter Priyanka, and her two sons Sudhir and Roshan were stripped, paraded naked, beaten, and murdered by the men of Kunbi and Kalar caste (Dominant caste). It was believed that the villagers were

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[80] Shubhangi Mishra, '5 Yrs On, Case Of Badaun Girls Found Hanging From Tree Still Murky' (*TheQuint*, 2019) < https://www.thequint.com/explainers/badaun-alleged-gang-rape-and-murder-case-explained#read-more > accessed 12 February 2022.

[81] Human Rights Watch, 'Small Change: Bonded Child Labor In India's Silk Industry' (Human Rights Watch 2003) < https://www.hrw.org/report/2003/01/22/small-change/bonded-child-labor-indias-silk-industry > accessed 22 February 2022.

[82] Shah, et al., Untouchability in Rural India, pp. 94-95.; Human Rights Watch, 'Hidden Apartheid: Caste Discrimination Against India's Untouchables' (Human Rights Watch 2007) <https://www.hrw.org/reports/2007/india0207/9.htm> accessed 22 March 2022.

[83] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.

[84] Ibid.

[85] Ibid.

[86] Prachi Patil, 'Understanding Sexual Violence As A Form Of Caste Violence' (2016) 7 Journal of Social Inclusion < https://www.researchgate.net/profile/Prachi-Patil-13/publication/334453789_Understanding_sexual_violence_as_a_form_of_caste_violence/links/5d2b4efb458515c11c3103a2/Understanding-sexual-violence-as-a-form-of-caste-violence.pdf > accessed 11 February 2022.

irked and could not accept that the family was economically prosperous and owned lands, despite belonging to the Dalit caste. It was also alleged that Sudhir was asked to have sex with his sister in public. Upon refusal, he was murdered, and his genitals were mutilated. Later Surekha and Priyanka were gang-raped, and objects were shoved into their vaginas until they succumbed to their injuries.[87] Bavadam comments on how women from upper caste families watched and cheered while fellow women were being sexually assaulted and degraded.[88] Despite this, there was no case filed against the women for being accomplices in the crime. Prachi Patel argues that women belonging to the upper caste community have been instrumental in perpetrating sexual violence on Dalit women, alongside the upper caste men.[89] Geeta deduces how upper caste women have been involved in crimes committed against Dalit women to ensure that their sense of purity is maintained which is 'defined by notions of honour and marked by the social distance between the castes.'[90] Though it was a palpable case of caste hatred and discrimination, it was not registered under the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act. The Court held that the murders were not committed because of caste hatred but was a case of revenge over a land dispute.[91]

Hathras case[92]: This impunity enjoyed by the dominant caste unfortunately remains prevalent even today. In 2020, a 19-year-old Dalit girl belonging to Hathras village in Uttar Pradesh (UP) was allegedly gang-raped by the upper caste members.[93] The four accused have been arrested and the case is under trial. What is concerning about the case is that there was, once again, gross negligence on the part of the police. They treated the case inhumanely, did not accompany the victim and her family to the hospital, and after the case was registered, did not hand over the charge sheet to the victim's family despite multiple requests, allegedly to delay their preparation for the trial.[94] In addition, the police had conducted a medical examination for sexual assault after 8 days after the incident, which led to the report claiming that there was no rape.[95] What drew the country's attention to the case was that when the girl succumbed to her injuries on 29th September, the police rushed to cremate the body early in the morning without the consent of the victim's family. It shows the

[87] Ibid 61.
[88] Ibid 64.
[89] Ibid.
[90] Ibid 64.
[91] Shivangi Gupta, 'The Khairlanji Massacre Still Continues To Haunt The Brahmanical State' *Feminism in India* (2019) < https://feminisminindia.com/2019/08/05/khairlanji-massacre-haunt-brahmanical-state/ > accessed 11 February 2022.
[92] *Satyama Dubey and others v Union of India and others* [2020] SC WP Crl 296.
[93] Vatsala Gaur, 'CBI Files Charges Of Gangrape And Murder Against Four Accused In Hathras Case' *The Economic Times* (2020) < https://economictimes.indiatimes.com/news/politics-and-nation/cbi-likely-to-file-charge-sheet-in-hathras-case/articleshow/79794267.cms?from=mdr > accessed 12 March 2022.
[94] SheThePeople Tv, '10 Things To Know About The Hathras Gang Rape' *SheThePeople Tv* (2020) < https://www.shethepeople.tv/news/10-things-to-know-about-the-hathras-gang-rape-case/ > accessed 7 March 2022.
[95] Arvind Gunasekar, 'This Article Is From Dec 22, 2020 Did UP Police Try To Cover Up Hathras Case? What CBI Chargesheet Says' *NDTV* (2020) < https://www.ndtv.com/india-news/did-up-police-try-to-cover-up-hathras-case-what-cbi-chargesheet-says-2341748 > accessed 12 March 2022.

dehumanising treatment and the complete lack of respect for Dalit women. It implies that they have no place in the law, in terms of legal rights and citizen status, allowing individuals from higher castes to behave disrespectfully towards them without fear of punishment. The lack of citizenship follows through in the way the police treat them. In essence, the upper castes are also outside citizenship, wherein they are above the law enjoying impunity, in contrast to the Dalit women who are beneath the law, deprived of basic legal rights.

Many conservative press channels like Republic TV have given a new spin to the case. They claim that it is a political conspiracy by the opposition leaders to defame the UP government, cause caste-based riots and that 'it was not even a case of rape.'[96] Astonishingly, even today, there are protests by the upper caste men of the village who are supporting the accused and are demanding their bail, claiming that there was no rape committed.[97] However, many left-wing media houses, for instance NDTV, are presenting the truth about how there was gross negligence by the UP Police and Government and how the case is about the dominance exercised by the upper caste.[98] This essentially reflects the conflict within the Indian Society between maintaining the caste system and the privileges that elite groups have and others who want to challenge them. It highlights the tradition dating back to the independence movement of the struggle to create a new India that was not pervaded by these differences. This conflict persists today and not just the violence against the Dalits, but that violence continues in the support that it is given effectively not only by the police but also by certain influential members in the Indian society, like the newspapers, that ultimately either support it or do not come out and condemn it.

D. Victim shaming – Compromises

One major reason why women in India are reluctant to file a complaint if they have been sexually assaulted is the fear of shame and the stigma attached to sexual assault that still exists in society. Victim shaming remains prevalent in the country, wherein even people holding higher political positions still uphold views that it is the women's fault and negligence to justify sexual crimes committed against them. One such sexist remark was made by Mulayam Singh Yadav, the former Chief Minister for three consecutive terms in Uttar Pradesh (State in India). While opposing the punishment for rape, by stating that 'Boys will be boys, mistakes can be made. Boys commit

[96] Dhyanesh Vaishnav, ''This Isn't A Case Of Rape': Arnab Goswami Rubbishes Hathras Horror As A 'Manohar Kahani'' *Newslaundry* (2020) < https://www.newslaundry.com/2020/10/08/this-is-not-a-case-of-rape-arnab-goswami-rubbishes-hathras-horror-as-a-manohar-kahani > accessed 12 March 2022.

[97] Apoorva Kashyap, 'Upper Caste Group, BJP Leader Rally In Support Of Hathras Gang-Rape Accused' (*Thelogicalindian.com*, 2022) < https://thelogicalindian.com/protestandinjustice/upper-caste-group-demands-justice-for-the-accused-of-hathras-gangrape-case-24138 > accessed 11 March 2022.

[98] Arvind Gunasekar, 'This Article Is From Dec 22, 2020 Did UP Police Try To Cover Up Hathras Case? What CBI Chargesheet Says' *NDTV* (2020) < https://www.ndtv.com/india-news/did-up-police-try-to-cover-up-hathras-case-what-cbi-chargesheet-says-2341748 > accessed 12 March 2022.

mistakes, should they be hanged for rape?'.[99] This becomes an even more significant hurdle for Dalit women, who are already looked down on for belonging to a lower caste and do not have the economic standing to fight their case.

According to National Family Health Survey over 90% of sexual violence victims have never sought help.[100] The National Crime Records Bureau data revealed that out of 50,291 cases registered for crimes against Dalits, only 216 resulted in a conviction.[101] While examining the low conviction rates under the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act, the Supreme Court stated that the number of convictions is low, not because of 'false cases' or misuse of the Act, but rather because of improper investigation and prosecution of crimes.[102] Police play a significant role in this, wherein they pressurise the Dalit victim's family to compromise, asking them not to file a case against an upper-caste member and shun the matter to avoid public shame in the society. Many Dalit women agree to compromise due to reasons of insufficient resources to fight the case, repeated counter threats of violence against them or their family by the upper caste members and the fear of losing their livelihood, since the prime source of their daily earnings come from working on lands belonging to the upper castes.[103] Even though the Supreme Court of India in Ramphal v. State of Haryana[104] has upheld that 'such compromises are not legal and shall not be taken into account when deciding on sexual assault cases', this provision does not appear to aid the Dalit women in reality.[105]

E. Lack of effective Victim Protection Scheme and problems with the Medical Examination

Another obstacle Dalit women face in obtaining justice is the lack of effective victim protection. Dalit women are often vulnerable to threats of violence and intimidation by the dominant caste and their family members when they decide to file a complaint with the police. Swabhiman Society argues that, on the ground level, it is difficult to get police protection for Dalit women and, more often than not, the police officers are bribed by the dominant caste and thus fail to provide adequate protection for the

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[99] 'Foot In Mouth: 10 Times Indian Politicians Have Shamed Women' (*News18*, 2021) < https://www.news18.com/news/india/foot-in-mouth-10-times-indian-politicians-have-shamed-women-4311164.html > accessed 8 March 2022.

[100] International Institute for Population Sciences (IIPS) and ICF, 'National Family Health Survey (NFHS-4)' (International Institute for Population Sciences 2016) < http://rchiips.org/NFHS/NFHS-4Reports/India.pdf > accessed 12 February 2022.

[101] Utkarsh Anand, 'Fewer Convictions In SC/ST Cases Due To 'Shoddy Investigations': Supreme Court' (*Hindustan Times*, 2021) < https://www.hindustantimes.com/india-news/fewer-convictions-in-sc-st-cases-due-to-shoddy-investigations-supreme-court-101635531834261.html > accessed 12 February 2022.

[102] Ibid.

[103] E Rao,'Land reforms and Dalits in Andhra Pradesh: A South Indian State' (2012) 3 OIDA International Journal of Sustainable Development < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2048055 > accessed 4 November 2022.

[104] *Ramphal v State of Haryana* [2019] Supreme Court of India, 438/2011 (Supreme Court of India).

[105] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.

victims.[106] Moreover, the protection provided is for a restrictive time frame. It can only be provided after the trial judge has made a judgment and it is withdrawn in a couple of months, which puts the victims in a vulnerable and fearful position of receiving threats.[107]

The other challenge that needs to be addressed is the ineffective conduct of the medical examination. In 2014 the Ministry of Health and Family Welfare introduced guidelines that require forensic examination practitioners to provide psychological help to women and girls who are victims of sexual violence or refer them to other practitioners who provide such support.[108] They have also released protocols to be adhered to in examining rape victims to respect their dignity and autonomy. Despite these measures, they are hindered due to caste discrimination and the political influence of the dominant caste. In many cases, the reports are altered to favour the accused, or there is a deliberate delay by the police officers in the victim's medical examination.[109] This delay can be demonstrated in the Hathras case that was discussed above, where the medical examination was conducted 8 days after the alleged offence.

F. Police Diversity

Poor policing in the case of Dalit women can be addressed by having more representation of women and Dalits in the department. According to the Bureau of Police Research and Development, in 2020, women constituted only 10.30% of the total police force in India and just 8.72% belong to the higher investigative ranks. [110] Pavani Nagaraja Bhat from the Police Reforms Program of the Commonwealth Human Rights Initiative (CHRI) points out that according to the 2017 report, 89% of the women police belonged to the constabulary ranks.[111] This is an alarming figure and raises concerns. Pavani argues that having more women in the department can help in reducing women's vulnerability to crimes committed against them and this underrepresentation adversely affects the handling of women-centric crimes.[112] These figures show the marginalisation of women in policing, particularly at the investigative and leadership levels.[113] Having more women in the department is

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[106] Ibid 23.
[107] Ibid 23.
[108] Ministry Of Health and Family Welfare, Government of India, 'GUIDELINES & PROTOCOLS Medico-Legal Care For Survivors/Victims Of Sexual Violence' (Government of India 2014) <https://main.mohfw.gov.in/sites/default/files/953522324.pdf>accessed 11 February 2022.
[109] Women Against Sexual Violence and State Repression, 'Speak! The Truth Is Still Alive: Land, Caste And Sexual Violence Against Dalit Girls And Women In Haryana' (Women Against Sexual Violence and State Repression 2014) < https://wssnet.files.wordpress.com/2014/07/wss-haryana-report-compiled.pdf > accessed 11 February 2022.
[110] Ministry of Home Affairs, Government of India, 'Data On Police Organisations' (Bureau of Police Research and Development 2020) < https://bprd.nic.in/WriteReadData/userfiles/file/20210101120101164836 4DOPO01012020.pdf > accessed 11 February 2022.
[111] 'Police Force Sans Diversity: Poor Rep Of Scs, Sts, Women, Obcs, Muslims Invisibilized | Sabrangindia' (*SabrangIndia*, 2019) < https://sabrangindia.in/article/police-force-sans-diversity-poor-rep-scs-sts-women-obcs-muslims-invisibilized > accessed 11 March 2022.
[112] Ibid.
[113] Ibid.

essential, and a study from 2010 highlights how women police officers are less likely to engage in police brutality and more likely to respond effectively to crimes against women.[114] The figures relating to the Scheduled Caste's representation in the police department are quite disappointing. While the Central Government has set a benchmark of 33% reservation quotas for lower castes in several public departments, it is at the discretion of each State to set its percentage of the quota. However, the Scheduled Castes are underrepresented in 19 out of 22 states in India.[115] Having a diverse police force is crucial as it helps in how the citizens perceive the police.[116] Dalit women cases could be effectively addressed if they were handled by either women officers or officers belonging to their caste, as this would develop an understanding of the struggles and challenges that are specific to their gender and caste.

