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THE EDITORIAL BOARD
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FOREWORD BY DOMINIC KENNEDY

As a graduate of The School of Law at the University of Leeds, I am deeply honored to have been invited to write the Foreword for the fourth edition of the Leeds Student Law and Criminal Justice Review. The articles featured in this volume explore an array of pressing and highly relevant topics, spanning intellectual property law, EU competition law, human rights, mental capacity, and policing of violence against women and girls. This diversity of subject matter speaks to the breadth and depth of the education provided by The School of Law, which continues to uphold its standards of excellence.

Reflecting on my own experiences at The School of Law, I am reminded of the invaluable foundation it provided for my subsequent career at the international courts and tribunals in The Hague. While my current focus lies with addressing genocide, crimes against humanity and war crimes on a daily basis, it made a refreshing change to read the compelling articles contained in this issue and gain a deeper understanding of the topics raised by the authors.

In her particularly persuasive article, Amanda Ruth explores whether illegal street art can be copyright protected and if artists should have control over the commercialisation of their works. Amanda not only navigates the legal intricacies but also examines the socio-political significance of street art in contemporary society.

Coral Alexander conducts a thorough analysis of big data in the digital economy under EU competition law, addressing its critical relevance in today's world. She evaluates whether existing EU competition law on merger reviews needs updating to incorporate considerations beyond price-centric parameters, including data protection and privacy.

Highlighting the plight of many migrant workers who suffered human rights violations in Qatar during the FIFA 2022 World Cup, Finn O'Carroll focuses on the legal responsibilities of both Qatar and FIFA. He examines whether there are avenues for migrant workers to seek redress through existing domestic, regional and international legal frameworks or whether the existing mechanisms are insufficient.

In her detailed article, Amy Ramswell provides insights into the challenges of assessing individual wishes and feelings in administering

the COVID-19 vaccine, raising questions about the prioritisation of wishes and feelings in best interest decisions under the Mental Capacity Act 2005.

Eve McRoberts comprehensively examines whether Pillar 1 of the National Framework for the Policing of Violence against Women and Girls can enhance confidence in the police, particularly in light of recent high-profile cases involving serving police officers. She questions the sufficiency of the National Framework in catalysing cultural change within policing.

I extend my gratitude to the authors for their well-crafted, persuasively argued, and thought-provoking contributions, which touch upon a wide range of pertinent issues. Though it has been many years since my graduation from The School of Law, it is evident that the quality of research methodologies and legal education remains exceptional, providing students with a solid foundation for their future careers.

I would also like to express my sincere appreciation to the 2023-2024 Editorial Board, including Managing Editor, Maria-Anda Busuioc and editors, Nur Ashikin Mokhtar, Jack Oortwyn, Anton Hendrik Samudra, Zahra Zaheer, and Jiaqi Zhang, for their dedication and expertise in producing this high-quality Review. Dr. Colin Mackie, who founded the Leeds Student Law and Criminal Justice Review, also deserves special thanks for his ongoing support and guidance to the Editorial Board.

I trust that readers will find this fourth edition of the Review as insightful and engaging as I have, and I eagerly anticipate the thought-provoking contributions of future issues.

INTRODUCTION TO THE FOURTH ISSUE

This is the fourth issue of the Student Law and Criminal Justice Review. This journal was the idea of Dr Colin Mackie, and over the last four 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 centres of the Law School: the Centre for Business Law and Practice, the Centre for Law and Social Justice, and the Centre for Criminal Justice Studies.

The journal represents a collaborative effort between postgraduate editors and 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 see it published.

We would like to thank Dr Colin Mackie for his advice and assistance throughout the publication process. We would also like to thank the authors who allowed us to publish their articles as part of issue four, as well as the supervisors and all those who supported them in undertaking their dissertations. Similarly, we would like to thank the Management Support staff in the School of Law who assisted with the administration necessary for the printing of the journal. Finally, we would like to express our sincere gratitude to Dominic Kennedy (LLB Law with European Law, Leeds 2007) for writing this issue's foreword.

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

The Editorial Board March 2024

AUTHOR BIOS

Coral Alexander

Coral recently graduated with first class honours in Law. Her dissertation was inspired by a combination of modules she studied whilst on her year abroad at Queen's University in Canada. For this piece, Coral was awarded the Hughes Dissertation Prize, given to the authors of the best dissertations in the cohort. Since graduating, Coral has been working as a paralegal whilst looking to secure a training contract at a commercial law firm where she hopes to continue to pursue her interest in competition law in the future.

Finn O'Carroll

Finn graduated from the University of Leeds with a first-class degree in Law in July of 2023, receiving the Hughes Dissertation Prize for the best dissertation in the school. After University, he joined a high street solicitors as a legal administrator in their commercial law department. Currently, he has undertaken a new position in Birmingham City University as a Course Advisor in the Business, Law and Social Sciences department.

As he was thinking of what to write for his dissertation project in September of 2022, Finn was drawn to the widespread coverage of the migrant worker related human right issues caused by the construction of the 2022 world cup in Qatar. As the event neared, taking place for the first time in November and December of that year, coverage was widespread online, as journalists reported the horrifying findings from notable human right organisations. This further inspired him to research this topic, as he began to realise that the actors of FIFA and Qatar had not been held accountable and responsible for these issues that they clearly had contributed to.

The talking points discussed in the dissertation project will remain prevalent, not only for those working to construct the games in Qatar, but also for its application to workers at the previous editions of the tournament (such as in South Africa, Brazil and Russia), and future editions of the tournament, considering that FIFA have awarded Saudi Arabia the rights to host the games in 2034. Finn therefore hopes to

explore this relationship between human rights and the accountability of transnational organisations like FIFA moving forward in his career.

Amanda Ruth

Ruth recently completed her studies at the University of Leeds, earning a distinction in Intellectual Property Law LLM, and was honoured with the Head of Law School Dissertation Prize for the academic year 2022-2023. Ruth pursued her undergraduate degree in law at Government Law College, Ernakulam, India, from 2015 to 2020. Following her undergraduate studies, she enrolled with the State of Kerala Bar Council and practiced intellectual property law for a year at a firm in her hometown of Kochi, Kerala.

Ruth's academic interests are centered around the intersection of art and intellectual property. This motivated her to focus her dissertation on the copyrightability of illegal street art, inspired by the vibrant street art scene she encountered during her time in England. Her dissertation advocates for the rights of artists in this context.

Upon completing her studies at Leeds, Ruth returned to India and resumed her professional responsibilities at the law firm in Kochi. However, she is currently exploring opportunities to transition into academia, where she hopes to continue her research in the field of intellectual property law, particularly focusing on art-related issues.

Amy Ramswell

Amy Ramswell graduated from her Law with European Legal Studies degree in September 2023. Having begun university in the year the Covid-19 pandemic began, Amy developed an interest in the tension between individual rights and the public interest. Her dissertation considers how the Mental Capacity Act was applied in decisions about whether to administer the Covid-19 vaccine to individuals without decision making capacity. Since graduating, Amy has been working in the In-House Legal Team at the University of Southampton. She plans to move to the Netherlands in August to begin a Masters in Health Law.

Eve McRoberts

Eve recently graduated from the University of Leeds in 2023 with a First Class Honours in Criminology and Criminal Justice, having also been awarded the Centre for Criminal Justice Studies Dissertation Prize for achieving the highest dissertation mark within her cohort. Eve's dissertation was inspired by the current epidemic of violence against women and girls (VAWG), the high-profile events by police officers, low female confidence in the police and the urgency for radical change to better the policing of VAWG in England and Wales. Her passion for improving female trust and confidence in the police combined with the importance for immediate change prompted her to analyse the National framework launched to improve the police response to VAWG, specifically Pillar 1, to identify whether this response will build female confidence in the police or whether further improvement is necessary.

After graduating, Eve decided to take some time out to travel around South America. On her return she aspires to continue this passion by gaining employment in the field of VAWG that involves working with and supporting female victims of crime.

Contents

Illegal Street Art and Copyright in the UK: Navigating Copyright Protection and Safeguarding Artists from Exploitative Commercialization

AMANDA RUTH

Abstract

This paper aims to enhance awareness of the enforceability and applicability of copyright protection in the UK in cases involving unauthorized street art. It examines the question of whether artists are entitled to copyright protection for street art created in violation of laws. With the assertion that they are entitled, the article then explores the justifications that exist to support this claim. After that, it assesses the extent to which they can effectively prevent their works from unauthorized reproduction, removal, sale, or destruction by third parties. It is argued that extending copyright protection to unauthorized street art aligns with the fundamental objectives of copyright law, while denying such protection will be contradictory to its underlying principles and values. It is further argued that copyright law is neutral regarding the legality or morality of works. Taking this into account, it is contended that artists are entitled to exercise control over their work by preventing unauthorized reproduction, sale, removal, destruction, or appropriation by third parties. As such, it is concluded that street artists should be able to assert their rights, reap the benefits of their creations, and maintain control over the commercialization and usage of their work, albeit with certain limitations. This recognition of the significance of copyright in the context of unauthorized street art is essential for artists to engage with communities and create artworks that reflect local identities, history, and shared experiences.

1. Introduction

Street art has emerged as a vibrant and captivating form of artistic expression that breathes life into urban landscapes across the globe. From sprawling murals adorning city walls to thought-provoking graffiti, it has evolved as a powerful voice in contemporary culture, provoking dialogue in public spaces while also attempting to undermine authority.[1] Its ephemeral nature adds to its allure,[2] evoking a range of emotions and fuelling the fires of inspiration. It provides artists with a means to circumvent the exclusivity of the formal art realm, where participation is typically limited to a privileged few.[3] While embellishing the dreary expanse of urban deterioration,[4] it also serves as a powerful catalyst, encouraging people to think

[1] Sondra Bacharach, 'Street Art and Consent' (2015) 55 (4) British Journal of Aesthetics 481, 490.
[2] ibid 486-487.
[3] Nicole Martinez, 'Street Art or Vandalism' (*Artepreneur Art Journal,* 1 December 2020) <https://artrepreneur.com/journal/street-art-or-vandalism/> accessed 04 June 2023.
[4] ibid.

deeply, engage with their surroundings, and appreciate the transformative power of art in everyday life.[5]

Through an analysis of relevant primary and secondary sources, this paper aims to enhance awareness of the enforceability and applicability of copyright protection in cases involving unauthorized street art. Despite the growing scholarly interest in street art, most of the pre-existing research is centred in the United States. Thus, little has been said about the treatment of unauthorized street art in the United Kingdom (UK). This research is of importance considering the country's notable association with street art, especially with the emergence of influential artists like Banksy.[6] Scholarly discourse on street art will be enriched by addressing this gap, leading to a more comprehensive understanding of its artistic and societal implications. Courts tend to analyse cases involving unsanctioned street art on the premise that such works are copyrightable,[7] although they have not explicitly held that these works hold valid copyright. The need to establish copyright in unauthorized street art stems from the current uncertainty regarding the same which can be taken advantage of by commercial entities to justify unauthorized use, monetization, or exploitation of such works without seeking permission or compensating the artists.[8] It is however acknowledged that it is not fair to give artists absolute rights in cases involving the destruction of their work by the property owner.[9] While the study will touch upon this aspect, its main emphasis will be on the commercialization of street art by third parties, including property owners. There is also a lack of scholarly literature addressing the question of whether copyright protection should extend to street art that contain elements deemed immoral or offensive. As such, this paper endeavours to investigate this unexplored territory, delving into the complexities posed by such works. Considering the limited availability of case laws concerning street art in the UK, this paper will use relevant cases from other jurisdictions to effectively fill the research gap.

The primary objective of this study is twofold: firstly, to examine whether artists are entitled to copyright protection for street art created in violation of laws, and if so, to explore the justifications that exist to support this claim; and secondly, to assess the extent to which street artists can effectively prevent their works from unauthorized reproduction, removal, sale, or destruction by third parties.

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[5] Bacharach (n 1) 494.

[6] It has been observed that Banksy has a significant influence in stimulating discussions within communities regarding the value of street art. See Luke Dickens 'Placing post-graffiti: The journey of the Peckham Rock' (2008) 15 (4) Cultural Geographies 471.

[7] For instance, in *Creative Foundation v Dreamland & Others* [2015] EWCH 2556 (Ch), Arnold J noted obiter that copyright in a mural belonged to Banksy even though it was created without the permission of the property owner.

[8] Paula Westenberger, 'Copyright Protection of Illegal Street and Graffiti Artworks' in Enrico Bonadio (ed), *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press 2019) 55, 68.

[9] Enrico Bonadio, 'Street Art, Graffiti and Copyright' in Enrico Bonadio and Nicola Lucchi (eds), *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* (Edward Elgar 2018) 105, 106.

This paper argues that extending copyright protection to unauthorized street art aligns with the fundamental objectives of copyright law. It is further argued that copyright law is neutral regarding the legality or morality of works. In this vein, it is contended that artists are entitled to exercise control over their work by preventing unauthorized reproduction, sale, removal, destruction, or appropriation by others. As such, it is concluded that street artists should be able to assert their rights, reap the benefits of their creations, and maintain control over the commercialization and usage of their work, albeit with certain limitations.

Following this introduction, section 2 provides an understanding of the world of street art and section 3 offers an overview of the legal framework governing copyright, discussing originality, fixation, and ownership, while also addressing the complexities surrounding immoral or illegal content within street art. Section 4 delves into two theories in copyright law and examines how they may be employed to support the case for granting copyright to street artists. Section 5 explores the issue of unauthorized use and exploitation of street art by third parties, while also analysing common defences employed in such cases. The final section offers a conclusion.

Before commencing the analysis, some clarifications should be made regarding the terminology employed by this work. While this study acknowledges the differences which exists between the term 'street art' and graffiti, it is worth remembering that scholarly literature occasionally draws upon graffiti to examine the street art movement due to the shared characteristics between the two art forms. It is further acknowledged that street artists are now often commissioned to create works in public spaces. However, the focus of this study is specifically on unauthorized street art. Therefore, the term 'street art' will be used throughout to refer to such unauthorized creations, unless stated otherwise.

2. *Understanding Street Art*

Street art has experienced a notable surge in popularity over the years. Once regarded as vandalism, an eyesore, and a perceived threat, it has transformed into a celebrated art form, with artists now being commissioned to create works in public spaces.[10] Some cities have designated areas, such as London's Leake Street and Melbourne's Hosier Lane, where - despite conflicting with general laws concerning public property- street art is not only legally permitted but also actively promoted. Dedicated websites have surfaced to showcase and document street art, and the art form has also found its place in music videos, advertisements,[11] and fashion.[12] Moreover, guided

[10] Susan Hansen, '"Pleasure stolen from the poor": Community discourse on the 'theft' of a Banksy' (2015) Crime Media Culture 1, 3 citing Jeff Ferrell, *Crimes of Style: Urban Graffiti and the Politics of Criminality* (Northeastern University Press 1996).

[11] Derry Jameson and Jesse Scott, 'Street Art, Advertising and Ethics' (Street Art Museum Amsterdam, 14 March 2019) < https://www.streetartmuseumamsterdam.com/post/2019/03/14/street-art-advertising-and-ethics > accessed 05 June 2023.

[12] Morwenna Ferrier, 'From the car park to the catwalk: how fashion embraced street art' (*The Guardian*, 12 May 2015) < https://www.theguardian.com/fashion/2015/may/12/from-the-car-park-to-the-catwalk-how-fashion-embraced-street-art > accessed 05 June 2023.

street art walking tours and workshops have emerged,[13] enabling art enthusiasts to explore and appreciate this art form. Though the transfer of street art from its original urban context to a curated environment betrays its true spirit, street art has made its way into the world of museums, with the first institution solely dedicated to this art form being The Street Art Museum in Saint Petersburg, established in 2014.[14] The global recognition of this art was exemplified through a diplomatic gesture, where the former British Prime Minister David Cameron presented a piece by Ben Eine as a gift to the former US President Barack Obama.[15] Documentaries like Exit Through the Gift Shop[16] and Saving Banksy[17] have further played a pivotal role in shedding light on the world of street art.

A. Street Art and Graffiti

In order to effectively address the topic of unauthorized street art, it is necessary to differentiate between street art and graffiti.[18]

The term "Graffiti" finds its roots in the Greek word *graphien* signifying the act of writing.[19] The modern graffiti movement originated in Philadelphia and New York City during the late 1960s, gradually evolving into a distinct artistic form in the 1970s, and subsequently disseminated to other cities and countries during the 1980s and 1990s.[20] Street art stemmed from the graffiti movement, and later evolved independently by integrating elements from established artistic movements like muralism.[21] This blending led to the emergence of a distinct art form that incorporates the rebellious spirit of graffiti while embracing the narrative and visually engaging qualities of other artistic works.

Both street art and graffiti involve creating visual compositions on walls and surfaces, challenging the traditional confines of gallery spaces.[22] However, while graffiti tends to prioritize stylized letters and numerals and is created using tools such as marker pens, acid etching and aerosol paints, street art focuses on figurative works,

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[13] Viator, Top London Street Art Tour <https://www.viator.com/en-GB/London-tours/Street-Art-Tour/d737-tag21519 > accessed 05 June 2023.

[14] Giulia Blocal, 'From the Street to the Museum: the journey of Urban Art' (*Urbaneez*, 22 August 2022) <https://urbaneez.art/magazine/from-the-street-to-the-museum-the-journey-of-urban-art > accessed 06 June 2023.

[15] BBC News, 'David Cameron presents Barack Obama with graffiti art' (*BBC*, 21 July 2010) < https://www.bbc.co.uk/news/uk-politics-10710074 > accessed 06 June 2023.

[16] Banksy, *Exit Through the Gift Shop* (United Kingdom, Paranoid Pictures 2010).

[17] Colin Day, *Saving Banksy* (United States of America, 2:32am Projects 2017).

[18] Bacharach (n 1) 483. However, cf Andrea Baldini, 'Copyright Skepticism and Street Art: A Contrasting Opinion' in Bonadio, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (n 8) 317-322.

[19] Alec Monopoly and Eduardo Kobra, 'History of Urban Art' (*Eden Gallery*, 29 March 2022) < https://www.eden-gallery.com/news/history-of-urban-art > accessed 04 June 2023.

[20] Enrico Bonadio, 'Preserving street art and graffiti: can the law reconcile the (often conflicting) rights of artists, property owners and local communities?' in Jani McCutcheon and Fiona McGaughey (eds), *Research Handbook on Art and Law* (Edward Elgar Publishing 2020) 194.

[21] ibid.

[22] Tony Chackal, 'Of Materiality and Meaning: The Illegality Condition in Street Art' (2016) The Journal of Aesthetics and Art Criticism 359, 360.

incorporating various techniques and mediums[23] that include stencils, paste ups and large murals.[24] Street art often embraces social and political commentary, while graffiti may be associated with personal expression or marking territory. Both of these artistic expressions are often transient[25] and unauthorized works that continuously emerge and vanish, primarily in urban public spaces.[26] Further, they may be made on private property without the consent of the property owner, thereby constituting acts of an unlawful nature.[27] However, the perceptions of graffiti and street art are contrasting in the sense that, unlike graffiti which is perceived as an indicator of urban decay due to its often association with criminal behaviour, street art is mostly perceived as a symbol of urban revitalization and gentrification.[28]Notwithstanding these differences in perception, the boundary between these two art forms ultimately remains ambiguous as many street artists engage in graffiti writing, and numerous graffiti artists incorporate figurative elements into their creations.[29]

B. Unauthorized Street Art

Street art serves as a powerful medium that exposes and questions the dominant influence of property, commerce, and politics in shaping our surroundings.[30] By occupying public spaces with thought-provoking imagery, it challenges the notion of who has the right to claim and control public spaces,[31] questions the unequal distribution of power and invites dialogue on social, cultural, and political issues.

Art forms, like Modern Art, Cubism, Romanticism, or the Enlightenment, respond to societal, cultural, and political developments of their respective eras; street art also represents historical or contemporary human expressions via tangible mediums such as visual works or sculptures.[32] Just as the artists of the past expressed their ideas and sentiments through their chosen art forms, street artists channel their voices and reflect the pulse of our time by navigating the urban landscape, utilizing walls and surfaces as their canvas. In this sense, street art continues the legacy of art movements throughout history, serving as reflections of the socio-cultural context in which they thrive.

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[23] Bonadio (n 20) 194.

[24] Marta Iljadica, *Copyright Beyond Law - Regulating Creativity in the Graffiti Subculture* (Bloomsbury 2016) 11.

[25] Bonadio has noted that certain forms of street art are less transient than other, often lasting for extended periods. This longevity can be attributed to the use of extra-strong glues or in some cases, cement. See Enrico Bonadio, *Copyright in the Street: An Oral History of Creative Processes in Street Art and Graffiti Subcultures* (Cambridge University Press 2023) 72.

[26] Peter Bengtsen and Matilda Arvidsson, 'Spatial Justice and Street Art' (2014) 5 Nordic Journal of Law and Social Research 117, 118.

[27] Hansen (n 10) 3 citing Jeff Ferrell, *Crimes of Style: Urban Graffiti and the Politics of Criminality* (Northeastern University Press 1996).

[28] Hansen (n 10)2.

[29] Bonadio(n 20) 194.

[30] Katya Assaf-Zakharov and Tim Schnetgöke, 'Reading the Illegible: Can Law Understand Graffiti?' (2020) 53 (1) Connecticut Law Review 1, 8.

[31] Hansen(n 10) 2 citing Alison Young, *Street Art, Public City* (Routledge 2014).

[32] Britney Karim, 'The Right to Create Art in a World Owned by Others - Protecting Street Art and Graffiti under Intellectual Property Law' (2019) 23 Intell Prop & Tech L J 53, 79.

Street art typically emerges on property that does not belong to the artist and is created without obtaining the consent of the property owner.[33] In accordance with the statutory provisions of the UK law, the acts of street artists are subject to criminalization through the application of various provisions such as trespass, private nuisance, and criminal damage.[34] However, public perception is what elevates a petty crime into a captivating artwork worthy of protection.[35] Thus, the categorization of graffiti and street art as acts which are to be criminalised or celebrated by public authorities is often influenced by aesthetic or populist considerations rather than legal ones.[36] As opinions diverge, defining socially acceptable street art becomes increasingly challenging. While some view all forms of street art and graffiti as vandalism, adhering to the notion that unauthorized markings are inherently destructive and illegal, the collective viewpoint has gradually shifted to recognize the subtleties of street art.[37] It is now widely appreciated as a distinct artistic expression that deserves protection against destruction, appropriation, or defacement.[38]

In the realm of intellectual property (IP), street art is perceived to exist within the "negative space" which covers areas and industries that are either unregulated or only partially regulated by formal IP laws.[39] While IP protection may not serve as a direct incentive for street artists, a growing number of them are voicing their concerns and actively advocating for the recognition of their rights with the aim of establishing control over their creations and preserving their artistic integrity.

Unauthorized street art is characterized by a defiance of legality, an ephemeral existence, unrestricted accessibility, and an inherent attachment - whether material or conceptual - to a specific location.[40] While these characteristics shape the principles and ideals that define street art, they also land it in a complex legal landscape where the boundary between creative expression and potential legal violations become intertwined.

3. Securing Rights: Exploring Copyright Protection For Street Art

Banksy's remark that copyright is for losers,[41] and that it is somewhat ill-mannered to assert copyright when one has cultivated a reputation rooted in a nonchalant attitude

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[33] Saurabh Nandrekar, 'Illegal Street Graffiti deserves Copyright Protection. Here's Why' (*Medium IP Bloke*, 30 October 2020) < https://medium.com/ipbloke/illegal-street-graffiti-deserves-copyright-protection-heres-why-e2c3425719a8 > accessed 04 June 2023.

[34] Enrico Bonadio, 'Street Art, Graffiti and Copyright: A UK Perspective' in Enrico Bonadio (ed), *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press 2019) 160.

[35] Karim (n 32) 58.

[36] Andrew Millie, 'Anti-Social Behaviour, Behavioural Expectations and an Urban Aesthetic' (2008) 48 British Journal of Criminology 379.

[37] Hansen (n 10)3 citing Anna Wacławek, *Graffiti and Street Art* (Thames & Hudson 2011).

[38] Karim (n 32) 58.

[39] Saurabh Nandrekar, 'Illegal Street Graffiti deserves Copyright Protection. Here's Why' (*Medium IP Bloke*, 30 October 2020) < https://medium.com/ipbloke/illegal-street-graffiti-deserves-copyright-protection-heres-why-e2c3425719a8 > accessed 04 June 2023.

[40] Evelyn Frederick, 'From the Museum to the Streets: A Discussion of the Tensions that Arise When Street Art is Institutionalized' (Thesis MA Art History and Museum Curating with Photography, University of Sussex 2016) 7 -8.

[41] Banksy, *Wall and Piece* (Century 2005).

towards property ownership has raised doubts on whether street artists wish to assert copyright over their creations.[42] However, the prevailing sentiments show that numerous artists are desirous of employing copyright as a tool to maintain control over their creations and combat the exploitation of their works that rises from unauthorized appropriation, particularly for commercial purposes.[43]

Street artists, often operating under a veil of anonymity, engage in a form of artistic practice that is untethered to the constraints and motivations of the art market.[44] The very nature of the art suggests that its purpose extends beyond commercial gain, as artists could choose to legally showcase their work on canvases or other conventional mediums if monetary rewards were their focus. In contrast to engaging in art for commercial purposes, these artists aim to convey a message or enhance the aesthetics of a particular location. Therefore, these artists are concerned with maintaining artistic autonomy and protecting the authenticity of their expressions. Their artistic integrity may, however, be compromised when unauthorized reproduction, removal, sale, or destruction of their artwork occurs at the hands of third parties. To prevent such situations, it is necessary to recognize their copyright in their works.

The regulation of copyright in the UK is governed by the Copyright, Designs and Patents Act (CDPA) 1988. To be eligible for protection, a work must meet certain criteria, which include originality,[45] fixation in a tangible form,[46] and falling within one of the following specified categories: artistic, literary, musical, or dramatic works.[47] Compared to other branches of IP law, copyright imposes fewer formalities and requirements and does not necessitate formal registration.[48]

Street art comes under the category of artistic works.[49] Thus, provided that the other requirements imposed by the CDPA are satisfied, copyright could subsist in these works. .[50] Consequently, this section will focus on examining whether street art satisfies the originality criterion, the challenges of fixation in ephemeral works, the complexities of ownership and authorship, and the legal implications surrounding the often-controversial nature of this art form.

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[42] Eleanor Mills, 'Banksy Stars in the World's "First Street Art's Disaster Movie"' (*The Sunday Times*, 28 February 2010) < https://www.thetimes.co.uk/article/banksy-stars-in-the-worlds-first-street-art-disaster-movie-p3nh5h7h8lw > accessed 17 June 2023.

[43] Bonadio, *Copyright in the Street: An Oral History of Creative Processes in Street Art and Graffiti Subcultures* (n 25) 36. It has also been argued that copyright protection can play a role in transforming the career prospects of street artists and perhaps steer them away from engaging in criminal activities. See Gregory Snyder, *Graffiti Lives: Beyond the Tag in New York's Urban Underground* (NYU Press 2009) 3-4 and Susan A Phillips, *Wallbangin': Graffiti and Gangs in L.A* (University of Chicago Press 1999) 313.

[44] Jonathan Barrett, 'Engaging with Outlaw Art' (2022) 21 Chi-Kent J Intell Prop 34.

[45] CDPA 1988, s 1(1) (a).

[46] CDPA 1988, s 3 (2).

[47] CDPA 1988, s 1(1) (a).

[48] Berne Convention for the Protection of Literary and Artistic Works 1886, Art 5(2).

[49] Section 4 of the CDPA 1988 defines artistic works, as including graphic works, photographs, sculptures, and collages, without regard to their artistic merit. It also clarifies that 'graphic works' consist of paintings, drawings, and other forms of visual art.

[50] CDPA 1988, s 1(1) (a).

A. Originality

The CDPA mandates that a work be original to be eligible for copyright protection.[51] However, the concept of originality remains undefined in law,[52] and so the extent to which a work qualifies as original is decided on a case-by-case basis.[53] This flexible approach encourages an inclusive understanding of artistic creation that provides opportunities for a wide range of works to be recognized and protected.

Unlike traditional art forms, street art is deeply connected to its environment and the context in which it is created. The decisions made during the process of creation - such as the choice of subject matter, style, and placement - reflect the artist's vision and individuality. Therefore, based on the 'author's own intellectual creation' test employed in the European Union,[54] as well as the 'skill, labour, and judgment' test applied in the UK,[55] a majority of street art would qualify as original works.[56] It is noteworthy that street artists often create preliminary sketches as guides for their final artwork, which results in two separate copyrights: one for the initial sketch and another for the painted piece.[57] But case law suggests that the existence of preliminary sketches does not undermine the originality of the final derivative work.[58]

Street artists may draw inspiration from existing works. However, within the subculture, this practice is generally not regarded as problematic, as fellow artists do not perceive it as outright "copying" of their pieces.[59] Nevertheless, whether such works qualify for protection necessitates a further evaluation of their originality. Courts have recognized that artists can take existing ideas and craft something distinct and original by virtue of their creative choices and arrangements. As such, even if certain elements in a work are recognizable as derived from other sources, the overall composition may still demonstrate originality if the author is considered to have made an independent contribution via their skill, labour, and judgment in the production of the derivative work.[60]

B. Authorship and Ownership

The individual who creates the original expression in a work is recognized as the author and, [61] therefore, the initial owner of the copyright.[62] In situations where a work is created as part of employment or is commissioned, the employer or

[51] ibid.
[52] Abbe Brown and others, *Contemporary Intellectual Property – Law and Policy* (5th ed, Oxford University Press 2016) 61.
[53] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16.
[54] ibid.
[55] *Ladbroke v William Hill* [1964] 1 All E.R. 465 HL at 469
[56] However, graffiti often falls short in terms of originality and tends to be considered too trivial to qualify for copyright protection. For a discussion on the copyrightability of tags, see Enrico Bonadio, 'Copyright protection of street art and graffiti under UK law' (2017) 2 IPQ 187, 193-195.
[57] Enrico Bonadio, 'Copyright protection of street art and graffiti under UK law' (2017) 2 IPQ 187, 192.
[58] ibid 192-193 citing *Biotrading and Financing OY v Biohit Ltd* [1996] FSR 393 Ch D.
[59] See Bonadio (n 25) 139 - 143.
[60] *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416.
[61] CDPA 1988, s 9 (1).
[62] CDPA 1988, s 11 (1).

commissioning party is regarded as the first owner, rather than the individual who created the work.[63] Ownership can also be assigned to another person or entity through a written agreement,[64] often seen in arrangements with galleries or organizations for exhibitions or commercial purposes.
For street artists, publicly claiming authorship of their works present both economic benefits and legal risks.[65] Although they are motivated to preserve a level of anonymity due to the illegality involved in the creation of their works, [66] they aspire to establish themselves within the art community and gain recognition through the use of pseudonyms.[67] By ensuring that their work is linked to their chosen pseudonym, they are able to maintain anonymity from authorities and, at the same time, be recognized within both the art community and the wider public.[68]

According to the CDPA, if the identification of an author is impossible, the work will remain entitled to copyright protection as a work of 'unknown authorship'.[69] This is advantageous for artists who may choose to remain anonymous to evade prosecution,[70] as they retain the option to reveal their authorship at a later stage, thereby securing their paternity rights.[71]

Sometimes two or more artists may collaboratively create a piece where their individual contributions are not distinct from each other, giving rise to a joint authorship[72] in the resulting work.[73] In such cases, the finished work is seen or experienced as a unified whole, rather than separate elements attributable to specific authors. Thus, when a work is jointly authored, all the artists involved share equal ownership of the copyright.

In case of authorized street art, ownership may vest in the property owner if the work was commissioned by them. But in case of unauthorized works, the element of

[63] CDPA 1988, s 11 (2).
[64] CDPA 1988, s 90.
[65] Karim (n 32), 65.
[66] Bacharach (n 1) 487.
[67] ibid.
[68] ibid; However, to avoid prosecution, some street artists may choose to remain anonymous till the expiration of limitation period to assert any claims over their work. See Westenberger (n 8) 69.
[69] CDPA 1988, s 9 and s 12.
[70] It should be noted that the risk of prosecution ceases to exist upon the expiration of the statute of limitations.
[71] Amil Jafarguliyev, 'Flipping a Coin for Copyrightability of Illegally Placed Street Art' (2023) 9 Baku St UL Rev 1, 17.
[72] A work of joint authorship is different from works of "co-authorship" where the individual contributions can be distinguished.
[73] CDPA 1988, s 10 (1). The determination of what constitutes a sufficient contribution in joint authorship may be assessed through the test laid down in *Infopaq*, which focuses on whether the individual in question has contributed elements that reflect their own intellectual creativity. The key aspect of this criterion lies in the exercise of free and expressive choices by the putative joint author. If the choices made are highly limited or constrained, it becomes less likely for them to meet the requirements set by the test. See Case C-5/08 *Infopaq International v. Danske Dagblades Forening* [2009] ECDR 16; Peter Byrd, 'The Tricky Issue of Joint Authorship in Copyright Works' (*Charles Russell Speechlys*, 27 January 2021) <https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/intellectual-property/2021/the-tricky-issue-of-joint-authorship-in-copyright-works/> accessed 27 July 2023.

illegality challenges the application of the general principle that recognizes the author of a work as the rightful owner as it would conflict with the laws that protect private property.[74] These laws exist to safeguard the fundamental rights of property owners, allowing them to exclude others from using or possessing their property and enjoying any potential benefits that may be derived from it.[75] They have the right to exercise control over their property, including the visual appearance of their buildings or walls.[76] But it has been argued that they do not hold title over the intellectual property in the artwork.[77] However, the rights associated with art attached to someone else's private property without the property owner's consent may be subordinate to the property owner's rights to control the use of the property.[78] As a result, even though the artist may have a legitimate interest in ownership,[79] their rights in such cases may be limited to moral rights[80] derived from authorship.[81]

C. Fixation

Copyright law protects the expression of ideas rather than the ideas themselves.[82] The requirement of "fixation" arises from the need of having a tangible embodiment of the expressive elements associated with an idea.[83] Fixation ensures that the expression is captured on a fixed medium - such as a book, painting, or digital recording - enabling it to be perceived, reproduced, and communicated to others.