This section has examined the types of sexual offences committed against Dalit women and has highlighted how there has been an increasing trend in the number of crimes against them, despite the enactment of specific laws that were discussed in section three. This section has discussed some cases and unreported survivor stories illustrating the challenges Dalit women face in terms of poor policing such as delays in filing FIRs, corruption and pressure to compromise, the impunity enjoyed by the dominant caste, victim shaming and problems with the medical examination. It has concluded by pointing out how the underrepresentation of women and lower castes in the police department adversely affects how these cases are dealt with.

5. Ineffective Judiciary system

This section will first examine the role of Khap Panchayats and how they hinder the process when Dalit women seek justice in India. By discussing a few case studies and judgements, this section will further analyse how the gender and caste bias of the judges poses a great risk for women and lower caste members to reflect upon the diversity that exists in the Indian judiciary. It will conclude by examining certain recommendations that could arguably improve the position of Dalit women in society and help them overcome the barriers to justice.

A. Role of Khap Panchayats

After facing many struggles, especially in filing a sexual violence case against the dominant-caste offenders, the matter is often intervened by Khap panchayats, a type of informal quasi-judicial body.[117] They are generally caste-based unofficial village councils, comprising majorly of dominant caste members who interfere to settle disputes in villages.[118] A report by Swabhiman Society describes how the Khap

[114] Ibid.
[115] Ibid.
[116] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.
[117] Ibid 18.
[118] Ibid 18.

Panchayats support the accused, who belongs to a dominant caste, and threaten and intimidate the rape victim's family into withdrawing their case and suggesting a compromise.[119] They hold extremely strong casteist and patriarchal views, believing in caste hierarchy which is evident in many cases where they have ordered 'honour killing' of people who wish to have an inter-caste marriage.[120] In 2011, the Supreme Court held Khap Panchayats to be illegal and described them as 'kangaroo courts, who take the law into their own hands.'[121] Despite the Supreme Court ruling, they are still prevalent in many parts of India. [122]

In 2015, a Dalit woman approached the Supreme Court for protection against a Khap Panchayat order for her rape.[123] She alleged that after her brother eloped with a girl from the dominant caste, the Khap Panchayat ordered for her to be raped and paraded naked in the village as retaliation.[124] Such institutions act as a major barrier for Dalit women who seek redress. Khap Panchayats portray themselves as resolving disputes and helping victims at the forefront when, instead, they just support the accused and reinforce caste hierarchy.

B. Barriers to the Judicial System

The Judiciary is considered a custodian of the constitution[125] and is meant to deliver justice without bias. However, ironically there have been many instances when this was not followed in practice. The previous section examined how many Dalit women cases are underreported due to various barriers. If they manage to overcome those challenges and successfully reach the trial stage, they are faced with the gender and caste biases of the judges, resulting in improperly conducted trials leading to acquittals. This section will now look at a few cases and statements where such views were held by some of the judges in India.

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[119] Ibid 18.

[120] Hindustan Times, 'Khap Panchayats Ruling Against Inter-Caste Marriage Of Adults Illegal, Says SC' (2018) < https://www.hindustantimes.com/india-news/khap-panchayats-ruling-against-inter-caste-marriage-of-adults-absolutely-illegal-sc/story-w1bVf2yfgpscwYzaDOrfiP.html > accessed 12 March 2022.

[121] Gopika Bashi, 'Ordered Rape Of Dalit Sisters Highlights Severe Caste And Gender Discrimination In India' (*Blog.amnestyusa.org*, 2015) < https://blog.amnestyusa.org/wp-content/uploads/wp-post-to-pdf-enhanced-cache/1/ordered-rape-of-dalit-sisters-highlights-severe-caste-and-gender-discrimination-in-india.pdf > accessed 1 April 2022.

[122] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.

[123]Gopika Bashi, 'Ordered Rape Of Dalit Sisters Highlights Severe Caste And Gender Discrimination In India' (*Blog.amnestyusa.org*, 2015) < https://blog.amnestyusa.org/wp-content/uploads/wp-post-to-pdf-enhanced-cache/1/ordered-rape-of-dalit-sisters-highlights-severe-caste-and-gender-discrimination-in-india.pdf > accessed 1 April 2022..

[124] Ibid.

[125] Anurag Bhaskar, 'Casteist Judges? Justice V. Chitambaresh Wasn'T The First, He Won'T Be The Last' *ThePrint* (2019) < https://theprint.in/opinion/casteist-judges-justice-v-chitambaresh-wasnt-the-first-he-wont-be-the-last/267852/ > accessed 3 April 2022.

One of the prominent cases illustrating this is that of Bhanwari Devi[126], a Dalit woman who was a member of the Women's Development Programme (WDP) led by the Rajasthan Government. In 1992, she reported the child marriage of a one-year-old daughter of the Gurjar family to the police. This angered the Gurjar family and a few months later, she was gang-raped by them in front of her husband to punish her for retaliating against the child marriage. It could again be illustrated how rape was used as a tool by men to punish women who stood up for their rights. What is astonishing was that, while acquitting the accused, the trial judge reasoned that 'rape is usually committed by teenagers, and since the accused are middle-aged and therefore respectable, they could not have committed the crime.'[127] He further added that 'an upper-caste man could not have defiled himself by raping a lower-caste woman.'[128] This case raised many alarms and although an appeal against the acquittal was filed in the High Court in 1996, the verdict remained.

Gender bias is also prominent at the Supreme Court level, as evidenced by the 1972 case of Tukaram and Another v. State of Maharashtra[129]: This case involved Mathura, who wanted to marry her lover Ashok, which was not acceptable by Mathura's brother. The brother filed a complaint against Ashok and his family that his sister, a minor, was being kidnapped by them.[130] After the interrogation, Ashok's family and Mathura's brother were permitted to leave the police station but Mathura was asked to stay back. She was then raped by two police officers. The case was first heard in the Sessions Court where the Judge decided that this was a matter of 'consensual sexual intercourse' as Mathura was 'habituated to sex' based on her medical examiner's report.[131] He further added that she made up the story of rape in order to sound 'virtuous before her lover' and that Mathura was 'a shocking liar whose testimony was riddled with falsehood and improbabilities.'[132] By making such statements, he had assigned a specific gender role to Mathura that she would make up such a story in order to prove her chastity to her lover. Upon the issue of having found no marks of injury on her body, he implied that there was no resistance by Mathura and equated the lack of resistance to consent and acquitted the two officers. He arguably ignored the strong case of passive submission caused by the fear of threat and injury, which the High Court later identified. While convicting the two accused, the Hight Court held that there was a lack of resistance as the officers were in a position of authority

[126] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.
[127] Ibid.
[128] Ibid.
[129] *Tuka Ram and Anr. v State of Maharashtra* AIR 1979 SC 185.
[130] Shweta Sengar, 'Habituated To Sex, May Have Incited Cops': How 1972 Mathura Rape Case Changed Nation And Laws' *IndiaTimes* (2021) < https://www.indiatimes.com/explainers/news/laws-against-rapes-in-india-555038.html > accessed 5 April 2022.
[131] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.
[132] Ibid.

and any resistance by Mathura would prove detrimental to her or her brother.[133] However, in 1979, the Supreme Court overturned the conviction and agreed with the Sessions Court Judge that this was a case of consensual sex and not rape, as there were no marks of injury and Mathura did not 'raise an alarm for help, and thus consented to it.'[134] This led to many protests and a call for more stringent laws for the protection of the dignity of rape victims. It resulted in the Criminal Law Amendment Act 1983[135], which shifted the burden of proof from the victim to the suspect in custodial rape cases under s.376 of the Indian Penal Code, after the intercourse is established.

Contrary to the belief that the amendment would improve the situation for rape victims, that is not the case. In Prem Chand and another v. State of Haryana 1989[136], Suman Rani was raped in custody by police officers.[137] Under s.376(2) of the Indian Penal Code, the punishment for Custodial Rape is a minimum of ten years.[138] However, legal flaws allow the judges to use their discretion to reduce the minimum sentence. This discretion was utilised in this case, wherein after hearing the medical officer's testimony that 'the victim was a person who had regular intercourse and there were no marks of sexual assault violence on her body'[139], the judge held that the minimum sentence should be cut in half. The reasoning given by the judge was that the victim was a person of questionable character because she had regular intercourse and that she did not complain until five days after the incident.[140] Even though many amendments were brought in, the situation for rape victims has not changed. In this case, a minimum sentence was not served simply because of the judge's prejudiced views, resulting in the victim being denied justice. Instead of focusing on the facts and the evidence, judges still give more weightage and attention to the stereotypical notion that if a woman is sexually active, the chances of her giving consent in rape cases are implied.

If one is to presume that this mindset has changed over recent years, they would be incorrect. Even in the 21st century, such views are still held by judges wherein if a woman alleges a sexual offence, the finger is first pointed at her. An example of this is the recent 2020 case of Rakesh v State of Karnataka[141], where Justice Krishna S. Dixit of the Karnataka High Court granted bail to the accused as he found difficulty in believing the rape accusations made by the complainant. He stated, 'It is unbecoming

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[133] Dhurmil Shah, 'Mathura Rape Case (1972): Summary' (*Aishwarya Sandeep*, 2021) < https://aishwaryasandeep.com/2021/10/27/mathura-rape-case-1972-summary/ > accessed 5 April 2022.
[134] Ibid.
[135] Criminal Law Amendment Act 1983.
[136] *Prem Chand and another v. State of Haryana* [1989] AIR 538 SCR Supl. (2) 496.
[137] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.
[138] 376(2) Indian Penal Code.
[139] Human Rights Watch, 'Attacks On Dalit Women: A Pattern Of Impunity - Broken People: Caste Violence Against India's Untouchables' (Human Rights Watch 1999) < https://www.hrw.org/reports/1999/india/India994-11.htm > accessed 11 February 2022.
[140] Ibid.
[141] *Rakesh v State of Karnataka* [2020] HC 2427.

of an Indian woman to sleep after she is ravished, that is not the way our women act.'[142] Such a misogynist statement reflects the reality of the patriarchal attitude high ranking judges still have. He has perhaps suggested a protocol that should be followed by rape victims as to how they should behave after being raped so that they fit the description of an ideal victim.

Besides holding sexist views, Indian judges also hold strong casteist perspectives. During the Tamil Brahmin's Global Meet in 2019, Justice V. Chitambaresh expressed his opinion about having economic reservations rather than reservations based on caste. He stated that 'brahmins should always be at the helm of affairs' as they have 'distinct characteristics', and it is them who should deliberate what reservations should be based on.[143] His statement reflects his belief in the caste hierarchy and how it could be imperilled because of reservations that are offered to people who fall at the bottom of the caste hierarchy. By suggesting that reservations should be based on economic status rather than caste, he arguably upholds the view that caste discrimination does not exist in society, thus, there would be no need for reservation quotas allocated for the lower castes.

If judges are influenced by their gender and caste views, it becomes distressing for Dalit women cases because these attitudes could potentially result in miscarriages of justice and therefore potentially serve to act as one of the many reasons why they fear seeking justice.

C. Diversity in the Judiciary

The Ministry of Law and Justice 2021 data reveals that there are just 4 women out of the 33 judges in the Supreme Court and only about 10 per cent in the High Courts.[144] This huge gender disparity ratio is alarming and calls for more representation at the higher levels to promote a more inclusive and responsive decision-making process. Speaking about the need for more women's representation in the judiciary, Justice Nagarathna adds that increasing the number and prominence of female judges will enhance women's desire to seek justice and assert their rights through the courts.[145] However the recent judgement by female Justice Pushpa Ganediwala of the Bombay High Court raised concerns. In January 2021, while hearing the case of a minor girl who was groped, she stated that "skin to skin" contact is necessary for the offence of

[142] Geeta Pandey, 'Outrage As Indian Judge Calls Alleged Rape Victim 'Unbecoming' *BBC* (2020) < https://www.bbc.co.uk/news/world-asia-india-53261239 > accessed 5 April 2022.

[143] Anurag Bhaskar, 'Casteist Judges? Justice V. Chitambaresh Wasn'T The First, He Won'T Be The Last' *ThePrint* (2019) < https://theprint.in/opinion/casteist-judges-justice-v-chitambaresh-wasnt-the-first-he-wont-be-the-last/267852/ > accessed 3 April 2022.

[144] Ministry of Law and Justice, 'Annual Report 2020-21' (Government of India 2021). < https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f697503875/uploads/2022/02/2022022325.pdf > accessed 3 April 2022.

[145] The New Indian Express, 'Women's Share In Judiciary Abysmal, SC Saw Only 11 Judges Since 1950: Justice Indira Banerjee' (2022) < https://www.newindianexpress.com/nation/2022/mar/10/womens-share-in-judiciary-abysmal-sc-saw-only-11-judges-since-1950-justice-indira-banerjee-2428584.html > accessed 12 March 2022.

sexual assault to be charged under s.7 of the Protection of Children from Sexual Offences (POCSO) Act.[146] In the given case, since the accused groped the girl with her clothes on, it did not amount to sexual assault under the POCSO Act. Instead, he was charged under s.374 of IPC 133 for "outraging the modesty of a woman" and was given just two-year imprisonment, which otherwise would be seven years if charged under the POCSO Act.[147] The Supreme Court, overturning the High Court Judgement, emphasised that for constituting an offence under s.7 of the POCSO Act, 'the important element is sexual intent and not direct skin to skin contact with the child.'[148] The controversial judgment by Justice Pushpa led to many criticisms about how a High Court Judge, especially a woman judge could so narrowly interpret the law.[149]

There are no reservations for any caste or class of people when it comes to appointing judges to the Supreme Court and the High Court.[150] The Law Ministry data in 2018 revealed that Dalits comprised less than 14% of the subordinate judiciary. At present, there are just two Scheduled Caste Judges in the Supreme Court,[151] whereas, more than 50% of the judges are upper-caste Hindus.[152] The underrepresentation of women and lower caste members, and the dominance of men and upper caste members in the judiciary, speaks about a deeply rooted discrimination. A survey conducted by a Delhi-based Non-Governmental Organisation revealed that 64% of the judges believe that 'women are partly culpable for the violence they encounter.'[153] This shared belief enunciates the need to have a diverse and inclusive judiciary to deliver less prejudiced judgments and subsequent precedents.

D. Delay in Trials

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[146] Protection of Children from Sexual Offences Act, 2012.

[147] Tribune India, 'Justice Pushpa Ganediwala Who Delivered 'Skin-To-Skin' Verdict Resigns' (2022) < https://www.tribuneindia.com/news/nation/justice-pushpa-ganediwala-who-delivered-skin-to-skin-verdict-resigns-369004 > accessed 5 April 2022.

[148] 'Skin To Skin Contact: How It Travelled Path Of Judiciary' (*Outlook India*, 2022) < https://www.outlookindia.com/website/story/skin-to-skin-contact-how-it-travelled-path-of-judiciary/401445 > accessed 5 April 2022.

[149] Vakasha Sachdev, '4 Shocking POCSO Orders By One Judge. But Is The Problem Bigger?' (*TheQuint*, 2022) <https://www.thequint.com/news/law/justice-ganediwala-bombay-hc-shocking-pocso-judgments-broader-problem-judicial-training-justice-lokur#read-more> accessed 2 April 2022.

[150] Ministry of Law and Justice, Government of India, 'Judges Belonging To SC, ST And OBC Communities' (2022) < https://pib.gov.in/PressReleasePage.aspx?PRID=1812040 > accessed 17 March 2022.

[151] Pradeep Thakur, 'Data: Obcs Just 12% Of Lower Court Judges' *The Times Of India* (2018) < https://timesofindia.indiatimes.com/india/data-obcs-just-12-of-lower-court-judges/articleshow/62687268.cms > accessed 17 March 2022.

[152] Namit Saxena, 'Disproportionate Representation At The Supreme Court: A Perspective Based On Caste And Religion Of Judges' (*Bar and Bench - Indian Legal news*, 2021) < https://www.barandbench.com/columns/disproportionate-representation-supreme-court-caste-and-religion-of-judges > accessed 17 March 2022.

[153]Human Rights Watch and Center for Human Rights and Global Justice, 'Caste Discrimination Against Dalits' (Human Rights Watch and Center for Human Rights and Global Justice 2007) < https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_NGO_Ind_70_9036_E.pdf > accessed 11 March 2022.

Considering many unreported cases involve sexual offences against Dalit women, few cases have been successfully brought before the courts due to the extreme delays in the judicial process. According to the National Crime Records Bureau report in 2019, the pendency rate of cases involving sexual offences against Dalit women is approximately 90%.[154] Although the setting up of fast-track courts is within the purview of State Governments, the 14th Finance Commission had recommended the States to set up 1800 fast-track Courts during 2015-20 to deal with cases involving heinous crimes, cases related to women, children and other serious crimes.[155] Yet, only 919 functional fast-track courts have been set up to date.[156] Moreover, it is crucial to consider that the statistics of the trial pendency rate belong to the year 2019, which essentially derails the potential argument that there were delays in conducting trials due to the Covid-19 Pandemic.

The startling figure questions the situation that Dalit women are put in during the pendency of their trials, wherein they run out of resources due to their disadvantaged economic standing and are often pressurised and threatened by the dominant caste members to withdraw the case.

E. Recommendations to improve the position of Dalit Women

A report by Swabhiman Society and Equality Now put forward a few recommendations that could potentially combat the intersectional discrimination faced by Dalit women and girls.[157] It suggests that the Government should ensure effective implementation of the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act[158], improve police responses to cases of sexual violence and ensure more representation in the police and judiciary that can essentially provide a perspective of the challenges faced by women and lower castes.[159] The suggestions also emphasize the importance of educating Dalit women and girls about their rights and the available legal redressal mechanisms such as their right to an advocate and legal aid.[160]

Although these recommendations are incredibly important to think about concrete ways in which one can change the situation, ultimately, if talking about societies in which those inequalities are normalised and practised every single day, until there is

[154] Ministry of Home Affairs, 'Crimes In India 2019' (Government of India 2019). <https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%207A.5_2.pdf > accessed 11 March 2022.
[155] Ministry of Law and Justice, 'Fast Track Courts' (Government of India 2022). < https://doj.gov.in/fast-track-courts/ > accessed 11 March 2022.
[156] Ibid.
[157] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.
[158] Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act 1989.
[159] Swabhiman Society and Equality Now, 'Justice Denied: Sexual Violence & Intersectional Discrimination' (Equality Now 2020) < https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/10/EN-Haryana_Report-ENG-PDF-1.pdf > accessed 11 January 2022.
[160] Ibid 33.

a major social change, these recommendations are not helpful. It essentially draws on Gandhi's vision for India after Independence, wherein all the differences and inequalities would be eradicated. However, India remains unequal even after 75 years of Independence.

6. Conclusion

This paper aimed to give a perspective on the unique issues experienced by Dalit women who are victims of sexual violence in India. Section two examined how women across societies are placed in a subordinate position to men due to the patriarchy system and the caste discrimination in India which exist until today. It highlighted the specificity of both elements and the implications towards the vulnerability of Dalit women. Due to the intersection of their low caste and female gender, they are deprived of their rights and are often victims of sexual violence. Section three briefly outlined the existing Indian laws enacted to address the specific challenges faced by Dalit women and its weak implementation, resulting in ineffective protection towards them.

Noting that the official data of sexual violence cases against Dalit women is underreported, section four aimed to provide the reasons for it. It examined how poor policing in terms of bribing, delays in filing FIRs and illegal compromises have resulted in hindering Dalit women from seeking justice. It was also argued that due to the caste hierarchy, Dalit women are sexually assaulted by upper caste men in the majority of cases. Coupled with poor policing, this has led to the impunity enjoyed by upper-caste men, resulting in the continuous oppression of Dalit women. The details of the cases were discussed in-depth to understand the dehumanisation of the Dalit women, which exacerbates the low status that women in general, especially women from poor backgrounds, occupy across the world.

Section five examined how the gender and caste bias of the Indian Judges has resulted in miscarriages of justice and emphasised the need for diversity in the Indian Judiciary. In summary, this paper has provided an outlook on structural barriers faced by Dalit women and has drawn an analysis that due to the intersection of their female gender and low caste, they are deprived of the basic citizenship rights under the law, in contrast to the upper caste community who are in essence, above the law enjoying impunity. It has stressed that despite 75 years of independence, the vision for a new India that is free of discrimination has not been achieved. By discussing a few recommendations that could arguably improve the position of Dalit women, this paper has concluded that unless there is social change, the position of Dalit women is unlikely to improve

Does it come from a land down-under? An analysis of crimmigration policy transfer between Australia and the UK

ALICIA JANE GRASSOM

Abstract

In March 2021, the Home Office released the 'New Plan for Immigration: policy statement' outlining government plans for a complete overhaul of the UK system. Proposed 'pushback policies' for turning migrant boats around at sea, and the establishment of offshore 'reception' centres holding asylum seekers, have spurred intentional criticism for seeking to replicate Australia's notoriously harsh 'crimmigration' regime. Through a critical discourse analysis and a framework of policy transfer, this comparative study investigates the extent of a crimmigration policy transfer between Australia's 'Operation Sovereign Borders' policy document and the 'UK's New Plan for Immigration: policy statement'. Findings suggest there is an emulation of Australian policy into the UK's plan, implying a significant transfer of discourse and rhetoric, with the potential for a complete transfer following upcoming legislative changes under the Nationality and Borders Bill 2022. Crimmigration discourse is identified as a political technology for appeasing public anxieties around immigration whilst reinforcing an unequal power system between the state and asylum seekers. Consequently, UK policymakers should firstly draw upon negative lessons from within the Australian immigration system before proceeding with system changes, employing a humanitarian discourse even at the expense of public support.

1. Introduction

This paper evaluates the transfer of crimmigration policy between Australia and the UK. 'Crimmigration' refers to the increasing tendency for migration to be treated as a crime problem, reflected in the increased synthesis of criminal justice and immigration controls globally (Bowling and Westerna, 2015). Immigration law breach, previously dealt with as an administrative civil law issue, is now regularly regarded as firmly within the criminal justice remit and as warranting punitive sanctions (Bowling and Westerna, 2015).

Australia's refugee and immigration system comprise one of the most punitive examples of a crimmigration control system operating across western democracies (Smith, 2018; Van Berlo, 2015). Since the first Australian mandatory immigration detention policy in 1992 (Nethery and Holman, 2016), successive governments have sought to securitise their asylum-seeking procedures. The 2001 'Pacific Solution' policy-initiated pushback operations at sea, thereby returning refugee boats to their place of origin. The Pacific Solution also coordinated the transfer and indefinite detention of asylum seekers in offshore processing centres on Nauru Island and Papua New Guinea, denying the prospect of resettlement in Australia (Sundram and Ventevogue, 2017). Despite the scheme's termination on humanitarian grounds, the current policy, 'Operation Sovereign Borders' (OSB), expanded its provisions,

including increasing the capacity of the asylum estate and employing military forces to manage boat arrivals (Nethery and Holman, 2016). Previous research has analysed OSB through its impact on asylum seekers (Essex et al, 2022; Sundram and Ventevogue, 2017; Hendrick et al, 2019; Ibekwe, 2021), its legal grounds law (Henderson, 2014; Neil and Peterie, 2018) and its use of discourse to bolster public support (Stewart, 2016; Nguyen and Gruba, 2019; Pickering and Weber, 2014; Van Berlo, 2014). However, little research has been conducted to investigate the influence of OSB on policymaking elsewhere.

Across the globe, the UK announced is seeking to reduce its number of undocumented boat arrivals. In March 2021, the 'New Plan for Immigration: policy statement' (NPFI) was released, providing a blueprint for legislative changes due to be enacted in the Nationalities and Borders Bill 2022 (Priti Patel, 2021). These plans strive to significantly amend the immigration and asylum process to prevent further deaths of asylum seekers travelling through risky routes to the UK and seek to create a fairer system (Priti Patel, 2021). This follows media attention to tragedies, such as the drowning of pregnant women and children whilst attempting to cross the English Channel and the suffocation of smuggled migrants in a refrigerated lorry container (BBC 2021; BBC 2021). However, the release of the NPFI has spurred criticism for its resemblance to Australia's harsh crimmigration OSB regime (Bulman, 2021; Taylor, 2021; Gleeson, 2021; 2020; UNHCR, 2022). Despite the significance of these claims, it has not been subject to academic interrogation. This paper will therefore empirically analyse the degree of transfer between the two policies. Policy transfer can be defined as:

> 'A process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system.' (Dolowitz and Marsh, 2002, p. 5).