In line with Article 2(2) of the Berne Convention,[84] Section 3(2) of the CDPA stipulates a fixation requirement for literary, dramatic, and musical works but no such statutory requirement exists for artistic works. The protection of impermanent artistic works has been subject to differing interpretations. Facial makeup, for instance, has been deemed ineligible for copyright protection.[85] However, a different stance was taken for an ice sculpture which, despite its transient nature, was held to be copyright eligible.[86]

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[74] Jafarguliyev (n 71) 20.
[75] ibid.
[76] Hansen notes that some perceive street art as a gift, considering that it is created on someone's property without permission and so it can be disposed of freely, while emphasizing the rights of property owners and the notion that "who owns the wall, owns the art." See Hansen(n 10) 11.
[77] Celia Lerman, 'Protecting Artistic Vandalism: Graffiti and Copyright Law' (2013) 2 NYU J. Intell. Prop. & Ent. L. 295, 317.
[78] Jafarguliyev(n 71)20 citing Griffin M Barnett, 'Recognized Stature: Protecting Street Art as Cultural Property' (2013) 12 The Chicago-Kent Journal of Intellectual Property 204, 208.
[79] Karim (n 32) 65.
[80] CDPA 1988, s 2 (2).
[81] However, even within these limitations, artists can still exert some influence to prevent unauthorized use or commercialization of their work, including by property owners. This shall be discussed in section 5.
[82] *Designers Guild v Russell Williams Textiles Ltd* [2000] 1 WLR 2416.
[83] Victoria Onyeagbako, 'Justifications for Copyright and Patents Protection' [2020] My Intellectual Property Law Guide, 3 citing Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn Oxford University Press 2019).
[84] Berne Convention for the Protection of Literary and Artistic Works 1886.
[85] *Merchandising Corp of America Inc & others v Harpbond Ltd & other* [1983] FSR 32.
[86] *Metix Ltd v G.H. Maughan Ltd* [1997] FSR 718.

Street art is often subjected to natural deterioration, vandalism, or intentional removal, distinguishing it from traditional art forms that are created with the intent of long-term preservation. Given that copyright law only applies to works that possess a certain level of permanence, it may be argued that this temporary nature of street art poses challenges to its eligibility for protection. However, fixation merely requires a work to possess a level of permanence or stability that enables it to be perceived, reproduced, or communicated for a duration longer than transitory. Therefore, while street art exhibit ephemeral qualities, it still fulfils the criteria of fixation as it enables viewers to perceive and appreciate the artwork even if only for its few minutes of existence.[87] Furthermore, it has also been suggested that photographs of street art would serve as a means of preserving the work in a fixed form, thereby satisfying this requirement.[88]

D. Illegality

The evolution of street art is intertwined with the element of illegality,[89] attributed either to its improper placement or its content.[90]

Form based illegality:

Unauthorized street art on properties raises concerns related to vandalism or trespass, constituting illegal acts punishable by law. However, copyright protection focuses on the originality and expression of the artistic work itself, rather than the circumstances surrounding its creation or the legality of the medium. While the process and location of creation hold significant importance for artists in terms of their artistic practice, it is not necessarily a determining factor for copyright protection.[91]

In *Creative Foundation v Dreamland*,[92] a property dispute involving a wall with a Banksy mural, Justice Arnold explicitly clarified that his focus did not extend to the copyright aspect of the work, which according to him, "prima facie belong[ed] to Banksy."[93] Some interpretations consider this judgment to not only recognize Banksy's copyright in the artwork, but also imply the existence of copyright in illegally placed works.[94] However, this presumption by the judge is insufficient to confirm copyright protection.[95]

Unlike the stances taken by courts, illegality has proven to be a contentious point in scholarly discourse regarding the copyrightability of street art. On one hand, some scholars advocate for a content-neutral approach without limitations based on taste or

[87] Enrico Bonadio, 'How Muralists, Street Artists, and Graffiti Writers Can Protect Their Artworks' (2022) 18 U St Thomas LJ 558, 565.
[88] Iljadica, *Copyright Beyond Law - Regulating Creativity in the Graffiti Subculture* (n 24) 103.
[89] Tony Chackal, 'Of Materiality and Meaning: The Illegality Condition in Street Art' (2016) The Journal of Aesthetics and Art Criticism 359.
[90] Westenberger (n 8) 55, 56.
[91] Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (n 24) 32.
[92] *Creative Foundation v Dreamland Leisure Ltd* [2015] EWHC 2556 (Ch).
[93] ibid 2.
[94] Aislinn O'Connel, 'The writing on the wall: street art and copyright' (2019) 14 (7) Journal of Intellectual Property Law & Practice 530, 538.
[95] Jafarguliyev (n 71),9.

government acceptability,[96] drawing comparisons between the copyrightability of illegal street art and that of obscene[97] and fraudulent works.[98] They argue that extending copyright protection to such art forms shouldn't be hindered by their illegality. On the other hand, there are those who strongly emphasize the illegality of street art and its potential detrimental effects. They argue that granting copyright protection to street art could inadvertently reinforce social injustice by incentivizing illegal behavior.[99] However, the utilization of public spaces for artistic purposes plays a vital role in facilitating unrestricted access, enjoyment, and participation in the arts by diverse individuals while also serving as a platform for expressing dissent or presenting different perspectives.[100] Considering this angle, granting copyright protection to illegal artworks should not be interpreted as endorsing vandalism. Instead, it should be understood as a means to ensure equitable treatment for a diverse range of artists, protecting their work from commercialization or unauthorized use.[101] Moreover, providing copyright protection to unsanctioned street art may foster a perception among artists that the law can be their supportive ally.[102]

Content based illegality:

The determination of what constitutes defamatory, vilifying, or obscene content in relation to street art lacks a universally applicable standard. Therefore, the evaluation of street art's content as being objectionable depends upon prevailing social attitudes and subjective interpretations.[103]

When it comes to morality, standards can vary among individuals and societies; what may be deemed immoral by one person or culture may be acceptable to another. Moreover, moral standards are subject to change over time, rendering what was once considered immoral as acceptable or even celebrated in the future.[104] The evolution of

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[96] *Mitchell Bros Film Group v Cinema Adult Theatre* (1979) 5th Circuit Appeals Court 604 F 2d 852, 856.

[97] In this context, in the US it was held that "there is not even a hint in that the obscene nature of a work renders it any less a copyrightable writing". See *Mitchell Bros Film Group v Cinema Adult Theatre* (1979) 5th Circuit Appeals Court 604 F 2d 852, 854.

[98] O'Connell, 'The writing on the wall: street art and copyright' (n 94) 535.

[99] Haber makes this argument by comparing graffiti to child pornography. He asserts that such undesirable works must be discouraged by removing the legal incentives associated with them. See Eldar Haber, Copyrighted Crimes: The Copyrightability of Illegal Works' (2014) 16 Yale J.L. & Tech 454, 485–86.

[100] Westenberger (n 8) 65 citing UN, Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: "The right to freedom of artistic expression and creativity," UN doc. A/HRC/23/34, 14 March 2013.

[101] Westenberger (n 8) 65.

[102] Lerman (n 77)295.

[103] Chris Dent, 'Regulating the artist: laws, norms and practices' in Jani McCutcheon and Fiona McGaughey (eds), *Research Handbook on Art and Law* (Edward Elgar Publishing 2020) 53.

[104] In this context, the European Court of Justice's (CJEU) comment in Case C-240/18 P - *Constantin Film Produktion v EUIPO* [2020] 2 WLUK 363 (ECJ (5th Chamber)), para 39 regarding the concept of accepted principles of morality may be relevant, though the case dealt with trademarks. According to the CJEU, the concept of accepted principles of morality "refers, in its usual sense, to the fundamental moral values and standards to which a society adheres at a given time." These principles "are likely to change over time and vary in space" and its determination should be "according to the social consensus prevailing in that society at the time of assessment". Furthermore, "due account is to be taken of the social context, including, where appropriate, the cultural, religious or philosophical diversities that

language further complicates the assessment of immorality, as shifting word meanings over time can alter interpretations of works, with formerly offensive words becoming widely accepted in contemporary usage.

Therefore, the subjective nature of morality, the fluidity of societal values, and the evolving meanings of words demand to be considered when evaluating the acceptability of the content of a work. For instance, the public's perception of a work featuring a nude woman may vary, resulting in a range of positive and negative moral perceptions. On one hand, such a work may be appreciated for its aesthetic qualities or on the basis that it promotes body positivity and challenges unrealistic beauty standards. It may also be viewed as challenging norms when considered in the light of artistic freedom. On the other hand, some may find it offensive or indecent, believing it infringes upon the right to public spaces free from explicit content. It may conflict with moral or religious values and teachings regarding modesty and the sanctity of the human body, or perceived as contributing to the objectification of women. Similarly, a satirical artwork that portrays a political leader in a controversial light may be hailed as a powerful expression of dissent and freedom of speech by some, while others may find it offensive, defamatory or even seditious. Such evaluation of political satire in art is tied to individual political perspectives, freedom of expression considerations, and societal norms regarding the limits of acceptable political discourse.[105]

While certain legal systems may have provisions or restrictions related to immoral or offensive works in other areas of law, these considerations generally fall outside the scope of copyright law. In the UK, various legislations address the protection of artwork, freedom of expression, and restrictions on defamatory or offensive content such as the Defamation Act 2013, the Public Order Act 1986, the Obscene Publications Act 1959 and 1964 and the Equality Act 2010. Further, street art may be considered a punishable offense under the Criminal Damage Act 1971 as this Act defines the offense of criminal damage as intentionally or recklessly causing damage to property belonging to another person without lawful excuse.[106]

However, though these legislations provide avenues for legal action against offensive or harmful artwork,[107] they do not negate the existence of copyright in the artwork itself. Copyright law recognizes the IP rights of the artist, ensuring their control over the commercial exploitation of their work. This regime grants artists the exclusive

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characterise it, in order to assess objectively what that society considers to be morally acceptable at that time."

[105] Tony Chackal, 'Of Materiality and Meaning: The Illegality Condition in Street Art' (2016) The Journal of Aesthetics and Art Criticism 359, 363.

[106] Criminal Damage Act (CDA) 1971, s 1 reads: "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence."

[107]For instance, In 2005, London implemented a fixed penalty of £75 for all graffiti. For serious cases like racist graffiti and heavy property damage, artists can be prosecuted with fines proportionate to the amount of damage (and up to £5,000) as well as up to 6 months in jail. See Ashleigh Kim, 'Graffiti Penalties Around the World, Bombers Take Note' (*HypeArt*, 15 April 2015) < https://hypebeast.com/2015/4/graffiti-penalties-around-the-world-bombers-take-note > accessed 04 August 2023.

rights to control the reproduction, distribution, and public display of their works regardless of their alleged offensive or illegal nature. On the other hand, the aforementioned legislations address the legal consequences of offensive or harmful content. Therefore, the possibility of legal actions against the artist do not diminish the separate existence and enforcement of copyright in the artwork itself. By adopting this neutral stance towards the content of works and focusing on the expression of ideas, copyright law provides a framework that allows for a broad range of artistic and creative works to be protected, irrespective of their subjective moral or ethical dimensions. Thus, while one may disagree with or find certain works objectionable, the right of individuals to express themselves freely must be upheld even if their ideas or content challenge societal norms.

However, the courts in the UK have denied or restricted copyright protection based on factors such as the obscene or immoral content in a work, which has led to rulings where copyright was either deemed non-existent, unenforceable, or incapable of awarding damages.[108] While it may seem counterintuitive, providing copyright protection even to objectionable works can be justified as a means to prevent the dissemination of such works. By granting copyright, the creators of objectionable works would have legal ownership and control over their creations. This control can be utilized to limit or restrict the distribution and reproduction of these works, thereby minimizing their impact on society.

The implications of public policy exclusions, such as immorality, on the existence and enforceability of copyright in a work remain unclear[109] as the CDPA does not explicitly state that controversial subject matter may be ineligible for copyright on public policy grounds.[110] However, The CDPA provides that copyright enforcement may be prevented or restricted based 'on grounds of public interest or otherwise'.[111] This provision has been interpreted to mean that courts have the discretion to refrain from enforcing copyright in situations where public interest or similar grounds are at stake.[112] Therefore, in cases involving dishonest and misleading works or those with a highly immoral nature, the enforcement of copyright may be affected.[113] Nevertheless, the subsistence of copyright in those works remains undisputed.[114]

This section analysed specific requisites within the copyright framework to assess the eligibility of unlawfully created street art for legal protection. The outcome of this analysis confirms that such artwork does, in fact, fulfil the essential criteria for protection.

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[108] Enrico Bonadio, 'Copyright protection of street art and graffiti under UK law' (2017) 2 IPQ 187, 211, 215.
[109] Lionel Bently and others, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 122- 123.
[110] Enrico Bonadio, "Copyright Protection of Street Art and Graffiti under UK Law" (2017) IPQ 211, 215; Further, Laddie, Vitoria and Prescott argue that "copyright subsists but is unenforceable" in case of unlawful works. See Hugh Laddie, Mary Vitoria and Peter Prescott, *The Modern Law of Copyright and Designs* (5th edn, Lexis Nexis 2018) [21.29].
[111] CDPA 1988, s 171(3).
[112] *Hyde Park Residence Ltd v Yelland* [2000] 3 WLR 215 [2001] Ch. 143.
[113] Westenberger (n 8) 57.
[114] Hugh Laddie, Mary Vitoria and Peter Prescott, *The Modern Law of Copyright and Designs* (5th edn, Lexis Nexis 2018) [21.29].

4. Justifying Rights: Exploring Theoretical Underpinnings

This section aims to explore the justifications for granting copyright protection to street artists for their illegally created works. To establish a rationale for recognizing copyright protection for street artists, this part of the paper will discuss the relevant theories which justify modern copyright laws.

The modern copyright system is underpinned by various justificatory bases which can be both complementary and contradictory,[115] with different legal systems placing varying emphasis on different rationales. In general terms, the labour and economic arguments are accorded greater significance within the common law traditions of the Anglo-American legal systems.[116] For common law systems, the exclusive rights enjoyed by creator over their works are understood as essential for enabling creatives to profit from works and, as a result, incentivizing further creation or innovation.[117] Consequently, the economic role of copyright is at the heart of the frameworks in common law systems.[118] Meanwhile, civil law systems tend to exhibit a stronger inclination towards natural law and human rights-based arguments.[119] Unlike the common law tradition, copyright is seen in civil law system as an essential element in promoting and respecting individual autonomy, cultural diversity, and freedom of expression.

In the UK, copyright laws are influenced by a combination of economic and natural rights justifications.[120] However, considering the circumstances surrounding street artists and their unorthodox methods of creation, a need arises to shift the focus away from economics-based arguments,[121] and instead explore justifications for copyright based on natural rights[122] and human rights.

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[115] Gwilym Harbottle and others, *Copinger and Skone James on Copyright* (18th edn, Sweet & Maxwell/Thomson Reuters 2021) 2.41.
[116] ibid.
[117] Abbe Brown and others, *Contemporary Intellectual Property – Law and Policy* (5th edn, Oxford University Press 2016) 42.
[118] ibid.
[119] Gwilym Harbottle and others, *Copinger and Skone James on Copyright* (18th edn, Sweet & Maxwell/Thomson Reuters 2021) 2.41.
[120] Mitchell Longan, 'A System Out of Balance: A Critical Analysis of Philosophical Justifications for Copyright Law through the Lenz of Users' Rights' (2022) 56 Michigan Journal of Law Reform 779, 789.
[121] The economics-based arguments are those which are associated with utilitarian justifications for copyright protection, and this may not be applicable to street artists as it suggests that copyright serves as a mechanism to incentivize creativity by providing creators with exclusive rights and economic benefits for their works. Street artists are mostly driven by the desire for self-expression, the opportunity to contribute to public spaces, or to raise awareness of social and political issues. Their motivations may be rooted in personal fulfilment, the urge to engage with communities, or the desire to challenge traditional artistic norms. Therefore, monetary compensation or commercial success may not be the primary factors driving their creations.
[122] It has been observed that a natural rights conception of copyright leads to a distinct understanding of copyright compared to an incentive-based conception. Specifically, a natural rights perspective tends to advocate for longer and stronger protection for authors. This is because such an argument perceives copyright as a perpetual and unqualified form of property. In contrast, an incentive-based argument seeks to justify granting only the minimum level of protection necessary to motivate the right holder to create and release their work. See Bently and others, *Intellectual Property Law* (n 113) 39-40.

A. Natural Rights Theory

When examining the concept of natural rights and its relationship to copyright protection, the writings of two influential philosophers hold significance: John Locke and Friedrich Hegel. However, a divergence exists in the weight attributed to their respective arguments regarding copyright protection in different regions. In the US, Locke's writings emphasizing labour-based justifications are regarded as more relevant in the discourse surrounding copyright protection,[123] whereas Europe places greater weight on the personality-based arguments advanced by Hegel. Both theories adopt a creator-centric approach, using concepts of labour or self-actualization of the individual as the basis for justifying the protection of their creations.[124]

John Locke

The natural rights theory, inspired primarily from the writings of Locke's theory of property rights, suggests that individuals have a natural right to control and enjoy the fruits of their labour.[125] According to this theory, creators invest their time, skills, and intellect into producing works and, therefore, should have exclusive rights to control and benefit from those works. This principle has been extended to intellectual creations, leading to the recognition of copyright as a natural right.[126]

Locke presents the concept of work or labour and its relationship to entitlement in the following manner:[127]

> Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it and joined to it something that is his own, and thereby makes it his property.[128]

This theory, when applied to street artists, supports the view that they should be entitled to copyright protection for their work despite its unlawful nature. Street artists, through their unconventional means of expression, exert significant artistic skill, time, and effort in the creation of their works. Granting copyright protection respects their personal investment, promotes artistic innovation, cultural expression, and acknowledges that the act of creation itself holds inherent value independent of the legal status surrounding its making. While it is necessary to also consider the rights

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[123] Bently and others, *Intellectual Property Law* (n 109) 36.

[124] Mitchell Longan, 'A System Out of Balance: A Critical Analysis of Philosophical Justifications for Copyright Law through the Lenz of Users' Rights' (n 120) 782.

[125] ibid 783.

[126] Similarly, Bruncken argues that "… To deprive a man of the power to dispose as he wills of such products of his mind, is an invasion of his personality of the most serious nature. For what can be more intimately connected with the very essence of a man's being than the spiritual products of his own mind?". See Ernest Bruncken, 'The Philosophy of Copyright' (1916) 2 (3) The Musical Quarterly 477, 478 - 479.

[127] Onyeagbako(n 83) 6.

[128] John Locke, *Two Treatises of Government, Second Treatise* (3rd edn, Cambridge University Press 1988) 287- 288.

of the property owners, as their ownership and control over the physical space where the artwork is created cannot be disregarded, it is important to bear in mind that this theory is employed to support the view that copyright may subsist in these works, even if the initial act of creation may have been unauthorized.

Friedrich Hegel

Hegel's theory posits that "property" serves as a well-suited mechanism for enabling self-actualization, personal expression, and the attainment of dignity and individual recognition.[129] He argues that the ability to exercise control over one's property is an essential aspect of self-consciousness and self-realization as a free person.[130] Therefore, the failure to acquire and exercise property rights can be equated with a failure to attain self-conscious knowledge of oneself as a free individual.[131] Without control over one's resources, individuals are deprived of the means to manifest their will and shape their own lives.[132] Thus, the acquisition and exercise of property rights play an important role in achieving personal fulfilment.[133]

Given its emphasis on the inherent connection between an author's personal identity and their work, this perspective is frequently invoked to provide a theoretical basis for moral rights within copyright law.[134] These moral rights include the right to be acknowledged as the author of a work (the right to paternity) and the right to oppose any alterations, distortions, or derogatory treatment of the work that could potentially harm the author's reputation (the right of integrity).[135] Under this understanding, copyright exist not primarily for the public's benefit but as a matter of justice and recognition of an individual's intellectual property.[136] The concept of intellectual productions being an extension of an author's personality suggests that creative works are deeply personal expressions of an individual's thoughts, ideas, and emotions[137] and that they have a fundamental right to control the use and distribution of their works. Therefore, under this theory, artists should have the right to safeguard their works from misattribution, modification, or unauthorized exploitation.[138]

This theory provides a rationale for affording copyright protection to street artists, as their creations can be viewed as an extension of their personalities. Emerging as unfiltered self-expression, street art mirrors artists' thoughts, ideas, and emotions authentically. Therefore, granting copyright acknowledges the significance of their contributions, while also recognizing their entitlement to safeguard and manage their artistic works.

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[129] Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown L. J. 287, 330.
[130] Graham Dutfield and Uma Suthersanen, *Dutfield and Suthersanen on Global Intellectual Property Law* (2nd edn, Edward Elgar Publishing 2020) 47.
[131] ibid.
[132] ibid.
[133] ibid.
[134] Mitchell Longan, 'A System Out of Balance: A Critical Analysis of Philosophical Justifications for Copyright Law through the Lenz of Users' Rights' (n 124) 790-791.
[135] Berne Convention for the Protection of Literary and Artistic Works 1886, art 6bis.
[136] Bently and others, *Intellectual Property Law* (n 109) 36.
[137] For understanding Hegelian perspective of the theory, see J. Hughes, The Philosophy of Intellectual Property' (1988) 77 Georgetown LJ 287.
[138] Bently and others, *Intellectual Property Law* (n 109) 36.

B. Human Rights Theory

In recent years, the recognition of a link between IP rights and human rights has gained acceptance as a justification for copyright protection.[139] This perspective argues that intellectual property should be regarded as a form of 'property rights' that warrant protection, extending beyond mere economic considerations to include the fundamental right of individuals to own and dispose of personal property as they deem fit.[140] This integration of copyright within the human rights discourse has prompted courts to perceive it as a positive right. However, under the CDPA, copyright is understood as a negative right.[141] Nevertheless, the courts have acknowledged that in a democratic society like the UK, the recognition and protection of private property, including copyright, are essential.[142] This reflects the understanding that copyright is a form of property right that merits legal protection and enforcement, and acknowledges the importance of nurturing an environment conducive to creative expression, innovation, and fair economic exploitation of intellectual works.

This theory draws strength from international conventions such as the Universal Declaration of Human Rights (UDHR) of 1948,[143] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[144] as well as regional instruments such as the European Convention on Human Rights.[145]

The preamble of the UDHR establishes an obligation for all member states to adopt and incorporate its provisions on human rights into their national laws.[146] This means that, in the absence of specific IP laws, creators and inventors may still seek protection and assert their rights against infringers.[147] Further, Article 27 recognizes the right of individuals to freely participate in the cultural life of their community, enjoy the arts, and benefit from scientific advancements.[148] It also states that everyone has the right to protect their moral and material interests as authors of scientific, literary, or artistic

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[139] Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases and Materials* (3rd edn, Oxford University Press 2017) 9.
[140] Onyeagbako(n 83) 10.
[141] In the sense that the law does not explicitly grant the owner of copyright in a work the right to publish it. It is also noteworthy that Hegel considers copyright as a purely negative right. See Dutfield and Suthersanen (n 130) 49.
[142] Gwilym Harbottle and others, *Copinger and Skone James on Copyright* (18th edn, Sweet & Maxwell/Thomson Reuters 2021) 2-44 citing *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142; [2002] 32 ECDR 337 at 349.
[143] Peter Yu notes that while drafting the UDHR, there was a reluctance among Western countries, particularly Britain and the United States, to acknowledge economic, social, and cultural rights as human rights. See Peter Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 U.C Davis Law Review 1039, 1148.
[144] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)
[145] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).
[146] Universal Declaration of Human Rights (adopted 10 December 1948).
[147] Onyeagbako, 'Justifications for Copyright and Patents Protection' (n 83) 11.
[148] Universal Declaration of Human Rights (adopted 10 December 1948) art 27.

creations.[149] This suggests that intellectual property deserves acknowledgment and that artists should receive protection in accordance with human rights. Failing to provide such protection would constitute a violation of the artist's property rights.

Similarly, Article 15 of the ICESCR affirms that everyone has the right to benefit from the protection of their moral and material interests resulting from their authorship of scientific, literary, or artistic works.[150] The denial of copyright protection to illegal graffiti and street artists may conflict with the principle of non-discrimination enshrined in the ICESCR under Article 2 (2).[151] This is relevant considering that not all artists can obtain proper authorization to display their works in public spaces.[152] Such differential treatment could violate the principles of non-discrimination, which require equal treatment and opportunities for individuals, regardless of their specific circumstances or background.[153] Thus, the recognition of IP rights within the broader framework of human rights offers a compelling justification for the copyright protection of street art, as it underscores the importance of respecting and protecting the creative contributions of individuals in society.

Many human rights are not absolute and are considered 'limited' or 'qualified', allowing for their restriction under certain circumstances.[154] Street art may present a complex situation in terms of the right to freedom of expression. While this right is fundamental, its qualified nature allows for restrictions when necessary to protect the rights of others or the public interest.[155] Street art's unlawful creation and often

[149] ibid.

[150] According to Dutfield and Suthersanen, the drafting history of Article 15(1) (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) indicates that its purpose was to safeguard a moral right for scientists and artists, protecting them against plagiarism, theft, mutilation, and unwarranted use of their work. See Dutfield and Suthersanen (n 130) 337. However, General Comment No.17 states that equating this Article with traditional intellectual property rights overlooks the fundamental nature of human rights, which focus on the well-being of individuals and cultural communities rather than corporate interests. This is because human rights are inherent, timeless entitlements, while intellectual property rights are temporary incentives for creativity and innovation, primarily protecting business interests. See Commission on Economic, Social & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant), U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) 1-3.

[151] Westenberger (n 8) 66 noting that one of State's core obligations is "to ensure equal access, particularly for authors belonging to disadvantaged and marginalized group."

[152] ibid noting that people engaged in creative activity in public spaces encounters various difficulties. See also Farida Shaheed, 'The right to freedom of artistic expression and creativity' (2013) Report of the Special Rapporteur in the field of cultural rights, UN Human Rights Council, UN doc. A/HRC/23/34, 68.

[153] ibid.

[154] Equality and Human Rights Commission, 'How are your rights protected?' (*Equality and Human Rights Commission*, 04 May 2016) <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected#:~:text=But%20most%20human%20rights%20are,convicted%20and%20sentenced%20to%20prison > accessed 30 July 2023.

[155] For example, Article 10 of the European Convention on Human Rights (ECHR) grants the right to freedom of expression, which includes the freedom to hold opinions and share information without interference by public authorities, regardless of borders. However, this freedom is not absolute and can be subject to limitations and restrictions as prescribed by law in a democratic society. These restrictions

controversial content may conflict with property rights, privacy, and public order concerns, justifying restrictions on freedom of expression. In such cases, striking a balance between artistic expression and the need to uphold other rights becomes crucial, requiring careful evaluation on a case-by-case basis to preserve both creative freedom and societal harmony.

However, the inclusion of IP in the discourse surrounding human rights has faced criticism from scholars who argue that considering relatively trivial matters like IP undermines the fundamental importance of human rights.[156] Similarly, the flaws in the UN Declaration has been highlighted, contending that not all intellectual property hold significant relevance to a person's physical well-being. From this perspective, issues pertaining to physical well-being should take precedence over guaranteeing intellectual property as a universal human right.[157] Moreover, the declaration of intellectual property as a human right is deemed problematic as it can create barriers to accessing commodities that contribute to physical well-being and national development.[158] Further concerns have been raised regarding potential abuse of IP rights by multinational corporations.[159]

While these arguments do hold merit, it is imperative to acknowledge that IP rights should be considered as part of human rights due to their significant contributions to fostering creativity, knowledge sharing, economic development, and cultural preservation. These rights incentivize innovation, encourage the exchange of ideas, and promote societal progress, all of which align with the fundamental principles of human rights. Moreover, copyright recognition acknowledges the moral rights of artists, ensuring proper attribution and preserving the integrity of their artistic expressions. Such protection is essential to empower them and preserve their contributions in the face of unauthorized exploitation, particularly by corporations seeking to capitalize on their works. This enables them to negotiate fair deals when their works are commercialized, leading to a more equitable distribution of wealth and recognition for their artistic contributions. Such recognition also empowers street artists to maintain a personal link with their creations and reinforces their rightful place as key actors in shaping communal narratives. Therefore, when thoughtfully integrated and upheld, IP rights can complement the timeless expressions of

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may be necessary for reasons such as national security, public safety, protection of health or morals, safeguarding the reputation or rights of others, preventing the disclosure of confidential information, or maintaining the authority and impartiality of the judiciary.

[156] Peter Yu, 'Ten common questions about intellectual property and human rights' (2007) 23 Ga St U L Rev 709, 713 – 714.

[157] Ostergard argues that not all intellectual property rights should be justified, emphasizing the state's responsibility to prioritize people's physical welfare over individuals' rights to profit. He asserts that there exists a hierarchy of intellectual objects based on perceived physical welfare and that IPR discussions should consider both producers' and consumers' rights as well as national welfare. See Robert Ostergard, 'Intellectual Property: A Universal Human Right' (1999) 21 Human Rights Quarterly 156-178.

[158] Robert Ostergard, 'Intellectual Property: A Universal Human Right' (1999) 21 Human Rights Quarterly 156, 176. Despite these criticisms, the Court of Justice of the European Union (CJEU) has invoked the theory of intellectual property as a human right in support of intellectual property protection. C- 277/10 *Martin Luksan v Petrus Van der Let Case* [2013] ECDR 5.

[159] Laurence R Helfer & Graeme W Austin, *Human Rights And Intellectual Property: Mapping The Global Interface* (Cambridge University Press 2011) 504 – 505.

entitlements afforded by human rights, collectively contributing to the advancement of human dignity and prosperity on a global scale.

This section explored the utilization of natural rights and human rights theories to justify copyright protection for street art. The conclusion drawn is that these theories indeed lend support to such protection.

5. *Profiting Off The Streets: Unauthorized Commercialization Of Street Art*

This section aims to explore instances of unauthorized copying, removal, sale, or destruction of illegal street art. To provide this analysis, the section will discuss two distinct scenarios: when it is the property owner who engages in such actions, and when third parties are involved. In addition, this section will also address two common defences invoked by third parties: the defence of unclean hands, and the concept of freedom of panorama.

A. Property Owners

Bacharach coined the term 'aconsensually' to describe street art made on a property, where the property owner's permission was neither sought nor denied.[160] While some property owners may welcome such art - particularly if it is created by renowned artists like Banksy, as they recognize its potential to enhance the value of their property[161]- others may prioritize property rights and aesthetic preferences and have it removed. This differing perspectives among property owners reflect a spectrum of attitudes towards unauthorized artistic interventions on private spaces.

This section explores destruction and commercialization by property owners and contends that, while the artists may struggle to prevent physical destruction of their work, they may still assert their copyright to prevent unauthorized commercialization of the piece by the property owner.

Destruction

The destruction of illegal street art by property owners reflects a clash between artistic expression and property rights.[162] Some artists acknowledge the inherent risk associated with affixing their works onto properties belonging to others, particularly if done without authorization.[163] Some property owners may perceive the work as a violation of their rights and a threat to the value and aesthetics of their property. Therefore, they may have it erased to maintain control over their property and uphold community standards. Moreover, property owners may have legitimate obligations - such as ensuring safety - which could necessitate the removal of walls or surfaces

[160] Bacharach (n1) 486.

[161] Bonadio(n 20) 198. Further, Ian Edwards notes that a homeowner who possessed a house adorned with a Banksy artwork chose to put both the artwork and the house up for sale as a combined offering, describing it as "a mural with a house attached." See Ian Edwards, 'Banksy's Graffiti: A Not-So-Simple Case of Criminal Damage?' (2009) 73 The Journal of Criminal Law 345, 351.

[162] It is noteworthy that some artists have expressed a lack of concern regarding the destruction of their artworks, as they consider photographic documentation to be a satisfactory substitute. See Bonadio (n 25) 83.

[163] Bonadio (n 25) 82.

where artworks are situated.[164] Notably, courts have also occasionally dismissed artists' efforts to prevent the destruction of their artworks citing safety concerns.[165] Furthermore, in cases where the local authority designates a work as detrimental to the area's amenity, a property owner may be required to remove the work.[166]

The arguments in favour of property owners exercising their rights to remove unsolicited works is grounded in the principle of property ownership. Property owners possess the right to control and make decisions regarding their property, including any artwork that may be present on it. Further, the 'first sale' doctrine can limit the artist's integrity rights.[167] The 'first sale' doctrine asserts that the lawful owner of a physical copy of a work has the right to sell or transfer that specific copy.[168] Therefore, it has been argued that while the artist retains copyright to the work, the building owner becomes the rightful holder of that specific 'copy' of the artwork painted onto their building.[169] Consequently, as they hold legal ownership and control over the physical space on which the artwork is situated, property owners are justified in asserting their rights to remove unsolicited works from their property.[170]

To address the issue of conflicting interests between artists and property owners, it is essential to consider remedies that strike a balance between their concerns. One potential solution involves giving the artists themselves the opportunity to remove their works, should it be feasible.[171] Furthermore, in cases where the owner intends to sell the property, offering artists the chance to purchase it before others can be considered a viable solution.[172] Another solution would be to allow artists to

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[164] For example, security personnel at the Royal College of Art in London deemed it necessary to dismantle a student's artwork due to safety considerations, as the piece comprised a structurally unsound staircase connecting the college building with a neighbouring fish and chips shop. Press Association, 'Royal College of Art dismantles sculpture for being a safety hazard' (*The Guardian*, 22 June 2010) <https://www.theguardian.com/education/2010/jun/22/art-college-sculpture-unsafe> accessed 25 July 2023. Further, some works may be removed due to road safety concerns. A case in point is that of the Canadian artist Roadsworth, who utilizes public streets as canvases, altering parking lots, crosswalks, sidewalks, and other asphalt surfaces. While his art garners widespread appreciation, it also faces criticism due to its potential to distract drivers and jeopardize their safety on the roads. Barbara Speed, 'Street Art Is Great, but Don't Try it on Crosswalks', (*City Monitor*, 11 February 2016) < https://citymonitor.ai/infrastructure/architecture-design/street-art-great-dont-try-it-crosswalks-1827 > accessed 27 July 2023.

[165] One illustrative case involved a monument crafted from aged wooden blocks installed in Paul Mistral Park in the town of Grenoble, France, which was determined to pose a hazard to public safety due to the material's deterioration.

[166] Marta Iljadica, 'Works and Walls: Graffiti Writing and Street Art at the Intersection of Copyright and Land Law' in Bonadio, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (n 8) 81.

[167] Jafarguliyev (n 71) 20.

[168] Griffin M Barnett, 'Recognized Stature: Protecting Street Art as Cultural Property' (2013) 12 The Chicago-Kent Journal of Intellectual Property 204, 207.

[169] ibid.

[170] This is why it has been observed that the "rights that may be associated with art affixed to the private property of another without the property owner's consent are secondary to the rights of the property owner to control the use of the property". See Griffin M Barnett, 'Recognized Stature: Protecting Street Art as Cultural Property' (2013) 12 The Chicago-Kent Journal of Intellectual Property 204, 208.

[171] Westenberger notes that this is possible in countries like France and United States. See Westenberger (n 8) 61-62.

[172] Westenberger (n 8) 67.

document their works through photography before whitewashing or destruction.[173] Finally, these tensions could be effectively alleviated through the creation of temporary art spaces or designated areas for street artists. By allowing artists the freedom to create within specified boundaries, property owners retain control over their properties while contributing to the enrichment of the urban environment.

Commercialisation

Property owners may view street art as a commodity and seek to profit from it by removing the artwork and selling it. The ethos of street art is grounded in the belief that these works are intended for public enjoyment. While the property owners' decision to remove unsolicited art from their premises may seem justifiable,[174] its removal for personal gain – even if lawful - is commonly perceived as wrong. These acts have led to such artworks being referred to as "stolen" even when this terminology is not legally accurate.[175] Such unauthorized commercialization not only disregards the artist's moral rights, but also undermines the integrity of the work's original context and intent. Allowing such acts may also set a precedent that encourages exploitation and commodification of artistic expressions without adequate recognition or remuneration for the creators. However, some scholars maintain that property owners are entitled to reap financial gains from a work of unsolicited art, arguing that the proceeds obtained through the removal and subsequent sale of the work can be utilized to rectify any damages inflicted upon the property in question.[176]

The property owner's decision to sell the artwork on their walls may also provoke a strong public reaction, particularly if the artwork has become an integral part of the local community's identity. Street art carries a unique narrative that reflects community sentiments and aspirations, leading residents to perceive it as a collective gift to the area capable of fostering a sense of community ownership. The commercialization of such artwork can be perceived as a betrayal of the communal spirit and a display of disregard for the sentiments of the local population. Public anger may stem from the perception that the property owner is prioritizing financial gain over the community's cultural and emotional investment in the artwork.[177] This situation could lead to conflicts between the property owner and the community, negatively affecting the overall social fabric of the area.

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[173] Emma C Peplow, 'Paint on Any Other Canvas: Closing a Copyright Loophole for Street Art on the Exterior of an Architectural Work' (2021) 70 Duke Law Journal 885, 928.
[174] Bonadio (n 9) 108.
[175] Westenberger (n 8) 67 citing Peter Bengtsen, *The Street Art World* (Almendros de Granada Press 2014) 86ff.
[176] Karim (n 32) 65.
[177] For example, the actions of a landlord couple who decided to remove a Banksy mural from their wall and subsequently sold it privately for an alleged sum of £2 million elicited significant public outrage. Ben Turner and Kieren Williams, 'Landlord sparks fury by selling Banksy mural 'for £2million' after tearing it off wall' (*Mirror*, 16 January 2022) <https://www.mirror.co.uk/news/uk-news/landlord-sparks-fury-selling-banksy-25963192> accessed 27 July 2023 ; See also BBC News, 'Lowestoft mayor reassured covered-up Banksy will not be sold' (*BBC*, 4 March 2023) <https://www.bbc.co.uk/news/uk-england-suffolk-64839214 > accessed 27 July 2023.

While property owners have rights over the physical embodiment of the artwork,[178] it does not grant them title over the intellectual property in the work.[179] Copyright law protects the intangible aspects of the work, including its originality and creativity, regardless of its location.[180] As a result, though property owners may have the legal right to paint over or remove the work as they see fit, they cannot profit from the work by reproducing it or engaging in any commercial ventures without the artist's permission as they do not have the right to the underlying intellectual property in the work.[181]

B. Museums, Galleries and Auction Houses

In recent years, there has been a growing trend of street art being displayed and commodified within traditional art spaces such as museums, commercial art galleries, and private collections.[182] Notably, galleries are witnessing sold-out shows and exhibitions, [183] and books dedicated to documenting and celebrating such works are now produced and in demand.[184] Organizers of indoor exhibitions featuring street and graffiti art often considers maintaining an authentic "street feeling" as an essential aspect.[185] While the inclusion of street art in these traditional art spaces may grant it broader visibility and recognition, it also runs the risk of commodification, dilution of original intent, and the erasure of its socio-political context. It has been rightly observed that 'to put a piece of street art in a gallery is not necessarily problematic, but such an object no longer amounts to being street art'.[186]

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[178] Lerman (n 77), 317.

[179] ibid.

[180] ibid 309.

[181] ibid 325. Further, Westenberger notes that in Germany, according to the Pictures on the Berlin Wall case, it is widely accepted that the owner of a property has the right to destroy a work of art, even if it is protected by copyright, if the work was forced upon them against their will but that this does not imply that the owner has the right to commercially exploit the work. The interference with the owner's property rights justifies the removal of the work, but not its independent economic exploitation. It is also worth noting that only the owner of the physical carrier, such as the wall, has the authority to authorize the removal of graffiti. See Westenberger (n 8) 62 and Re Pictures on the Berlin Wall [1997] ECC 553 at [11].

[182] Peter Bengsten, 'Stealing From the Public: The Value of Street Art Taken from the Street' in JI Ross (ed), *Routledge Handbook of Graffiti and Street Art* (Abingdon: Routledge 2016) 416.

[183] Karim (n 32), 74.

[184] ibid.

[185] Galleries that specialize in showcasing street art strive to eliminate the traditional "white cube" effect associated with fine art environments by aiming to recreate the vibrant atmosphere of the street, aligning with the expectations of enthusiasts. This "street feeling" is brought in by deliberately arranging the works in a disorderly manner, deviating from the geometric order normally found in traditional galleries. To enhance the ambiance, street signs may be integrated into the scene, and the walls themselves may be adorned with fitting motifs. See Enrico Bonadio, 'Conservation of Street Art, Moral Right of Integrity and a Maze of Conflicting Interests' in Bonadio , *The Cambridge Handbook of Copyright in Street Art and Graffiti* (n 8) 74 citing Alison Young, *Street Art World* (Reaktions Books 2016) 130–31.

[186] Ronald Kramer, 'Graffiti and Street Art: Creative Practices Amid "Corporatization" and "Corporate Appropriation"' in Enrico Bonadio (ed), *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press 2019) 34 citing Peter Bengtsen, *The Street Art World* (Almendros de Granada Press 2014).

The prospect of having their work displayed in a gallery and subsequently sold can serve as a positive source of motivation for fine artists.[187] However, street artists may be driven more by negative motivators.[188] Although Banksy's success demonstrates that street art can hold considerable value, street artists usually do not create their art on walls with the intention of selling the pieces.[189] Moreover, many street artists do not support placing their works in galleries or museums.[190] While some artists may feel enthusiastic about their art gaining wider recognition and reaching a larger audience through galleries and publications,[191] others may strongly oppose the removal of their works from their original sites. For many artists, the ephemeral nature of their art is an essential aspect of its message and purpose.[192] Street art often serve as a form of social commentary, activism, or artistic expression that resonates specifically within the context of its original location.[193] Some artists may therefore view it as a form of commodification that diminishes the authenticity and spirit of their work. These artists may prioritize the integrity of their art over the financial benefits or recognition that come with its commercialization.[194]

Removals and relocations of street art should not always be equated with 'art thefts' as, under certain circumstances, such actions can be instances of ex-situ conservation. This is applicable when the extraction of the artwork from its original location is conducted skilfully and safely, and subsequently relocated to a controlled and secure environment where the public can still freely access it.[195] But if a fee is imposed for accessing and appreciating the removed work, it may dilute the essence of street art which is intended to be freely enjoyed. As a result, the audience in such a setting may differ from the typical passersby who chance upon street artworks while strolling down the street.[196] By invoking moral rights, artists possess the ability to contest any alteration or distortion of their works.[197] In the case of removing and relocating street

[187] Dent (n 107) 46, further noting that many professional artists depend on additional sources of income to supplement their earnings from their creative pursuits.
[188] ibid.
[189] Bonadio notes that artists are not happy with the economic exploitation of their works. To learn more about the artists' views, see Bonadio (n 25) 97.
[190] Bonadio notes 'Every street artist makes a decision at the outset. They do not make art in the hope that it may hang in a gallery that 1% of the city goes to. They give their creations for free to the whole city, putting them out there for an entire neighbourhood to walk by and see.' See Bonadio, (n 25) 90 citing Leon Reid, Brad Downey, *The Adventures of Darius & Downey & Other True Tales of Street Art* (Thames & Hudson, 2008).
[191] Bonadio (n 25) 101.
[192] For this reason, Bonadio notes that artists prefer that their work 'die' in the street art, rather than being removed for commercial exploitation. See ibid 98.
[193] Bonadio however notes that not all street art is site-specific. See Enrico Bonadio, 'Conservation of Street Art, Moral Right of Integrity and a Maze of Conflicting Interests' in Enrico Bonadio (ed), *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press 2019) 73.
[194] In this context, Darren Julien, founder, and CEO of Julien's Auctions argues that "The other side of it is that [auctions are] really what made them famous." The publicity generated through auctions can lead to increased demand for their works, opening doors to collaborations, commissions, and further opportunities within the art world. See Christy Kuesel, 'The fraught business of removing and selling street art murals' (*CNN*, 20 January 2020) <https://edition.cnn.com/style/article/street-art-murals-artsy/index.html> accessed 08 August 2023.
[195] Enrico Bonadio, 'Feelings about Attribution and Preservation' in Bonadio(n 25) 102.
[196] ibid 102 citing Peter Bengtsen, *The Street Art World* (Almendros de Granada Press 2014) 100–102.
[197] CDPA 1988, s 80 (2) (b).

art to indoor and restricted environments, as well as charging a fee to view it, such actions can be deemed as forms of "distortion" since it alters the intended message the artist sought to convey through the original placement of the artwork.[198]

The sale of merchandise, posters, prints, and other items featuring street art in museums and galleries also raises concerns regarding its impact on the rights of artists. These institutions, which serve as custodians of art and culture, capitalize on the popularity and appeal of such works. The production and sale of such merchandise may occur without the consent or involvement of the artists. Such appropriation and commodification may contribute to the erosion of the artists' control over their own work and the exploitation of their works for commercial gain. Therefore, by recognizing the copyright of street artists, their rights to control and benefit from their artistic expressions can be upheld.

C. Corporations

The appeal of street art among customers, especially with the younger demographic, has led companies to recognize its potential as a marketing tool.[199] Some artists do not view commodification problematic,[200] provided they are acknowledged and financially compensated for their creations.[201] Therefore, unfair appropriations arise when individuals or corporate actors - despite their lack of involvement in its creation or absence of any genuine connection to the cultural world it represents - exploit street art solely for the purpose of generating privatized profits.[202]The legal ambiguity surrounding the copyrightability of unauthorized street art has proved advantageous for corporations seeking to exploit it for commercial purposes.[203] By incorporating elements of this artform into their branding, products or marketing campaigns, corporations sidestep the need to provide appropriate compensation or recognition to the artists. The appropriation of street art style and form in advertising is also met with strong opposition from street art enthusiasts due to its contradiction of the core value of street art culture, which is to oppose the overwhelming influence of commercial advertising in public spaces.[204] The significant resources and legal teams at the disposal of corporations further strengthen their position, allowing them to navigate the legal complexities more effectively. This results in street artists finding themselves at a distinct disadvantage, struggling to assert their rights and protect their intellectual property against the powerful entities that seek to commercialize their

[198] Enrico Bonadio, 'Conservation of Street Art, Moral Right of Integrity and a Maze of Conflicting Interests' in Bonadio, (n 8) 74.
[199] Karim notes that street art as a powerful marketing tool has witnessed the likes of Nike Inc., Time magazine, International Business Machines Corp., Google, Inc., Nokia, Inc., and Sony, Inc. See Karim (n 32) 76.
[200] Several graffiti writers and street artists have transformed their creative talents into viable business ventures, particularly by offering their services as artists for hire. This includes undertaking commercial advertising projects as well as working on personalized portraits, memorial walls, interior design elements for small businesses, and even logo design. See Kramer, (n 190) 32.
[201] ibid 34.
[202] ibid 35.
[203] Karim (n 32) 76.
[204] Andrea Baldini, 'Street Art: A Reply to Riggle' (2016) 74 (2) The Journal of Aesthetics and Art Criticism 187, 188.

work. This disparity in legal standing not only perpetuates an unjust power dynamic, but also compromises the integrity of street art as a form of artistic expression and social commentary. Therefore, the commodification and appropriation of street art by external actors is a challenge to the autonomy, authenticity, and sustainability of this artistic movement.

As stated above, artists may have varying views on the use of their works by different entities. The decision to take legal action would depend on several factors, including the identity of the entity using the artwork, the intended purpose of its use, and the artist's own preferences and values. Street art often serves as a voice for marginalized communities and a means of expressing dissent against corporate influence and consumerism. Therefore, some artists may be hesitant to engage with companies that are perceived to perpetuate the very systems they critique. They may fear compromising their message or becoming mere tools in a larger advertising campaign. However, some street artists may be open to collaborations or the use of their art by certain entities, while others may strongly oppose the same. In such cases, the entities may need to demonstrate an authentic appreciation for the art form and engage in ethical practices, such as compensating artists fairly for their work and respecting their IP rights.

Thus, recognizing copyright protection is necessary to prevent unjust commercial exploitation of street art by entities other than the artist, who should not be allowed to benefit from its illegal nature.[205] This protection is warranted due to the intellectual and creative nature of street art as an artistic endeavour, and because allowing its commercial exploitation would result in authorial injustice.[206] Corporations may attempt to justify not providing proper credit or compensation for commercially exploiting street art by claiming ignorance of the artist's identity. However, local graffiti community,[207] the artwork's distinct style, online artist communities, and image search tools make it relatively easy to identify the artists nowadays. Therefore, such claims are observed to be exaggerated.[208]

D. Defences

While it is not uncommon for street artists to take legal action against property owners and corporations to oppose the commercial exploitation of their work, third parties commonly employ two defences when faced with such legal challenges: the Doctrine of Unclean Hands and the Freedom of Panorama. The following analysis will focus on the reasons for the limited likelihood of success of these defences within the legal framework of the UK, drawing insights from both case law and academic perspectives.

Doctrine of Unclean Hands

The doctrine of unclean hands, rooted in the principle that no one should benefit from their own wrongdoing, holds that individuals who have acted wrongly in relation to

[205] Bonadio (n 9) 105.
[206] Westenberger (n 8) 63 citing Lerman (n 77) 316–18.
[207] Lerman (n 77) 329.
[208] Lerman (n 77) 329.

a matter of complaint cannot seek protection under the law. Street artists may commit offenses such as defacement of property, trespass, and tort against the property owner during the creation of their works. These violations of laws raise the question of whether the artist's "unclean hands" disqualify them from seeking legal remedies due to their own wrongdoing.[209] It is noteworthy that the doctrine focuses on the relationship between the parties involved in the legal dispute and whether the wrongdoing of one party affects the equitable considerations of the case.[210] While this may prevent an artist from claiming copyright protection against the property owner whose wall has been defaced, the illegal nature of the initial action does not necessarily impact the equitable relationship between the artist and a third party seeking to reproduce or engage in other restricted acts under copyright law.[211] Therefore, the illegal nature of the original act does not automatically absolve the third party from infringement claims, as the equitable considerations in such cases centre around the actions and intentions of the alleged infringing party.[212]

Hence the doctrine should not be extended to such cases because the illegal actions of the artist do not directly harm the individual or organization that has misappropriated the unlawfully placed art.[213] Instead, the negative impact is felt by the property owner upon whose premises the artwork is created, who is usually not involved in the legal proceedings.[214] Therefore accepting this doctrine would yield an unjust outcome, as it would ultimately reward parties who are not direct victims of the alleged vandalism, such as the property owner.[215] Allowing this doctrine to operate in such circumstances would legitimize the appropriation of street art and fail to provide any recognition or compensation for the artists,[216] which contradicts the underlying principles of international copyright and human rights protection, that aims to safeguard the rights of creators and promote equitable treatment.[217]

Therefore, the defence of unclean hands can only be invoked by a litigant who has demonstrated fair and honest conduct, and does not apply to individuals who have violated the law or infringed upon the rights of others.[218] Therefore, if it is assumed that copyright protection applies to street art, it logically follows that a third party who has violated the artist's rights would be unable to assert this defence in their favour.

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[209] Saurabh Nandrekar, 'Illegal Street Graffiti deserves Copyright Protection. Here's Why' (*Medium IP Bloke*, 30 October 2020) < https://medium.com/ipbloke/illegal-street-graffiti-deserves-copyright-protection-heres-why-e2c3425719a8 > accessed 04 June 2023.

[210] *Mitchell Bros Film Group v Cinema Adult Theatre* (1979) 5th Circuit Appeals Court 604 F 2d 852, [9] - [10].

[211] O'Connel, 'The writing on the wall: street art and copyright' (n 94) 536.

[212] *Mitchell Bros Film Group v Cinema Adult Theater* (1979) 5th Circuit Appeals Court 604 F 2d 852, [10].

[213] Bonadio (n 9) 103, 104.

[214] ibid.

[215] Enrico Bonadio, 'How Muralists, Street Artists, and Graffiti Writers Can Protect Their Artworks' (2022) 18 U St Thomas LJ 558, 570.

[216] ibid.

[217] Westenberger (n 8) 68 Citing Jamison Davies, 'Art Crimes? Theoretical Perspectives on Copyright Protection for Illegally Created Graffiti Art' (2013) 65 Me. L. Rev. 27, 51.

[218] Saurabh Nandrekar, 'Illegal Street Graffiti deserves Copyright Protection. Here's Why' (*Medium IP Bloke*, 30 October 2020) < https://medium.com/ipbloke/illegal-street-graffiti-deserves-copyright-protection-heres-why-e2c3425719a8 > accessed 04 June 2023.

Freedom of Panorama

The concept of "freedom of panorama" allows for the creation of paintings, drawings, engravings, photographs, and the inclusion of artworks in films or television broadcasts, without infringing on the copyright of the original work.[219] While this exception recognizes the value of street art, it enables its commodification by allowing it to be used as a backdrop for various commercial purposes, such as advertisements and music videos.[220] This can lead to the appropriation of their creations for financial gain without adequately recognizing their contributions and has therefore been perceived as having a negative impact on artists' rights in the UK.[221]

The freedom of panorama exception is covered under Section 62 of the CDPA. It specifies that the provisions pertain to buildings, sculptures, models for buildings, and works of artistic craftsmanship. "Works of artistic craftsmanship" and "graphic works" are distinct and Section 62 does not extend its freedom to the latter. Section 4 (2) provides a definition of "graphic works", and this include various forms such as paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, and similar works. [222]The protection conferred by this Section thus appears to be limited to three-dimensional works, excluding two-dimensional works.[223] As a result, the act of capturing graphic works, such as street art, which are situated in public places, necessitates compliance with copyright law and obtaining permissions from the respective rights holders.[224] Thus, it appears that the defence of freedom of panorama cannot be invoked with regards to street art, given the aforementioned restrictions and obligations imposed by copyright law.

This section delved into the multifaceted involvement of third parties, including property owners, in the exploitation of street art. As part of the discussion conducted throughout this section, particular focus has been placed on the unauthorized commercialisation of street art . It has been argued that third-party commercialization without the artists' consent should not be permitted, even if the artwork was created illegally. The analysis has acknowledged possible constraints on the artist's rights, particularly concerning property owner's interests.

6. Conclusion

This paper has examined the intricacies surrounding the extension of copyright protection to unauthorized street art. While it is acknowledged that the primary motivation behind street artists placing their works in public spaces may not revolve

[219] CDPA 1988, s 31(1).

[220] Linda Mulcahy and Tatiana Flessas, 'Limiting Law: Art in the Street and Street in the Art' (2015) Law Culture and Humanities, 4.

[221] ibid noting that this may not however be the case in the US.

[222] CDPA 1988, s 4(2).

[223] The rationale behind this exclusion finds its basis in a New Zealand judgment, where it was explained that the aim of a similar provision in the New Zealand Copyright Act 1994, is to prevent the creation of two-dimensional derivative works that could recreate and substitute the original artwork which would undermine the rights of the original artist. See *Radford v Hallensteins Bros* Ltd [2007] NZHC 1654.

[224] Francesca Barra, 'The Relationship Between Street Art And Freedom Of Panorama Under UK Law' (2021) 26 (3) Art Antiquity & Law.

around seeking copyright protection, the rising interest in safeguarding their works and the growing legal actions against appropriation highlight the need to consider this extension for their benefit.

Street art's distinct aesthetic and socio-political significance, challenging conventional notions of art and providing a platform for marginalized voices, further supports the argument for copyright protection. Acknowledging their creative endeavours through copyright not only affirms the value of this unique form of art, but also recognizes its cultural contribution to society. Through an examination of legal instruments and theoretical foundations of the copyright regime, it has been argued that unauthorized street art should be eligible for copyright protection, provided it meets the requisite legal criteria. The fact that such art was created in violation of laws should not undermine its eligibility for protection. Similarly, the presence of immoral or offensive content in street art should not disqualify it from receiving copyright protection, although the enforcement of copyright in such cases might be challenging. Further, the unauthorized commercial exploitation of street art by third parties who attempt to justify their actions based on the illegal origin of the works is strongly opposed. Likewise, the removal and placement of street art in museums and galleries without the artist's consent are also discouraged.

While recognizing that the artist's moral rights might be insufficient to prevent the destruction or removal of their works by property owners, the paper explored potential remedies through a balancing interest approach. However, it remains steadfast in its opposition to commercial exploitation by property owners.

In conclusion, this study calls for a balanced approach that respects the rights of both artists and property owners, while acknowledging the significance of protecting and promoting artistic expression in public space. It underscores the need for clear legal frameworks that acknowledge the creative contributions of street artists and provide avenues for safeguarding their rights, all the while discouraging unauthorized commercial exploitation and disrespect for artistic integrity. By finding common ground and addressing the complexities of this issue, society can foster a more inclusive and supportive environment for street art and its creators.

The Competitive Significance of Big Data in the Digital Economy: Should There be Greater Consideration for Data Protection and Privacy in Merger Reviews Conducted under European Union Competition Law?

CORAL ALEXANDER

Abstract

Big Data has had an undeniable impact on society. It offers positive opportunities for innovation and growth across almost every business sector. However, alongside the potential of Big Data, concerns have also been raised regarding its implications for competition law. This is of particular interest when conducting merger reviews under European Union (EU) law, or at least it should be. This paper examines whether data protection should be offered greater consideration within merger reviews conducted under EU competition law. There are features of the digital economy that demand competition authorities reconsider how existing principles should be applied to mergers that involve Big Data. Furthermore, a key question is why the European Commission utilises price-centric analytical tools in assessment of mergers when competition concerns in the digital economy do not logically fit within this structure. There should be acknowledgment of broader non-price parameters of competition which are more appropriate for analysing competitive effects in the digital economy, and there is scope within existing competition law principles to do so. This paper addresses arguments that data protection concerns are beyond the scope of existing competition law and highlights there are clear synergies between the data protection and competition law. It will also articulate how Big Data interacts differently with existing competition principles like market power. In proposing there should be greater consideration for data protection, two methods of achieving this will be suggested.

1. Introduction

Big Data is a buzzword that features heavily in policy and regulatory discussions within the digital economy. It has an increasing influence on competitive business models and strategies in the digital economy. As such, it has emerged as a competition concern. This paper will discuss the existing approach to merger review under European Union (EU) competition law and argue why it should have greater consideration for data protection and privacy concerns. Through this, the real competitive significance of Big Data will be acknowledged. This is important not only to protect consumers of goods and services in markets within the digital economy but also to protect and uphold the integrity of EU competition law itself.

Two key standpoints emerge within the literature: the separatist and the integrationist. Separatists argue for a continued distinction between data protection and competition law. Integrationists advise there is scope for competition law to

afford greater consideration to data protection concerns within its application. The wider discussion concerning the implications of Big Data within the digital economy has largely ignored how it affects merger reviews and how this should be addressed in practice. This paper will focus on the implications for merger reviews, drawing on developments in other areas of competition law across the EU and national competition authorities to inform analysis and discussion where appropriate.

This paper is composed of four sections. Section two explores how Big Data is defined and then considers its implications for the digital economy. It highlights the features and challenges of digital markets and looks at the emergence of data protection as a competition law concern. Section three analyses the current approach of the Commission to merger decisions. It considers the price-centric nature of the approach and outlines how this is not wholly appropriate for reviewing mergers in the digital economy. It explores developments in Commission decisions that demonstrate an evolution from strict unacceptance of data protection as potential competition law concerns to an acknowledgement of this and considers a case brought against Facebook by the German Bundeskartellamt. Section four explains the separatist argument and analyses how the synergies and common objectives of competition law and data protection regulation prove this argument erroneous. The section then presents the concept of data as a source of market power to further refute the separatist view. Section five looks at implementing greater consideration for data protection and privacy in merger reviews. It outlines two methods for doing so. The first considers privacy as a quality parameter of competition. The second method outlines how existing data protection regulations can offer normative guidance to competition law. Finally, this section considers future areas of development and areas of research that need to be undertaken to offer further clarification of the issues identified by this paper.

2. Big Data and the Challenges of the Digital Economy

A. Introduction

The importance and influence of data, specifically 'Big Data' in today's economy is undeniable. It has been proclaimed as the 'new oil' and calls for regulation are increasing as is the power held by the biggest names in the market. [1] Companies including Google, Meta, Apple, and Microsoft dominate their respective markets. Their notable rise to dominance has changed how data protection and privacy issues are considered, particularly in relation to competitive activities including mergers.
This section will explore the importance of data in the digital economy. To achieve this, the section will start by presenting characteristics of Big Data. Following this, the section will move to discuss the implications of Big Data. This part of the analysis will present the features of the digital economy that challenge those of traditional markets. By contemplating the definition of Big Data alongside its implications and the features

[1] 'The world's most valuable resource is no longer oil, but data' (*The Economist*, 6 May 2017) <www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 28 February 2023.

of digital markets, this section will conclude by exploring the emergence of data protection and privacy as competition law concerns.

B. Defining Big Data

The term 'Big Data' features frequently in discussions concerning the digital economy and technological advances. It has gained status as a buzzword in legal, regulatory, and academic discussions due to its rise to relevance, most notably in the past two decades.[2] Despite this, the term lacks an official definition. Instead, it is recognised as having 'various definitions'.[3] References to data and Big Data in this paper will explicitly concern personal data. Personal data is defined in EU law in Regulation 2016/679 under Article 4(1) as 'any information…related to an identified or identifiable natural person'.[4]

Without a specific definition of Big Data, it is helpful to look at its notable characteristics. These are known as the four 'V's: volume, velocity, variety and value.[5] Volume is how much data is collected. It has been highlighted that the collection of data is increasing significantly in terms of volume. This is expected to only increase as technology continues to advance.[6] Velocity concerns '[t]he speed at which data are generated, accessed, processed and analysed'.[7] The velocity element of Big Data means there is 'growing potential for big data…to have an immediate effect on a person's surrounding environment or decisions'.[8] As such, velocity recognises the time-sensitive nature of Big Data.[9] The third characteristic is the variety of data collected and this shares strong links to volume and velocity. When the characteristics are combined, a more powerful data collection takes place, which significantly increases the value of data.[10] The fourth V, value, is reinforced by the previous three characteristics discussed. The value of data is increased by the volume collected, the variety collected and the velocity at which it can be processed.[11]

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[2] Gil Press, 'A Very Short History of Big Data' (*Forbes,* 9 May 2013) <www.forbes.com/sites/gilpress/2013/05/09/a-very-short-history-of-big-data/?sh=767fad4765a1> accessed 14 April 2023.

[3] Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (Oxford University Press 2016) 15.

[4] Regulation (EU) 2016/679 of 4 May 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 (GDPR).

[5] Stucke and Grunes (n 3) 16.

[6] McKinsey Global Institute, 'Big data: The next frontier for innovation, competition, and productivity' (*McKinsey & Company*, June 2011) 2 <www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/big%20data%20the%20next%20frontier%20for%20innovation/mgi_big_data_full_report.pdf> accessed 16 April 2023.

[7] Organisation for Economic Co-Operation and Development (OECD), 'Supporting Investment in Knowledge Capital, Growth and Innovation' (OECD Publishing 2013) 325 <https://doi.org/10.1787/9789264193307-en> accessed 16 April 2023.

[8] Executive Office of the President, 'Big Data: Seizing Opportunities, Preserving Values' (May 2014) 5 <https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf> accessed 16 April 2023.

[9] Stucke and Grunes (n 3) 21.

[10] ibid.

[11] OECD, Data Driven Innovation: Big Data for Growth and Wellbeing' (OECD Publishing 2015) 12 <https://doi.org/10.1787/9789264229358-en> accessed 2 May 2023.

There is also an important connection between the value of Big Data and 'Big Analytics'. Big Analytics is 'the ability to design algorithms that can access and analyse vast amounts of information'.[12] As with Big Data, there are infinitely broad applications of Big Analytics that stretch beyond the scope of this paper.[13] However, the idea of companies in the digital economy being able to utilise Big Analytics to facilitate higher levels of collection, processing of and storage of data remains crucial. For the purposes of this work, Big Analytics should be understood to increase the value that companies are able to derive from data that is collected.[14]

C. Implications of Big Data

It has been argued that companies can increase their competitive strength or gain a competitive edge from collecting an increasing quantity of high-quality data. This is known as acquiring a 'data advantage'.[15] This data advantage is particularly significant for companies that operate on two- or multi-sided markets. Multi-sided markets are those in which platforms have two distinct groups of users and these groups each confer benefits on the other. The development and success of companies in the digital economy which can be attributed to data is exemplified by Google's acquisition of Waze. Waze could not achieve a competitive advantage in the market of online and app-based mapping services due to an insufficient volume of data at its disposal.[16] Accordingly, the four Vs can be understood as driving forces behind Big Data's prominence in the digital economy. Companies are highly aware of the potential advantages that can be derived from Big Data. This point is further demonstrated by the Organisation for Economic Co-Operation and Development (OECD) citing Big Data as a 'core economic asset that can create significant competitive advantage for firms'.[17] Furthermore, the World Economic Forum announced data as a 'new asset class' in a 2011 report, thus reinforcing its value in the digital economy.[18]

Advocates of strong data protection measures within the EU have argued that with the value and potential uses of user data increasing, traditional competition analytical frameworks should be revisited to ensure that sufficient protection of personal data is achieved.[19] For example, the European Data Protection Supervisor (EDPS) indicates

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[12] Ariel Ezrachi and Maurice Stucke, *Virtual Competition: The Problems and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016) 15.

[13] See G Bharadwaja Kumar, 'An Encyclopedic Overview of 'Big Data' Analytics (2015) 10(3) International Journal of Applied Engineering Research 5681; Daniel Lee Andersen, Christine Sarah Anne Ashbrook and Neil Bang Karlborg, 'Significance of big data analytics and the internet of things (IOT) aspects in industrial development, governance and sustainability' (2020) 1 International Journal of Intelligent Networks 107.

[14] OECD, 'Data Driven Innovation: Big Data for Growth and Well-Being' (n 11) 11.

[15] Ezrachi and Stucke (n 12) 20-21.

[16] Stucke and Grunes (n 3) 8.

[17] OECD, 'Supporting Investment in Knowledge Capital, Growth and Innovation' (n 7) 322.

[18] World Economic Forum, 'Personal Data: The Emergence of a New Asset Class' (January 2011) 5 <www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf> accessed 16 April 2023.

[19] Kevin Coates, *Competition Law and Regulation of Technology Markets* (Oxford University Press 2011) 392.

the value of personal data to companies with data-driven business strategies is problematic in the traditional competition law framework.[20] However, there are criticisms of this approach which suggest data cannot have competitive significance because of its ubiquitous nature and the fact it can be obtained at a low cost.[21] Nevertheless, this view can be dismissed as misguided based on the following aspects.

The OECD has pointed out that data may be acquired with limited expense in some examples, but this may not be true in others. However, it is the overall and combined value of the total data collected by a company which will give a much clearer picture of the value the data holds for the company that has collected it.[22] Furthermore, the legitimate concern for the implications of Big Data is supported by several competition authorities carrying out notable research into these issues.[23] A report published by the French Autorité de la concurrence and the German Bundeskartellamt (BKA) provides a comprehensive insight into the changes and developments which have revolutionised opportunities to utilise data across numerous business sectors.[24] It could be suggested it was the success of companies utilising Big Data that has spurred discussions concerning the interactions of Big Data, data protection, and competition law in the digital economy. From this, a strong link between the value of Big Data, and its other characteristics, suggest there should be greater consideration for data protection and privacy within competition law.