It is important to analyse policy transfer between Australia and the UK due to the human rights violations that have resulted from OSB strategies (Henderson, 2014; Del Guadio and Phillips, 2018). Despite government attempts to guarantee secrecy over the internal operations of processing centres, various sources have disclosed dark and even torturous accounts from detainees (Boochani, 2018; Nasiri, 2016; Hendrick et al, 2019; Henderson, 2014; Fraenkel, 2016; Nethery and Holman, 2016). Independent inquiries such as the *Moss Report* (2015) and the *Forgotten Children* (2014) report have also reported human rights abuses within the system, leading to the Papua New Guinea supreme court ruling Manus Island Regional Processing Centre unconstitutional in 2016 (Dastyari and O Sullivan, 2016). Regardless, Prime Minister Tony Abbott dismissed reports as a 'transparent stitch up', stating that he would not 'succumb to the cries of the human rights lawyers' (Fergus, 2018, 1). Controversially, the use of pushback and detainment strategies persist (Phillips and Spinks, 2013; Human Rights Watch, 2017).

Whilst studies have undertaken discourse analyses on OSB (Stewart, 2016; Van Berlo, 2015; Pickering and Weber, 2014), the same focus has not yet been given to the NPFI, nor has any degree of transfer been academically established. Policy transfer may occur at differing degrees, including 'copying, emulation, combinations or inspiration' (Dolowitz and Marsh, 2002), resulting in different practical outcomes. Therefore, the existence of transfer will be empirically tested by addressing the research question:

1. *To what extent has the UK transferred the 'Operation Sovereign Borders' crimmigration policy into the 'New Plan for Immigration: policy statement'?*

To answer this research question, three specific sub-questions will also be addressed:

1a. How are asylum seekers framed in both 'Operation Sovereign Borders' and the 'New Plan for Immigration'?
1b. How do the policies present crimmigration discourses?
1c. What socio-cultural or political factors contextualise the use of a crimmigration rhetoric?

The structure of this paper comprises five chapters. The first chapter examines the existing academic literature on the topic. The second chapter explains and justifies methodological considerations for the study design. The third is dedicated to discussion of the discourse analyses findings from both OSB and NPFI, before the fourth chapter synthesises the discussion and analyses the degree of transfer between the policies. Finally, the conclusive chapter summarises the study's academic contributions to the field of criminology as well as its implication for future research.

2. *Literature Review*

A. Constructing the 'risky migrant'

The concept of 'risk' is well established across many realms of literature. From a social sciences approach, Beck (2006), describes contemporary western 'risk society' as ruled by a preoccupation with risk management, despite a limited ability to control ambivalent risks. Through a social anthropologist lens, Douglas and Wildavsky (1982) provide greater scrutiny over the politicised process of risk selection. Risks presenting threats to organisational power and social values are prioritised, especially in the presence of a culpable body (Douglas, 1992). Hence, risk selection reinforces unequal power dynamics (Beck, 2006; Douglas, 1992). In the context of immigration, the state has power over the migrant to deny an immigration status if they perceive them as a threat (Douglas, 1992). Whilst these grand theories were not exclusively constructed around immigration systems, they form a foundation for literature exploring contemporary political fixation with the 'risky migrant'.

Lupton (2012) applies the concept of risk to practices of spatial exclusion at the border. Conceptualising geographical spaces as representing cultural objects of Self and Other, Lutpon (2012) explains border controls as processes for dominant groups to

assert the internal from the external and exclude those deemed to be *risky*. This builds on the work of Douglas (1969) who identified immigration as a means of risk management. Shamir (2005, p. 197) described this as presenting a 'mobility gap' between migrants where the 'licence to move' (Shamir, 2005, p. 201) is based upon group status in a 'deservingness framework' (Mayers, 2019, p. 62). Aas (2013) notes the differential treatment of citizens of the global north and global south in mobility regimes, acquiring labels of 'tourists' or 'vagabonds' and gaining different entitlements (Bauman, 1996, p. 5). Shamir (2005, p. 201) argues that this is a means for wealthy states to extend their powers over weaker states to manage economic risk to the labour market (McColloch and Pickering, 2012). With economic income and labour skills indicative of citizens 'licence to move' (Shamir, 2005, p. 201), refugee populations have become 'doubly immobilized', occupying the bottom of social hierarchies and often coming from already impoverished states (Shamir, 2005, p. 205). For this reason, bordered societies are therefore arguably reflective of global inequalities (Aas, 2013).

Adopting a different rationale, Mayers (2019) argues that risk management strategies are instead ordered by racialised and gendered biases. Through discourse analysis, Mayers (2019) finds surveillance technologies to be justified in the US through construction of the 'good', hardworking migrant against the 'bad' Latino and Arab welfare-dependents. Similarly, Ibhrahim (2022) traces a history of hostility towards the racialised other as underpinning British immigration policies. Ibrahim (2022, p. 17) binds racial coding to the UK's colonial history which used borders as 'racial instruments' for controlling alien bodies. Supporting this, Bowling et al (2019), review post-colonial immigration law, suggesting it was designed to discriminate against citizens of African, Caribbean and Asian origin and stigmatise them as presenting an inherently higher level of criminality (Peplow, 2021). Abbas (2018) provides a continuation of the neo-colonial configurations in contemporary UK immigration policy. Abbas (2018) argues that Muslim Middle Eastern refugees are constructed as 'parasitic invaders' of western society in political discourse, often conflating 'refugee' and 'terrorist', to justify discriminative immigration practices (Abbas, 2018, p. 2452). Commentators identify how this rhetoric was intensified after the events of 9/11 and subsequent Islamic terrorist attacks across Europe and has resulted in intrusive risk-based screening strategies, especially for refugees and migrants from majority Muslim countries (Abbas, 2018; Cuauhtemoc and Herndandex, 2018; Miller, 2003).

B. Crimmigration control

In response to security fears, 'crimmigration' laws and policies have been rapidly enacted across Western states (Cuauhtemoc and Herndandex, 2018). Crimmigration was first conceptualised in academia by Stumpf (2006) who noted a punitive shift in procedural law and enforcement tactics. Its development has now been traced overtime (Cuauhtemoc and Herndandex, 2018; Aas 2013; Ibhrahim, 2022; Peterie, 2016; Bowling and Westerna, 2015) and evidenced across states (Mayers, 2019; Bhatia, 2019; Peterie, 2016). Over seventeen years form 1999 to 2016, the UK legislated for eighty-nine new immigration offence categories and the foreign national offender (FNO) population continues to rise (Bhatia, 2019). Immigration status is increasingly

considered an aggravating factor for criminal sentences; indeed it can be denied on the grounds of a criminal record (Cuauhtemoc and Herndandex, 2018). Miller (2003) further identifies the curtailment of migrant rights, narrowing grounds for judicial review and expansion of provisions for deportation as evidence of increasingly punitive legal crimmigration control.

Further evidence of crimmigration has been highlighted through the 'securitisation' of migrants and borders (Cuauhtemoc and Herndandex, 2018). The scholar Buzan et al (1998, p. 21) defines securitisation is 'the process by which issues are identified, labelled and reinforced as threats to a community, often by politicians for electoral gain'. Scholars argue that securitisation demonises migrants as criminals (Cuauhtemoc and Herndandex, 2018) and is used to provide a punitive scapegoat for social issues (Young, 1999). The process also applies to the creation of hard borders through the building of walls, electric, razor-wire fences and detention centres, which, as Bowling and Westerna (2015) highlight, greatly resemble criminal justice prison estate security (). Both the labelling of migrants and enforced security measures are conceptualised by Aas (2018, p. 21) as creating 'ordered' and 'bordered' societies. Khan et al (2018) argue that securitisation is a form of penal populism in western states; Donald Trump's promise to build a 'big beautiful wall' on was instrumental in his electoral success. However, securitisation is criticised as pacification strategy to distract from social problems at the cause of the public's growing discontent (Ackerman, 2014).

In recent years, the securitisation of asylum seekers, especially those arriving by boat, has dominated political immigration doctrine (Ibhrahim, 2022; Pugh, 2004). 'Boat people' have increasingly been singled out in political and media discourse as presenting an existential threat to security and even likened to an invasion warranting responses analogous with war (Pugh, 2004, p. 50; Stewart, 2016). Depicted as 'stateless wanderers' and opportunistic 'economic migrants' rather than refugees (Pugh, 2004, p. 53), this 'categorical fetishism' (Apostolova, 2015, p. 48) towards 'boat people' has led to the widespread spatial and normative exclusion of groups who identify as refugees and an encroachment on international human rights (Pugh, 2004, p. 50; Crawley and Skleparis, 2017; Gupte and Mehta, 2007; Peterie, 2016; Safety of Life at Sea Convention 1974; Law of the Sea Convention, 1982; International Convention on Maritime Search and Rescue, 1979). However, there is a need to revisit the depiction of refugees in political and policy discourse since the 2015 'European refugee crisis' was announced (Ibrahim, 2015). In the past decades, conflict in the middle east has triggered a surge in displaced refugees fleeing conflict and arriving to European countries via boat, increasing greatly in 2015 following the…. Boat. Over the past decades, conflict in the middle east has resulted in millions of displaced refugees fleeing war zones and seeking safety in other states (Ibhrahim, 2022). In 2015 the European 'refugee crisis' was announced, and the UK along with other European states saw heightened numbers of boat arrivals to their shores. Since the declaration of this crisis, there is a need to revisit the depiction of refugees in political and policy discourse.

C. Australia's crimmigration regime

Australia's border policies have attracted international attention for the punitive securitisation of boat arrivals (Hartley et al, 2019; Phillips and Spinks, 2013; Ibekwe, 2021). Since the 2001 Pacific Solution, political rhetoric towards boat arrivals has become increasingly hostile, with discourse analyses showing refugees portrayed as criminals, terrorists, queue jumpers, wartime enemies and ingenuine economic migrants (Peterie, 2016; Rowe and O'Brien, 2014). Corroborating these studies, Van Berlo (2015) critical discourse analysis (CDA) on OSB transcripts and policy documents and found them to be securitised and militarised extensions of previous crimmigration regimes. 'Militarisation' includes the 'highly visible presence of military personnel and artefacts at the borderline or the adoption of overtly military tactics' (Wilson, 2014, p. 142). Other studies have argued campaign materials and political parties use discourses of governmentality, risk management and deterrence scripts to frame boat arrivals (Nguyen and Gruba, 2019; Pickering and Weber, 2014). Arguably, findings from Van Berlo (2015) are more reliable than those revealed by Nguyen and Gruba (2019) because, as Bryman et al (2021) suggest, the use of a singular video means that results may be influenced by a sample bias and present a reduced generalisability of findings. Furthermore, Stewart (2016) found that the media primarily employed a militarist discourse to frame boat arrivals as a threat to state sovereignty in the lead up to the 2013 federal election. However, Stewart (2016) relied only upon overtly militarist images and phrases as evidence of this discourse. This positivist process of data collection ignores the way that discourse is used to convey ideological perspectives in delicate and covert ways (Bryman et al, 2021; Batstone, 1995). Debate in the literature highlights the need for further empirical analysis.

Studies have also explored the effects of Australia's crimmigration policies on public opinion. Hartley et al (2019) evidenced the power of discourse in forming public support for Australian pushback and offshoring policies. Political ideology, prejudice and false beliefs about those seeking asylum were the strongest predictive factor for support of offshoring policy (Hartley et al, 2019). Van Berlo (2015) found the crimmigration discourse to be instrumental in creating public panic, enabling the government to continue with their securitisation agenda (Pugh, 2004). As crimmigration law becomes equally globalized and bordered, it is important for the effects of other state policies to also be analysed (Aas, 2013).

There is an extensive body of literature that analyses the impact of Australia's crimmigration policies on asylum seekers (Hendrick et al, 2019; Sundram and Ventevogel, 2017; Grewcock, 2016; Peterie, 2021; Fraenkel, 2016; Ibekwe, 2021). Internal narratives shed light on asylum seekers being 'treated like animals' (Nasiri, 2016) and prisoners (Boochani, 2018). The *Moss review* (2015) exposed accounts of beating by guards; child sexual exploitation; rape and forced indecent exposure in exchange for showers, cigarettes and marijuana. Forced relocations and indefinite detention have also been shown to bring about negative impacts on mental health (Hendrick et al, 2019, p. 1-9; Neil and Peteriem 2018; Peterie, 2021; Sundram and Ventevogel, 2017; Fleay and Hoffman, 2014), in deliberate attempt to deter boat arrivals and encourage 'voluntary repatriations' (Peterie, 2021, p. 2669).