D. Features of the Digital Economy

Digital markets, those markets within the digital economy, are understood as encompassing all business activities that rely on or utilise digital technology.[25] This understanding is broad, and there are many transactions which may fall under its scope. This underlines the importance of this discussion and its application to

[20] European Data Protection Supervisor, 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (Preliminary Opinion of the EDPS, 2014) 10 <https://edps.europa.eu/sites/default/files/publication/14-03-26_competitition_law_big_data_en.pdf> accessed 9 May 2023.

[21] Darren S Tucker and Hill B Wellford, 'Big Mistakes Regarding Big Data' (*The Antitrust Source*, December 2014) <https://ssrn.com/abstract=2549044> accessed 5 May 2023.

[22] OECD, 'Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value' (OECD Digital Economy Papers No. 220, OECD Publishing 2013) 27 <https://doi.org/10.1787/20716826> accessed 2 May 2023.

[23] Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the digital era' (*European Commission*, 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 17 April 2023; Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (10 May 2016) <www.autoritedelaconcurrence.fr/sites/default/files/2021-11/big_data_papier.pdf> accessed 3 May 2023; Jason Furman et al, 'Unlocking Digital Competition – Report of the Digital Competition Expert Panel' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 7 May 2023.

[24] Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (n 23) 9.

[25] Viktoria Robertson, 'Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy' in Heinz D Kurz and others (eds), *The Routledge Handbook of Smart Technologies: An Economic and Social Perspective* (Routledge 2022) 3 <https://ssrn.com/abstract=3631002> accessed 3 May 2023.

competition law, specifically to merger reviews. According to the OECD, there has been a large increase in merger activity in digital markets from 2008 to 2012, and this increase is expected to continue.[26] Several features of the digital economy are central to understanding how competition law may interact with activities in this area and how Big Data may facilitate competitive strategies.

Companies that operate within the digital economy often do so from a platform business model. Platform companies are intermediaries, which means they operate in two- or multi-sided markets.[27] The multi-sided business model has been explained in economic terms by several scholars, but most notably by Richet and Tirole.[28] Platforms operating on a multi-sided market usually offer goods or services to consumers on at least one side of the market for free, identified as a zero-price market.[29] However, the seemingly free products and services available do cost users. It is increasingly acknowledged that users, whilst not paying a monetary price, are paying with the exchange of their personal data.[30] This is arguably where the concern for data protection within competition law has emerged. It was noted by the former Commissioner for Competition, Margrethe Vestager, that data acts as a currency with which users pay for ostensibly free services.[31] In this way, personal data can be seen as an important input for companies operating a platform business model, meaning there is scope for it to be considered a competitive advantage within the digital economy.

The digital economy is also characterised by strong network effects which can be direct and indirect. Direct network effects are enjoyed, for example, when more users are brought to a platform through the number of existing users on the platform. Indirect network effects occur when increased use of a product or service also grows a complementary product or service's value.[32] For example, with social media platforms indirect network effects occur as it becomes a more popular choice for advertisers based on the number of users increasing the potential audience for advertisements.[33]

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[26] OCED, 'Data Driven Innovation: Big Data for Growth and Well-Being' (n 11) 23.
[27] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones and Sufrin's EU Competition Law Text, Cases, and Materials* (7th edn, Oxford University Press 2019) 58.
[28] For further detail on the economic explanation see Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) Journal of the European Economic Association 990; David Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20(2) Yale Journal on Regulation 325.
[29] John Newman, 'Antitrust in Zero-Price Markets: Foundations' (2015) 164 University of Pennsylvania Law Review 149, 165-169.
[30] Carmen Langhanke, 'Consumer Data as Consideration' (2016) 4(6) Journal of European Consumer and Market Law 218.
[31] Jones, Sufrin and Dunne (n 27) 59.
[32] ibid 48.
[33] Adam Alfredsson, 'Data Protection Considerations in EU Competition Law – A Natural Evolution or Disruptive Development?' (LLM thesis, Lund University 2020) 20-21 <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=9015379&fileOId=9015399> accessed 7 May 2023; Inge Graef 'Data as Essential Facility: Competition and Innovation on Online Platforms' (LLD thesis, KU Leuven 2015) 1, 26-29.

These effects are particularly important for digital platforms which operate in multi-sided markets as increased usage on one side, usually the 'free' side, increases the value of other sides, specifically those with clear monetary pricing. Network effects can generate barriers to entry in the digital economy.[34] Barriers to entry can also be created by an incumbent company's exclusive control of data.[35] These barriers may be particularly large where the scale of data collection cannot be matched by competitors.[36] Strong network effects can also create a positive feedback loop which means an increasing number of users make a platform seem more desirable to additional users.[37] It has been suggested the four Vs of data operate in a similar way to network effects.[38] This helps to demonstrate Big Data's relevance in driving competition in the digital economy. Furthermore, a report published by the European Commission highlighted strong network effects combined with a new role of data within the digital economy leads to 'strong economies of scope which…give incumbents a strong competitive advantage'.[39]

It has been argued that with many platform businesses, particularly social media and search engines, there is no single approach to understanding how network effects and economies of scale impact the success of companies.[40] As a result, the features outlined above are of increasing importance to competition authorities when considering merger cases in the digital economy. This is specifically true of those where data collection and accumulation are key features or consequences of the merger. However, these factors are often overlooked in favour of a price-centric analysis on the paid side of the market in question. This will be explored in section three.

E. Data Protection as a Competition Law Concern

Data protection and privacy are distinct concepts.[41] Whilst an in-depth analysis of this distinction is beyond the scope of this paper, it should be noted that much of the literature referenced uses privacy and data protection interchangeably or concurrently. This is largely due to US literature favouring the term privacy. This work will follow the favoured EU approach which refers to data protection measures as those which form the basis of a legal framework, and privacy or data privacy as a general concept of protection of personal data.

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[34] Jones, Sufrin and Dunne (n 27) 61.
[35] ibid.
[36] Nathan Newman, 'Search, Antitrust and the Economics of the Control of User Data' (2014) 31(2) Yale Journal on Regulation 401, 407.
[37] John M Yun, 'Overview of Network Effects and Platforms in Digital Markets' (The Global Antitrust Institute Report on the Digital Economy, 2020) 3 <https://dx.doi.org/10.2139/ssrn.3733656> accessed 20 March 2023.
[38] Matt Turck, 'The Power of Data Network Effects' (4 January 2016) <https://mattturck.com/the-power-of-data-network-effects/> accessed 17 April 2016.
[39] Cremer, de Montjoye and Schweitzer (n 23) 2.
[40] Catherine Tucker, 'Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility' (2019) CPI Antitrust Chronicle 2, 3 <www.analysisgroup.com/globalassets/content/news_and_events/news/2019-tucker-online-advertising-and-antitrust.pdf> accessed 7 May 2023.
[41] For a more detailed analysis of this distinction see Peter Erik Blume, 'Data Protection and Privacy – Basic Concepts in a Changing World' (2010) 56 Scandinavian Studies in Law 151.

Since comprehensive data protection measures exist in the EU, it is questioned why there should be additional consideration for data protection under competition law. The OECD has argued that there is too much reliance placed on data protection regulations operating independently from competition law.[42] Competition authorities cannot expect data protection regulations to cover for the privacy harms that happen because of the inapplicability of existing competition principles to non-traditional markets. It can be argued that the extent to which consumers value data protection in services means that competition law should be considering the demand for it.[43]

Furthermore, the Court of Justice of the European Union (CJEU) has confirmed it is not significant if a regulation exists to govern a certain issue when deciding whether competition law can be applied to the issue as well.[44] As a result, it should be considered whether companies in the digital economy satisfy the value placed on privacy by consumers and the demand for data protection measures from them. If not, it should be determined if that can be attributed to their market power.[45] Furthermore, the EU Horizontal Merger Guidelines state that competition is negatively affected when a merger causes a noteworthy increase in market power. This is explicitly referred to as a company's ability 'to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation or otherwise influence parameters of competition'.[46] As such, the value which Big Data holds for companies in the digital economy and thus the protection of data could readily be considered as influencing parameters of competition.

Academics acknowledge that data protection and privacy are emerging as competition law concerns. For example, Ohlhausen and Okuliar note, 'privacy protection has emerged as a small, but rapidly expanding, dimension of competition'.[47] At this stage, there is no agreement on the nature of the relationship between data protection and competition law. This paper aims to offer guidance on how this should be conceptualised in the context of merger reviews.

F. Conclusion

With the importance of Big Data and its influence on companies operating within the digital economy established, it can be acknowledged the 'conventional hard line

[42] OECD, 'Consumer Data Rights and Competition' (Background Note, 12 June 2020) 26-29 <https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf> accessed 8 May 2023.
[43] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (University of Oslo Faculty of Law Legal Studies Research Paper Series No 2018-26, 2018) 8 <https://dx.doi.org/10.2139/ssrn.3232701> accessed 7 May 2023.
[44] C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603.
[45] Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n 43) 9.
[46] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (5 February 2004) OJ L31/03, para 8 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0205%2802%29> accessed 7 May 2023.
[47] Maureen Ohlhausen and Alexander Okuliar, 'Competition, Consumer Protection and the (Right) Approach to Privacy' (2015) 80(1) Antitrust Law Journal 121, 133.

between competition law and privacy may be softening'.[48] This section has asserted Big Data has important implications for the digital economy, specifically concerning competition law. Additionally, the features of the digital economy demonstrate why there should be a discussion of how competition law should be utilised most effectively in this area. Finally, this section explored how Big Data and data protection have emerged as important competition law concerns under EU law.

3. Guidance from Existing Case Law

A. Introduction

This section will explore issues that are present in both the general approach of the European Commission (the Commission) to merger reviews, and those which have arisen in specific cases concerning the digital economy. It will highlight why the current price-centric approach utilised by the Commission is not wholly appropriate for application to the digital economy and, specifically, to companies and mergers that involve Big Data. It will then draw on key points of interest from case law decided by the Commission. From this, a clearer picture will emerge as to the approach and analytical methods used by the Commission when processing merger reviews under competition law. Finally, a novel approach to the integration of data protection and competition law will be outlined in the approach of the German BKA in its recent proceedings against Facebook.

B. The Price Centric Approach

When conducting a merger review, competition authorities usually apply the Small, but Significant, Non-Transitory Increase in Price (SSNIP) test. This establishes whether the transaction is likely to cause an increase in price above accepted competitive levels within the relevant market.[49] This test has a price-centric focus, as price is a readily measurable and easily analysed factor of a proposed merger. In traditional markets, price-based calculations are effective. It can also be argued that when data features in a merger where the data itself is being bought or sold, a price-centric analytical tool may still be effective.[50] However, there have been legitimate questions raised as to its applicability to data-driven transactions. This has been of particular concern in zero-price markets where users are paying for goods or services with their personal data.[51]

[48] Maria Wasastjerna, 'The Implications of Big Data on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface' (2019) European Business Law Review 30(3) 337, 365.
[49] Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (Oxford University Press 2016) 117.
[50] Maria Wasastjerna, 'The Implications of Big Data on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface' (n 48) 352-353.
[51] Stucke and Grunes (n 49) 126.

It has been noted throughout the academic and policy debate that data-driven business strategies including mergers can raise competition concerns beyond price.[52] As such, there should be greater consideration for non-price competition factors. Furthermore, issues with the SSNIP test have questioned whether there should be less importance afforded to it. Instead, there should be an increased focus on identifying anticompetitive strategies that may be used by companies in the digital economy.[53] It has also been advised that in its current form the SSNIP test cannot apply to multi-sided markets[54] or to those which also operate a zero-price market. For example, in *Google Search (Shopping)* the SSNIP test was not applied because users were not paying a monetary price to access search services on Google's platform.[55] It is helpful to draw on the Commission's reasoning for why the SSNIP test is not applicable in cases where data is used as a form of payment as this could have a similar effect in merger reviews. It has also been confirmed by the General Court that the SSNIP test is not the only test at the Commission's disposal and using alternative approaches to analysis is not erroneous.[56] As a result, the Commission should use alternative approaches when reviewing mergers in the digital economy.

Due to the inapplicability of price-centric analytical tools, increasing attention has been paid at the effect a proposed merger has on non-price competition parameters like the degradation of privacy and quality.[57] Non-price competition considerations are not novel within a competitive analysis. However, with the rise of zero-price markets and the implications of Big Data and other notable features of digital markets, there is increasing concern about how competition authorities should favour non-price parameters in their analysis. It can be argued that consumers paying no monetary price leaves the tools used by competition authorities inappropriate from solely a mathematical standpoint.[58] The OECD has suggested that the current price-centric approach also does not consider the significance of innovation and the dynamic nature of the digital economy.[59] This leaves competition authorities with inappropriate tools to analyse proposed mergers.

C. Analysis of Previous Commission Decisions

Officially, the Commission upholds a separation of competition law and principles of data protection and privacy. However, this strict separation initially demonstrated in

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[52] Lisa Kimmel and Janis Kestenbaum, 'What's Up with WhatsApp?: A Transatlantic View on Privacy and Merger Enforcement in Digital Markets' (2014) 29(1) Antitrust 48, 53.
[53] Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the digital era' (*European Commission*, 2019) 46 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 17 April 2023.
[54] Dirk Auer and Nicolas Petit, 'Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy' (2015) 60(4) The Antitrust Bulletin 426, <https://doi.org/10.1177/0003603X15607155> accessed 5 May 2023.
[55] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444, para 245.
[56] Case T-699/14 *Topps Europe Ltd v European Commission* [2017] EU:T:2017:2, para 82
[57] Stucke and Grunes (n 49) 4.
[58] ibid 117.
[59] OECD, 'Dynamic Efficiencies in Merger Analysis' (OECD Policy Roundtables, 2007) DAF/COMP(2007)41 17 <www.oecd.org/daf/competition/mergers/40623561.pdf> accessed 7 May 2023.

the *Google/DoubleClick* case has since lost its prominence. While the Commission continues to officially promote a separation of the two frameworks, it could be argued that there is a hesitant acknowledgement that data protection and privacy concerns could play some role within mergers.

In the *Google/DoubleClick* merger, personal data was considered an asset within the transaction.[60] It was stated that any decision or conclusion made is without prejudice to any relevant obligations or regulations regarding data protection measures.[61] In the circumstances of this case, it was decided that no competitive advantage would be gained from the combination of the datasets of the companies.[62] However, this decision has been criticised for failing to recognise the implications of the merger in strengthening Google's position in the online advertising market.[63] This merger was also reviewed by the US Federal Trade Commission (FTC). In a dissenting opinion, Comissioner Harbour noted that in clearing the merger unconditionally 'neither the competition nor the privacy interests of consumers will have been adequately addressed'.[64] Despite calls for greater consideration of data protection and privacy within competition law, there is not support for this in the decision.

The second decision of interest is the *Facebook/WhatsApp* merger. In its analysis, the Commission has largely repeated what was stated in the *Google/DoubleClick* case. However, this case has been specifically criticised because the Commission did not examine the extent of personal data collection once the combination of the two company's datasets would take place.[65] Similarly, there was no analysis of any potential effects that could result on the 'free' side of the markets in question.[66] Given the importance of the multi-sided nature of markets in the digital economy, leaving this key feature out of the analysis could be erroneous. Nevertheless, the Commission justified its one-sided analytical approach by stating that '[a]ny privacy-related concerns flowing from the increased concentration of data within the control of

[60] *Google/DoubleClick* (Case COMP/m.4731) Commission Decision C(2008) 927, para 359.
[61] ibid, para 368.
[62] Joaquin Almunia, 'Competition and Personal Data Protection' (Privacy Platform event: Competition and Privacy in Markets of Data, Brussels, 26 November 2012) <file:///C:/Users/lw19cmal/Downloads/Speech_-_Competition_and_personal_data_protection__Commissioner_Joaqu_n_Almunia.pdf> accessed 7 May 2023.
[63] European Parliament, 'Challenges for Competition Policy in a Digitalized Economy' (Study for the ECON Committee, Directorate-General for Internal Policies, Economic and Monetary Affairs 2015) IP/A/ECON/2014-12 54 <www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU(2015)542235_EN.pdf> accessed 5 May 2023.
[64] 'Dissenting Statement of Commissioner Pamela Jones Harbour In the matter of Google/DoubleClick' (FTC File No 071-0170, 20 December 2007) <www.ftc.gov/os/caselist/0710170/071220statement.pdf> accessed 7 May 2023.
[65] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239, para 164.
[66] Maria Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (International Competition Law Series Volume 86, Wolters Kluwer 2020) 189.

Facebook as a result of the transaction do not fall within the scope of EU competition law'.[67]

This position of separation has been affirmed by the General Court in *Asnef-Equifax*[68] where it was noted that issues relating to personal data 'may be resolved on the basis of the relevant provisions governing data protection'.[69] These decisions demonstrate the initial hard separation of data protection and competition law promoted by both the Commission and the CJEU.

The *Facebook/WhatsApp* merger may be re-examined considering the Commission's subsequent decisions, and further action taken by the Commission and national competition bodies against Facebook after the merger was completed.[70] In its decision, the Commission did acknowledge privacy as a parameter of competition, and it also noted that consumers are valuing privacy to an increasing extent.[71] But it concluded that competition did not take place to a greater extent on the privacy features as parameters of competition.[72] However, after the merger was allowed, the merged entity began to combine the datasets from the two user bases, an action which was not made explicit to the Commission in the merger review proceedings.[73] It has been argued that the Commission should have assessed the privacy implications for users on the free side of the market in its initial competitive assessment.[74] In doing so, competition law would consider data protection within a merger review itself.

The *Microsoft/LinkedIn* merger highlights a shift emerging in the strict separation of data protection and competition law. Whilst the Commission continued to reiterate the separation of the scope of the two frameworks, it did acknowledge that privacy could be viewed as an element of the competitive assessment if it were considered an element of product quality.[75] Accordingly, the Commission has brought data protection and privacy concerns into the scope of competition law. Since the merger was allowed, albeit subject to conditions, it has not implemented analysis using privacy as a quality parameter. Nevertheless, this statement supports greater consideration of data protection within competition law. It can be argued that there was a more holistic analysis of competition concerns in this case. Thus, this decision

[67] European Commission, 'Mergers: Commission approves acquisition of WhatsApp by Facebook' (Daily News, 3 October 2014) MEX/14/1003 <https://ec.europa.eu/commission/presscorner/detail/en/MEX_14_1003> accessed 7 May 2023.
[68] Case C-238/05 *Asnef-Equifax Servicios de Informacion sobre Solvencia y Credito SL v Asociacion de Usuarios de Servicios Bancarios* [2006] ECR I-11125.
[69] ibid, para 63.
[70] For details and analysis of actions brought against Facebook following this merger see Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64(3) The Antitrust Bulletin 428.
[71] *Facebook/WhatsApp* (n 65) para 174.
[72] ibid.
[73] Kimmel and Kestenbaum (n 52) 51.
[74] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 130.
[75] European Commission, 'Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions' (Press Release, Brussels 6 December 2016) IP/16/4284 <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284> accessed 7 May 2023.

has been highlighted as being more 'in line with market realities'.[76] However, it was also stated that integration of datasets will only be governed by data protection rules which seems to continue to promote the official position of separation of the two frameworks.[77]

In the examination of these cases, it is clear the price-centric focus employed by the Commission avoids looking at how proposed mergers could potentially cause privacy harm to consumers and have anticompetitive effects.[78] The problem is most clear when the Commission fails to acknowledge the multi-sided nature of the markets in which the companies operate. This is compounded by the fact that the side often ignored is that in which price is not a relevant factor.

D. The German Facebook Case

The separation propagated by the Commission can be seen to blur when looking to the recent proceedings brought against Facebook by the German BKA. Whilst not a merger decision, it offers a pioneering approach to providing greater consideration for data protection within competition law. The case challenged Facebook's abuse of dominance in the German market for social networks. In its preliminary assessment the BKA found an abuse of dominance by Facebook through imposing unfair contractual terms on its users.[79] It should also be noted that the BKA applied German competition laws when arguing this case, as opposed to EU competition law.[80] Nevertheless, the reasoning of the court and the analysis provided remains relevant.
The key difference in the approach of the BKA and that of the Commission is the BKA's analysis of competitive effects on the zero-price side of the markets in question.[81] In merger decisions, the Commission has failed to provide meaningful analysis concerning the effect the proposed transaction would have for users on the free side of the market. Conversely, the BKA case offers support for the inapplicability of price-based analytical methods in competition law and demonstrates a move from the focus on price to that of quality-based competition parameters.[82] This was done by suggesting the harm to consumers was realised as a loss of control of data as opposed to an increase in price.[83] Furthermore, it can be seen to promote the idea of data as a source of market power.

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[76] Inge Graef, 'When Data Evolves into Market Power' in Martin Moore and Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford University Press 2018) 79.
[77] *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision C(2016) 8404, para 177.
[78] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 133.
[79] ibid 145.
[80] Proceedings were initiated under Article 19(1) Gesetz gegen Wettbewerbsbeschränkungen (German Competition Act), see Bundeskartellamt, 'Background Information in the Facebook Proceeding' (19 December 2017)
<www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=4> accessed 8 May 2023.
[81] Giulia Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook' (2018) 9(4) Journal of European Competition Law & Practice 213, 214.
[82] ibid, 218.
[83] Bundeskartellamt, 'Background Information in the Facebook Proceeding' (n 80) 4.

Despite criticisms that have been launched against this case, [84] it offers an interesting analytical perspective on how data protection and competition law should interact in the digital economy. It highlights the impact features of the digital economy, including network effects, have on competition and how this links to market power.[85] This case demonstrates an 'intellectual shift' in the extent to which data protection considerations are included in competition law.[86] It has been argued that doing so is now 'necessary'.[87] The data collection central to this case was deemed anticompetitive, and it was acknowledged that this had a negative impact on consumers' privacy. As such, the negative privacy effects or the lowering of data protection standards can be interpreted as consumer harm and a reduction of consumer welfare.[88] The analysis in this case is important in the context of the present discussion for two reasons. First, this case provides a strong level of support for greater consideration of data protection within competition law can be seen. Second, it demonstrates that competition authorities are willing to acknowledge new forms of anti-competitive practices which is helpful when attempting to extend this premise to merger reviews.

E. Conclusion

This section has demonstrated why Commission's current approach to merger decisions could be considered as inadequate in the digital economy. By outlining the price-centric approach from a theoretical perspective, this section has demonstrated why the current approach adopted by the Commission fails to comprehensively understand the impact of the merger on all aspect of the market in question. Following this discussion, the section has introduced the German Facebook case as a way to outline a new and pioneering approach to the integration of data protection principles within competition law. This case was argued to offer an example of why data protection should be given greater consideration in merger reviews. Despite its criticisms, the reasoning of the court and implications in broader policy and academic discussions remain especially important. These points will further inform the analysis of section four which aims to demonstrate how arguments which favour the strict separation of data protection and competition law are misguided.

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[84] See Torsten Korber, 'Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?' (2019) 4 Neue Zeitschrift Fur Kartellrecht 187; Pranvera Kellezi, 'Data Protection and Competition Law: Non-Compliance as Abuse of Dominant Position' (2019) sui.generis 343 <https://ssrn.com/abstract=3503860> accessed 7 May 2023.

[85] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 151.

[86] ibid, 155.

[87] Wolfgang Kerber and Karsten K Zolna, 'The German Facebook case: the law and economics of the relationship between competition and data protection law' (2022) 54 European Journal of Law and Economics 217, 244.

[88] ibid, 230.

4. Debunking the Separatist Argument

A. Introduction

With the emergence of Big Data and the increasing collection, processing, and analysis of personal data by companies as key elements of their business strategies, competition concerns have been brought to the forefront of the debate. The separatist argument refers to the notion that data protection should not be included in competition law. This section will demonstrate that this argument is misguided. Instead, there is scope within existing law for greater consideration of data protection within competition law partially due to overlapping objectives of the two frameworks. Furthermore, the increasing acknowledgement and acceptance of data as a source of market power create a concrete link between data protection and competition law in the digital economy. To this end, the separatist argument will be debunked, and greater consideration for data protection and privacy in merger reviews will be proposed.

B. The Separatist Argument

Some academics are heavily critical of any proposition that supports or promotes the integration of data protection regulations within competition law.[89] This separatist view argues that data protection and privacy concerns fall outside the scope of competition law. Proponents of this view such as Ezrachi highlight that data protection is considered under a separate regulatory regime for this reason.[90] It has been suggested by other supporters of this separatist view, such as Sokol and Comerford, that data is not actually a scarce resource, and therefore cannot constitute or create any competitive issues as it is readily available to companies that wish to access it.[91] As such, there is an implied assumption from commentators that support this separatist position that access to and collection of data is inexpensive and can be done with ease.[92] However, this view disregards the implications these practices have for creating economies of scale and scope, and creating barriers to entry. It also ignores the benefits that multi-sided platforms gain from both direct and indirect network effects.[93]

When considering data as a strategic factor in many multi-sided platforms' business models, it is difficult to argue that data-driven efficiencies should not be an important

[89] See Daniel Sokol and Roisin Comerford, 'Antitrust and Regulating Big Data' (2016) 23 George Mason Law Review 1129; Darren S Tucker and Hill B Wellford, 'Big Mistakes Regarding Big Data' (*The Antitrust Source*, December 2014) <https://ssrn.com/abstract=2549044> accessed 5 May 2023; Geoffrey Manne and Ben Sperry, 'The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework' (2015) 2 CPI Antitrust Chronicle <https://ssrn.com/abstract=2617685> accessed 5 May 2023.

[90] Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (Oxford Legal Studies Research Paper No 17, 2018) 18-19 <http://dx.doi.org/10.2139/ssrn.3191766> accessed 5 May 2023.

[91] Sokol and Comerford (n 89) 1136.

[92] Tucker and Wellford (n 89) 3.

[93] Nils-Peter Schepp and Achim Wambach, 'On Big Data and Its Relevance for Market Power Assessment' (2016) 7(2) Journal of European Competition Law & Practice 120, 121.

competitive concern, particularly in the digital economy. Nevertheless, economists continue to challenge the suggestion of broadening competition law to include non-economic factors like data protection and privacy. For example, it has been suggested that doing so could lead to price distortion and other unintended effects.[94] However, it can also be argued that non-price competition parameters are not new. They existed prior to any discussion about their application to or suitability for merger reviews concerning the digital economy. Instead, they are simply becoming increasingly important due to the features of the data-driven digital economy. There is pushback against recognising and implementing specific non-price parameters like quality and choice because, as Manne and Sperry argue, they usually can be reflected in price measurements and analysis to the same end.[95] Ultimately, this view is erroneous because when there is no price paid by consumers, it is not appropriate that non-price considerations like quality be pushed into analytical frameworks that are not wholly suited for them.

It could also be said that current data protection is sufficient. As such, there is no need to expand competition law to incorporate concerns which are already accounted for in other legislation. However, this view fails to recognise the implications of Big Data and features of the digital economy that have transformed the relationship between the two frameworks.[96] Furthermore, it has been argued that competition law largely applies to economic activity and aims to prevent economic harm.[97] Conversely, data protection laws may prevent economic harms, but these are not its primary concern. It can be said that the debate in this area is 'somewhat polarised'.[98] There is little room for compromise or balance between the two sides. Nevertheless, in practice, even supporters of separation are beginning to accept this is not wholly appropriate when applying the relevant principles to the digital economy. The separatist view can be argued as misguided and too deeply rooted in the past where different competition concerns are favoured, which are less relevant in the digital economy.

C. Common Objectives

The argument that data protection concerns should be afforded greater consideration within merger reviews can be supported by an analysis of common objectives of the two legal frameworks. This is an indicator of existing synergies between them. There is no current agreement as to whether competition policy should pursue aims and objectives that do not have an economic focus.[99] Academics point to different potential

[94] Cento Vejanovski, 'Counterfactual Tests in Competition Law' (2010) 4 Competition Law Journal 1 <https://doi.org/10.2139/ssrn.1714706> accessed 7 May 2023.
[95] Manne and Sperry (n 89) 3.
[96] Wolfgang Kerber and Karsten K Zolna, 'The German Facebook case: the law and economics of the relationship between competition and data protection law' (2022) 54 European Journal of Law and Economics 217, 244.
[97] Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29(2) Oxford Journal of Legal Studies 267, 299.
[98] Maria Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 125.
[99] For literature on the broader discussion of the goals of competition law see Daniel Zimmer (ed), *The Goals of Competition Law* (Edgar Elgar 2012) and Dina L Waked, 'Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices' (2014) 38 Seattle University Law Review 945.

goals of competition law to justify their arguments.[100] There is also no 'prescribed single unifying objective for competition law in the EU Treaties'.[101] This permits discussion of the different ways in which the goals and objectives of competition law may be considered. This is acutely true when applying the existing law to an area with novel issues like the digital economy. Furthermore, EU competition law has been noted as 'multidimensional' meaning that it has the scope to pursue different policy objectives and goals.[102] As such, there is arguably existing scope for data protection to be considered under competition law.

It has been argued that both data protection and competition law share a common objective for promoting the welfare of the individual.[103] Some academics suggest a broader scope of competition law in which welfare applies beyond solely economic welfare and general objectives can have additional focuses beyond the economic ones.[104] Furthermore, the GDPR explicitly promotes the protection of the individual in its requirement for consent in the processing of personal data.[105] When considering data protection within competition law it is important to question how consent may be given considering the market power, and the general influence of platforms offering services to consumers.[106] It has also been suggested by some scholars that privacy, data protection and competition law within the EU share the objectives of upholding transparency and consumer control.[107] To this end, it is plausible that competition law and data protection regulations may need to overlap in their application to ensure effective enforcement in the digital economy. This has been argued as necessary due to the impact a reduction of privacy protections could have on consumer welfare.[108] The variety of understandings as to how these frameworks promote the welfare of the individual permit an argument that the shared or overlapping objectives mean data protection should be afforded greater consideration within competition law.

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[100] For a comprehensive discussion on the difficulty of defining the goals of competition law, particularly in the digital economy, see Miriam Caroline Buiten, 'Exploitative abuses in digital markets: between competition law and data protection law' (2021) 9(2) Journal of Antitrust Enforcement 270, 287

[101] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 84.

[102] ibid.

[103] Francisco Costa-Cabral and Orla Lynskey, 'Family ties: the interaction between data protection and competition in EU law' (2017) 54(1) Common Market Law Review 11, 21.

[104] Frank Maier-Rigaud, 'On the Normative Foundations of Competition Law: Efficiency, Political Freedom and the Freedom to Compete' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 132.

[105] GDPR (n 4), Article 6.

[106] Klaus Wiedmann, 'Data Protection and Competition Law Enforcement in the Digital Economy: Why a Coherent and Consistent Approach is Necessary' (2021) 52 Institute for Innovation and Competition 915, 928.

[107] Lisa Kimmel and Janis Kestenbaum, 'What's Up with WhatsApp?: A Transatlantic View on Privacy and Merger Enforcement in Digital Markets' (2014) 29(1) Antitrust 48, 48.

[108] Erika M Douglas, 'Digital Crossroads: The Intersection of Competition Law and Data Privacy' (Temple University Legal Studies Research Paper No 2021-40, 2021) 62 <https://dx.doi.org/10.2139/ssrn.3880737> accessed 7 May 2023.

The objective of fairness is also useful in demonstrating why there should be greater consideration for data protection within competition law. It is particularly important in the context of the digital economy because typical commercial practice often intersects at the boundaries of the two frameworks.[109] Support for the idea of ensuring fairness in the digital economy regarding competition concerns has been voiced by the European Commission. It was stated that issues arising from activities of digital platforms cannot be addressed solely by competition policy and that 'additional rules may be needed to ensure…fairness'.[110] The suggestion from the Commission that there would be a benefit from utilising additional rules or protection in this area directly brings data protection into consideration to perform this function.

It should be noted that fairness has not been established as an official objective by the Commission, nor by the CJEU.[111] Nevertheless, there has been increasing acknowledgement of the importance of broadening the scope of competition law. For example, Ezrachi highlights how fairness can be seen as a moral norm that features throughout EU competition rules.[112] Critics suggest that there may be difficulties in quantifying fairness as an objective of competition law.[113] Despite this, fairness has been described as an 'inherent objective or outcome of competition enforcement'.[114] Therefore, instead of discounting fairness as an overlap, there should be further consideration for methods of quantification. Additionally, data protection in the EU has been described as a 'conclusive system of checks and balances which ensures a lawful processing of personal data'.[115] There is also explicit mention of fairness of data processing in Article 5(1)(a) of the GDPR.[116] As such, fairness can be seen to link the two frameworks. This, in turn, supports an argument of greater consideration for data protection within merger review.

Acknowledging the wider objectives of competition law as in line with those of data protection demonstrates why data protection should be considered in merger reviews. The frameworks have been said to share 'family ties' which means that, despite their differences, they do share notable commonalities.[117] The overlap explored above highlights that the two frameworks converge in certain situations, and this should not be denied or ignored as this overlap is particularly relevant in the digital economy.

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[109] Inge Graef, Damian Clifford and Peggy Vackle, 'Fairness and enforcement: bridging competition, data protection and consumer law' (2018) 8(3) International Data Privacy Law 200, 206.
[110] European Commission, 'Shaping Europe's digital future' (Communication, 19 February 2020) 5 <https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf> accessed 7 May 2023.
[111] Konstantinos Stylianou and Marios Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' (2022) 42(4) Legal Studies 620, 642.
[112] Ezrachi (n 90) 15.
[113] Lewis Crofts, 'Vestager's 'fairness' mantra rattles through EU competition law' (*MLex Market Insight,* 15 November 2016) <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/vestagers-fairness-mantra-rattles-through-eu-competition-law> accessed 17 April 2023.
[114] Graef, Clifford and Vackle (n 108) 205.
[115] Herke Kranenborg, 'Article 8 – Protection of Personal Data' in Steve Peers et al. (eds) *EU Charter of Fundamental Rights: A Commentary* (1st edition, Hart/Beck 2014) 229.
[116] GDPR (n 4).
[117] Costa-Cabral and Lynskey (n 102) 13.

D. Data as a Source of Market Power

Market power is a 'fundamental concept for competition law and policy',[118] and this is particularly true for merger reviews under EU competition law. Recent interest in this topic from the OECD demonstrates how understanding it in the context of Big Data and the digital economy is challenging.

Market power is usually linked to market shares, but in the digital economy this provides a restricted understanding of the power actually held by companies.[119] In economic theory, market power is understood as the capacity to increase prices beyond the competitive price level.[120] However, the characteristics and features of the digital economy, some of which were explored in section two, result in consumer harm being 'likely to manifest itself as privacy harm'.[121] This can be seen as causing the market power held by platform businesses in the digital economy to be linked to their business structures and access to data. This is then compounded by the presence of strong network effects and other features. When building a picture of the changing understanding of market power in the digital economy, it is important to appreciate the value that data holds for businesses. Furthermore, it has been demonstrated that the way digital platforms handle data protection and the level of data protection provided to consumers is driven by market power.[122]

Outside of mergers that are specifically focused within the digital economy, there may be a variety of considerations for how market power is valued or assessed. But as market power is strongly linked to the value of data, it seems evident there should be further consideration for data protection in the application of competition law to the digital economy, specifically concerning mergers. This has been noted by the OECD, which drew on the Commission's wording in the *Google/Fitbit* decision. It explicitly mentioned the impact of Google gaining access to a large amount of additional personal data through its acquisition of Fitbit.[123] Considering this, the OECD has suggested there may be a significant impact of access to data for market power and has suggested several criteria in which data provides value to digital platforms like Google.[124] This review highlights situations where market power is influenced by the value of data and explains that data protection could be an area where anticompetitive behaviour is engaged in.[125] This acknowledgement by the OECD demonstrates that data, specifically Big Data, can be considered a source of market power for platform

[118] OECD, 'Market Power in the Digital Economy and Competition Policy' (*OECD.org*, 22 June 2022) <https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm> accessed 2 May 2023.
[119] OECD, 'The Evolving Concept of Market Power in the Digital Economy' (OECD Competition Policy Roundtable Background Note, 2022) 21 <www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf> accessed 20 March 2023.
[120] Simon Bishop and Mike Walker, *The Economics of EC Competition Law* (2nd edn Sweet & Maxwell 2002) 3.
[121] Miriam Caroline Buiten, 'Exploitative abuses in digital markets: between competition law and data protection law' (2021) 9(2) Journal of Antitrust Enforcement 270, 287.
[122] Jeffrey Prince and Scott Wallsten, 'Empirical Evidence of the Value of Privacy' (2021) 12(8) Journal of European Competition Law & Practice 648, 654.
[123] *Google/Fitbit* (Case M.9660) Commission Decision C(2020) 9105, para 449-455.
[124] OECD, 'The Evolving Concept of Market Power in the Digital Economy' (n 118) 14-15.
[125] ibid, 15.

businesses in the digital economy. It has also been argued that if a company gains greater market power from data because of a merger, it will be able to reinforce its position even more by collecting additional personal data following the merger itself.[126] As such, there is an argument forming within the policy discussion that there should be greater consideration for data protection and privacy in merger reviews conducted under EU competition law.

The joint report by the French and German national competition authorities proposes several ways in which data can be understood as a source of market power. While the report acknowelges that the variety of data collected by a company may drive competitiveness in the market, it nevertheless demonstrates that the processing of data on such a large scale could create large barriers to entry.[127] As such, it is necessary to consider if data collection and processing should be considered as a manifestation of market power.[128] By doing so, the competitive significance of data will be acknowledged, particularly within merger reviews.

In the analysis produced by the Commission in the *Apple/Shazam* merger, the difficulties associated with the typical assessment of market power by ascertaining the market shares held by a company were highlighted.[129] It should be noted that despite the Commission raising an issue with calculating market power in the digital economy, there was no further detail provided on this issue.[130] However, it was also later confirmed by the Commission itself in its press release following the merger review that data is a key input in the digital economy and carries a lot of importance.[131] It can be inferred from this decision that the Commission does acknowledge data as a source of market power.[132] The Commission's recognition of this is an important move for opening the debate, and could have implications for future decisions in merger reviews. However, to appropriately analyse merger activity regarding this new element, changes would have to be made in the way in which with respect to how future cases are to be decided.

It can also be acknowledged that there is no issue with 'bigness' of a company when looking at violations of competition law. [133] Firms are permitted to have market power. The key concern to competition authorities is how that power is used. The issue raised

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[126] Maria Wasastjerna, 'The Implications of Big Data on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface' (n 48) 345.
[127] Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (10 May 2016) 26 <www.autoritedelaconcurrence.fr/sites/default/files/2021-11/big_data_papier.pdf> accessed 3 May 2023.
[128] Marc Bourreau, Alexandre de Streel and Inge Graef, 'Big data and competition policy: Market power, personalised pricing and advertising' (Centre on Regulation in Europe, 16 February 2017) 37-38. <https://ssrn.com/abstract=2920301> accessed 8 May 2023.
[129] *Apple/Shazam* (Case M.8788) Commission Decision C(2018) 5748, para 162.
[130] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 132
[131] European Commission, 'Mergers: Commission clears Apple's acquisition of Shazam' (Press release, Brussels 2018) IP/18/5662 <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662> accessed 3 May 2023.
[132] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 132.
[133] Sokol and Comerford (n 89) 1130.

by some proponents of an 'integrationist' approach to data protection and competition law is that the type of market power that can be exerted over consumers and competitors is different in digital markets as compared to that found in traditional markets.[134] This is why there should be greater consideration for data protection in merger reviews. To this end, the Furman Report outlines a new concept of strategic market status.[135] It explains this as an ability 'to exercise market power over a gateway or bottleneck in a digital market, where [those companies] control others' market access'.[136] In line with this understanding of a new concept of market power, another competition report by the German competition authority has called for explicit Commission guidance on assessing market power in the digital economy.[137]

E. Conclusion

This section has outlined different arguments that debunk the separatist argument maintaining data protection and privacy concerns should stay separate from competition law within the EU. Furthermore, it has detailed how the separatist argument is misguided. Claims that data protection and privacy concerns are beyond the scope of competition law and have no place for consideration within a merger review are erroneous. This section highlighted common objectives of competition law and data protection regulations, and subsequently demonstrated how data should be viewed as a source of market power. Drawing on guidance from case law and policy discussion, it has been demonstrated that data can and should be considered within merger reviews to protect and maintain competition principles. Doing so will ensure competition law can apply to the digital economy as it does traditional markets, and account for changes in the structure and features of data-driven business strategies.

5. Providing Greater Consideration for Data Protection in EU Competition Law in Practice

A. Introduction

Thus far, concrete arguments have been articulated that demonstrate why EU competition law should give data protection greater consideration within the merger review process. This section will explore two ways through which this could be achieved. It will consider areas of potential future research and suggest how to build on the findings and conclusions reached in this paper. The premise behind privacy as a non-price parameter - whether this be as quality, choice, innovation, or any other form - is that in the digital economy there is a significant impact on privacy, much

[134] Viktoria Robertson, 'Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy' in Heinz D Kurz and others (eds), *The Routledge Handbook of Smart Technologies: An Economic and Social Perspective* (Routledge 2022) 11 <https://ssrn.com/abstract=3631002> accessed 3 May 2023.

[135] Jason Furman et al, 'Unlocking Digital Competition – Report of the Digital Competition Expert Panel' (2019) 41 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 7 May 2023.

[136] ibid, 55.

[137] Robertson (n 133) 11.

more so than on price. This is largely due to zero price markets. As a result, a merger where privacy and data protection concerns are not included in the assessment in some way can prove harmful to consumers and competition within a market.[138] Furthermore, utilising data protection as a normative benchmark in competition law provides meaningful guidance to competition authorities for how to incorporate these concerns into the existing competition law framework.

B. Privacy as a Quality Parameter

Quality has long been acknowledged as a 'key non-price consideration'[139] not only within a competitive assessment but also when acting as an aid in consumer choice and driving innovation within markets.[140] Competition law aims to promote consumer welfare and does so by ensuring a market can be appropriately competitive, allowing consumers to benefit from lower prices, more choice, and higher quality products and services.[141] Therefore, it can be argued that conduct which may affect a parameter that is not price, such as quality, will reduce consumer welfare also and can be considered anticompetitive.[142] This makes it an important factor for understanding competition in digital markets, principally where goods and services are often free. When considering zero-price markets, it has been argued that there is no longer a way to consider quality as a competition parameter alongside price. It now stands on its own as it has more direct links to the level of privacy protection offered to users.[143] Despite the Commission not actually blocking a merger based on quality concerns, it has been confirmed as a significant competitive parameter when a product is free.[144] Furthermore, the OECD notes there is explicit mention of quality as a basis for analysis within the existing legal framework for merger reviews.[145] It has thus been argued that a reduction in quality should be placed on equal footing with that of a price increase regarding its competitive effects.[146] This highlights the established prevalence of this argument within academic and policy discussion and offers a starting point for future research.

The privacy as a quality parameter of competition argument was first proposed to the US Federal Trade Commission (FTC) by Peter Swire during the assessment of the

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[138] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (University of Oslo Faculty of Law Legal Studies Research Paper Series No 2018-26, 2018) 4 <https://dx.doi.org/10.2139/ssrn.3232701> accessed 7 May 2023.
[139] Jose Thomas Llanos, 'A close look on privacy protection as a non-price parameter of competition' (2019) 15 European Competition Journal 225, 226 and OECD, 'The Role and Measurement of Quality in Competition Analysis' (Competition Law & Policy OECD 2013) DAF/COMP(2013)17 <www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf> accessed 5 May 2023.
[140] Samson Esayas, 'Privacy-as-a-quality parameter: some reflections on the scepticism' (Faculty of Law Stockholm University Research Paper No 43, 2017) 37 <https://dx.doi.org/10.2139/ssrn.3075239> accessed 7 May 2023.
[141] Case C-209/10 *Post Danmark AS v Konkurranceradet* [2012] EU:C:2012:172 para 22.
[142] Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n 137) 4.
[143] ibid, 8.
[144] *Microsoft/Yahoo! Search Business* (Case COMP/M.5727) Commission Decision D/2118 C(2010) 1077, para 101.
[145] OECD, 'The Role and Measurement of Quality in Competition Analysis' (n 138) 83.
[146] Maria Wasastjerna, 'The Implications of Big Data on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface' (n 48) 355.

Google/DoubleClick merger. Swire argued that the merger would lead to a 'less privacy-protective structure' which harms consumers, particularly those with preferences for higher levels of privacy protection. [147] In the context of this decision, Swire pointed out how Google's 'deep' information and DoubleClick's 'broad' information about users would make an ill-advised combination as it would lead to a 'significant reduction in the quality of the search product' for individuals with higher privacy protection preferences. [148]

It can be implied that the Commission has considered privacy as a quality parameter within a merger review in previous decisions. However, there has not been a case that has relied on this premise in its final decision. It could be said that the Commission agreed with the concept but is yet to utilise it in practice.[149] For example, in the *Facebook/WhatsApp* merger review the Commission did note privacy as a key parameter of competition but it failed to meaningfully analyse how the merger itself would actually impact privacy as a competitive parameter.[150] It also confirmed the approaches taken in previous merger reviews, stating that 'any privacy-related concerns flowing from the increased concentration of data within the control of Facebook because of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU Data Protection rules'.[151] Nevertheless, it could be said the Commission indirectly highlighted that some actions may be taken to reduce privacy, for example collecting more data causing some users to use an alternative service.[152]

Academics have supported the proposal for a reduction of privacy protections to constitute a reduction in quality as a competition parameter.[153] This support stems from points raised by Swire that argue a collection or processing of too much consumer information should be considered a degradation of privacy, and in turn, quality.[154]As such, data protection should be given greater consideration in merger reviews under EU competition law. It has been suggested that when WhatsApp changed its privacy policy following its acquisition by Facebook, this reduced the quality of privacy offered to users.[155] It could be argued that this conduct is a consequence of increased market power following the merger, reinforcing the idea

[147] Peter Swire, 'Submitted Testimony to the Federal Trade Commission Behavioural Advertising Town Hall' (18 October 2007) 4 <www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/testimony_peterswire_/Testimony_peterswire_en.pdf> accessed 7 May 2023.
[148] ibid 4.
[149] Wasastjerna, 'The Implications of Big Data on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface' (n 48) 357-358.
[150] Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n 137) 14.
[151] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 para 164.
[152] Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n 137) 15.
[153] Howard Shelanski, 'Information, Innovation, and Competition Policy for the Internet' (2013) 161 University of Pennsylvania Law Review 1663, 1691-1692.
[154] Peter Swire, 'Submitted Testimony to the Federal Trade Commission Behavioural Advertising Town Hall' (18 October 2007) 5 <www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/testimony_peterswire_/Testimony_peterswire_en.pdf> accessed 7 May 2023.
[155] Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n 137) 16.

that data does act as a source of market power.[156] Furthermore, it can also be argued the *Microsoft/LinkedIn* merger strengthens the idea of privacy as a quality parameter. In this case, the reduction in quality is demonstrated by a loss of control over data.[157] Understanding this as a loss of control or loss of choice offers an alternative method of implementation for the privacy as a quality parameter concept that does not necessarily require quantification of quality.[158] This is a helpful clarification as issues surrounding quantification of privacy are often cited as criticisms of this theory.[159] Ultimately, there is strong policy support for this theory and emergence of support, intended or not, can also be seen in merger cases from the Commission. Without explicit reliance on privacy as a quality parameter in analysis of a decision, further research and clarification as to some of the issues raised concerning implementation is necessary. Nevertheless, this concept offers meaningful guidance as to how data protection should be given greater consideration within competition law.

C. Data Protection as a Normative Benchmark

It has been suggested that data protection could provide normative guidance to competition law and merger reviews.[160] Using data protection regulations in this manner would not alter the focus of competition law and would not draw it away from having an economic focus or detract from an emphasis on consumer welfare.[161] The GDPR is a comprehensive and well-developed framework of law. However, it is not able to tackle the competition issues that arise concerning Big Data.[162] As such, there should be greater consideration for data protection within competition law specifically in its application to the digital economy.

It has been argued that data protection laws in the EU cannot effectively regulate privacy concerns arising in the digital economy.[163] It has been suggested a broader approach is necessary. This broader approach would take influence from other EU laws and policies, including that of competition law as it relates to and shapes consumer markets.[164] This approach is supported by the EDPS which is a strong advocate for greater consideration of data protection concerns within competition law in general.[165]

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156 ibid.
157 *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision C(2016) 8404, para 350.
158 Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n 137) 22.
159 See OECD, 'The Role and Measurement of Quality in Competition Analysis' (n 138) 79.
160 Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: the intersection between data protection and competition in EU Law' (2017) 54(1) Common Market Law Review 11, 24-26, 32-33.
161 ibid, 33.
162 Wolfgang Kerber and Karsten K Zolna, 'The German Facebook case: the law and economics of the relationship between competition and data protection law' (2022) 54 European Journal of Law and Economics 217, 232-233.
163 Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4 International Data Privacy Law 250, 256.
164 Maria Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 177.
165 EDPS 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (Preliminary Opinion of the EDPS, 2014) 16 <https://edps.europa.eu/sites/default/files/publication/14-03-26_competitition_law_big_data_en.pdf> accessed 9 May 2023.

By using data protection considerations and regulations to provide normative guidance for competition law and anticompetitive conduct, the importance of data protection as a central right is validated. The use of privacy and data protection regulations in this way can be implied from more recent competition enforcement. For example, it was noted by Margrethe Vestager that '[t]he right to decide what happens with our personal information is one of our most fundamental rights as individuals'.[166] As such, using data protection regulations to guide competition law is helpful as it ensures competition law does not violate fundamental rights enshrined under EU law. One of the justifications for why data protection and privacy deserve greater consideration, particularly under competition law, is that they hold a privileged and protected position as they are specifically considered in the EU Charter of Fundamental Rights.[167] It has been argued that this is particularly true when considering the importance of data within the digital economy.[168] As such, some have questioned whether the Commission's lack of consideration for data protection in previous merger review decisions was erroneous.[169] It could be said that by dismissing these concerns entirely in cases like *Google/DoubleClick* and *Facebook/WhatsApp* the Commission failed to respect and promote the EU Charter.

There is also support for data protection as a normative benchmark which can be found within EU case law. In 2013, the Court of Justice (ECJ) ruled that competition law and regulation can employ the objectives and goals of other rules in its assessment of potentially anticompetitive actions.[170] This argument has been produced when dealing with abuses of dominance under Article 102 of the Treaty on the Functioning of the European Union.[171] However, there is no reason this argument should not have further applicability to merger reviews. Furthermore, it can be seen from the German Facebook case that data protection and privacy regulations can be normative benchmarks for competition law in the digital economy. The BKA considered data protection as a standard off which to confirm an abuse under competition law, specifically looking at the implications of market power and special responsibility.[172] As the actions constituted a violation of German competition law, there is scope for further discussion or policy debate in this area. However, some commentators disagree with the arguments in favour of adopting the conclusion from the BKA decision into the EU legislative realm. They argue that the German case was improperly decided and thus reliance on it would not be appropriate as competition

[166] Margrethe Vestager, 'What Competition Can Do – And What It Can't' (Chilling Competition Conference, Brussels, 25 October 2017) <https://ec.europa.eu/newsroom/comp/items/606329/en> accessed 7 May 2023.
[167] Costa-Cabral and Lynskey (n 159) 14.
[168] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 178.
[169] ibid.
[170] Case C32/11 *Allianz Hungaria Biztosito Zrt v Gazdasagi Versenyhivatal* [2013] EU:C:2013:160.
[171] Beatriz Kira, Vikram Sinha and Sharmadha Srinivasan, 'Regulating digital ecosystems: bridging the gap between competition policy and data protection' (2021) 30 Industrial and Corporate Change 1337, 1354 <https://doi.org/10.1093/icc/dtab053> accessed 5 May 2023.
[172] Inge Graef and Sean Van Berlo, 'Towards Smarter Regulation in the Areas of Competition, Data Protection and Consumer Law: Why Greater Power Should Come with Greater Responsibility (2021) 12 European Journal of Risk Regulation 674, 680.

law was utilised beyond appropriate bounds.[173] Nevertheless, other commentators believe that the German case does have applicability beyond the national law, and there is scope for the EU to take a similar approach to cases of a similar nature in the future.[174] To this end, there is support for this concept in both academic and policy discussion as well as emerging national decisional practice. It remains up to the Commission to lead the way concerning how or whether to implement this idea.

D. Future Directions

It has been argued that competition law was 'written for an offline world'.[175] The data protection concerns raised by Big Data and the dynamics of the digital economy have triggered 'a reconsideration of fundamental assumptions of competition law'.[176] To this end, there is important research and development that should take place to facilitate competition law being able to appropriately address the issues that are arising within the digital economy.

With the recent OECD publications on the assessment of market power in the digital economy,[177] the Commission should explore how it wishes to proceed with regard to evaluating the appropriateness of its approach to market power. Furthermore, increasing academic discussion citing privacy as a quality parameter of competition, and acceptance of this by the Commission in previous decisions suggests there should be serious consideration of how to implement this in merger analysis.

The EU holds a unique position regarding potential for future development in this area. It has been suggested that there is scope for national competition authorities to take different approaches to the overlap and interactions of data protection and privacy concerns with competition law.[178] There is also an argument to be made that 'better coordination between enforcement authorities is necessary to adequately protect consumers'.[179] As such, there needs to be a broader acknowledgement of the impacts of Big Data on competition and the Commission needs to address how it proposes to move forward. This will provide clarity to Member States as well as to companies and consumers.

The Digital Markets Act (DMA) may have interesting implications for large platform companies that operate within the digital economy by imposing new obligations on

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[173] Roger Van den Bergh and Franziska Weber, 'The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?' (2021) 44(1) World Competition 29, 31.
[174] Giulia Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook' (2018) 9(4) Journal of European Competition Law & Practice 213, 213.
[175] Wasastjerna, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* (n 66) 233.
[176] Schneider (n 173) 225.
[177] OECD, 'The Evolving Concept of Market Power in the Digital Economy' (OECD Competition Policy Roundtable Background Note, 2022) <www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf> accessed 20 March 2023.
[178] Inge Graef, Damian Clifford and Peggy Vackle, 'Fairness and enforcement: bridging competition, data protection and consumer law' (2018) 8(3) International Data Privacy Law 200, 201.
[179] ibid.

'gatekeepers'.[180] The DMA defines which companies will be designated as gatekeepers, but it can be assumed that companies such as Google and Meta will fall under this classification. It has been suggested there is scope for evolution and the DMA could help realise a more integrated approach to data protection and competition law principles, specifically applying to digital platform 'gatekeepers'.[181] The DMA has entered into force on 1 November 2022 and its obligations have applied since 2 May 2023.[182] Consequently, at the time of writing, there has not been sufficient time to comment on the implications of this act for the issues discussed throught this paper. Neverthless, future research should focus on providing an overview as to how the DMA contributes to this discussion.

Another prominent point concerning the future direction of this discussion has been raised by the EDPS. It has advocated for a unified European regulatory body that would oversee activities in the digital economy.[183] Regulation of this type would require cooperation from several different policy areas including at least data protection, competition law, and consumer law.[184] The discussion within this paper has omitted concerns beyond that of data protection and competition law for clarity. However, other policy areas overlap in this area that have implications for this debate. Nevertheless, exploring the possibility of providing greater consideration to data protection and privacy within competition law, is likely to extend the debate to consider the interaction between other policy areas and if or how other developments should take place.

E. Conclusion

This section has highlighted two analytical methods in which data protection and privacy may be afforded greater consideration within EU competition law. Privacy as a quality parameter is particularly relevant for merger reviews. It is also becoming increasingly acknowledged as the favoured justification for moving away from relying solely on price-based analysis. Furthermore, utilising data protection laws as a normative benchmark within competition law offers a solution to problems within both frameworks. It tackles the inability of data protection to address market concerns within the digital economy and adds a data protection element to competition law as promoted by some scholars. The section also explored the opportunities for further research and identified areas which should be considered in policy discussions in the future. From this analysis, it has been demonstrated there are existing methods and

[180] For an overview of the Digital Markets Act and the obligations contained within see Fiona Scott Morton and Cristina Caffarra, 'The European Commission Digital Markets Act: a translation' (*VoxEU*, 5 January 2021) <https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation> accessed 7 May 2023.
[181] Kerber and Zolna (n 161) 240-242.
[182] Tambiama Andre Madiega, 'Digital Markets Act: Application timeline' (*European Parliament Think Tank*, 30 November 2022) <www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)739226> accessed 6 May 2023.
[183] Giovanni Buttarelli, 'It's not the end of the world as we know it' (*European Data Protection Supervisor*, 7 December 2017) <https://edps.europa.eu/press-publications/press-news/blog/it%E2%80%99s-not-end-world-we-know-it_en> accessed 7 May 2023.
[184] ibid.

possibilities for the development of additional ways for data protection and privacy to be given greater consideration by competition law.

6. Conclusion

In conclusion, it has been demonstrated there should be greater consideration for privacy and data protection within merger reviews under EU competition law in the digital economy. This has been achieved firstly through the exploration of existing case law guidance from the Commission and beyond. Additionally, by analysing emerging common objectives and themes that intersect data protection and competition law. It cannot be denied there are hurdles which must be overcome. Additional research and policy discussion must be undertaken for this to be realised. However, this paper demonstrates the normative premise of the argument withstands criticism that privacy and data protection considerations are not an issue for competition law in the digital economy.

The discussion provided has centred on the implications of Big Data. The key characteristics of Big Data that mean platform companies are utilising the value of Big Data to create competitive advantages. This can be seen when companies within the digital economy merge and gain access to new and larger datasets. Furthermore, features of the digital economy require greater consideration within a competitive assessment, as they mean markets function differently, and consequently competition law should apply differently in these areas. As such, it has been argued data protection has emerged as a concern for competition law in the digital economy.

The third section outlined the current price-centric approach used by the Commission and discussed cases that highlight its current approach to merger reviews in the digital economy. As case law has developed, a blurring of the separation of data protection and competition law has taken place. The German Facebook case then offered an example of a decision affording data protection greater consideration within German national competition law. The reasoning of the German FCO particularly is interesting to examine within the scope of this discussion and offers a novel approach to the question posed within this paper.

Next, this paper analysed the separatist argument and highlighted how it falls short of acknowledging the common objectives of data protection and competition law. The objectives of promotion of the welfare of the individual and fairness help highlight why data protection should be considered within competition law. Additionally, this section considered data as a source of market power and demonstrated how in the digital economy, market power can be and is conceptualised differently than traditional markets. As such, there should be changes to competition law to fully acknowledge these issues.

Finally, section five outlined two approaches that should be considered in realising greater consideration for data protection within EU competition law. Conceptualising privacy as a quality parameter makes data protection an important factor in

competition law and rightfully acknowledges the competitive significance of Big Data. Furthermore, using data protection as a normative benchmark within competition law tackles the issue of existing data protection not being wholly appropriate for protecting consumer interests in the digital economy. However, further research and discussion in this area is necessary.

It cannot be questioned that Big Data has provided positive opportunities and increased innovation in the digital economy. However, this paper has demonstrated that Big Data does have a competitive significance and, as a result, in the digital economy there should be greater consideration for data protection and privacy in merger reviews conducted under EU competition law.

Legal Responsibility and Accountability of Qatar and FIFA for Migrant Workers' Rights: A Focus on the 2022 FIFA World Cup

FINN O'CARROLL

Abstract

Since FIFA rewarded Qatar with the hosting rights for the 2022 FIFA World Cup, migrant workers engaged in World Cup related projects and services, have had their human right violated. This research aims to ascertain whether Qatar and FIFA can be held judicially accountable for contributing to these violations. This will be achieved through highlighting the human right violations in Qatar and signifying how they correspond to Qatar and FIFAs human right obligations. Subsequently, the effectiveness of these obligations and the actors particular legal systems will be analysed, leading to an investigation of new accountability measures within international human rights law. It will be argued that although both Qatar and FIFA should be held accountable for their roles in the human right violations of migrant workers engaged in World Cup related projects and services, the current responsibility and accountability frameworks are ineffective in construing judicial accountability for the actors. It will be further discussed that, despite the current system's inadequacy, the proposed legally binding instrument under UNHRC Resolution 26/9 has the potential to enforce accountability upon FIFA. It will therefore be concluded that the best route for migrant workers to seek legal redress is through FIFA under the Swiss courts, when this instrument is eventually established, understood in how it operates, and when Switzerland agrees to be bound by it. Ultimately, however, Qatar cannot be held accountable, as the identified shared international responsibility framework comes down to their agreement to be bound, which henceforward is not likely.

1. Introduction

Since being awarded the rights to host the 2022 Fédération internationale de football association (FIFA) World Cup on December the 10th, 2010, Qatar's migrant population has increased to service the construction sector of the games. Between December 2010 to April 2022, the state's population has increased from 1.63 million people in December 2010 to 2.67 million in December 2018.[1] However, in its increase, the human right violations of migrant workers, which were previously reported by Human Right Organisations (HROs) within the state, have exacerbated. These violations have taken place through all phases of the migrant life cycle, and in major part due to the Kafala system, a sponsorship system which is the 'means by which unscrupulous employers

[1] Planning and Statistics Authority, 'Monthly figures on Total Population' (*Planning and Statistics Authority*, 2023) available <https://www.psa.gov.qa/en/statistics1/StatisticsSite/pages/population.aspx> accessed 1 Dec 2022.

in Qatar exert control over their foreign workforce'.[2] This leaves migrant workers in vulnerable positions, not only regarding their abused wages and working conditions, but also when engaging the accountability of the actors involved. Despite Qatar and FIFAs ascertainable roles in perpetuating these violations, their existing obligations and the overall legal systems are inadequate in ensuring the actors responsibility and accountability. This research aims to highlight and subsequently address this issue, seeking to answer the main research question: Can Qatar and FIFA be held judicially accountable for the human right violations of migrant workers engaged in World Cup related projects and services?

The main aims of the research are to establish how migrant workers can best seek legal redress for their violations and determine the most effective ways the actors can be held accountable under existing and proposed international, domestic, and regional law. The sub questions to supplement this are: what are the violations suffered by migrant workers engaged in the World Cup related projects and services? Are Qatar and FIFA responsible for these human right violations? How effective are the existing human rights frameworks and systems in holding these actors judicially accountable? Are there any effective propositions to construe judicial accountability going forward?

In answering these questions, a doctrinal methodological approach is used, by conducting critical analysis on a range of secondary and primary sources, detailing journal articles, human rights reports, domestic cases, along with migrant worker related human rights frameworks. Additionally, a comparative methodology is used, as the propositions of a legal resolution and a conceptual international law framework will be compared regarding their effectiveness. The cut off point for collating these sources was the 1st of April 2023.

This topics purpose is apparent, as by analysing the effectiveness of existing and proposed legal responsibility and accountability frameworks, this thesis can contribute to the discussion of the best possible routes to ensure that unratified states like Qatar and non-state actors like FIFA abide by their human rights obligations more attentively, while allowing migrant workers and their families to seek adequate legal redress. Furthermore, it should be noted that this thesis covers recommendations from two prominent legal scholars, Antoine Duval, and Daniela Heerdt. In their research agenda on FIFA and Human Rights, they signified that 'it is essential that…scholarly attention be dedicated to investigating and inventing legal mechanisms to ensure that FIFA accounts before independent judges or arbitrators for the negative human rights effects of its decisions or practices'.[3] They stressed that too little work was done in 'assessing their comparative viability'.[4] These recommendations will be fulfilled in section 5. However, the object of this thesis also concerns Qatar, to signify the

[2] Amnesty International, 'Qatar: Labour reform unfinished and compensation still owed as World Cup looms' (*Amnesty International,* 20 October 2022) available <https://www.amnesty.org/en/latest/news/2022/10/qatar-labour-reform-unfinished-and-compensation-still-owed-as-world-cup-looms/> accessed 1 Dec 2022.

[3] Antoine Duval and Daniela Heerdt, 'FIFA and human rights: A research agenda' (2020) 25(1) Tilburg Law Review: Journal on international and comparative law 10.

[4] ibid 7.

differences of obligations between state and non-state actors, and the differences in holding these actors accountable.
To answer the main research question, the objective of this research is fourfold. First, section 2 lays out the human right obligations relevant to migrant workers for Qatar and FIFA. Following this, section 3 contextualises the situation of migrant workers at the 2022 World Cup in Qatar, by identifying the alleged human right violations and reforms reported from HROs and linking them to Qatar's international obligations. To continue, in section 4, the linkage of conduct between the actors and the violations will be ascertained. This will lead into analysis on the effectiveness of the outlined human rights obligations and other mechanisms within the individual legal systems in holding Qatar and FIFA responsible and accountable, using prominent case law in the area. Finally, establishing accountability going forward is the objective in section 5. This is through the Resolution 26/9 and the shared international responsibility framework, which will be analysed regarding their effectiveness and viability, fulfilling the legal scholar's recommendations, and informed by Griffin A. Clark and Raquel Regueiro, among others.

To conclude, this research will argue that Qatar and FIFAs obligations and the current legal systems are inadequate in holding the actors effectively responsible and judicially accountable for the human right violations of migrant workers engaged in World Cup related projects and services. However, it also recognises that the proposed legally binding instrument under the United Nations High Commissioner for Refugees (UNHRC) Resolution 26/9 could conceivably establish accountability for FIFA under the Swiss courts in the future, although this requires time for its establishment, understanding and acceptance. Meanwhile, it can be conceived that the shared international responsibility framework could lead to Qatar being accountable. However, considering Qatar's non-ratification of the optional protocols and the International Criminal Court (ICC), it does not seem likely that they will ratify the framework. Therefore, in answering the main research question, it is conceivable for only FIFA to be held judicially accountable, albeit this will be in the future.

2. *Human Rights Responsibilities for Qatar and FIFA regarding Migrant Workers*

In tackling the substantial analysis of this research, the migrant worker relevant human rights responsibilities and obligations, for Qatar and FIFA must be outlined. Both actors have obligations under differing judicial systems, to prevent the human right abuses of migrant workers and provide remedy when these abuses occur.[5] Qatar have international obligations under the United Nations (UN), the core human rights treaties, and the International Labour Organisation (ILO), alongside regional obligations within the Arab Charter. Meanwhile, FIFA has soft law obligations under the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the Organization for Economic Cooperation and Development (OECD), alongside due diligence obligations under Swiss Law. The deeper analysis into the effectiveness of

[5] Amnesty International, *Predictable and Preventable: Why FIFA and Qatar should remedy abuses behind the 2022 World Cup* (2022) 6.

these obligations will be addressed thereafter in section 4. To begin with, Qatar's international obligations will be outlined.

A. Human Right Obligations for Qatar Regarding Migrant Workers

As a state actor, Qatar is obligated to protect migrant workers under international human rights law. This is found in the International Bill of Rights, which features the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[6] The ICCPR and the ICESCR make up two of the designated nine core human right treaties. There are five of concern towards migrant workers, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which has not been ratified by Qatar.[7] These treaties have had the general principles of non-discrimination and due diligence built into them. The UDHR is monitored by charter-based bodies including the Human Rights Council (HRC) and the Universal Periodic Review (UPR).[8] Meanwhile, the ICCPR and ICESCR are monitored by the bodies of the Human Rights Committee (HRC), and the Committee on Economic, Social, and Cultural Rights (CESCR).[9]

There are many obligations that Qatar is accountable to under its membership within the UN since 1971. Firstly, the UDHR, which was adopted by the General Assembly of the UN in 1948.[10] Although it is not legally binding, the UDHR has paved the way for the treaties and instruments detailed above.[11] For example, in regard to migrant workers, Article 1 addresses that 'all human beings are born free and equal in dignity and rights'.[12] Meanwhile, Article 2 recognises that 'everyone is entitled to all the rights and freedoms'.[13] This declaration therefore addresses the universality of human rights, embodying that everyone everywhere, including migrant workers, has the same human rights. In 2005, there was a World Summit in New York which reaffirmed the UDHR, recognising that 'all human rights are universal, indivisible, interrelated,

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[6] Organization for Security and Co-operation in Europe, 'International Legal Framework for the Protection of Migrant Workers' (2006) available <https://www.osce.org/files/f/documents/b/a/19246.pdf> accessed 3 April 2023, 25-26.