> One interviewee explained that the man she had supported was now back in Iran because '[h]e couldn't take it anymore. They sent him to Christmas Island and he just said ''I'll go back and die. A quick death. It's better than this slow death'''
>
> (Peterie, 2021, p. 2669)

Methods of self-harm recorded amongst Australia's asylum population in 2015 included cutting, hanging, self-poisoning, burning and lips sewing (Hendrick et al, 2019). Sundram and Ventevogel (2017) found 90% of detainees suffered with serious mental health conditions and whilst majority had experienced torture or traumatic events prior to seeking asylum, most had not suffered symptoms prior to immigration detention. Despite these conditions being described as a 'toxic emotional environment' (Del Guadio and Philips, 2018, p. 14), the *Forgotten Children Report* (2014) found detention times for children to be increasing.

Literature has also explored negative effects of Australian offshoring on host countries, exposing the consequences of aggravating social tensions and placing additional strain on local economies (Refugee Action Coalition, 2016; Opeskin and Ghezelbash, 2015; Sundram et al, 2017). However, research has focused less on the influence of these crimmigration policies than on other states elsewhere, revealing a literary deficit that this paper seeks to address.

D. The UK's immigration landscape

Upon its announcement, the NPFI spurred media attention for presenting commonalities with the Australian system (Bulman, 2021; Taylor, 2021; Gleeson, 2021). Del Guadio and Phillips (2018) found commonalities in current Australian and EU policies over the detention of asylum seeker children, but the NPFI has not been subject to the same academic review. Furthermore, research into UK immigration discourse is under researched compared to the analysis on Australia's policies, despite Bhatia (2019) highlighting the increasing use of crimmigration controls. Literature presents the UK as already operating harsh immigration and asylum systems but as taking a more punitive turn (Bosworth and Vannier, 2020). Coddington (2018) finds the UK operated as one of the most punitive systems in the European Union (EU), being the only member state to permit the indefinite detention of migrants and use prisons and squalor conditions as processing cites (Loggin, 2019; Eye DJ 2015). Furthermore, Bosworth and Vannier (2020) found that migrants are being detained on ever-widening grounds under the Dublin Convention.

Due to its contemporaneity, research into the NPFI is limited. Portes (2022) analysed the rollout of the new points-based system considering the effects on the labour market but did not address the new asylum system from a crimmigration perspective. Therefore, this paper conducts a discourse analysis on OSB and the NPFI to analyse the existence of a crimmigration policy transfer. Given the potential humanitarian costs that a full transfer may incur, it is essential to address this gap in the literature. The following chapter outlines how this research was conducted.

3. *Methodology*

A. Methodological approach

To bridge the gaps identified in the literature review, this paper aims to carry out a CDA of the OSB policy document and the NPFI policy statement to analyse policy mobilities between Australia and the UK. The study adopts a qualitative interpretivist methodological approach because this best aligns with the selected sources and the nature of the research questions (Bryman et al, 2021). As there is little pre-existing research into the policies, an inductive generation of knowledge will be required, which is best generated through qualitative analysis (Bryman et al, 2021). This means that the findings of the study will be used to form a theory as to the purpose of the governmental discourse. There will also be an iterative strategy to enable existing theories to be drawn upon to facilitate the understanding of the discursive themes and conceptualisations present (Bryman et al, 2021). Practical considerations also demand a qualitative approach due to the emphasis on words and themes in policy documents rather than the quantification of data collection (Bryman et al, 2021). Identifying discourses within the policy documents will be determined through an interpretivist process because the social realities of discourse are not objective truths, but rather a subjective phenomenon (Bryman et al, 2021). It is useful to adopt an interpretative approach to study discourse because, as Becker et al (2012, p. 112) highlight, it enables a 'bridging of the gap between policy and the lived realities in practice'. This is particularly relevant in considering research question (1c); policy mobilities do not always result in a complete transfer (Dolowitz and Marsh, 2002). Discourse and transfer of policy is therefore not a social phenomenon that can be measured through positivism methods of the natural sciences (Bryman, 2016). Moreover, qualitative research is broadly constructivist in nature (Bryman et al, 2021, p. 351). This study is grounded in constructivism ontology as policy discourse cannot be separated from the actors involved in the constructing, producing and delivering of discourse (Bryman et al, 2021).

B. Sampling and research materials

This study bridges the gap in current literature by using policy documents to analyse governmental discourse and policy transfer between Australia and the UK. As identified in the literature review, previous studies analysed campaign materials, official media releases and news reports of OSB from a risk, deterrence and militarisation perspective (Stewart, 2016; Nguyen and Gruba, 2019; Pickering and Weber, 2014). Van Berlo (2014) also conducted a CDA on government transcripts and the OSB policy document deductively from a crimmigration perspective. However, this research project operationalises formal policy documents to study immigration discourse through an inductive approach. This is because empirical analysis of formal policy documents offers the most substantive representation of governmental rhetoric (Bernstein and Casore, 2000). The Australian OSB policy document and the UK's NPFI represent the actual choices made by governments and are reflective of the power and

cultural views of states (Bernstein and Casore, 2000). According to Newburn (2018), official documents are also the best sources for studying the extent of policy transfer. Acknowledging the limitations of such sources, research must be mindful of the gap between the transfer of policy 'on paper' and transfer of 'policy in practice' (Newburn, 2018, p. 576).

The OSB Coalition policy document is twenty-one pages long, providing an amble sample, and is still used to inform Australian border force operations today. This provided an ample sample size for the discourse analysis. However, this purposive sample does not consider other platforms or social actors that contribute to the generation of immigration discourse in Australia. Nonetheless, Van Berlo (2014) found that the government have a monopoly over the control of discourse in Australia on immigration, increasing the validity of this study's findings.

Prior to this study, a discourse analysis of the UK's NPFI for Immigration had not yet been undertaken. As the Nationality and Borders Bill, which legislates for the proposed changes is currently passing through Parliament, the policy statement was selected as a static source for critical discourse review. The NPFI is thirty-three pages long as updated in December 2021. Dolowitz and Marsh (2002) argue that it is imperative to study policies in their early stage of development for evidence of policy transfer, making the proposed plan ideal for analysis in the present context. Whilst it did not provide a direct comparison for the OSB policy document, it still provided a substantive indicator of contemporary governmental discourse (Newburn, 2018). However, using the policy statement limits the validity and reliability of policy mobility findings as it is undetermined what content will be transferred into the final policy programmes. The constructionist nature of governmental discourse means that this is subject to change as the bill is amended but it is likely to remain generally consistent due to the preserved ideologies of the elected political party in power.

C. Justification of method and data analysis

The qualitative approach selected for this research was undertaken in two parts. Firstly, a CDA on both the OSB and the NPFI documents was conducted. Secondly, an analysis of policy transfer was carried out in which the immigration discourses were compared to see what content and processes they share. The theoretical frameworks applied were Fairclough's multi-dimensional model of CDA (Fairclough, 1989, 1995a, 1995b, 2001) and Dolowitz and Marsh's (2002) framework of policy transfer. The selection of these methods will now be discussed and justified.

CDA is defined as 'a form of discourse analysis that emphasises the role of language as a power resource that is related to ideology and socio-cultural change' (Bryman et al, 2021, p. 607). CDA was selected to analyse the policy documents because social and political issues of power and inequality within discourse are central to global mobility regimes (Fairclough, 1989; Van Dijk, 1993; Shamir, 2005). Discourse produces social realities and gives meaning to them (Phillips and Hardy, 2002), but may also actively create and alter migrant social identities, as opposed to accurately reflecting them (Philips and Jørgensen, 2002). Slovic (2010) highlights that institutions monopolise

over the power to define risks in immigration discourse and pose rational solutions. For example, citizens rely on government services to carry out safe and effective visa management (Douglas, 1992).

However, implicit or indirect meanings (Van Dijk, 2001) expressed through linguistic resources may be misused as a 'political technology' to maintain social order through creating 'common-sense' assumptions in critical discourses known as 'ideologies' (Jackson, 2007, p. 421; Van Dijk, 1993; Fairclough, 1989). This is done through highlighting some ideologies and backgrounding alternative narratives (Machin and Mayr, 2012). Bhatia (2019) argues that refugee narratives must be articulated by scholars to scrutinise social inequalities and challenge power relations (Van Dijk, 1993) through exploration of 'who uses language, how, why and when' (Van Dijk, 1992, p. 2). These questions were considered in the CDA to bridge the gap between the initial micro-level analyses of the policy document's textual features and a macro-level analysis of immigration power structures (Van Dijk, 2005).

Fairclough's three-dimensional framework was used to conduct the CDA (Fairclough, 1995). Applying this, the documents were analysed at the textual, discursive and sociocultural levels (Fairclough, 1995). Each document was read multiple times to identify the emerging predominant discourses. Lexical features used to support specific discursive strategies were analysed through a linguistical analysis (Machin and Mayr, 2012; Baker and Ellece, 2011). Discursive features such as text production, consumption and distribution were then discussed before a macro-level exploration of sociocultural contexts of the texts was explored using existing literature (Fairclough, 1995).

Fairclough's Marxist interpretation of discourse was selected over Van Dijk's socio-cognitive model (1993) and Wodak's (2001) discourse-historical approach because of its emphasis on exploring the power dynamics of discourse, which is more pertinent to immigration policy (Poole, 2010; Jahedi et al, 2014). However, there are drawbacks to using CDA and Faiclough's (1995) framework. Widdowson (1998) critiques CDA, arguing that findings are simply critical discourse *interpretations,* particularly leftist political pretext. These interpretations are unable to be tested and validated for their impact on readers. Moreover, Hoey (2001) argues that different groups interpret texts differently, making findings overly deterministic (Poole, 2010). The conclusions drawn in this study are therefore limited by issues of reflexivity and researcher bias inherent to the nature of CDA and its epistemological and ontological underpinnings (Bryman et al, 2021). Hence, the inductive generation of the discourse themes was not a value-free process but bound by the researcher's ideologies and perceptions (Van Dijk, 2001), thus the reader's understanding of the findings is reliant upon the researcher's subjective interpretations (Bucholtz, 2001). Finally, Poole (2010) highlights the underuse of psycholinguistic features and the inability to define the number of discourses present. To best counter these limitations, this study drew upon the predominant discourses and themes of texts and selected linguistic features for analysis. The researcher attempted to maintain a self-consciousness in the production

of the research; ultimately though, issues of reflexivity and bias remain a limitation to the study (Bucholtz, 2001).

The second part of this research consisted of a comparison of the documents and their discourses. This was done by selecting questions from Dolowitz and Marsh's (2002). Discussion to explore i) 'what is transferred?', ii) 'from where are lessons drawn?', 'iii) 'what are the different degrees of transfer?'. Questions from the framework that were irrelevant to the purpose of the study were excluded. Answering these questions enabled discussion to differentiate the between different aspects of policy, such as the goals, institutions or rhetoric that are trasnferred (Dolowitz and Marsh, 1996; 2002;). Newburn (2018) highlights that rhetoric is the most easily and commonly transferable aspect, underlining the necessity to conduct the CDA beforehand. Whilst there are limited alternative models available, this framework was selected over Rose's (1991) model of lesson-drawing as it enabled transfer to be placed on a continuum of 'copying, emulation, combinations or inspiration'. The literature on policy transfer suggests that likelihood of policy 'successes' or 'failures' should also be considered (Dolowitz and Marsh, 2002; Rose, 1991). This is beyond the scope of this study, but should be considered for future research.

D. Ethical considerations

This research abided by the School of Law's block ethical approval. Ethical concerns were minimal due to the use of policy documents as the sampling material for the study. The documents are accessible on the internet and do not contain sensitive information. The research design therefore avoided contact with the vulnerable people that the policy affects.

E. Summary

This chapter has detailed the methodological and practical considerations for carrying out this research. Whilst there are limitations to the research design, these methods best enabled findings to address the research objectives and draw nuanced conclusions that considered the extent of policy mobility between the states. With the aims, methods and limitations of this study accounted for, the following chapter discusses the findings of this research.

4. Critical discourse analysis findings and discussion

A. *'Operation Sovereign Borders'* micro-level textual analysis: *The dichotomous social identities of asylum seekers*

Whilst many themes and ideologies were revealed in the CDA at the micro-textual level, for the limitations of this study, the three dominating ones will be discussed. The first theme explored is the constructed identity of the migrant, enabling the discussion to answer **research question 1a.** Lexical analysis of OSB revealed that discourse frames migrants arriving in Australia as falling into two polarised identities: the 'real' refugee and the 'illegal boat arrival'. This categorisation resembles the 'culture of disbelief' (Jubany, 2011, p. 74) that exists towards the claims of asylum

seekers arriving by boat. Boat arrivals are instead viewed as criminally deviant and undertaking opportunistic migration for personal gain rather than in genuine need of refuge:

> 'More than 14,500 desperate people have been denied a place under our offshore humanitarian programme because those places have been taken by people who have arrived illegally by boat. These people are *genuine refugees*, already processed by United Nations agencies, but they are denied a chance at resettlement by people who have *money in their pocket* to buy a place via people smugglers.' (p. 3, emphasis added)

Not only does the text infer boat arrivals to be illegitimate refugees but, through passive deletion of the actor, it backgrounds the active role of the government in refusing asylum applications and instead attributes blame to boat arrivals for jumping the 'queue' (p. 5) (Baker and Ellece, 2011). This infers a moral disjuncture exists between refugees depending on their mode of transport and reinforces the existence of a 'deservingness framework' (Mayers, 2019, p. 62; Crawley and Skleparis, 2017). In reality, the existence of an orderly queue is factually incorrect (Rowe and O'Brien, 2014). Asylum systems do not operate on a systemized *first-come-first-served* basis but are dependent upon individual needs and circumstances (Karlsen, 2011). Furthermore, the 'queing' metaphor (p. 5) endorses state systems as operating as an otherwise fair, timely and civilised process (Rowe and O'Brien, 2014). Yet, reports of the conditions and delays within processing centres demonstrate that this is not the reality (the *Forgotten Children Report*, 2014). Discursive categorisation of refugees throughout the text therefore allows boat arrivals to be constructed as unruly, uncivilised alien bodies, in contrast to the patient, socially controlled refugee, whilst drawing attention away from government negligence towards poorly managed systems (Ibekwe, 2021). By using boat arrivals as a scapegoat for the condemning reports of the Australian asylum system, the text reproduces unequal power relations where boat arrivals are repeatedly demonised (Young, 1999).