[7] ibid, 26.

[8] United Nations Office of the High Commissioner, 'Instruments & mechanisms' available <https://www.ohchr.org/en/instruments-and-mechanisms#:~:text=There%20are%20two%20types%20of,core%20international%20human%20rights%20treaties. > accessed 1 January 2023.

[9] Georgetown Law Library, 'Human Rights Law Research Guide' (*Georgetown Law*)available < https://guides.ll.georgetown.edu/c.php?g=273364&p=6066284#Universal%20Declaration%20of%20Human%20Rights > accessed 3 March 2023.

[10] Amnesty International, 'Universal Declaration of Human Rights' (*Amnesty International*) available <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/ > accessed 3 May 2023.

[11] United Nations, 'Universal Declaration of Human Rights' available https://www.un.org/en/about-us/universal-declaration-of-human-rights > accessed 6 January 2023

[12] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 1.

[13] ibid, article 2.

interdependent and mutually reinforcing'.[14] Furthermore, Qatar is obligated under the UNGPs, to protect from the abuses caused by corporations on its territory. Principle 1 of the UNGP's addresses that 'states must protect against human rights abuse within their territory and/ or jurisdiction by third parties'.[15]

Furthermore, in 2018, Qatar accessed to the binding treaties of the ICCPR and the ICESCR.[16] In its accession, Qatar did not ratify the treaties optional protocol.[17] Furthermore, while Qatar has not ratified the ICRMW, their articles will be outlined in order to recognise their disregard for the articles in this significant treaty. The rights, influenced by the UDHR, are as follows. First, they protect freedom of movement and the right to leave the country as in Article 12 (1) and (2) of the ICCPR and Article 8 (1) of the ICRMW.[18] Second, they protect equal access with nationals to the courts as in Article 18 (1) of the ICRMW.[19] Moving on, they explicitly oppose the confiscation of passports, under Article 21 of the ICRMW.[20] Additionally, they prohibit forced labour under Article 8 of the ICCPR.[21] Furthermore, Article 7 of the ICESCR recognises the right of everyone to enjoy just and favourable conditions of work, including fair wages and a decent living for individuals.[22] Finally, Article 8 of the ICESCR promotes the right of everyone to form trade unions and the right to strike.[23]

There is an abundance of migrant worker related ILO conventions. However, Qatar has only ratified six of them. In relation to migrant workers, three of them are of utmost significance; the Forced Labour Convention (29), the Abolition of Forced Labour Convention (105) and the Labour Inspection Convention (81). Under Article 1 of the Forced Labour Convention, Qatar have been required since its ratification in 1998 to 'suppress the use of forced or compulsory labour in all its forms within the shortest possible period'.[24] Under Article 2, it addresses that forced labour 'shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[25] Additionally, since 2007, Article 2 of the Abolition of Forced Labour convention, has made it necessary for Qatar to 'take effective measures to secure the immediate and complete

[14] United Nations General Assembly, 'World Summit Outcome' (14-16 September 2005) A/RES/60/1, Provision 121. 27.
[15] United Nations Guiding Principles on Business and Human Rights (adopted 16 June 2011) UNHRC Res 17/4, Principle 1.
[16] OHCR, 'UN Treaty Body Database: Qatar' available < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=140&Lang=EN > accessed 3 May 2023.
[17] Ibid.
[18] Organization for Security and Co-operation in Europe, 'International Legal Framework for the Protection of Migrant Workers' (2006) available <https://www.osce.org/files/f/documents/b/a/19246.pdf> accessed 3 April 2023, 25-26.
[19] ibid.
[20] ibid.
[21] ibid.
[22] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Article 7.
[23] ibid, Article 8.
[24] International Labour Organisation (ILO) Forced Labour Convention 1930 (No.29), Article 1
[25] ibid, Article 2.

abolition of forced or compulsory labour'.[26] This includes but not limited to, 'using labour for purposes of economic development'.[27] Finally, under Article 1 of the Labour Inspection Convention, Qatar has been required since 1976 to 'maintain a system of labour inspection in industrial workplaces'.[28]

Finally, Qatar has obligations under regional human rights law. The Council of the League of Arab States adopted the Arab Charter on Human Rights in 2004, and Qatar has been a state party to it since 2009. The charter sets out by affirming the provisions within the International Bill of Human Rights.[29] The International Bill is majorly significant, encompassing the previous major human right treaties, being the UDHR, ICCPR and the ICESCR.[30] Additionally, regarding migrant workers, Article 10 within the Charter prohibits forced labour and all forms of slavery and Article 26 states that everyone has the rights to freedom of movement, underlining that Qatar are similarly obligated regionally to migrant workers as they are internationally. [31]

B. Human Right Obligations for FIFA Regarding Migrant Workers

To continue, FIFA's human right obligations will be defined. As a non-state actor, FIFA does not have any binding international human right obligations. Nevertheless, in February of 2016, FIFA incorporated human rights provision 3 into its statutes, addressing that they are 'committed to respecting all internationally recognised human rights.'[32] This consists of the International Bill of Human Rights and the ILO conventions.[33] The Court of Arbitration for Sport (CAS), may provide an avenue of judicial accountability to discuss FIFA's statute 3 under international law.[34]

Principally, FIFA's human right obligations derive from soft law instruments. For this thesis, attention will be primarily given to the UNGPs and the OECD, due to their esteem and status that has made them predominantly recognised over other soft law measures status internationally. The UNGPs were unanimously endorsed by the UNHRC in June of 2011.[35] They are 'the basic policies and processes that enterprises need to implement if they are to know and show they respect human rights in

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[26] International Labour Organisation (ILO) Abolition of Forced Labour Convention 1957 (No.105) Article 2.
[27] ibid, Article 1.
[28] International Labour Organisation (ILO) Labour Inspection Convention 1947 (No.81) Article 1.
[29] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2018) 12 International Human Rights Reports 893 (Arab Charter) 1.
[30] United Nations Human Rights Office of the High Commissioner, 'International Bill of Human Rights' available < https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights > accessed 20 November 2023.
[31] Arab Charter (n 29).
[32] FIFA Statutes (May 2021), Provision 3. 11.
[33] Brendan Schwab, 'Explainer: Human rights and the 2022 FIFA World Cup in Qatar'(*UNSW Australian Human Rights Institute*) available <https://www.humanrights.unsw.edu.au/research/commentary/explainer-human-rights-fifa-world-cup-qatar > accessed 4 January 2023.
[34] Antoine Duval and Daniela Heerdt, 'FIFA and human rights: A research agenda' (2020) 25(1) Tilburg Law Review: Journal on international and comparative law 1, 8.
[35] John Ruggie, '"FOR THE GAME. FOR THE WORLD." FIFA and Human Rights' Corporate Responsibility Initiative Report. No. 68 (Cambridge, MA: Harvard Kennedy School 2016) 11.

practice'.[36] FIFA have a soft law obligation of due diligence, as Principle 17 of the UNGPs states that 'business enterprises should carry out human rights due diligence',[37] which 'should cover adverse human rights impacts that the business enterprise may cause or contribute to'.[38] Meanwhile, Principle 22 of the UNGPs states 'when business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation.'[39] The provisions outlined in the UNGPs were built on the Protect, Respect and Remedy framework,[40] and were evidently created with the foundations of existing hard law in mind by John Ruggie. In 2016, it was Ruggie who published a report on how the UNGPs could be implemented by FIFA after the organisation asked him to develop recommendations for embedding human rights across its operations.[41] Significantly, he held that the UNGPs are applicable to FIFA, as while FIFA is not an enterprise, it conducts 'significant commercial activities on a global scale'.[42] The recommendations from Ruggie have initiated change within FIFA, as they published their Human Rights Policy in May of 2017, identifying their commitment to the UNGPs. Significantly, Ruggie outlined that 'FIFA is not responsible for all human rights abuses by…any country in which its events are staged. But it is responsible for its own involvement with such risks'.[43] Furthermore, he recognises that 'the UNGPs make it clear that responsibility stems from being linked to the risk'.[44]

FIFA also has obligations under Swiss Law, as it is based in Switzerland.[45] As a duty bearer, the companies under the Swiss jurisdiction are obliged to the provenance of international treaties. One of these core duties is due diligence. Under Article 55 of the Code of Obligations, 'an employer is liable for the damage caused by his employees…unless he proves that he took all due care to avoid a damage of this type'.[46] FIFA therefore may have an obligation to take due care when it uses its leverage in awarding the games to Qatar.

Finally, FIFA has obligations under the OECD Guidelines for Multinational Enterprises (2011), as Switzerland is a state adhering to the OECD Declaration on International Investment and Multinational Enterprises.[47] This has mandated

[36] ibid 5.
[37] United Nations Guiding Principles on Business and Human Rights (16 June 2011) UNHRC Res 17/4, Principle 17.
[38] ibid Principle 17.
[39] ibid Principle 22.
[40] John Ruggie, '"FOR THE GAME. FOR THE WORLD." FIFA and Human Rights' Corporate Responsibility Initiative Report. No. 68. (Cambridge, MA: Harvard Kennedy School 2016) 12.
[41] ibid 4.
[42] ibid 5.
[43] ibid 20.
[44] ibid 20.
[45] Simon Rice, 'What is FIFA, how much is it worth – and who votes for the president?' (*Independent,* 29 May 2015) available < https://www.independent.co.uk/sport/football/news/what-is-fifa-how-much-is-it-worth-and-who-votes-for-the-president-10281482.html > accessed 6 February 2023.
[46] Swiss Code of Obligations (as amended by 220 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code), Article 55.
[47] National Action Plans on Business and Human Rights, 'OECD National Contact Points' available < https://globalnaps.org/issue/oecd-national-contact-points-

Switzerland to set up a National Contact Point (NCP).[48] This is a mechanism to allow the mediation of issues surrounding human rights.[49] Among other things, this recognises that business enterprises under states must 'carry out human rights due diligence as appropriate'.[50] If they have failed to do this, victims can hold FIFA accountable under the NCP mechanism.

C. Summary

This section has appropriately outlined part of the most significant migrant worker related human right obligations that the actors of Qatar and FIFA are subjected to. Qatar has submitted itself to oblige by various international and regional human rights law relevant to migrant workers. However, it has not yet ratified the optional protocol to the treaties or the ICRMW. On the other hand, FIFA has soft law and Swiss law obligations of due diligence. The specific articles within these obligations will be succinctly mentioned in the following section, where it will be used to contextualise the violations of migrant workers engaged in Qatar. Thereafter, these obligations will be analysed regarding their effectiveness in section 4. These two descriptive parts will thereby converge and stimulate the main analysis of this thesis.

3. The Situation of Migrant Workers in preparation for the 2022 FIFA World Cup in Qatar

In order to analyse the responsibility and accountability frameworks towards Qatar and FIFA, attention must be given to the allegations of human right violations of migrant workers engaged in World Cup related projects and services. Firstly, the Kafala system will be overviewed alongside its reforms. Subsequently, the alleged current and past abuses of migrant workers within the migrant life cycle along with reforms proposed to combat these abuses will be detailed. The evidencing of these abuses will be drawn on reports from Human Rights Organisations (HROs) and these findings will be analysed correspondingly to the legislative framework of Qatar's labour laws, and the international human rights framework set out in section 2. Therefore, this section situates the judicial analysis within the wider context. To begin with, an overview of the Kafala system is required.

A. Kafala System

At the heart of all abuses against migrant workers engaged in World Cup related projects and services is the Kafala system, which as already introduced, is a sponsorship system which is the 'means by which unscrupulous employers in Qatar exert control over their foreign workforce'.[51] This permeates throughout all stages of

ncps/#:~:text=The%20OECD%20Guidelines%20for%20Multinational,in%20or%20from%20these%20states. > accessed 4 March 2023.

[48] ibid.

[49] OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 3.

[50] ibid 31.

[51] Amnesty International, 'Qatar: Labour reform unfinished and compensation still owed as World Cup looms' (*Amnesty International*, 20 October 2022) available <https://www.amnesty.org/en/latest/news/2022/10/qatar-labour-reform-unfinished-and-compensation-still-owed-as-world-cup-looms/> accessed 1 Dec 2022.

the migrant life cycle, creating a deeply imbalanced relationship between workers and their Kafeel (sponsor). As a result of the 22nd edition of the FIFA World Cup, the influx of migrant workers has exacerbated its inherently abusive nature. To host the tournament, the construction of seven new stadiums, the refurbishment of an eighth and the additional infrastructure to service the tournament was promised, totalling an estimated £220 billion.[52] When Qatar began to service this new infrastructure, as a country principally reliant on migrant workers, they sought even more workers from communities in South Asia, Southeast Asia, and East Africa.[53] As a result, the state's population increased from 1.63 million people in December 2010 to 2.67 million in December 2018.[54] Among which were two million migrant workers who made up 95 percent of the labour workforce.[55] Therefore, the fast-ascending population of workers have been opened to the exploitation of their Kafeel, due to Qatar winning the World Cup bid.

The new Kafala law was enacted under Law No. 4 of 2009, 1 year before Qatar won the rights to host the games. However, after the reviews by HROs into the Kafala system were undertaken, Law No. 21 of 2015 was introduced, amending the previous Kafala law, in an attempt to transition to a contract-based system.[56] However, the initial construction for the World Cup benefited from this abusive system, as HROs had not uncovered the truth of labour abuses in Qatar. Furthermore, the system remains in part, due to its provocations of other issues within the migrant workers lifecycle, including within the recruitment phase.

B. Recruitment Phase

The migration life cycle begins with their recruitment. One of the alleged human rights issues within this phase in Qatar is the imposition of recruitment fees onto migrant workers. While recruitment fees are prohibited under Article 33 of Qatar's Labour Law,[57] as the HRW have alleged, the Qatar labour law 'does nothing to restrict Qatar based recruiting agencies or employers from working with recruiting agencies abroad that charge such fees'.[58] The ILO recognises the problems this causes, highlighting that companies in Qatar circumvent local labour laws as 'contractors and subcontractors

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[52] Andrew Zimbalist, 'World Cup economics: Qatar's record spending is unlikely to pay off' (*Sportico* November 10, 2022) available < https://www.sportico.com/business/finance/2022/world-cup-economics-qatar-record-spending-1234694134/> accessed 1 Dec 2022.

[53] Amnesty International, *Predictable and Preventable: Why FIFA and Qatar should remedy abuses behind the 2022 World Cup* (2022) 6.

[54] Qatar Ministry of Development, 'Planning and Statistics, Monthly figures on total population' available <https://www.psa.gov.qa/en/statistics1/StatisticsSite/pages/population.aspx > accessed 1 Dec 2022.

[55] Boundless, 'Migrant Worker Controversy Behind the Scenes of Qatar's World Cup' (*Boundless,* 30 November 2022) available <https://www.boundless.com/blog/qatar-world-cup-migrant-workers/ > accessed 2 Dec 2022.

[56] Amnesty International, *New Name, Old System? Qatar's New Employment Law and Abuse of Migrant Workers* (2016) 4.

[57] Qatar Labour Law No (14) of 2004, Article 116.

[58] John Holmes, 'How can we work without wages? Salary abuses facing migrant workers ahead of Qatar's FIFA World Cup 2022' (*Human Rights Watch*, 24 August 2020) available <https://www.hrw.org/report/2020/08/24/how-can-we-work-without-wages/salary-abuses-facing-migrant-workers-ahead-qatars#_ftn36 > accessed 1 Dec 2022.

outsource recruitment costs to private recruitment agencies in origin countries'.[59] Furthermore, while the Qatar government deflects blame onto recruitment agencies abroad, they directly benefit from the fees, as signified by an estimated $17 million to $34 million being transferred per year to Qatar from Nepal.[60] These fees contribute to debt bondage, which is where individuals are forced to work to pay off their debts. This is prohibited under Article 2 of the ILO's Forced Labour Convention.[61] Migrant workers arrive indebted in Qatar, having paid on average between $693 to $2,613 in recruitment fees to secure work there.[62] This indebtedness leads to the exacerbation of forced labour, as workers struggle to pay back their debts from the outset.[63]

C. Deployment Phase

The exploitation of migrant workers allegedly continues in their deployment, through wage abuses. Article 66 of the Qatari Labour Law outlines that workers who are employed on an annual or monthly basis must be paid at least once every month.[64] However, this is consistently violated, as signified by complaints from employees within Bin Omran Trading and Contracting (BOTC).[65] The HRW spoke to four BOTC employees, who stated that wages for their co-workers and themselves had been delayed by two months in some cases and five months in others,[66] violating Article 66 of the Qatari Labour Law. Additionally, memos sent by the employers were reviewed in the report, where despite the delaying of wages, the employees were asked to keep working, or they would face further wage deductions.[67] This is evidently forced labour under the ILO's Forced Labour Convention.[68] Therefore, as employers in Qatar are violating its own Labour Law and International Law standards, Qatar is not fulfilling its human right responsibilities. Furthermore, the monthly salary of just 1,000 Qatari riyals (around USD 275) introduced in 2021,[69] is still insufficient according to HRW. As outlined by HRW, Qatar is required under the ICESCR to ensure migrant workers 'have a decent living for themselves and their families'.[70] When considering the debt

[59] Ray Jureidini, 'Ways forward in recruitment of low-skilled migrant workers in the Asia-Arab States corridor' (ILO White Paper 2016), 8.
[60] ILO, 'Issue paper: Fair recruitment in international labour migration between Asia and the Gulf Cooperation Council countries'(2015), 4.
[61] International Labour Organisation (ILO) Forced Labour Convention 1930 (No.29) Article 2.
[62] John Holmes, 'How can we work without wages? Salary abuses facing migrant workers ahead of Qatar's FIFA World Cup 2022' Human Rights Watch (*Human Rights Watch,* 24 August 2020) available <https://www.hrw.org/report/2020/08/24/how-can-we-work-without-wages/salary-abuses-facing-migrant-workers-ahead-qatars#_ftn36> accessed 1 Dec 2022.
[63] ibid.
[64] Qatar Law No. (1) of 2015 Amending Provisions of the Labour Law Promulgated by Law No. (14) of 2004. Article 66.
[65] 'Qatar: Wage Abuses by Firm in World Cup Leadup' (*Human Rights Watch*, 3 March 2022) available <https://www.hrw.org/news/2022/03/03/qatar-wage-abuses-firm-world-cup-leadup> accessed 1 Dec 2022.
[66] ibid.
[67] ibid.
[68] International Labour Organisation (ILO) Forced Labour Convention 1930 (No.29).
[69] John Holmes, 'How can we work without wages? Salary abuses facing migrant workers ahead of Qatar's FIFA World Cup 2022' (*Human Rights Watch*, 24 August 2020) available <https://www.hrw.org/report/2020/08/24/how-can-we-work-without-wages/salary-abuses-facing-migrant-workers-ahead-qatars#_ftn36> accessed 1 Dec 2022.
[70] ibid.

incurred by migrant workers in the recruitment and deployment phase, this right is not being fulfilled by Qatar, as the minimum wage is not sufficient to ensure a 'decent living' to help with the abuses they face.[71]

These wage injustices persist despite the introduction of Law No. 1 in 2015.[72] This law changed Article 66 of the Labour Law, and resulted in the introduction of the Wage Protection System, an electronic system which monitors the payment of workers wages and imposes sanctions for non-compliance.[73] Furthermore, the Worker's Support and Insurance Fund (WSIF) was established in 2019 to ensure workers were paid unclaimed wages when companies failed to or closed down.[74] According to an ILO progress report as of September 2022, the WSIF has compensated over 320 million of unpaid wages.[75] However, migrant workers still fall victim to their employers as signified in the BOTC case above. This is seen further through a HRW report, where between January 19 and May 2020, all 93 migrant workers interviewed reported some form of wage abuse by their 60 different employers.[76] This indicates that even after reform, companies in Qatar are still committing wage abuses, illustrating that Qatar has not acted sufficiently to rectify this.

D. Employment Phase

During employment, there are two major migrant worker related human right violations. Firstly, the working conditions. Employers continue to violate the Qatari Labour Law by forcing their employees to work in the heat. As temperatures exceed 37.7°C for five months out of the year,[77] there is a concern worker fatalities are directly caused by heat stress. Qatar's Supreme Committee has stated that only 9 of the 11 worker fatalities linked to infrastructure projects were attributed to respiratory failure.[78] However, according to Pradhan in a 2019 article in the cardiology, this is not the truth. He identified that 'most of the workers are in the age range (of) 25–35 years and are most likely very healthy as they were accepted for this temporary work

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[71] ibid.

[72] Qatar Law No. (1) of 2015 Amending Provisions of the Labour Law Promulgated by Law No. (14) of 2004.

[73]'Qatar: Wage Abuses by Firm in World Cup Leadup' (*Human Rights Watch*, 3 March 2022) available <https://www.hrw.org/news/2022/03/03/qatar-wage-abuses-firm-world-cup-leadup> accessed 1 Dec 2022.

[74] ibid.

[75] ILO, 'Progress report on the technical cooperation programme between the Government of Qatar and the ILO' (December 2021).

[76] John Holmes, 'How can we work without wages? Salary abuses facing migrant workers ahead of Qatar's FIFA World Cup 2022' (*Human Rights Watch*, 24 August 2020) online: https://www.hrw.org/report/2020/08/24/how-can-we-work-without-wages/salary-abuses-facing-migrant-workers-ahead-qatars#_ftn36 accessed> accessed 1 Dec 2022.

[77] Tom Dart, 'How many migrant workers have died in Qatar? What we know about the human cost of the 2022 World Cup', (*The Guardian*, 27 November 2022), available <https://www.theguardian.com/football/2022/nov/27/qatar-deaths-how-many-migrant-workers-died-world-cup-number-toll >accessed 5 December 2022.

[78] Annie Kelly, Niamh McIntyre and Pete Pattisson, 'Revealed: hundreds of migrant workers dying of heat stress in Qatar each year' (*The Guardian*, 2 October 2019), available <https://www.theguardian.com/global-development/2019/oct/02/revealed-hundreds-of-migrant-workers-dying-of-heat-stress-in-qatar-each-year > accessed 5 December 2022.

migration'.[79] He went on to conclude that 'as many as 200 of the 571 cardiovascular deaths of the Nepali workers during 2009-17 could have been prevented if effective heat protection measures had been implemented'.[80]

This raises questions concerning the death toll in Qatar, as Qatar have claimed 37 deaths among construction sector workers between 2014 and 2020.[81] However, as this discounts death by heat stress, the extent of the fatalities must be more profound. The Guardians report, which estimated 6,500 deaths between 2010 and 2020, has been criticised for not 'differentiating between migrant workers and the general migrant population'.[82] Despite this, when considering Pradhan's conclusions, it is more conceivable than what the Qatari authorities are currently portraying. Furthermore, the authorities only included the construction and renovation sites of the eight stadiums,[83] which represents only two percent of the workers employed in the construction industry in Qatar.[84] This has led to a large amount of migrant workers deaths being discounted. Therefore, Qatar has not portrayed the reality of migrant worker fatalities. Nevertheless, Qatar has failed to follow its ICESCR obligations, by violating migrant workers rights of favourable conditions of work.[85]

Finally, within the employment phases, migrant workers have had their freedom of association taken away. Freedom of association refers to the right to of everyone to form and join trade unions.[86] This is verifiable and not alleged, as under Article 116 of the Qatar Labour Law, the right of freedom of association 'shall be confined to the Qatari workers'.[87] As migrant workers do not have the same laws as nationals the equal access with nationals to the courts, as in Article 18 (1) of the ICRMW,[88] and the

[79] Bandana Pradhan and others, 'Heat Stress Impacts on Cardiac Mortality in Nepali Migrant Workers in Qatar' (2019) 143(1) Cardiology 37, 47 .
[80] ibid.
[81] Pete Pattison and Niamh McIntyre, 'Revealed: 6,500 migrant workers have died in Qatar since World Cup awarded' (*The Guardian*, 23 February 2021) available https://www.theguardian.com/global-development/2021/feb/23/revealed-migrant-worker-deaths-qatar-fifa-world-cup-2022 accessed 4 February 2023.
[82] International Labour Organisation, 'One is too many: The collection and analysis of data on occupational injuries in Qatar' (November, 2021) 9.
[83] Gary Dagorn and Irish Derœux, 'World Cup 2022: The difficulty with estimating the number of deaths on Qatar construction sites' (*Le Monde*, 15 November 2022) available < https://www.lemonde.fr/en/les-decodeurs/article/2022/11/15/world-cup-2022-the-difficulty-with-estimating-the-number-of-deaths-on-qatar-construction-sites_6004375_8.html> accessed 4 February 2023.
[84] ibid.
[85] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Article 7.
[86] European Union agency for Fundamental Rights, 'EU Charter of Fundamental Rights' available < https://fra.europa.eu/en/eu-charter/article/12-freedom-assembly-and-association#:~:text=Everyone%20has%20the%20right%20to,of%20his%20or%20her%20interests. > accessed 20 November 2023.
[87] Qatar Labour Law No (14) of 2004. Article 116.
[88] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Article 18(1).

right of everyone to form trade unions, under Article 8 of the ICESCR,[89] are undermined.

E. Return Phase

The end of the migration life cycle comes upon return. Until eventual reform in 2018, migrant workers were compounded by the requirement of obtaining their employer's permission to access exit permits under the 2009 Sponsorship Law.[90] Therefore, if workers were not admitted exit permits before 2018, they were involuntarily under forced labour. Furthermore, this violated the workers right to freedom of movement under Article 12 of the ICCPR.[91] Additionally, in cooperation with the ILO in October 2018, Qatar attempted to 'remove restrictions on workers' ability to change employer and exit the country'.[92] They removed the powers of employers in issuing 'exit permits' under Law No. 13 of 2018.[93] However, employers can still request exit permits for up to five percent of their workforce.[94] Furthermore, in taking eight years to reform the exit permit system, many migrant workers have become trapped in Qatar. This may signal to employers that it may be justified for them to commit more human right abuses, such as confiscating passports.

Qatar issuing of Law No. 21 in 2015 took effect on the 13th of December 2016. This sought to prevent passport confiscation. However, under Article 8, companies are still allowed to hold passports if the worker requests this in writing.[95] This is not an adequate safeguard for migrant workers, given the disproportionate level of remaining influence the Kafala system has; employers may use this as a loophole,[96] enforcing forced labour. This is reflected by Amnesty International, stating that 'it will be very hard to affirm whether employees who have asked their employer to retain their passport did so freely.'[97] Therefore, despite its abolishment, the Kafala system

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[89] International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Article 8.

[90] Amnesty International, *New Name, Old System? Qatar's New Employment Law and Abuse of Migrant Workers* (2016).

[91] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 12.

[92] Amnesty International, 'Qatar/UN: Agreement to tackle migrant labour abuse offers path to reform' (*Amnesty International*, 27 October 2022) available < https://www.amnesty.org/en/latest/press-release/2017/10/qatar-un-agreement-to-tackle-migrant-labour-abuse-offers-path-to-reform/> accessed 20 November 2022.

[93] Amnesty International, 'Qatar: Partial abolition of 'exit permit' lifts travel restrictions for most migrant workers' (*Amnesty International*, 5 September 2018), available https://www.amnesty.org/en/latest/press-release/2018/09/qatar-exit-system-reform-first-step/#:~:text=However%2C%20employers%20can%20still%20request,yet%20covered%20by%20the%20reform. accessed 4 January 2023.

[94] ibid.

[95] Qatar Law No. 21 of 2015, Regulating the Entry, Exit, and Residence of Expatriates, Article 8(3).

[96] Amnesty International, 'Qatar: Partial abolition of 'exit permit' lifts travel restrictions for most migrant workers' (*Amnesty International*, 5 September 2018) available < https://www.amnesty.org/en/latest/press-release/2018/09/qatar-exit-system-reform-first-step/#:~:text=However%2C%20employers%20can%20still%20request,yet%20covered%20by%20the%20reform. > accessed 4 January 2023.

[97] Amnesty International, *New Name, Old System? Qatar's New Employment Law and Abuse of Migrant Workers* (2016).

still empowers employers, allowing them to find loopholes in the law and abuse migrant workers.

F. Summary

In this section, the alleged human rights abuses of migrant workers engaged in World Cup related projects and services, have been outlined. The abuses presented detail an appalling situation for migrant workers, with issues ranging from illegal fees when recruiting, wage abuses when deployed, abhorrent working and striking conditions in employment, and the inability to acquire an exit permit on return. This only touches upon some of the issues, yet the violation of international law right is apparent. While Qatar has made significant changes, through the amendment of the Kafala system and the reformation of every stage of the migrant life cycle, these reforms do not rectify the past abuses within Qatar and have also been inadequate in eliminating the risk of abuse of migrant workers themselves. Therefore, migrant workers engaged in World Cup related projects and services have had their human rights violated. This section will now serve the following, as Qatar and FIFAs roles in this abuse will be briefly ascertained, allowing analysis into the effectiveness of their obligations alongside the legal systems in holding these actors responsible and accountable.

4. Effectiveness of the International, Domestic and Regional Legal Systems

This section serves to briefly ascertain how Qatar and FIFA are responsible for the violations of migrant workers under the legal systems, and subsequently analyse the effectiveness of the responsibility and judicial accountability mechanisms related to these rights. Analysis will be afforded to the UDHR, ICCPR, ICESCR, ICC and the UPR among other relevant instruments for Qatar. Meanwhile, the UNGPs, the CAS, the OECD with reference to the Building and Woodworkers International complaint, and the Swiss courts, with reference to *significant cases* will be analysed for FIFA. In order to have grounds to address this inadequacy, a linkage will be established between the aforementioned human right violations of migrant workers, and the conduct of Qatar and FIFA at the beginning of each subheading. Overall, this section argues that while Qatar and FIFA are responsible for the violations discussed in part 3, their human right obligations and the mechanisms involved are inadequate in garnering their accountability and ensuring legal redress to migrant workers.

A. Analysis of Qatar's Human Right Obligations

As set out in section 3, migrant workers have had their human rights violated. It has been signified that the abuses portrayed by HROs violate the rights outlined in Qatar's domestic laws, and the ICCPR, ICESCR, ILO and the UDHR, which Qatar has ratified. This therefore implies that they should be held responsible under these mechanisms. However, as previously addressed, the UDHR, and the UNGPs are non-binding upon Qatar, therefore they cannot be held judicially accountable under these instruments. When analysing the binding treaties of the ICCPR and the ICESCR, however, judicial issues remain. Qatar had formal reservations to trade unions in its accession to both

treaties,[98] signifying a restricted obligatory responsibility for Qatar. Furthermore, the main treaty on migrant workers' rights, the ICRMW, has not been ratified by Qatar,[99] which concerns these rights of free association. By removing their responsibility for core unionisation rights, Qatar cannot be held accountable for impeding these obligations, thereby opposing the universality of human rights. However, even if these rights were obligated towards Qatar, issues would remain. In their accession to the treaties, the state did not ratify the optional protocols.[100] This insinuates that when migrant workers' rights have been violated, they cannot individually file a complaint against Qatar alleging that they have not fulfilled their human right obligations.[101]

Furthermore, the monitoring instruments of the treaties are ineffective. According to Mutua, the HRC in particular 'has been unable to penetrate either the surface or the conscience of most states to meaningfully advance the ICCPR.'[102] While this was reported in 1998, these issues of penetrating Qatar to accede to the optional protocols remain, highlighting the HRC's enforcement ineffectiveness. Furthermore, Qatar has obligations under the UPR which monitors the application of the UDHR within the state.[103] In analysing Qatar's recent third cycle of the UPR in 2019, it is said that they 'received 34 recommendations on ratifying and lifting reservations to international conventions, as well as on acceding to their Optional Protocols'.[104] Furthermore, they were obliged to 'amend provisions…that criminalise the right to freedom of expression'.[105] However, as previously highlighted, the optional protocols have still not been ratified and the right to freedom of expression, including the right of free association, has not been amended under the Qatar Labour Law. Thus, the UPR is also ineffective in ensuring the responsibilities of Qatar are adhered to. One of the remaining mechanisms that has potential to hold Qatar judicially accountable is the International Criminal Court (ICC). However, Qatar has not ratified the Rome Statute

[98] International Justice Resource Centre, 'Qatar to become party to two UN human rights conventions' (*International Justice Resource Centre,* 5 June 2018) available < https://ijrcenter.org/2018/06/05/qatar-to-become-party-to-two-un-human-rights-conventions/ > accessed 5 March 2023.

[99] Organization for Security and Co-operation in Europe, 'International Legal Framework for the Protection of Migrant Workers' (2006) available < https://www.osce.org/files/f/documents/b/a/19246.pdf > accessed 3 April 2023, 25-26.

[100] OHCR, 'UN Treaty Body Database: Qatar' available < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=140&Lang=EN > accessed 3 May 2023.

[101] International Justice Resource Centre, 'Qatar to become party to two UN human rights conventions', (*International Justice Resource Centre,* 5 June 2018) available < https://ijrcenter.org/2018/06/05/qatar-to-become-party-to-two-un-human-rights-conventions/ > accessed 5 March 2023.

[102] Makau Mutua, 'Looking Past the Human Rights Committee: An Argument for De- Marginalizing Enforcement' (1998) 4 University at Buffalo School of Law 212

[103] United Nations Office of the High Commissioner, 'Instruments & mechanisms' available < https://www.ohchr.org/en/instruments-and-mechanisms#:~:text=There%20are%20two%20types%20of,core%20international%20human%20rights%20treaties. > accessed 1 January 2023.

[104] MENA Rights Group, 'Qatar's human rights record examined by UN Member States in Universal Periodic Review' (*MENA Rights Group*, 28 May 2019), available < https://www.menarights.org/en/articles/qatars-human-rights-record-examined-un-member-states-universal-periodic-review > accessed 4 May 2023.

[105] ibid.

of the ICC.[106] Therefore, they cannot be held judicially accountable under international law for their violations of migrant workers human rights.

Finally, issues are portrayed within Qatar's obligations under regional law. Throughout section 3, it was shown how Qatar has violated its obligations under the Arab Charter. This being due to the charter recognising the International Bill of Rights. However, there is no regional human rights court in the Asia-Pacific region.[107] This means that the violated migrant workers cannot bring claims against the state's invalidation of its obligations. Furthermore, as highlighted by Almutawa, the charter 'allows a conservative interpretation of the Sharia to restrict individual rights, such as the right to freedom of movement under Article 26.'[108] This thereby recognises that along with the lack of courts in Asia, the charters obligations themselves are inadequate, signifying that Qatar cannot be adequately held responsible and accountable for the human right abuses it has caused under regional law. Overall, what Qatar's ineffective international and regional obligations serve to do is highlight how an undemocratic state can ignore its responsibilities, change them to fit their own version of universal human rights, and deflect from the accountability mechanisms most Member States of the UN are subject to.[109] In turn, the possibility of holding Qatar judicially accountable for the human right violations of migrant workers is slim, and it relies on measures that are not legally binding, such as the WSIF, which has compensated over £320 million in unpaid wages.[110]

B. Analysis of FIFA's International Human Right Obligations

Like Qatar, FIFA are additionally party to the violation of migrant workers human rights outlined in section 3. FIFA did not commit human rights due diligence when awarding the games to Qatar, and according to Amnesty International, 'the existence of widespread labour rights abuses was well-documented'.[111] 'FIFA knew, or ought to have known, that the monumental construction work…would rest on the shoulders of vulnerable migrant workers'.[112] In analysing their obligations however, they are ineffective in holding them to account. FIFA commits itself to preservation of 'all internationally recognised human rights' under Article 3 of their statutes.[113] However, international human rights obligations do not apply judicially to non-state actors. This lack of legal enforceability highlights Regueiro's conception that 'the respect of international hard law depends on the non-state actor themselves.'[114] In turn, FIFA are

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[106] Nomad Capitalist, 'Six Countries that Aren't Part of the ICC' (*Nomad Capitalist*) available <https://nomadcapitalist.com/global-citizen/countries-arent-part-of-icc/ > accessed 5 April 2023

[107] Kelly Dawn Askin, 'Issues Surrounding The Creation Of A Regional Human Rights System For The Asia-Pacific' (1998) 4(2) ILSA Journal of International & Comparative Law 599.

[108] Ahmed Almutawa, 'The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights' (2021) 21(3) Human Rights Law Review 506-532.

[109] Joan C. Henderson 'Hosting the 2022 FIFA World Cup: opportunities and challenges for Qatar' (2015), 19(3-4) Journal of Sport and Tourism 281-298.

[110] ILO, 'Progress report on the technical cooperation programme between the Government of Qatar and the ILO' (December 2021).

[111] Amnesty International, *Qatar: Predictable and preventable: Why FIFA and Qatar should remedy abuses behind the 2022 World Cup'* (2022).

[112] ibid.

[113] FIFA Statues (May 2021), Article 3.

[114] Raquel Regueiro. 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar' (2020) 25(1) Tilburg Law Review 27-39.

shielded from the accountability of failing its human right obligations to migrant workers as it relies on their self-enforcement.[115] Nevertheless, there is potential for migrant workers to seek legal redress through the CAS. This is recognised by Bützler, who states that after the introduction of 'the new Article 3 (into) the FIFA Statutes, human rights no longer just apply subsidiarily…but directly in CAS proceedings according to R58 CAS Code'.[116] Furthermore, there is previous human right case law within the CAS as it was the first area of recourse in *Semenya v IAAF*,[117] where Semenya filed an application arguing she was discriminated against on the basis of sex.[118] However, this case concerns an individual athlete's human right violations not a transnational organisations human right obligations for thousands of migrant workers. As highlighted by Duval, the CAS is 'institutionally weak',[119] therefore if it was adjudicating the decisions of thousands of migrant workers, there would be major enforcement problems.

Significantly, Bützler argues that as 'the only decision rendered by FIFA as a sports-related association is the World Cup bid itself… migrant workers lack the necessary standing to sue'.[120] Therefore, while human rights may apply directly in CAS proceedings, FIFA's awarding of the games does not constitute it as a binding actor involved in the violation of migrant workers human rights. However, FIFA's standing as an actor in this regard can be constituted under Swiss Law, which will be explored later. Ultimately, the CAS, as an avenue of accountability is ineffective, as it is institutionally weak and lacks sufficient legal footing. Furthermore, the mere proposition of FIFA's accountability under the CAS suggests that there is a clarity problem for migrant workers in recognising the normative jurisdictions to hold transnational corporations accountable.

C. Analysis of FIFA's Soft Law Human Right Obligations

Due diligence under Principle 17 of the UNGPs includes 'adverse human rights impacts that the business enterprise may cause or contribute to.'[121] By awarding the World Cup to Qatar, FIFA violated its soft law obligation of due diligence. However, despite being created with hard law obligations in mind by Ruggie, the UNGPs do not constitute a binding source of international law.[122] It is said that 'they serve as the

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[115] Griffin A. Clark, 'UNHRC Resolution 26/9: Is a New International "Red Card" Enough to Keep FIFA and Others Accountable?' (2021) 22(2) Chicago Journal of International Law 639.

[116] Bodo Bützler and Lisa Schöddert, 'Constitutionalizing FIFA: Promises and Challenges' (2020) 25(1) Tilburg Law Review 40-54.

[117] *Mokgadi Caster Semenya v International Association of Athletics Federations* [2018] CAS.

[118] Vahid Bazzar, 'Caster Semenya Case in the CAS and Human Rights' (*International Law Blog*, 16 August 2021), available <https://nliu-cril.weebly.com/blog/caster-semenya-case-in-the-cas-and-human-rights > accessed 5 November 2022.

[119] Antoine Duval and Daniela Heerdt, 'FIFA and human rights: A research agenda' (2020) 25(1)Tilburg Law Review: Journal on international and comparative law 1-11.

[120] Bodo Bützler and Lisa Schöddert, 'Constitutionalizing FIFA: Promises and Challenges' (2020) 25(1) Tilburg Law Review 40-54.

[121] United Nations Guiding Principles on Business and Human Rights (adopted 16 June 2011) UNHRC Res 17/4, Principle 17.

[122] Tomáš Grel, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part I: The Claims Against FIFA' (*Asser International Sports Law Blog*, 28 February 2017) available www.asser.nl/SportsLaw/Blog/post/fifa-s-responsibility-for-human- rights-abuses-in-qatar-part-i-by-by-tomas-grell accessed 5 January 2023.

foundational principles with which states and business entities should structure their affairs'[123]. 'Should' portrays the soft nature of this instrument, pertaining to the fact that they are aspirational guidelines.[124] Therefore, FIFAs lack of due diligence cannot hold them judicially accountable under the UNGPs. Furthermore, this ineffectiveness traverses into inadequacy, as FIFA has not yet implemented all of Ruggie's suggestions . Ruggie suggested that they should enable access to effective remedy in line with Article 22 of the UNGPs.[125] However, the only remedy FIFA has provided is through the aforementioned WSIF, which is limited to wage theft, capped payments, and lack of transnational enforcement.[126] A final critique with the UNGPs is that they 'only mention migrant workers in passing as a category of victim potentially in need of additional attention' according to Ganji.[127] Therefore, even if FIFA did abide by these principles, there is concern that this lack of expansion may not have effectively outlined how FIFA can protect against migrant worker abuses. Therefore, it is apparent that the UNGPs are ineffective, portraying an international legal system which is inadequate in ensuring the compliance and accountability of non-state actors. However, not all of FIFA's soft law obligations are ineffective in this regard.

In 2015, The Building and Woodworker case against FIFA under the Swiss NCP, highlighted the effectiveness of the OECD in ensuring the accountability of FIFA. The case, summarised by Duval, claimed that FIFA violated the OECD Guidelines for Multinational Enterprises by failing to conduct due diligence on the human right violations of migrant workers in Qatar.[128] The case reconciled in a final statement in May of 2017, where 'FIFA acknowledged its responsibility for the working conditions of migrant workers active on the 2022 FIFA World Cup Qatar construction sites'.[129] This therefore signifies that the OECD is particularly effective in holding FIFA accountable for their due diligence obligations, as FIFA before this decision had refused to take any responsibility for migrant workers. However, FIFA was not held judicially accountable because of the NCP. Duval recognises that accountability was achieved through the 'wider context of the case surfing on the shockwaves of a massive transnational shaming campaign.'[130] This thereby reinforces the viewpoint that garnering the judicial accountability of FIFA for the violations of migrant workers is not effective through the strength of soft law measures; the successful enforcement within the case was down to public outcry.

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[123] Griffin A. Clark, 'UNHRC Resolution 26/9: Is a New International "Red Card" Enough to Keep FIFA and Others Accountable?' (2021) 22(2) Chicago Journal of International Law 631.
[124] ibid.
[125] John Ruggie, '"FOR THE GAME. FOR THE WORLD." FIFA and Human Rights' Corporate Responsibility Initiative Report. No. 68 (Cambridge, MA: Harvard Kennedy School 2016) 11.
[126] 'Qatar: FIFA World Cup Ending Without Migrant Remedy Fund' (*Human Rights Watch*, 16 December 2022) available <https://www.hrw.org/news/2022/12/16/qatar-fifa-world-cup-ending-without-migrant-remedy-fund#:~:text=On%20May%2019%2C%202022%2C%20Human,awarded%20to%20Qatar%20in%202010 . > accessed 4 May 2023.
[127] Sarath Ganji, 'Leveraging the World Cup: Mega Sporting Events, Human Rights Risk, and Worker Welfare Reform in Qatar' (2016) 4(4) Journal on migration and Human Security 237.
[128] Antoine Duval, 'How Qatar's migrant workers became FIFA's Problem: a transnational struggle for responsibility' (2021) 12(4) Transnational Legal Theory 473-500.
[129] ibid.
[130] ibid.

D. Analysis of FIFA's Swiss Law Human Right Obligations

There may be grounds for legal accountability under the domestic courts for FIFA, through its due diligence under Article 55 of the Swiss code of obligations. This is signified through the decision in *FNV & Nadim Shariful Alam v FIFA*, which took place between 2016 and 2017. Under Claim 3, the migrant worker Alam sought damages of USD 4,000.[131] However, this claim was rejected, on the 'grounds of inadmissibility and lack of jurisdiction, without pronouncing itself on the merits of the case'.[132] By not announcing itself on the merits, there may be a future for the Swiss courts in adjudicating migrant workers claims, as long as these claims are not additionally inadmissible.[133] Furthermore, as this was the first time FIFA had been taken to court for its transnational human right contributions, this may have impacted the adjudication of the Swiss courts. Although Alam only requested damages of USD 4,000, granting these damages could have led to the claims of thousands of abused migrant workers.[134] Therefore, this perhaps influenced Switzerland to immediately expel the cases claims, especially considering that the legally binding instrument in the UNHRC Resolution 26/9 was still being established at the time; they may have wanted to wait to receive universal guidelines before making a fundamental decision. Furthermore, this instrument and the shared international responsibility framework signifies that there may be future standings for FIFA to be held accountable within the Swiss courts, emphasising Duval's outlook in that 'they will most likely remain a potential accountability forum in the years ahead'.[135]

However, as argued by Grell, 'the Court arguably turns a blind eye to the ever-increasing power of non-state actors in contemporary international relations.'[136] This is supported by Kaleck who recognises that 'actual crimes are often perpetrated by a local actor'.[137] This signifies the ineffectiveness of the Swiss courts as an avenue of accountability, as the discouraging decision signifies that rationally, only state actors can be responsible for the crimes they commit in their jurisdiction. Furthermore, according to Pielke, 'the Swiss authorities have historically been less than enthusiastic in their oversight of FIFA.'[138] Therefore, they may have been lenient in their review of FIFAs due diligence in FNV, signifying that the courts cannot be relied on for migrant

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131 Tomáš Grell, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part II: The Zurich Court's Ruling' (*Sports Integrity Initiative*, 28 February 2017) available https://www.sportsintegrityinitiative.com/fifas-responsibility-human-rights-abuses-qatar-part-ii-zurich-courts-ruling/ accessed 5 January 2023.

132 ibid.

133 ibid.

134 Owen Gibson, 'FIFA faces legal challenge over Qatar migrant workers' (*The Guardian*, 10 October 2016) available <https://www.theguardian.com/football/2016/oct/10/fifa-faces-legal-challenge-over-qatar-migrant-workers-world-cup-2022 > accessed 8 May 2023.

135 Antoine Duval and Daniela Heerdt. 'FIFA and human rights: A research agenda' (2020) 25(1) Tilburg Law Review: Journal on international and comparative law 1-11.

136 Tomáš Grell, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part II: The Zurich Court's Ruling' (*Sports Integrity Initiative*, 28 February 2017) available <https://www.sportsintegrityinitiative.com/fifas-responsibility-human-rights-abuses-qatar-part-ii-zurich-courts-ruling/> accessed 5 January 2023.

137 Wolfgang Kaleck and Miriam Saage-MaaB, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes' (2010) Journal of International Criminal Justice 722.

138 Roger Pielke, 'How can FIFA be held accountable?' (2013) 16(3) Sport Management Review 262.

workers to seek legal redress in the future. Coupled with the fact that the Swiss courts by area of adjudication are difficult to access for migrant workers currently, holding FIFA accountable under Swiss Law is ineffective.

E. Summary

To conclude, this section argues that the legal frameworks are inadequate in holding Qatar and FIFA responsible and accountable for the human right violations of migrant workers engaged in World Cup related projects and services. If Qatar does not consent to the jurisdiction of the ICC, ratifies the optional protocol to the covenants, and there remains no regional human right courts in Asia, it cannot be held accountable. Meanwhile, if the UNGPs and the OECD remain non-binding, FIFA will not be held judicially accountable. While the OECD has garnered some semblance of accountability for FIFA, this is not a judicial mechanism, and has relied predominantly on public outcry, not the strength of soft law. Furthermore, while the Swiss courts remain an avenue for accountability,[139] the decision in *FNV v FIFA* encapsulates Switzerland's reluctance to hold transnational corporations accountable for their violations in another state.[140] In turn, it would be difficult for migrant workers to seek legal redress for Qatar and FIFA's wrongdoing, as there is a deep-rooted ineffectiveness of the responsibility frameworks and there is a lack of clarity of the normative jurisdiction where they can be held accountable. However, not all is lost. The purpose of the next section is to rectify the outlined inadequacies of the legal systems, by looking at the proposed legally binding instrument and the shared responsibility framework.

5. Towards an effective Human Rights System – Establishing Accountability for Qatar and FIFA

As signified in section 4, the current legal systems and frameworks are inadequate in ensuring the responsibility and accountability of Qatar and FIFA. This section serves to rectify these issues. Firstly, the legally binding instrument within the UNHRC Resolution 26/9 will be outlined, applied to FIFA, and analysed for its effectiveness, using research acquired from Griffin A. Clark's journal article. Following this, the shared international responsibility framework will be conceptualised, attributed to Qatar, FIFA, and Switzerland, then subsequently analysed in regard to its effectiveness. This will be informed by Andre Nollkaemper, who put forward the framework, and Daniela Heerdt and Raquel Regueiro, who applied it to the 2022 World Cup. Overall, this section signifies that while there is potential for the legally binding instrument to address the impracticality of the shared responsibility framework, holding both Qatar and FIFA to account, this is subject to Qatar's unlikely ratification. Therefore, it concludes that the best proposed option for accountability going forward is through the proposed instrument within the UNHRC resolution 26/9, where FIFA can be held accountable for the human right violations of migrant workers engaged in World Cup related projects and services.

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[139] Antoine Duval and Daniela Heerdt, 'FIFA and human rights: A research agenda', (2020) 25(1) Tilburg Law Review: Journal on international and comparative law 1-11.
[140] ibid.

A. UNHRC Resolution 26/9 Outline and Application to FIFA

The proposition of the UNHRC Resolution 26/9 may provide a recourse to the inadequacies in holding non-state actors accountable for their human right violations. On the 26th of June 2014, the HRC adopted the Resolution 26/9 after a divided vote,[141] tabled by Ecuador and South Africa. This established an intergovernmental working group to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'[142] After its 9th session as of 2023, this legally binding instrument is on its third revised draft.[143] Clark in applying this instrument to FIFA, recognises that FIFA's conduct can succumb to the resolution, as the 'labour abuses caused by a bureaucratically-endorsed, exploitative labour system are certainly foreseeable'.[144] Furthermore, he outlines that the World Cup is classed as a transnational business activity under the Resolution 26/9, as 'FIFA is headquartered in Switzerland and maintains significant control in its business relationship with Qatar'.[145]

In terms of the instrument itself, Clark recognises that it 'delineates broader adjudicative jurisdiction for domestic courts… (allowing them) to adjudicate some foreign business activities carried out by domiciled corporations'.[146] Furthermore, 'victims can circumvent foreign judicial systems in regions where human rights abuses are prevalent and bring claims in the transnational corporation's domicile'.[147] Clark in applying the rules to FIFA, recognises that the Swiss courts 'will have jurisdiction to hear claims from migrant workers who suffered human rights violations in Qatar',[148] allowing them to seek legal redress, while additionally allowing the courts to sanction FIFA.[149] He permits that as 'Article IV…grants victims the right to submit claims through a representative…international human rights organizations can represent these workers in Switzerland.'[150] For example, under this article, an international organisation like Amnesty International, with permission from a migrant worker without domestic legal basis in Switzerland, could represent their clients lawsuit. This would enable a swifter process for the victim in claiming legal redress.

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[141] John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (*IHRB*, 9 July 2014) available < https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre#_edn10 > accessed 5 April 2023.

[142] Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (26 June 2014) A/HRC Res. 26/9, para. 9.

[143] United Nations Human Rights Council, 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' available < https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc#:~:text=At%20its%2026th%20session%2C%20on,to%20elaborate%20an%20international%20legally > accessed 3 May 2023.

[144] Griffin A. Clark 'UNHRC Resolution 26/9: Is a New International "Red Card" Enough to Keep FIFA and Others Accountable?' (2021) 22(2) Chicago Journal of International Law 650.

[145] ibid 647.

[146] ibid 634.

[147] ibid 634.

[148] ibid 650.

[149] ibid 652.

[150] ibid 650.

B. Effectiveness of the UNHRC Resolution 26/9

The resolution has no fixed deadline for its completion, yet it is promising for holding FIFA accountable. [151] This is because when it is eventually finalised, its 'binding' effects will allow the regulation and accountability of the activities of transnational corporations like FIFA.[152] This is unlike the soft law implementation of the UNGPs, which as highlighted in section 4 are ineffective in enforcing binding legal accountability.[153] However, despite its application to FIFA, there is some barriers to the effectiveness of the instrument. Ruggie for one, notes two major concerns, believing that the resolution may falter off like the code of conduct negotiations did in the 1970s, and questions the binding enforceability on States who do not ratify the resolution.[154]

Firstly, this is not the first attempt at holding transnational corporations judicially accountable for their roles in human right abuses, as there has been ongoing resolutions since the Code of Conduct negotiations in the 1970s.[155] John Ruggie portrayed this concern when the instrument was announced. He questioned, 'will this latest attempt...turn out to be another instance of the classic dysfunction of doing the same thing over and over again and expecting a different result?'.[156] He instead recognised that 'the obvious answer should be to implement and build on the UNGPs.'[157] This answer was also the case for Argentina, Ghana, Norway and Russia, who's proposition of the Resolution 26/22 was adopted unanimously by the HRC the following day the Resolution 26/9 was announced.[158] The Resolution 26/22 called 'upon all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles'.[159] What the Resolution 26/22 has served to do is to reinforce the conflicting opinions within the Human Right Council, concerning

[151] Nicole R. Tuttle, 'Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?' (2015) 19(20) American Society of International Law.

[152] International Justice Resource Centre, 'In controversial landmark resolution, human rights council takes first step toward treaty on transnational corporations' human rights obligations' (*International Justice Resource Centre*, 15 July 2014) available <https://ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/ > accessed 3 April 2023

[153] ibid.

[154] John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (*IHRB*, 9 July 20142014) available <https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre#_edn10> accessed 5 April 2023.

[155] ibid.

[156] ibid.

[157] ibid.

[158] Nicole R. Tuttle, 'Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?' (2015) 19(20) American Society of International Law.

[159] Human Rights Council, 'Human rights and transnational corporations and other business enterprises' (15 July 2014) A/HRC Res 26/22, para. 3.

the legally binding instrument.[160] This distracts states from taking responsibility.[161] This opposition may suggest that the legally binding instrument will fail just like its predecessors, reinforcing Ruggie's notion of dysfunctionality.

However, the resolution is on its 8th session signifying that the treaty will not end up like the Code of Conduct negotiations as signalled by Ruggie. Furthermore, as signified by Clark, the treaty does not undermine the UNGPs, instead it serves to 'strengthen and improve the existing business and human rights responsibility framework at the international level.'[162] Therefore, despite oppositions at the time, recent developments have foretold that the legally binding instrument is the most effective recourse for establishing binding accountability for FIFAs actions. This is in part due to it being alongside Resolution 26/22. Simply put, the UNGPs should make up a part of the same framework that the binding instrument is strengthening.

Furthermore, the mandate may be incapable of being enforced upon Switzerland. As highlighted by Ruggie, it relies on whether Switzerland will ratify the instrument when it is finally established.[163] Clark additionally recognises that 'states may not want to adopt a treaty that involves adjudicating claims occurring in a different nation'.[164] However, Clark thwarts Ruggie's concerns by stating that this will likely not be an issue , 'given Switzerland's continued involvement in each drafting and negotiating session held by the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG).'[165] Therefore, the ratification of the instrument by Switzerland is likely, and FIFA can be held to its provisions when it is agreed upon. Nevertheless, while it may be ratified by Switzerland, Clark recognises that 'bringing a claim against FIFA in Switzerland …opens the door for Swiss bias in favor of the nation's pre-existing status as a refuge for international sports governing bodies.'[166] This was highlighted in section 4, concerning the discouraging decision in the FNV case. However, he recognises that the 'size and scope of the abuses committed in Qatar may persuade the state's courts to impose substantial financial penalties on the

[160] International Justice Resource Centre, 'In controversial landmark resolution, human rights council takes first step toward treaty on transnational corporations' human rights obligations' (*International Justice Resource Centre*, 15 July 2014) available <https://ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/ > accessed 3 April 2023.
[161] Nicole R. Tuttle, 'Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?' (2015) 19(20) American Society of International Law.
[162] Griffin A. Clark, 'UNHRC Resolution 26/9: Is a New International "Red Card" Enough to Keep FIFA and Others Accountable?' (2021) 22(2) Chicago Journal of International Law 632.
[163] John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (*IHRB*, 9 July 2014) available https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre#_edn10 accessed 5 April 2023.
[164] Griffin A. Clark, 'UNHRC Resolution 26/9: Is a New International "Red Card" Enough to Keep FIFA and Others Accountable?' (2021) 22(2) Chicago Journal of International Law 634.
[165] ibid 648.
[166] ibid 651.

organization.'[167] Furthermore, as highlighted the biased decision in the FNV case, they may not have wanted to make a decision that would escalate the litigation floodgates. Therefore, the Swiss courts may provide unbiased adjudication, due to the scope of the abuses linked to FIFA, and the previous bias in the Swiss courts being a result of Switzerland waiting on the universal guidelines through this resolution.

Furthermore, Clark recognises that its uncertain how migrant workers will bring the claims to Switzerland, although 'labourers may rely on NGOs to represent them in court'.[168] Nevertheless, while migrant workers are currently left in the dark regarding their representatives, NGOs could protect against Qatar's reservations against trade unions under the ICCPR.[169] This due to NGOs being able to help them securing their claims, without breaching the right of association under the Qatari Labour Law.[170] To continue, Clark recognises the difficulties in adjudicating as 'claims such as unpaid wages are easier to resolve than forced labour, inhumane working conditions, or worker death.'[171] While the outlined domicile under the Swiss courts protects against the amalgamation of accountability avenues highlighted in section 4, the distinct abuse procedure has not been outlined. Therefore, while there may be issues of ratification and bias from Switzerland, and historical indicators from the 70s that imply the binding instrument will not be effective, these issues are likely to be stable. The main issue is that the instrument has not been fully established and therefore the working group needs more sessions to fully expand upon the instrument's application. However, the possibility of the instrument in holding FIFA accountable for the violations of migrant workers engaged in World Cup projects and services remains likely.

C. Outline of the Shared International Responsibility Framework

Instead of individually seeking to confer responsibility on FIFA as a sole actor, establishing accountability 'should be based on an inclusive approach that takes the contribution of all actors into account'.[172] According to Heerdt, the approach of only calling upon the responsibility of FIFA ignores how the human right violations of migrant workers engaged in World Cup related projects and services is 'a harmful outcome of various contributions by multiple private and public actors.'[173] The shared international responsibility framework, as developed by Nollkaemper and applied to the context of the World Cup by Regueiro and Heerdt, may provide recourse to this issue. According to Nollkaemper, the term 'shared international responsibility' 'refers to the responsibility of multiple actors for their contribution to a single harmful

[167] ibid 652.
[168] ibid 656.
[169] ibid 656.
[170] ibid 656.
[171] ibid 652.
[172] Daniela Heerdt, 'Winning at the World Cup: A matter of protecting human rights and sharing responsibilities' (2018) 36(2) Netherlands Quarterly of Human Rights 90.
[173] ibid.

outcome.'[174] Therefore, this framework may be able to address not only Qatar and FIFA's involvement towards the violations of migrant workers human rights, but also other actors involved in the violations like the World Cup sponsors.

D. Shared International Responsibility Framework's Effectiveness

Injured parties are currently faced with a 'plurality of wrongdoing actors' according to Nollkaemper.[175] Therefore, there is a lack of clarity regarding where and how these parties can seek legal redress. The shared responsibility framework can protect against this according to Heerdt; who believes that the shared responsibility approach can help migrant workers pick out the actors who are individually responsible for the violations they were affected by under collaborative remedy.[176] This ensures they 'get compensated for the entire harm they suffered and not just parts of it.'[177] This offers clarity in the context of the World Cup, the actors of Qatar, FIFA and Switzerland could share responsibility.[178] This protects against the inadequacies highlighted in section 4 regarding the disjointed amalgamation of the International, Swiss, Regional and CAS courts, as it provides a framework where migrant workers can identify what each actors' obligations are and if they are responsible for their individual abuse. Furthermore, it identifies how the binding instrument in Resolution 26/9 is ineffective, as it ignores the multiple actors involved in human rights abuses, due to its refined scope and singular application to FIFA.

However, while this approach could provide clarity, Regueiro posits that it cannot currently be enforced. She recognises that Qatar and Switzerland are both obligated to provide legal redress,[179] due to their binding international responsibilities. However, she recognises that holding states and non-state actors responsible for their joint contribution to human right violations is exasperatingly difficult, as 'contributions to the harmful outcome must trigger the legal responsibility of the wrongdoers.'[180] As highlighted in section 4, FIFA is not responsible under international human rights law. As they do not have any binding international obligations, their legal responsibility cannot be triggered under the framework. Regueiro further reinforces this difficulty, in recognising that 'it is not essential for the obligations to be shared, as long as all of the obligations violated have an overlapping content.'[181] FIFA's deficiency of judicial international obligations therefore does not overlap with the international obligations of Qatar and Switzerland, signifying that they cannot be held jointly accountable underneath this framework.

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[174] Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) Michigan Journal of International Law 367.
[175] ibid 362.
[176] Daniela Heerdt, 'Winning at the World Cup: A matter of protecting human rights and sharing responsibilities' (2018) 36(2) Netherlands Quarterly of Human Rights 92.
[177] Daniela Heerdt, 'Addressing human rights abuses at mega-sporting events – A shared responsibility in theory and practice'(2022) Journal of Frontiers in Sports and Active Living 3.
[178] Daniela Heerdt, 'Winning at the World Cup: A matter of protecting human rights and sharing responsibilities' (2018) 36(2) Netherlands Quarterly of Human Rights 90.
[179] Raquel Regueiro, 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar' (2020) 25(1) Tilburg Law Review 38.
[180] ibid 28.
[181] ibid.

Finally, just like the legally binding instrument, the concept may take time before it is enacted. It has been highlighted by Nollkaemper that the scholarly literature is 'surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility.'[182] Therefore, academics must review the concept before it can be applied in the future.

E. Viability

Finally, the propositions viability will be analysed. An effective human rights system requires its frameworks to mutually reinforce one another. The proposed instrument in Resolution 26/9 and the shared international responsibility framework may be able to meet this requirement. The legally binding international instrument is based upon protecting the binding rights set out in international law.[183] Therefore, when and if this is established and ratified by Switzerland, this could resolve the ineffectiveness of the shared international responsibility framework. The framework requires the actor's obligations to have an overlapping content,[184] which is not possible as FIFA is not bound by international obligations. However, when the international legally binding instrument is enacted, FIFA will have internationally binding obligations, meaning the shared responsibility framework can take full effect. As the shared responsibility framework allows victims to pick out the actors responsible under a collaborative remedy, they can highlight what actor is responsible for what violation they have individually dealt with.[185] This would quell the highlighted ineffectiveness of the varied claims.

However, there is only potential for this to take place. Nollkaemper recognises that the shared responsibility framework may cause the actors to 'favor "buck passing"'.[186] This involves an actor refusing to recognise their responsibility and passing the blame onto another, in this case being another state actor. Therefore, even if international obligations can be drawn between Qatar, FIFA and Switzerland, there may be issues with enforceability if one of the actors refuses to recognise and transfers their responsibility under the proposed framework. As Qatar has still not ratified the ICC, or the optional protocol to the binding ICCPR and ICESCR, this suggests that the shared international responsibility framework will remain ineffective for migrant workers to seek legal redress and hold the actors accountable.

F. Summary

To conclude, it is proposed that in reaching an effective human rights system, the legally binding instrument within the UNHRC Resolution 26/9 is the most effective

[182] Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) Michigan Journal of International Law 363.
[183] Griffin A. Clark, 'UNHRC Resolution 26/9: Is a New International "Red Card" Enough to Keep FIFA and Others Accountable?' (2021) 22(2) Chicago Journal of International Law 647.
[184] Raquel Regueiro, 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar' (2020) 25(1) Tilburg Law Review 28.
[185] Daniela Heerdt, 'Winning at the World Cup: A matter of protecting human rights and sharing responsibilities' (2018) 36(2) Netherlands Quarterly of Human Rights 92.
[186] Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) Michigan Journal of International Law 437.

proposition, as it will enable migrant workers to seek adequate legal redress from FIFA under the Swiss courts. This effectively protects against the ineffectiveness of soft law, the Swiss courts and the CAS as outlined in section 4. To continue, while the shared international responsibility framework could be effective due to its viability, its ineffectiveness lies in the concept of 'buck passing', whereby Qatar would likely pass the responsibility onto other state actors. Therefore, in answering the main research question of this thesis, it is opined that there is a possibility that FIFA can be held accountable for the human right violations of migrant workers engaged in World Cup related projects and services. However, the proposed legally binding instrument needs to be established, agreed upon by Switzerland, and clarified.

6. Conclusion

This thesis has sought to answer the main research question; Can Qatar and FIFA be held judicially accountable for the human right violations of migrant workers engaged in World Cup related projects and services? In answering this main research question, sub questions were asked. I first asked, 'are Qatar and FIFA responsible for the human right violations of migrant workers engaged in World Cup'? This was detailed in section 2 and 3. The actor's migrant worker related human right obligations were linked to the abuses of migrant workers in Qatar, including but not limited to wage abuses, recruitment fees and heat stress. As the responsibility of the actors to the violations were garnered, I asked 'how effective are the existing human rights frameworks and systems in holding these actors judicially responsible and accountable'? It was outlined that as Qatar has not ratified the optional protocol to the binding ICCPR, ICESCR, or signed the ICC, coupled with the lack of a regional human right courts in the Middle East, they cannot be held judicially accountable. Meanwhile, the existing human right frameworks are also ineffective for holding FIFA to account. It was highlighted how the OECD's accountability was a result of international outcry and the UNGPs are nonbinding and partially implemented. Furthermore, the CAS lacks legal footing, and the discouraging decision of the FNV case under Swiss Law suggests that the existing human rights systems are inadequate in construing judicial accountability for non-state actors like FIFA. I finally asked, 'are there any effective propositions to construe judicial accountability going forward?' It was argued that there may be grounds to rectify current issues of accountability and hold FIFA judicially accountable in the future, albeit this relies on Switzerland ratifying the instrument within the UNHRC Resolution 26/9. While there is potential to hold Qatar accountable under the shared international responsibility framework as the binding instrument may trigger its requirements, considering Qatar's non-ratification of the optional protocols, it does not seem likely that they will agree to be bound.

In drawing the findings together, this thesis has outlined the human right abuses of migrant workers in Qatar, established Qatar and FIFAs obligations for these abuses, outlined the ineffectiveness of these obligations and the legal systems in holding them accountable, and sought to recognise new pathways that could rectify these inadequacies. Therefore, it has been argued that while Qatar and FIFA's obligations and the current legal systems are inadequate in holding the actors accountable for the human right violations of migrant workers engaged in World Cup related projects ,

the proposed legally binding instrument could conceivably establish accountability for FIFA under the Swiss courts in the future. This is by no means definitive however, as it is still awaiting agreement. This conclusion is unusual considering the current status of the two actors obligations. Despite FIFA having no binding international law upon its operations, the Resolution 26/9 opens a realistic opportunity for effective accountability and adequate legal redress to migrant workers in the future. Meanwhile, despite having binding international law, as long as Qatar does not ratify the optional protocol to the binding treaties of the ICCPR and the ICESCR, or the Rome Statute of the ICC, its judicial accountability cannot be construed.