As evidenced in the passage, discourse positions the *real* refugee as economically worse-off than those who arrive by boat (p. 3). Under the Refugee Convention 1951, wealth and mode of transport are not determinates of refugee status (Rowe and O'Brien, 2014) and should not be used to distinguish refugee legitimacy (Rowe and O'Brien, 2014). Nonetheless, Ibekwe (2021) further highlights the often very poor financial status of boat arrivals to Australia. Despite highlighting the risk of these dangerous journeys, exemplified by the fact that 'more than 1,000 people have perished at sea after people smugglers' boats sank' (p. 3), the text continually uses a neoliberalist tone to depict these journeys as an individual choice, accessible through economic privilege. Lexical references to 'passengers' (p. 5, p. 7. p. 14, p. 15) and 'taking the sugar off the table' (p. 7) connote luxury, reducing readers' sympathy towards migrants. Pederson et al (2006) support this, finding that categorising refugees produces a negative public attitude towards boat arrivals. However, from analysing the humanitarian crises occurring in the states of Australia's highest refugee intakes; Iraq, Congo and Myanmar (Settlement Services International, no date), a *de*

facto assumption of the need for international protection could be presumed (Crawley and Skleparis, 2017). Instead, through delegitimising claims of boat migrants, government relinquishes itself from blame for failing to provide sufficient, safe asylum routes.

OSB uses a crimmigration discourse to frame the boat arrivals. Although it is not illegal to arrive in Australia without a visa to seek asylum, nor is it permissible to criminalise fleeing persecution under international law (UNHCR, 2010), the policy seeks to deter and punish those seeking to do so. Adopting the label 'illegal boat arrivals' evidences their securitisation (p. 3, p. 17, p. 19). They are constructed as a risk to the public, rather than at-risk themselves (Bellamy and Manson, 2003; Miller, 2003). Deaths at sea are directly attributed to migrant criminal involvement; 'more than 6,000 children have had their lives put at risk by travelling on people smugglers boats to Australia' (p. 3). By removing the agent, the text infers children are deliberately harmed by the deviant choices of their guardians and their conspiracy with human smuggler networks. Through this association, boat migrants and human smugglers are bound together in a synergy creating the 'modern folk devil' (Sanchez, 2015, p. 113) within the Australian immigration system.

B. *Crimmigration in action*

Having explored how asylum seekers are framed in the policy, discussion now turns to analyse how the policies present crimmigration discourses. As well as highlighting the threat of migrant boat arrivals through the association with human smuggler networks (p. 3), the policy employs a crimmigration rhetoric to the entire approach of OSB. The creation of the 'Joint Agency Taskforce' (p. 11) demonstrates that the Coalition party view immigration processes as demanding crime control organisational intervention. The taskforce partners fifteen different agencies from across sectors of immigration, security and national defence together in a synthesised approach to managing migrants arriving by boats (p. 11). These include 'The Australian Federal Police', 'The Australian Security Intelligence Organisation' and 'The Department of Immigration and Citizenship' (p. 11). This discursively conveys that migrants present a serious threat to national security and the risks warrant a multi-agency intensive intervention. This power structure goes largely unresisted and unquestioned in Australia due to the silencing of asylum seekers in the discursive debate (Van Belro, 2015), whose narratives may refute dominant government ideology and enable them to emancipate themselves from their assigned criminogenic label.

Furthermore, there is a dominance of lexis connoting securitisation and the creation of criminal justice interventions in the text (p. 2, p. 5, p. 14). There is only a brief and undetailed reference to assisting humanitarian resettlement as part of the 'regional cooperation' approach (p. 6). Instead, the crimmigration discourse focuses on increasing the securitisation of borders in partnering regions, including plans to 'improve maritime surveillance'; develop 'tougher border controls' and implement 'improved border security' (p. 6). Provisions of OSB also include the command to 'turn back boats' and deport migrants to other countries stating an order to 'increas[e]

capacity, at offshore processing centres' in Nauru and Manus Island (p. 5, p. 15). These are punitive interventions, which claim to focus 'single-mindedly on deterrence' (p. 5). Whilst deterrence is a predominant theme of the Coalition's discourse (Pickering and Weber, 2014; Van Berlo, 2015), the analysis revealed the inclusion of other criminal justice pinciples in the design of the asylum system, such as incapacitation and rehabilitation, (Canton, 2017). For example, the 'Regional Deterrence Framework' integrated measures across 'deterrence', 'detection', 'detention' and 'return, remove, resettle' (p. 8). The adoption of such principles in the asylum system context presents further evidence of a crimmigration system of control.

C. *Militarisation: At War with the boats*

Militarisation is another dominant discourse of the policy document. The name 'Operation Sovereign Borders' foreshadows the formal militarist tone used to frame the immigration 'problem' (p. 9, p. 10) (Stewart, 2016). The word 'operation' derives directly from military discourse and 'sovereign borders' emphasises the national state's duty to protect its borders, almost as if it were at war with the boats (Stewart, 2016; Pugh, 2004). The 'Chief of Defence Force' is elected to run OSB and discourse uses the nomination of official departments; 'The Australian Defence Force', and the appointment of high-ranking military positions; 'military commander of 3-star ranking' (Baker and Ellece, 2011) for reinforcing status (p. 2, p. 11, p. 12). This asserts formality and power structures within the text, further reiterating unequal power relations between the state and asylum seekers (Douglas, 1992).

A militarisation discourse is further demonstrated through lexical choices with militarist connotations used throughout the document, such as 'combat' (p. 2, p. 4-9), 'command and control' (p. 2, p. 9, p. 12) and 'discipline and focus' (p. 2, p. 9, p. 10). The tone of the document reflects a militarist style, using imperative and declarative sentence styles to assert information as facts, commanding action; 'There must be one person responsible with all the necessary resources of government at his or her command' (p. 2, p. 9); 'stop the entry of detected SIEVs into Australian territory' (p. 10). References to the inefficiency of Labor's 'static' (p. 2, p. 9) policies that lack 'authority and accountability' (p. 10) are juxtaposed against the Coalition's 'hit the ground running' military resolve (p. 10, p. 14). The militarisation of the system and discourse is justified by elevating the risk of boat arrivals to a 'border protection crisis' (p. 2, p. 10) and 'national emergency' (p. 2, p. 10). By positioning the sovereignty and security of Australia's borders as under attack by refugee boats, a military-met response is justified.

D. *Meso-Discursive level analysis*

The policy document was created as a campaign tool by the Liberal-National Coalition political party in the run-up to the federal elections in 2013. It is divided into sections that guide readers from 'The scale of the Problem Cause by Labor' (p. 3), to understanding 'The Way Forward' (p. 8) with their own OSB proposal. The policy states its 'message' is for 'the Australian people', 'people smugglers' and 'their prospective passengers' (p. 14). However, it is unlikely that potential boat migrants would gain access to the document unless they are aware of the policy's unique name

and can search it up online. Therefore, the document is likely targeted primarily towards Australian citizens. Its purpose is to persuade voters by using a political campaign narrative (Van Berlo, 2015). The document uses selective conversationalisation to create a 'fake intimacy' (Hoggart, 1957, p. 150) between the consumers and the producers of the text. For example, phrases such as 'when it comes to securing our borders, Labor's heart is simply not in it' are designed to appeal to the emotions of the reader. In contrast to the formal crimmigration and militarisation rhetoric, selective conversationalisation is used from a position of power to create loyalty between the Coalition party and the voter (Baker and Ellece, 2011). In contrast, the text ideologically squares the 'weak' proposals (p. 5) of Labor as providing an 'open invitation' (p. 3) to people smugglers and illegal boat arrivals (Van Dijk, 1998).

The Coalition use a one- directional discourse, designed to eliminate alternative narratives from the text (Van Berlo, 2015). This allows their ideology to dominate public discourse as 'common sense' assumptions (Fairclough, 1989, p. 11; Van Berlo, 2015). Despite refugee boat arrivals being the subject of OSB, their narratives are absent from the document and their presence is largely de-emphasised. Through abstracting the refugees as subjects from the text, they are backgrounded and impersonalised (Baker and Ellece, 2011). For example, using statements such as 'turn back boats' and labelling asylum seekers the 'problem' (p.2, p.3, pp.7-10) Visual semiotic resources further reinforce this message (p.1, pp. 17-20). resulting in emotionally distancing the reader from them as human actors (Leeuwen, 1996). Refugees are further mystified through the secrecy of the offshore processing centres that preserve the unidirectional flow of narrative informing public discourse (Van Berlo, 2015; Australian Border Force Act, 2015). This permits the use of a crimmigration discourse by the Coalition to be expressed unchallenged, preserving the unequal power structures between authorities and refugees (Van Berlo, 2015; Fairclough, 1995a).

E. *Sociocultural context*

Exploring the sociocultural context of the source is useful to understand why a crimmigration discourse is used and for exploring the socio-cultural and political contexts behind crimmigration rhetorics. As Fairclough (1989) highlights, discourse may be used to maintain systems of power. As a government document, this is particularly relevant to OSB. At the time of its construction, there was an approaching federal election. The Labor party had been in government for two terms during a time when boat arrivals had begun to rise (Phillips and Spinks, 2017). As part of their campaign narrative, it was within the Coalition's interest to overstate the risk posed by asylum seekers (Kasperson et al.,1988) and highlight risk mismanagement by the opposition to cause a loss of public trust (Douglas, 1992). Controlling migration, therefore, became an important electoral tool and 'political technology' (Jackson, 2007, p. 421) to bolster public support and create a social order where the Coalition regained power (Fairclough, 1995a). The party were successful in winning the election and OSB remains in practice today.

Using a crimmigration discourse is politically popular with the voters in Australia because, despite being a previous penal colony itself, Australia has historically held hostility towards selected groups of migrants (Van Berlo, 2015). For example, under the White Australia Policy 1901-1958, white immigrants were favoured over those who were non-white (Immigration Restriction Act, 1901). A refocused attention on irregular boat arrivals began with the mandatory detention policy of 1992 (Van Berlo, 2015), before more radical changes were implemented in the Coalition's 2001 policy, 'The Pacific Solution'. Public tendency to view oneself as vulnerable to external threats made crimmigration policies politically popular (Carvalho et al, 2020). It was effective in reducing boat arrivals, making a replication of the rhetoric politically attractive for the OSB campaign. However, the Pacific Solution was also condoned as inhumane and draconian in its approach to handling migrants (Van Berlo, 2015). Its detention laws were ruled unconstitutional and found in breach of the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights (Australian Human Rights Commission, 2004; Fraenkel, 2016; Library of Congress, 2016).

After negative press from these reports, it is plausible that OSB constructed the migrants as 'queue jumpers' as rhetoric to legitimise delays, overcrowding and poor conditions (Grewcock, 2009). Similar rhetoric was employed by the Australian government in 2001 to discursively link terrorists and refugees during the Tampa crisis (Pugh, 2004; Manne, 2003) . This negates the state's duty to take accountability for these violations and legitimises the system's continued operation. Using a crimmigration discourse also pacifies social frustrations at government spending, claiming 'real money that could have been spent on Australian schools, hospitals or improving our infrastructure' (p. 3) is being wasted on managing boat arrivals (Ackerman, 2014). Yet, the Coalition also proposes a $10 million investment alone (p. 16) for the establishment of the OSB joint agency taskforce and fails to state projected savings or redirection of public funds. Hartley and Pederson (2019) projected that OSB costs millions of tax-funded money to sustain each year, in addition to the significant social and psychological costs to asylum seekers. This supports Ackerman's (2014) pacification theory that demonising migrants diverts attention away from structural social problems at the cause of the public's growing discontent. Plausibly, if citizens felt confident in their justice and social support systems, they would be less fearful of threats to social and economic values (Douglas and Wildavsly, 1982).

This CDA finds that a crimmigration narrative, whilst justified through securitisation of boat arrivals, provides a discursive advantage for electoral success. Positioning asylum seekers arriving by boat as 'risky' criminal threats justifies harsh crimmigration controls and militarised national defence strategies. However, there remains little evidence to suggest that they discourage asylum seeker journeys, indicated by the rising detention population (p. 19) (Del Guadio and Phillips, 2018). These findings support other studies that have found refugees to be negatively constructed through other sources of discourse for political gain (Rowe and O'Brien, 2014; Van Berlo, 2015; Suhnan et al, 2012; Saxton 2003, p. 118).

5. *'The New Plan for Immigration: policy statement' micro-level textual analysis*

A. *The dichotomous social identities of asylum seekers*

Discussion will now explore findings from the NPFI analysis to revisit **research question 1a**. Similarly to OSB, lexical analysis of the NPFI reveals that asylum seekers are presented as having conflicting identities. In its new approach, the UK plans to use mode of transport as means of categorising migrants and awarding their 'licence to move' (Shamir, 2005, p. 201; Watkins and Kovalsky, 2016);'for the first time how somebody arrives in the UK will impact on how their asylum claim progresses, and on their status in the UK if that claim is successful' (p. 4, p. 18). Whilst those travelling through 'safe and legal' (p. 14-16) routes are framed through a humanitarian discourse; 'families and young children' (p. 4), 'victims' (p. 25-26), 'refugees' (pp. 3-4, p. 6, pp. 14-16); those arriving by boat or without a visa on 'dangerous and illegal' (p. 17, p. 27) journeys are securitised, labelled as 'economic migrants' (p. 4, p. 17) who are attempting 'illegal immigration' (p.3, p.17, p.27). Discriminating against migrants based on their mode of travel is an ideology at the core of OSB, but the unequal treatment of refugees beyond their successful asylum claims presents a punitive extension of the deterrent framework employed within Australian policy. However, new provisions, such as the constant reassessment for temporary protection visas and uninformed citizenship stripping, present hostility towards refugees (p. 4, p. 29), and extend beyond the controls of the external border to produce a structurally embedded border (Ibrahim, 2022, Weber, 2019). Unlike OSB, this blurs binary constructions of refugees as either 'genuine' or illegitimate, presenting a 'culture of disbelief' (Jubany, 2011, p. 74) towards all refugees (Ibrahim, 2022).

Like OSB, the financial status of the migrant can be manipulated in policy to frame them as ingenuine. 'Access to the UK's asylum system should be based on genuine need, not on the ability to enter illegally by paying people smugglers' (p. 3, p. 6, p. 18). Compared to the existing system, which is described as 'openly gamed by economic migrants' and vulnerable to 'criminal exploitation' (p. 4), the NPFI claims to be 'fair but firm' (p. 4). However, the narrowing grounds on which someone can successfully claim asylum suggests fairness is a discursive tool used to hide an increasingly exclusionary system of control. For example, the use of stricter age testing for child claimants (p. 20); a 'good faith' test (p. 23); an increased threshold for the well-founded fear of persecution test (p. 18) and reducing the opportunity to appeal or bring forth evidence to a case (p. 24). Measures to remove powers for judicial review are alarming in a system where appeal rates show at least 25% of initial claims are wrongly decided (Williams and Kaye, 2010). Therefore, the system appears to be more 'firm' than 'fair' in its depiction of arrivals as economic migrants.

The identities of asylum seekers are increasingly polarised in the new system through increasing the rights awarded to those who gain refugee status (p. 15) and the harsh crimmigration discourse used to frame those who don't (p. 4, p. 28, p. 30). The NPFI discusses the granting of indefinite leave to remain status (p. 15) and improved support for refugees on legitimised government schemes and verified victims of modern slavery (p. 26). Nonetheless, resettlement needs are framed by concerns of the

British taxpayer; the need for 'self-sufficiency' (p. 16), financial independence and the ability 'to contribute to the economic and cultural life of the UK' (p. 16). This supports literature suggesting the mobility gap is managed by cost-orientated and managerial principles (Miller, 2003), with emphasis placed on an individual's skills and capital. Whilst the NPFI claims that these opportunities are available to all refugees and 'fair to everyone' (p. 4), many scholars have identified a racial bias within the system (Bhatia, 2019; Mayers, 2019; Lewis, 2006; Ibrahim, 2022). Whilst the NPFI does not explicitly refer to race, the policy appears to predominately exclude non-white nations given the UK receives most of its asylum applications from Syria, Afghanistan, and Venezuela (UNHCR, 2021). Case studies of Syrian migrants (p. 16) and Jamaican offenders convicted of 'murder, rape and child sexual exploitation' (p. 22) embody a 'racial coding' of asylum seekers (Mayers, 2019) as a criminal threat.

The use of a crimmigration, which presents hostility and scepticism towards asylum seekers (Ibrahim, 2022), can be directly contrasted with the perception and handling of the Ukrainian refugee crisis. Whilst European efforts have been commendable in their creation of safe refugee and visa rollout for Ukrainian refugees (European Commission, 2022), Parekh (2020) argues that western countries are bound by human rights principles and their moral obligations to accept and help greater numbers of refugees from all nationalities in similar systems. This supports Bauman's (1998) reiteration of the disparity in treatment towards citizens of the global north and the global south (Aas, 2013; McCulloch and Pickering, 2012). Through securitising boat arrivals as illegal and undeserving, criminality can be used as a trojan horse for diminishing state responsibility to resettle racialised refugee boat arrivals.

The CDA analysis revealed that a crimmigration discourse was used to frame immigration as a crime problem, similarly to in OSB (Hernandez and Cuauhtemoc, 2018). Like OSB, boat migrants' association with criminal networks of human smugglers is highlighted (p. 17, p. 27). Whilst there is mention of a continued effort to tackle the 'upstream causes of illegal immigration' (p. 27), the strategies posed to 'break the business model of the people smugglers' (p. 28) from 'profiting from human misery' (p. 27) are based upon harsh deterrent principles targeted at criminalising illegal migrants. These include border force powers to search, seize and pushback boats and for the provisions of offshore 'reception centres' (p. 21, p. 28). Further measures include increased fines for the summary offence of entering the UK without permission and expanding the scope of the law to encompass those 'seeking to enter' (p. 28). This latter clause would criminalise all asylum seekers arriving outside of government legitimised schemes. Easier grounds for deportation (p. 29-30) and the introduction of a life sentence for facilitating illegal entry (p. 4) also represent further crimmigration controls. These strategies are based on criminal justice philosophies of deterrence, incapacitation and retribution, justified by the depiction of boat arrivals as presenting a criminal threat. By discursively tying the migrant to 'ruthless' (p. 17) human smugglers, the text forms association between refugees and sensationalistic transnational crimes, such as 'drug and firearms trafficking' (p. 3, p. 27), 'criminal gangs' (p. 3) and other forms of 'serious violent crime' (p. 3). However, Sanchez (2016) found that official narratives demonising smugglers are stereotypes. Many are

perceived by the asylum seekers as protectors on the risky journeys, in the absence of alternative legitimate pathways (Sanchez, 2016).

Redesigning the entire immigration and asylum system, the NPFI is broader in its punitive scope than OSB. It is also less detailed in describing the institutional arrangements and frameworks responsible for enforcing the new systems. It is, therefore, difficult to conclude the extent of criminal justice agency involvement. Nonetheless, the NPFI grants increased powers to the Border Force (p. 28) and courts (p. 24) as well as encouraging greater inter-agency working between 'Local Authorities, the police and immigration officers' (p. 25). New offences and power will ultimately lead to the net-widening of migrants caught in the criminal justice system, despite expressing how the court system is already overstretched and 'overwhelmed' (p. 13).

Moreover, the actual effectiveness of the crimmigration measures outlined is dubious, given that studies show deterrence-based paradigms (p. 27) prove ineffective internationally at reducing irregular arrivals (Squire et al, 2021). Rather, they only increase the experience of precarity and danger for asylum seekers forced to travel via riskier routes (Squire et al, 2021). The recent news of Rwanda as a confirmed offshore processing site for the NPFI is also criticised for ignoring international law and the 'inevitability of human rights abuses in closed institutions' (Nethery and Holmans, 2016, p. 1021; Gallardo, 2022; UNHCR, no date). Ibrahim (2020) argues that through offshoring, the state shifts their responsibility, whilst simultaneously using a neo-colonial approach to assert its authority to control irregular migration beyond its borders (Bulman, 2021). This reasserts the UK's position as a 'world leader in refugee resettlement' (p. 14), whilst concurrently using a crimmigration discourse to ensure 'that our generosity is not exploited' (p. 21).

B. *The UK: a ridiculed humanitarian hero*

The findings of this study support the work of Ibrahim (2022, p. 12) who suggests that 'the myth of humanitarianism' underpins the rhetoric of UK immigration policy. Social prestige and romanticism of refuge are boasted, but, punitive approaches are adopted (Ibrahim, 2022). From the opening sentences, the text portrays the UK as a liberal and globalised state; 'the UK has a proud history of being open to the world' (p. 3). Labelling itself as 'Global Britain' (p. 3, p. 5, p. 15) and presenting graphs and statistics claiming it resettles more refugees than any other European country (p. 6), the policy seeks to verify the narrative that the UK demonstrates 'global leadership welcoming those most in need' (p. 15). This portrayal works to corroborate claims that the system is on the brink of collapse, placing 'unsustainable pressures on public services' (p. 17) and increasing the 'costs of the asylum system to the taxpayer' (p. 12). As Lupton (2012) theorises, anxiety towards the Other is disclosed by presenting migrants as disposing a 'threat to the public and UK National Security' (p. 25). By instilling panic into the reader, discourse enables the government to relay their dominant ideology in 'a common-sense approach to controlling immigration' (p. 4), using increasingly punitive controls (Fairclough, 1989, p. 77).

Despite these depictions, alternative narratives contradict the UK's claims of global leadership status. The UNHCR (2021) cites Turkey, Colombia, Uganda, Pakistan and Germany as hosting the largest number of refugees, with most refugees relocating within their region of displacement (Sanchez, 2016; UNHCR, 2021). In addition, the NPFI suggests asylum applications are uncontrollably rising, yet the 36,000 asylum applications in 2019 were unmatched by the figures of 2002, which peaked at 84,132 (House of Commons Library, 2022). Discourse is therefore instrumental in serving the interests of the state and working to negate its duty to address issues at the core of public anxieties (Waquant, 2009). Highlighting the cost to the taxpayer of over '£1 billion' (p. 12) and 'the use of hotels to accommodate arrivals' (p. 19), the policy appears to use migrants as a scapegoat for economic hardship in a period of rising living costs and austerity (Young, 1999). Whilst the 'economic migrant' rhetoric (p.3) suggests that refugees are 'getting something for nothing', whilst citizens receive less' for their hard work (Schor, 1991), many asylum seekers live in a state of precarity and face destitution (Coddington, 2018). Asylum seekers are entitled to £5 a day of financial support and otherwise rely on charities, faith groups and community-based support whilst they are prohibited from working (Immigration Act, 1971; Coddington, 2018).

The text appeals emotively to the British reader as the humanitarian hero whose 'generosity' (p. 3) is presented as ridiculed and 'exploited' (p. 21). It appeals to neo-colonial configurations of the vulnerable and the benevolent protector; 'behind each statistic lies the story of a person or a family who can look forward to a better future because of the generosity of the British people' (p. 3) (Bulman, 2021, Abbas, 2018, 2459; Suzuki, 2016). Discourse accredits the philanthropic and caring nature of the British people; 'the British people are fair and generous when it comes to helping those in need' (p. 4), constructing a 'contemporary manifestation of the white saviour' (Abbas, 2019, p. 2459). This presumption is reinforced by the repeated collectivisation of 'our' and 'we' used to portray commonly shared goals and morals amongst British society; *'we* will continue *our* proud record of welcoming and resettling refugees in the UK' (p. 15, emphasis added) (Bulman, 2021, Abbas, 2018, 2459; Suzuki, 2016). Collectivisation discursively creates an 'imagined community' on which a 'national identity' is formed and an emotional disposition towards outsiders may be expressed (Baker and Ellece, 2011, p. 74; Anderson, 1983; Wodak et al, 2009,4; Barker and Galasinski, 2001). In reality, refugees are not always welcomed in the UK and often face hostility, harassment and discrimination (Coddingdton, 2018). This hostility is manifested through discourse as a guiding principle for crimmigration policy support (Ibrahim, 2022).

C. *Meso-Discursive level analysis*

Unlike OSB, the NPFI has been designed by the Conservative party currently in government. The statement was released in March 2021, ahead of the Nationality and Border Bill's first reading and set out the guiding principles for the new policy. Written by the Home Office and signed off by the Secretary of State, Priti Patel, it contains nine chapters which address the immigration system in its entirety.

Embedding chapters targeting criminal justice concerns such as disrupting criminal networks (p. 17, p. 27) and removing FNOs (p. 29) with chapters on asylum claims (p. 21), modern slavery victims (p. 25) and those fleeing persecution, oppression and tyranny (p. 14) form an association between criminals and asylum seekers in the text.

In some instances, the statement appears to directly address the illegal immigrant; 'If you illegally enter the UK via a safe country in which you could have claimed asylum, you are not seeking refuge from imminent peril' (p. 4). Yet, like OSB, it is unlikely that this document will be accessed by potential migrants, instead appealing more to the British citizen as its audience. Discourse suggests that the new system will return the *power to the people;* 'the UK now decides who comes to our country' (p. 3), when in reality this is an institutional power. This is useful to maintain government power over the system as public backing is needed to uphold structures of unequal power distribution (Van Berlo, 2015; Fairclough, 1995a).

Unlike OSB, the NPFI does state that it invites the contribution from other narratives in its final chapter, including 'views from stakeholders' sectors, as well as members of the public' (p. 31). However, the extent to which they are to be incorporated is yet to be evidenced. At the time of writing, the Nationality and Borders Bill is due for Royal Assent and the full implications of the NPFI remain to be seen.

D. *Sociocultural context*

Turning to address the socio-cultural and political factors that contextualise this more punitive immigration system's development, scholars have identified preoccupation with fearing the racialised other (Bbambra, 2017). This fear can be contextualised against the UK's history as a colonial state (Bhambra, 2017). During decolonisation and the renaming of the Empire as the Commonwealth, there was panic in Britain over the migration of non-white citizens from former colonies who had rights to British citizenship (Bhambra, 2017). This led to an increased categorisation of who was viewed as a 'citizen' and who was considered an 'immigrant'. Corridors for Europeans to travel to the UK were opened, while increasing migration restrictions were placed on typically non-white nations (Salt and Bauer, no date; Bhambra, 2017; Karatani, 2003). The over-categorisation of refugees identified in the NPFI found in this study arguably demonstrates a punitive extension of former desires to exclude the racialised other.

Pre-existing fear of immigration was perpetuated by a rise in asylum applications to the UK during the 2015 European migration crisis (Goodwin and Millazo, 2017). The Brexit 'leave' campaign capitalised on this fear, using the renowned slogan of 'tak[ing] back control' of its borders as central rhetoric to its referendum success (Gietel-Basten, 2016, p. 2). Immigration was a key driver for Brexiteers, with studies exposing it to be explicitly linked in public discourse to a lack of housing, school places, infrastructure, welfare and strain placed on the NHS (Goodwin and Millazo, 2017). Crimmigration discourse enables the effects of recession and austerity on social and economic security to be understated and scapegoated by the deviant migrant (Gietel-Basten, 2016; Young, 1999). Furthermore, fears of migrants threatening national identity and

security were also driving factors (Goodwin and Millazo, 2017). Reports on terrorist attacks have discursively linked migrants, refugees and terrorists to construct a deviant Middle Eastern vagabond, threatening UK safety (Gietel-Basten, 2016). Driving up anti-immigrant resentment gains political support for increased crimmigration controls, even though these have proven ineffective at deterring terror attacks (Helbling and Meierrieks, 2020).

The use of a crimmigration discourse in the text can also be contextualised against the already penal approach of the presiding UK system (Coddinton, 2018). Reports on Brook House detention centres uncovered abuse, violence and high levels of self-harm and suicide (Holt, 2021; Independent Monitoring Board, 2016). This contradicts with the *land of milk and honey* rhetoric employed in pulic and political discourse (Dagilyte, 2020).

An inhibiting factor which should prevent the transfer of increased crimmigration controls into the NPFI is the UK's signatory to the 1951 Refugee Convention, in which it took a leading role in the drafting of (UNHCR, no date). As findings suggest, the NPFI references 'moral obligations' (p. 5) in refugee resettlement, using a tone that depicts government altruism; 'in the heart of our New Plan for Immigration' (p. 3), humanitarian efforts are romanticised; 'we take pride in fulfilling our moral responsibility' (p. 3) (Ibrahim, 2022). The final page of the NPFI briefly references their commitment to upholding international obligations (p. 31) of the Refugee Convention 1951, the European Convention on Human Rights 1950 and the UN Convention on the Law of the Sea 1982. However, how these commitments will be met is not made explicitly clear. Referencing humanitarian legal obligations seemingly reinstates a status of power whilst acting as a façade for the narrowing grounds of granting refuge.

There has been resistance to the NPFI (Amnesty International UK, 2021; UNHCR, no date) and the growing influence of international governing bodies (IGOs) and national governing bodies (NGOs) to influence policymakers may affect adoption of a full policy transfer (Dolowitz and Marsh, 2002). The government's ability to legally enforce the policy proposals has been met with scepticism, even criticised as part of a scheme to distract from the Prime Minister's breaking of lockdown conditions (Syal and Sabbagh, 2022). Further evidence of resistance to the NPFI has been met by agencies required to implement it, including denial by the military to enforce pushback policies (Syal and Sabbagh, 2022) and numerous failed talks with states to establish offshore detention centres (Milmo, 2022). Nonetheless, the recently confirmed deal with Rwanda (Woodcock, 2022) suggests discursive systems enable systems of domination and power to prevail and maintain social order (Van Berlo, 2015; Fairclough, 1995a). Further comparison of policy transfer will be analysed in the following chapter.

6. *Analysis of policy transfer and discussion: What is transferred?*

A. *Policy goals, content and instruments*

The 'mission' of OSB is concise; to 'stop the entry of detected suspected illegal entry vessels into Australian territory (SIEV)' (OSB,10). However, the aims set out in the UK's NPFI (p. 4) reflect a broader system overhaul with a focus wider than just on boat arrivals. Nonetheless, deterring illegal entry by boat is a central tenet of the NPFI objectives of the document. Both systems also seek to make the system fairer, reduce its costs and break the business model of people smugglers, presenting at least an emulation of OSB policy goals.

Increasing crimmigration control is at the core of the two proposals. Both seek to increase the securitisation of their borders through intensified border surveillance powers to search, seize, stop, redirect and return intercepted vessels, thereby effectively forming a state fortress (Bermejo, 2009). Both propose the use of offshore detention to hold undocumented boat arrivals and restricted visa access, suggesting policy content has been 'copied' from OSB (Dolowitz and Marsh, 2002). These measures rely on criminal justice philosophies, designing deterrence frameworks which use suffering and incapacitation as means of dissuading, and arguably intimidating, potential irregular migrants from making journeys. Neither policy presents well-detailed humanitarian aid proposals as a state-led solution.
However, the NPFI extends its crimmigration controls beyond that of OSB, proposing a broader range of criminal justice sanctions and reduced rights to enforce a structurally embedded border. For example, reducing the ability of stateless persons to claim British citizenship (p. 17). This represents a crimmigration control system that stretches beyond the instruments of OSB to control alien bodies.

B. *Policy programs*

Official programmes based on the NPFI are currently being developed. Newly confirmed plans to set up offshoring programmes in Rwanda (Woodcock, 2022) and the passing of the Nationality and Border Bill (2022) suggest these programs are likely to be completed copied from Australian policy. Nonetheless, their resistance to the NPFI has been met with, as discussed in chapter three, which means full adoption of programmes may be constrained.

C. *Institutions*

Both policies use inter-agency working of criminal justice and immigration agencies, exemplifying a unified crimmigration response. This is inferred in NPFI through expanding powers of courts, border forces and police to manage offenders and is overtly proposed in OSB through the creation of the OSB Joint Agency Taskforce.
However, one of the greatest discrepancies between OSB and the NPFI is the absence of military intervention. Whilst the military is selected to run and enforce OSB, the NPFI assigns the role of boat pushbacks to the UK border force. This presents a securitisation of the border force's role, shifting from the maritime regimes of saving lives at sea under custom and law, to a national defence position (Pugh, 2004). Nevertheless, the UK military has since confirmed to oversee pushback operations, despite initially refusing their involvement (BBC, 2022; Defence HQ, 2022). This suggests the UK have drawn inspiration from OSB in the militarisation of their institutions responsible for managing UK boat arrivals.

D. *Ideologies, ideas and attitudes*

The most compelling evidence of a policy transfer between the documents is a transfer of discourse. Both the UK Conservative party and the Australian Liberal-Nationals Coalition have right and centre-right political ideologies, reflected in their shared view that asylum seekers are individuals personally accountable for their social position (Bell, 2011), underpinned by tones of small-state neoliberalism ideas.

Both policy documents construct migrants as presenting dichotomous social identities, with boat arrivals being increasingly securitised as criminal risks to society and threats to national identity. Both present a 'categorical fetishism' towards separating migrants from refugees, using the mode of transport, visas and economic incomes as the criterion for genuine refugee status. However, in the NPFI, hostility is fostered through constant surveillance measures of all refugees, representing a securitisation that extends beyond OSB principles to construct internal borders. Limiting the grounds of their legitimacy enables the government to monopolise the power to define and manage risks, in turn informing public perceptions and anxieties. Both use a crimmigration discourse to present boat arrivals as a 'risky' social group. They are discursively tied to criminals, FNOs and described as arriving in unprecedented and unmanageable numbers. This induces anxiety in readers, posing harsh crimmigration controls as common-sense outcomes and reinforcing political support.

Both policies allude to their humanitarian obligations, but greatly remove this from their dominant discourse. There are also differences in their discourses. Whilst OSB uses a formal militarist tone, the NPFI focuses on global leadership using a neo-colonialist style. However, both styles similarly reinforce the status of the status over migrants, preserving social order. Australia further diminishes the position of boat arrivals by silencing their narrative in public discourse, whilst the UK invites a bi-directional flow of information in its final policy formation. By presenting an alternative narrative, boat migrants may challenge political discourse as a means of empowerment (Van Berlo, 2015).

E. *Negative lessons*

Drawing a negative lesson is learning from failed policies elsewhere and avoiding a similar approach (Rose, 1991). Analysis has not shown the UK as drawing negative lessons from OSB but instead interpreting falling statistics of boat arrivals to the mainland as a positive lesson transfer (Rose, 1991). The government likens the NPFI to Denmark's approach (p. 2), rather than to Australia's. This may be a deliberate attempt to deny allegations of a policy transfer and *turn a blind eye* to the potential subsequent undesirable outcomes.

F. *From where are lessons drawn?*

Whilst the focus of this study centres around analysing the transfer between Australia's current policy and the UK's NPFI, it has also demonstrated that policy is influenced by the UK's predating hostility towards refugees and a history of harsh

colonial and immigration laws controlling the racialised other. Claims suggestive of a complete transfer may be limited by an exploration of the ways the current system already criminalises refugees. However, this study rebuts this criticism, arguing that these conditions serve as evidence for the UK's increased propensity towards transferring a more punitive crimmigration regime, due to pre-existing ideological proximity of the two states (Newburn, 2004).

G. *What are the different degrees of transfer?*

This paper finds that there has been an emulation of policy between OSB and the NPFI policy statement, conveying a 'transfer of ideas behind the policy' (Dolowitz and Marsh, 2002, p. 13), but with the likelihood of a complete transfer with the ongoing development of policy programmes. The crimmigration discourses present significant symmetry in their goals and ideas, which are likely to result in a direct, complete transfer in the absence of withdrawn public support or any substantial IGO intervention.

7. Conclusion

This research aimed to investigate crimmigration policy transfer between Australia's OSB policy document and the UK's NPFI. Through exploring the research questions, the study found similarities in the way migrants are dichotomously constructed in discourse as legal and legitimate or illegal and deviant, noting especially the securitisation of asylum seekers arriving by boat. It also found evidence of a crimmigration policy transfer more broadly in text through the adoption of criminal justice aims, principles, frameworks, institutions and ideas into the NPFI that underpin the OSB regime. However, discussion found that the NPFI outlines even harsher crimmigration controls, whilst concealing their populist agenda under a principle of fairness and humanitarian 'global leadership'. The sociocultural contexts differed between states, but the adoption of Fairclough's (1995) three-dimensional framework enabled CDA to evidence that, in both instances, crimmigration discourse is largely employed for political gain. This method was effective in enabling a nuanced analysis of transfer to be conducted, showing discourse and content to be nearly completely transferred from Australia, but also influenced by existing UK punitive rhetoric. Overall, an 'emulation' of Australia's crimmigration policy was found, but with the potential for a complete transfer as the construction of the new immigration system develops. Implications of these findings depict a disconcerting future for the safety of refugees within the UK immigration system, risking a tainted human rights reputation for the UK. Policymakers should listen to the voices within the system to build more effective long-term, humane solutions.

Limitations to this study are bound by its contemporaneousness with the evolving immigration system which may result in compromising the validity of the findings of this research. Furthermore, the exclusion of some of Dolowtiz and Marsh's (2002) framework questions has prevented the study from exploring the policy transfer process and the likelihood of policy success. These aims should be explored in future

research. Further comparative criminology could also research UK crimmigration policies with other states elsewhere.

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