On a final point, this thesis was not able to extensively expand upon the conduct of Qatar and FIFA. While this was not the thesis's main role, and it briefly contextualised section 4's analysis, the complexities of the situation in Qatar must be understood. Therefore, going forward, scholarly attention should be given to how Qatar, FIFA, Switzerland, the Local Organising Committee (LOC), the World Cup sponsors and others, collectively contributed to the human right abuses in Qatar.

Should an Individual's Wishes and Feelings Prevail? An Analysis of the Forced Administration of the COVID-19 Vaccine in the Court of Protection

AMY RAMSWELL

Abstract

In recent years, arguments for the prioritisation of the individual's wishes and feelings in the best interest decision under the Mental Capacity Act 2005 have gained traction. This discussion has been rooted in a desire to increase respect for the autonomy of the individual, regardless of their level of capacity. However, upon examination of COVID-19 vaccine administration decisions, this paper will question whether prioritising wishes and feelings is always desirable within the current Mental Capacity Act 2005 framework. This body of case law invites critical reflection on the Act's ability to ascertain the genuine wishes of the individual. Analysis will highlight that the decision maker can selectively include factors they deem relevant to the decision, whilst pertaining to be considering matters from the individual's perspective. Thus, this paper will expose the potential for artificial conceptions of the individual's wishes by the decision maker. It will suggest that such artificialities will gain pervasiveness if wishes and feelings are explicitly given priority in the best interest decision. The aims of this paper will be achieved by considering the purpose of inquiries about wishes and feelings. Then this paper will consider the representation of wishes and feelings in COVID-19 vaccination case law and the usage of substitute judgments in the absence of ascertainable wishes and feelings. It will conclude that, upon examination of these inquiries in practice, the individual's wishes should not necessarily prevail over other factors in the best interests decision.

1. *Introduction*

The value of autonomy in a liberal society cannot be understated. It is the principle which 'underwrites individuals' rights and liberties'[1] in relation to the state[2] and other citizens.[3] In England and Wales, the principle of autonomy underpins the tort of battery, which prohibits unlawful interferences with an individual's body.[4] This tortious action can be called upon in situations where unauthorised bodily violations occur.[5] A relevant example of such a situation is the administration of unwanted medical treatment, such as vaccinations.

Given the importance of the principle of autonomy in society, the courts are cautious to avoid unduly restricting an individual's access to make choices about their body.[6]

[1] Geoffrey Levey, 'Liberal Autonomy As a Pluralistic Value' (2012) 95(1) The Monist 103, 103.

[2] The right to exist free from state interference is enshrined in Human Rights Act 1998, Article 8.

[3] Joseph Raz, *The Morality of Freedom,* (OUP, 1998) 400.

[4] Elizabeth Adjin-Tettey, 'Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery' (2006) 39 UBC L Rev 3, 7.

[5] Jonathan Pugh, *Autonomy, Rationality, and Contemporary Bioethics,* (OUP, 2020) 153.

[6] See for instance *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

This ability to make a decision is removed when an individual is found to lack capacity as a result of an impairment or disturbance of the mind under the Mental Capacity Act 2005 (MCA 2005).[7] Capacity pertains to the individual's ability to use, retain, understand and communicate information.[8] In the absence of capacity, the decision maker is required to make a decision in the individual's best interests, with reference to their past and present wishes, feelings, beliefs and values.[9] This framework appears to be autonomy enhancing and to take into account the individual's desires, notwithstanding their lack of capacity related to the decision. Thus, at face value, it is representative of the increasing rejection of 'unchecked paternalism' in modern healthcare jurisprudence.[10]

Since the case of *Aintree v James*,[11] the individual's wishes and feelings have gained a more central role in the best interests decision.[12] This also fits within a broader socio-legal trend towards autonomy prioritisation, as seen in the Convention on the Rights of Persons with Disabilities 2006 (CRPD 2006).[13] This Convention, which the UK ratified in 2009, requires the implementation of a framework where the individual is always the voice behind the decision.[14] Whilst it is apparent that wishes and feelings have since received greater consideration by the judiciary,[15] the ratification of the CRPD 2006 has not brought about any statutory change to the MCA 2005 framework. Thus, wishes and feelings are not statutorily prioritised over other factors within the best interest decision.[16] Although this may be due to a misunderstanding of the obligations enshrined in Article 12 CRPD 2006,[17] it may also reflect the fact that prioritising wishes and feelings is not always possible, nor desirable.[18]

Against this background, this paper will seek to question whether wishes and feelings should indeed prevail over other factors in the best interest decision. It will question whether the MCA 2005 has a sufficiently robust mechanism for ensuring that these wishes and feelings truly represent the desires of the individual. This might, for instance, be because of the individual's inability to apply their own values to the facts of the situation, leading to a decision which does not represent their authentic

[7] Mental Capacity Act 2005 (MCA 2005), s 2(1).

[8] ibid s 3(1).

[9] ibid s 4(6).

[10] John Coggon and José Miola, 'Autonomy, Liberty, and Medical Decision-Making' (2011) 70(3) Camb Law J 523, 523.

[11] *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2013] EWCA Civ 65.

[12] Alex Ruck Keene and Michal Friedman, 'Best interests, wishes and feelings and the Court of Protection 2015-2020' (2020) Winter Edn, Eld LJ 31, 31.

[13] Convention on the Rights of Persons with Disabilities (CRPD 2006) (adopted 13 December 2006, entered into force 8 June 2009) 2515 UNTS 3.

[14] United Nations, 'General Comment No. 1 - Article 12 : Equal recognition before the law' 11th Session, 19 May 2014, CRPD/C/GC/1 (General Comment No.1) para 3.

[15] Ruck Keene and Friedman (n 12) 31.

[16] Department of Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (The Stationery Office 2007) para 5.38.

[17] General Comment No. 1 para 3.

[18] Renu Barton-Hanson, 'Reforming best interests: the road towards supported decision-making', (2018) 40(3) J Soc Welf Fam Law 277, 286.

desires.[19] Turning to autonomy to support the inclusion of wishes and feelings may not accurately represent these wishes and their meaning for the individual. Nor, indeed, may the individual's wishes always fit easily alongside considerations about their welfare or dignity.

The representation of wishes and feelings will be explored through reference to COVID-19 vaccine administration decisions in the Court of Protection. Such cases 'provide rich material with which to interrogate what the concept of "respect for rights, will and preferences" means in practice'.[20] Alex Ruck-Keene and Michal Friedman have already conducted an important study into the representation of wishes and feelings in Court of Protection case law between 2015 and 2020.[21] However, this study was conducted from a positive rather than normative perspective and ended before COVID-19 cases came before the Court of Protection.[22] Thus, at the time of writing,[23] this area remains unexplored. This article will seek to review the representation of wishes and feelings in COVID-19 vaccination cases. This will facilitate normative consideration of the degree to which wishes and feelings should prevail in the best interest decision.

COVID-19 vaccine cases have been treated as a 'sub-group of their own' by the judiciary,[24] which suggests that they warrant exploration to identify the unique tensions arising within these cases. There are two reasons that these cases pose fruitful ground for the consideration of wishes and feelings. Firstly, the novelty of COVID-19 raises challenges regarding the incorporation of past wishes and feelings, because no such event had happened previously.[25] Secondly, these cases are of interest given the unique moral and political circumstances in which these decisions were reached. The COVID-19 vaccine posed a protective function to the individual[26] but also benefitted the community at large by minimising the spread of the virus and protecting hospital resources.[27] Vaccine administration is a communitarian and public health driven initiative,[28] while the framework of MCA 2005 is individual-focused.[29] Thus, by their nature, the vaccine policy and the MCA 2005 are logically contradictory at the underlying level.

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[19] Jonathan Herring and Jesse Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act' (2015) 35 Legal Stud 698, 706.

[20] Ruck Keene and Friedman (n 12) 48.

[21] ibid 48.

[22] The first of which was seen on 20th January 2021 (*Re E* [2021] EWCOP 7*)*.

[23] This paper was concluded in May 2023.

[24] *MC & Anor v A CCG & Anor* [2022] EWCOP 20.

[25] Abid Haleem and Mohd Javaid, 'Effects of COVID-19 pandemic in daily life' 2020 10(2) Curr Med Res Pract 78, 78.

[26] World Health Organisation, 'Coronavirus disease (COVID-19): Vaccines and vaccine safety' (World Health Organisation Q&A 28 June 2023) <https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-(covid-19)-vaccines> Accessed 27th November 2023.

[27] Steven Kraaijeveld and Bob Mulder, 'Altruistic Vaccination: Insights from Two Focus Group Studies' (2022) 30 Health Care Anal 275, 275.

[28] Emma Cave, 'Voluntary Vaccination: The Pandemic Effect' (2017) 37(2) Legal Stud 279, 302.

[29] MCA 2005 Code of Practice (n 16) foreword.

This paper will use a legal-doctrinal method to consider the degree to which wishes and feelings should prevail in best interest decisions. Section 2 will assess the purpose of ascertaining an individual's wishes and feelings, through a conceptual and legal analysis of autonomy and its position within the MCA 2005. Section 3 will analyse how the MCA 2005 inquiry into past and present wishes and feelings was conducted and used in COVID-19 vaccine related decisions. Finally, in Section 4, cases will be considered where no wishes and feelings could be ascertained. It will shed light on the usage of 'thought experiment[s]'[30] to consider the individual's potential considerations in relation to vaccination. This will be deemed a futile exploration which extends wishes and feelings inquiries to an artificial level.

This exploration will highlight that it is important to situate the individual's wishes and feelings within a framework which, where possible, enables the individual to be heard. However, there should also be room for the decision maker to consider the best interests of the individual holistically, from a welfare and medical perspective. Without scope for this, such considerations will still be considered tacitly, to the detriment of the individual.

2. *Autonomy and the Mental Capacity Act 2005*

In order to understand the role an individual's wishes should play in the best interest decision, it is first necessary to understand why the MCA 2005 seeks to include the individual's views in the end decision. Therefore, in this section, the principle of autonomy will be explored in order to establish its central importance to healthcare law,[31] and the MCA 2005.[32] Then, the wishes and feelings of individuals who lack capacity will be considered to understand the rationale behind the inclusion of these wishes in the best interest decision. Finally, this section will reflect upon the growth in respect for the post-incapacity wishes and feelings of the individual within mental capacity case law, in light of *Aintree v James*[33] and the CRPD 2006. This will provide the groundwork with which to explore the usage of wishes and feelings inquiries in practice, in the following sections.

A. The principle of autonomy

The enactment of the MCA 2005 marked a revolutionary shift in the way in which decision making about people with cognitive impairments was undergone.[34] It provided a statutory framework for decision making which positioned the individual

[30] *North Yorkshire Clinical Commissioning Group v E (Covid Vaccination)* [2022] EWCOP 15 [47].

[31] Eleanor Milligan and Jennifer Jones, 'Rethinking Autonomy and Consent in Healthcare Ethics' in Peter Clark (ed), *Bioethics - Medical, Ethical and Legal Perspectives* (Intechopen 2016).

[32] Camilla Kong and others, 'Judging Values and Participation in Mental Capacity Law' (2019) 8(1) Laws 3, 22.

[33] *Aintree* (n 11).

[34] Peter Bartlett, 'Re-thinking the Mental Capacity Act 2005: Towards the Next Generation of Law' (2023) 86(3) Mod Law Rev 659, 659.

at the heart of the process.[35] During its drafting phase, respect for autonomy was contended to be 'the general principle' underpinning the Mental Capacity Bill.[36] The eventual implementation of its inclusive framework was thus described as a 'triumph of autonomy'.[37] When considered in light of the MCA 2005's historical background, there is no surprise that this shift towards individual participation is boldly described in such terms. Most pertinently, the MCA 2005 starts from the assumption that all individuals have capacity.[38] By contrast, the MCA 2005 was conceived out of a history which negated the ability of disabled people to exercise any autonomy and was characterised by 'widespread abuse of rights'.[39]

Prior to the MCA 2005, where individuals were deemed unable to provide consent, professionals would perform treatment whenever they thought it was in the individual's best interests, under the doctrine of necessity.[40] There was no requirement to consult the individual or include them in the decision.[41] It was at the discretion of the decision maker to decide whether or not to act on the individual's wishes. Calls came for this "deficient"[42] area of law to be reformed so that a balance could be struck between protection and autonomy.[43] Thus from this paternalistic background, the MCA 2005 facilitated individuals with cognitive impairments within the autonomy-promotional trend to which they had previously been excluded.[44]

Autonomy is the ethical concept of self-regulation;[45] that is, the ability for an individual to govern their own commitments.[46] Exercising autonomy can be viewed in relation to the concepts of authenticity, mental capacity and liberty.[47] According to liberal thinking, an authentic decision can be reached in conditions free from controlling influence and where the individual has the cognitive toolkit to reason. This is not the only model of autonomy, yet at the time of contemplating a new mental capacity framework, this was the way in which autonomy was understood.[48]

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[35] MCA 2005 Code of Practice (n 16) para 1.

[36] Joint Committee on the Draft Mental Incapacity Bill, *Draft Mental Incapacity Bill* (HL & HC 2002-2003, HL 189; HC 1083) 22.

[37] Amel Alghrani and others, 'EDITORIAL: THE MENTAL CAPACITY ACT 2005—TEN YEARS ON' (2016) 24(3) Med Law Rev 311, 311.

[38] MCA 2005 s1(2).

[39] George Szmukler, '"Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18(1) World Psychiatry 34, 35.

[40] Helen Taylor, 'WHAT ARE 'BEST INTERESTS'? A CRITICAL EVALUATION OF 'BEST INTERESTS' DECISION-MAKING IN CLINICAL PRACTICE' (2016) 24 (2) Med Law Rev 176, 177.

[41] *Re F (Mental patient sterilisation)* [1990] 2 AC 1 per Lord Griffiths [1080].

[42] Law Commission, *MENTAL INCAPACITY* (Law Com No 231, 1995) para 1.4.

[43] ibid para 2.28.

[44] Eileen Carey and others, 'Exercising autonomy—The effectiveness and meaningfulness of autonomy support interventions engaged by adults with intellectual disability. A mixed-methods review' [2012] Br J Learn Disabil 1, 2.

[45] Nicole Legate and Richard Ryan, 'Individual Autonomy' in Alex Michanos (ed) *Encyclopedia of Quality of Life and Well-Being Research* (Springer, Dordrecht 2014) 3234.

[46] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, CUP 1997).

[47] Tom O'Shea, 'Autonomy and Value' (2012) Essex Autonomy Project Green Paper Report, 5.

[48] Bartlett (n 34) 669.

According to this theory of autonomy, autonomous decisions are made by those who have the capacity to reason.[49]

This autonomy model has clearly influenced the framework of the MCA 2005 wherein, to exercise the 'right to autonomy', an individual must have capacity.[50] To be confirmed to have capacity, a person must have the ability to weigh, retain, use, and understand relevant information to the decision.[51]

Jonathan Herring and Jesse Wall see capacity as the legal standard which must be met to consent to a 'wrong' (a battery for the purposes of healthcare law).[52] The rationale for this threshold is that, if the person is not capable of decision making, then they are unable to effectively confirm that the 'wrong' in question is not contrary to their interests.[53] Thus, capacity can be seen as the 'gatekeeper' for an individual to express their autonomy through the means of consent.[54] This gatekeeper account is also confirmed in case law. For example, in *Bailey v Warren,* it was held that 'capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making in relation to himself and his affairs'.[55] According to this dictum, the capacity threshold appears to demarcate the line where an individual is considered to have the ability to exercise autonomy.

Adults who are found to meet the capacity threshold will be able to consent to, or reject treatment as they wish, and have their views respected.[56] Individuals who are not found to meet the capacity threshold will have a decision made in their best interests.[57] However, even where an individual is found to lack capacity, there are still attempts within the MCA 2005 to pay respect to the individual's wishes and feelings.[58] This is undoubtedly important; if the MCA 2005 pertains to put the individual at the heart of the decision,[59] then their wishes must be considered. It also serves to safeguard against paternalistic medical practices by ensuring the individual is not obfuscated.[60] However, whether these inquiries are justified by autonomy principles is a more tenuous question, as the individual may lack the reasoning capacity necessary to act autonomously, at least when applying a liberal account of autonomy.[61]

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[49] Bruce Jennings, 'Reconceptualizing Autonomy: A Relational Turn in Bioethics' (2016) 46(3) Hastings Center Report, 11,12.

[50] MCA 2005 Code of Practice (n 16) para 1.2.

[51] MCA 2005, s 3(1).

[52] Herring and Wall (n 19) 701.

[53] ibid 702.

[54] Paul Skowron, 'The Relationship between Autonomy and Adult Mental Capacity in the Law of England and Wales', (2019) 27(1) Med Law Rev 32, 37.

[55] *Bailey v Warren* [2006] EWCA Civ 51, [2006] CP Rep 26 [105].

[56] Barry Main and S Adair, 'The changing face of informed consent' (2015) 219(7) Br Dent J 325, 325.

[57] MCA 2005, s 1(5).

[58] ibid s 4(6).

[59] MCA 2005 Code of Practice (n 16) para 1.

[60] Alghrani and others (n 37) 313.

[61] Jennings (n 49) 12.

B. Autonomy Past the Capacity Threshold

When a person is found to lack capacity, a decision is made in the individual's best interests, with reference to:

> *(a)the person's past and present wishes and feelings*
> *(b)the beliefs and values that would be likely to influence his decision if he had capacity, and*
> *(c)the other factors that he would be likely to consider if he were able to do so.*[62]

Paying regard to these factors represents an awareness that 'capacity impairment is not necessarily a barrier to people having views and preferences' or 'having values, life narratives and a sense of selfhood, and seeking to formulate ways in which to give effect to these'.[63] Thus, despite lacking the legal capacity to consent to treatment, there is consideration in the MCA 2005 that the individual still has some degree of mental capacity,[64] even if the person does not have the requisite cognitive ability to exercise legal capacity.[65]

However, whether these post-incapacity wishes and feelings are representative of autonomy requires further exploration. Respecting wishes and feelings beyond the capacity threshold ought to be scrutinised for the extent to which it represents the person's true choice, particularly given that some conditions can prevent a person from applying their own values to information.[66] Because the person has already been deemed to lack capacity, their expressed wishes and feelings may not be fully informed or weighed.[67]

There is certainly value in treating each case on an individual basis, given the vast variance in capacity which may be presented before the decision maker. This is made clear in *ITW v MZ*, where Judge Munby contended that the closer to the capacity threshold, the more weight should be given to an individual's wishes and feelings.[68] This demonstrates judicial awareness that the ability to exercise autonomy exists on a sliding scale and is not a 'stark binary' like the capacity threshold.[69] For example, one way in which capacity can be lost is if a person cannot communicate a decision.[70] This

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[62] MCA 2005 s 4(6).

[63] Mary Donnelly, 'Best Interests in the Mental Capacity Act: Time to say Goodbye?' (2016) 24(3) Med Law Rev 318, 322.

[64] Alec Buchanan, 'Mental capacity, legal competence and consent to treatment' (2004) 97(9) J R Soc Med 415, 415.

[65] Legal capacity pertains to the ability for an individual to exercise legal duties and rights. See Rosie Harding, 'What is Legal Capacity?' 29 March 2017, Legal Capacity Research <https://legalcapacity.org.uk/everyday-decisions/what-is-legal-capacity/> accessed 6 May 2023.

[66] Herring and Wall (n 19) 706.

[67] G. Schaefer and others, 'Vaccination of individuals lacking decision-making capacity during a public health emergency' (2022) 9(2) J. Law Biosci 1, 6.

[68] *ITW v Z* [2009] EWHC 2525 (Fam), [2011] 1 WLR 344 [35].

[69] Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16(3) Soc Policy Soc 469, 472.

[70] MCA 2005, s 3(d).

does not mean the person is prima facie incapable of making a decision, nor does it inhibit them from having values and desires of equal strength to a person with capacity.

It is clear that the extent to which wishes and feelings represent an account of autonomy, which is rationalised and ethically convincing, will vary depending on the degree to which the wishes reflect the individual's true values.[71] Whether the MCA 2005 framework is capable of this careful consideration of wishes and feelings is another question.

The courts have frequently justified the inclusion of wishes and feelings by turning to simplified accounts of autonomy.[72] As Skowron contends, 'judges tend to use whatever ideas about personal "autonomy", a word that is not legally defined, best suit their rhetorical needs in the immediate case'.[73] For example, in *Barnsley Hospital v MSP*,[74] the judge contended that 'the focus must always be on identifying the views and feelings of P, the incapacitated individual. The objective is to reassert P's autonomy'.[75] The only problem with such assertions is that they negate the potential impact of cognitive impairments on the individual's ability to construct their wishes and feelings in line with their values. Thus, these wishes may not in fact reassert the individual's autonomy.

Such dicta also seems to contradict with 'gatekeeper' accounts of autonomy used elsewhere in MCA 2005 case law. This gatekeeper account of autonomy implies that falling below the capacity threshold justifies limitations on the right to autonomy, because the individual's ability to self-govern is compromised.[76] This is exemplified in *Independent News and Media v A* where it was said that 'the reduced capacity of the individual requires interference with his or her personal autonomy'.[77] Perhaps this shows that the definition of autonomy has moved on from how it was originally conceived in the drafting of the MCA 2005.[78] Alternatively, it may demonstrate conceptual uncertainty regarding the definition of autonomy, particularly when employed by the courts in this context.[79]
Thus, given this uncertainty as to whether autonomy is an ethically convincing basis for the inclusion of post-incapacity wishes and feelings, it may be necessary to also look beyond autonomy to find a strong basis for the inclusion of these wishes and feelings. Indeed, in healthcare law, autonomy is not the 'only game in town';[80] it must

[71] Donnelly (n 63) 322.

[72] See, for example, *Re E* [2021] EWCOP 7 [14].

[73] Skowron (n 54) 33.

[74] *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26.

[75] ibid [24].

[76] Skowron (n 54) 36.

[77] *Independent News and Media v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262 [18].

[78] Bartlett (n 34) 668.

[79] Nell Munro, 'Taking wishes and feelings seriously: the views of people lacking capacity in Court of Protection decision-making' (2014) 31(1) Journal of Social Welfare and Family Law 59, 71.

[80] Stephen Gilmore and Jonathan Herring, ''No' is the hardest word: consent and children's autonomy' (2011) 23(1) CFLQ 3, 5.

be considered alongside other principles such as welfare, cost-benefit considerations, and the individual's dignity.

The CRPD 2006 recognises the 'inherent dignity' of all humans in its preamble.[81] This statement reflects the construct of dignity which is frequently attributed to Immanuel Kant: that by the very nature of being human, every person deserves equal respect.[82] Nell Munro thus contends that dignity can be maintained through continual dialogue with the individual.[83] This means that the process can remain rooted in the unique values which uphold the individual's life and respects the intrinsic worth of the individual's perspective. Dignity may provide a supplement to autonomy when contemplating the rationale for individual participation in the MCA 2005 decision making process. This principle can justify the facilitation of the individual even where they lack cognitive capacity[84] without taking this to the point of artificiality.

Compared to autonomy, the principle of dignity is relatively unexplored as a justification for the inclusion of wishes and feelings. Perhaps this stems from a sense that dignity lacks a clear definition[85] and thus serves limited conceptual purpose. However, autonomy has also been demonstrated to have a multitude of different, sometimes contradictory meanings. Nonetheless, autonomy was cited in every COVID-19 vaccine administration decision conducted by Lord Justice Hayden,[86] the former Vice President of the Court of Protection[87] and the predominant judge in COVID-19 vaccination decisions.[88] Dignity is referenced considerably fewer times.[89] This judicial focus on autonomy suggests that conceptual clarity may be required regarding the justifications for the inclusion of wishes and feelings, if the Court of Protection is to use these inquiries appropriately. This is particularly crucial given the new socio-political landscape within which the MCA 2005 operates, characterised by

[81] CRPD 2006, preamble a.

[82] Jeremy Waldron, 'HOW LAW PROTECTS DIGNITY' (2012) 71(1) CLJ 200, 202.

[83] Munro (n 79) 73.

[84] Donnelly (n 63) 323.

[85]Conor O'Mahony, 'There is no such thing as a right to dignity' (2012) 10(2) International Journal of Constitutional Law 551, 552.

[86] See *MC & Anor (*n 24) [11]; *SD v Royal Borough of Kensington And Chelsea* [2021] EWCOP 14 [26]; E (Vaccine) [2021] EWCOP 7 [14]; *SS v London Borough of Richmond Upon Thames & Ano*r [2021] EWCOP 31 [32]; *TN v An NHS ICB & Anor* [2022] EWCOP 53 [25].

[87] Courts and Tribunals Judiciary, 'Appointment of a new Vice-President of the Court of Protection', 17 February 2023 <https://www.judiciary.uk/appointments-and-retirements/appointment-of-a-new-vice-president-of-the-court-of-protection/> accessed 2 May 2023.

[88] Of the 14 Covid-19 vaccine administration cases available on Bailii, 5 were conducted by Mr Justice Hayden, 3 by Mr Justice Burrows and 1 by Mr Justice Cohen, Mr Justice Brown, Mr Justice Poole, Mrs Justice Hilder and Mr Justice Butler respectively. See British and Irish Legal Information Institute, <https://www.bailii.org/cgi-bin/lucy_search_1.cgi?datelow=&highlight=1&sort=rank&datehigh=&query=(Covid-19)%20AND%20(vaccine)&mask_path=ew/cases/EWCA+ew/cases/EWCA/Civ+ew/cases/EWCOP&method=boolean> accessed 2 May 2023.

[89] Although reference to dignity is present in *SS v London Borough of Richmond Upon Thames & Anor* [2021] EWCOP 31 [32]; *TN v An NHS ICB & Anor* [2022] EWCOP 53 [25].

greater consideration of the rights of disabled people[90] and less by harsh binaries concerning rationality/irrationality and autonomy/paternalism.

C. Promotion of wishes and feelings within the MCA 2005

Having explored the rationale behind the inclusion of wishes and feelings post-incapacity, this part will consider the extent to which the MCA 2005 framework prioritises wishes and feelings in the best interest decision.

Where an individual is deemed to lack capacity, a decision must be made in their best interests.[91] There is no set definition of best interests and the MCA 2005 Code of Practice emphasises the fluidity of the concept, stating 'it is impossible to give a single description of what "best interests" are, because they depend on individual circumstances'.[92] However, the decision maker must consult the section 4 checklist in coming to a best interests decision.[93] This includes paying regard to the individual's past and present wishes and feelings, the beliefs and values that would influence their decision, and any other potential factors that they would be likely to consider.[94] This framework is intended to trace the individual's desires beyond the capacity threshold,[95] ensuring an individualised conception of best interests.[96] However, in practice, the person's views may not be the conclusive factor and 'the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific'.[97]

In practice, diverging lines of case law have emerged regarding the emphasis put on wishes and feelings in a best interests decision. In *RB v Brighton and Hove CC*, the Court of Appeal upheld the decision for RB to have his liberty restricted in order to prevent him from 'seriously injuring himself' whilst living independently.[98] This judgment prioritised the individual's perceived welfare over his emphatically stated wish to continue living independently, and no compromise or alternative arrangement was sought. In contrast, in *Aintree v James*,[99] - the first Supreme Court decision applying the MCA 2005 - the importance of wishes and feelings was emphasised in the decision. Lady Hale asserted that 'the purpose of the best interests test is to consider matters from the patient's point of view'.[100] This suggests that the best interests decision should not be objective, but subjective, in line with the individual's wishes. The explicit wording of the MCA 2005 does not go as far as Lady Hale contended in

[90] ibid 665.

[91] MCA 2005, s 1(5).

[92] MCA 2005 Code of Practice (n 16) para 5.37.

[93] MCA 2005 s 4.

[94] ibid s 4(6)c.

[95] Helen Marshall and Sally Sprung, 'The Mental Capacity Act: 'Best interests'-a review of the literature' (2017) 22(8) Br J Community Nurs 384, 385.

[96] Mary Donnelly, 'Best interests, patient participation and the Mental Capacity Act 2005', (2009) 17(1) Med Law Re*v* 1,15.

[97] *ITW v Z* (n 68) [35].

[98] *RB v Brighton and Hove City Council* [2014] EWCA Civ 561 [83].

[99] *Aintree* (n 11).

[100] ibid [45].

Aintree, a judgment deemed to provide 'new impetus' for the centralisation of the individual in best interest decisions.[101]

Ruck Keene and Cressida Auckland have located a trend of growing respect for wishes and feelings within case law since the UK ratified the CRPD 2006,[102] notwithstanding the lack of statutory prioritisation of wishes and feelings. From this perspective, the case of *RB* is merely an outlier, perhaps representative of the lack of scope for in depth analysis of the facts in the Court of Appeal.[103] However, given that judgments such as *RB* continue to arise in the aftermath of *Aintree,* some have called for the MCA 2005 to be statutorily reworked in order to explicitly prioritise wishes and feelings over other factors.[104]

Indeed, the CRPD 2006 - which the UK ratified in 2009- requires a supported decision making model, wherein the individual is always the voice behind the decision.[105] The CRPD 2006 is 'in support of autonomous decision making' regardless of the individual's cognitive impairments.[106] There should be no point where the individual loses legal capacity, regardless of their mental capacity.[107] The CRPD is yet to have provoked any statutory change. Nonetheless, judges have identified that ratifying the CRPD means that the laws should be interpreted to conform with this convention.[108] Thus, ratifying the CRPD has jolted the UK 'out of complacency' and encouraged greater efforts to be made to locate the wishes of the individual.[109]

The MCA 2005 diverges structurally from being a fully supported decision making model as there is a distinct line between capacity bearers and people who lack decision making capacity.[110] Thus, in order to be CRPD compliant, the MCA 2005 should accommodate the participation of every individual,[111] and there should be no point where capacity is deemed to be lost.[112] Rather than fully replacing the structure of the MCA 2005, the Law Commission suggested an amendment to the MCA 2005, wherein the status of wishes and feelings would be elevated above other factors in the

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[101] Select Committee on the Mental Capacity Act, *Mental Capacity Act 2005: Post-legislative Scrutiny* (HL 2013-2014, 139) para 99.

[102] Cressida Auckland and Alex Ruck Keene, 'More presumptions please? Wishes, feelings and best interests decision-making' (2015) 5(3) Elder L J 293, 293.

[103] Donnelly (n 63) 330.

[104] See Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017) para 5.33.

[105] CRPD 2006 Article 12(3).

[106] Shirli Werner, 'Individuals with Intellectual Disabilities: A Review of the Literature on Decision-Making since the Convention on the Rights of People with Disabilities (CRPD)' (2012) 34(12) Public Health Rev 1,1.

[107] General Comment No. 1 para 25.

[108] *Re: A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 [3].

[109] Alex Ruck Keene and others, 'Mental capacity—why look for a paradigm shift?' (2023) Med Law Rev, 1, 17.

[110] Bartlett (n 34), 669.

[111] Law Commission of Ontario, Michael Bach and Lana Kerzner, 'A new paradigm for protecting autonomy and the right to legal capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice' (2010) 53.

[112] CRPD 2006 Article 12 (2).

decision.[113] However, whether this is truly the ideal solution is questionable. The subsequent sections will provide practical substance to this investigation by exposing the complexity of ascertaining and balancing wishes and feelings within Court of Protection decisions.

D. Conclusion

This section explored the concept of autonomy and how it underpins facets of the MCA 2005. Clear efforts are being made within the MCA 2005 to identify the wishes and feelings of the individual and to enable them to participate in decision making. This fits within a growing international focus on recognising the individual's autonomy in decision making. Simultaneously, this section highlighted the complexity of establishing the strength of wishes and feelings, particularly given the diversity of cognitive processes when mental disorders are involved. It thus considered that multiple principles are at play when considering an individual's wishes and feelings under the MCA 2005. The following section will explore the representation of wishes and feelings in practice by examining the application of the MCA 2005 to decisions about COVID-19 vaccine administration.

3. *Ascertaining an individual's wishes and feelings within COVID-19 vaccine administration decisions*

The previous section explored the principles underpinning the inclusion of the individual's perspective in the MCA 2005 decision making framework through a theoretical lens. This section will utilise a practical perspective to further investigate the extent to which wishes and feelings should prevail in the best interest decision. It will explore the application of section 4(6)a MCA 2005 in practice, with reference to its application in COVID-19 vaccine administration decisions in the Court of Protection.[114] Section 4(6)a requires the decision maker to consider, 'as far as reasonably ascertainable', the individual's 'past and present wishes and feelings'.[115] Analysing these inquiries in practice will expose a tendency for the judiciary to consider an individual's behaviour from a capacitous lens when seeking their wishes, without considering the potential impact of mental impairments on cognitive functioning. Thus, this section will critically reflect on the limitations of section 4(6)a in practice.

A. Pre-incapacity wishes and feelings towards vaccines

Within the body of case law regarding the administration of the COVID-19 vaccine, several individuals had lost decision making capacity at some point in their lives and had wishes and feelings predating this loss of capacity which were of relevance to the

[113] Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017) para 5.33.

[114] There are 14 Covid-19 vaccine administration cases available on Bailii at the time of submission (6 May 2023). Four of these cases will be explored in this section because of the complexities which they expose in relation to the representation of wishes and feelings. These are: *Re E* [2021] EWCOP 7*; SS v London Borough of Richmond Upon Thames & Anor* [2021] EWCOP 31*; SD v Royal Borough of Kensington And Chelsea* [2021] EWCOP 14*; A Clinical Commissioning Group v FZ* [2022] EWCOP 21.

[115] MCA 2005, s 4(6)a.

courts.[116] However, the COVID-19 pandemic was a novel situation.[117] Thus, the courts had to grapple with the fact that wishes and feelings regarding previous vaccinations were contextually divergent in terms of the degree of risk to life which the respective diseases presented and the degree of restriction in place in society as a result of the disease.[118] Such obstacles expose a core and unresolved uncertainty arising from section 4(6)a, namely the extent to which past behaviour should be deemed relevant in analogous, but not identical situations.

In the case of *Re E*,[119] the court undertook a best interest decision with regard to Mrs E, a woman who had been diagnosed with schizophrenia and dementia.[120] The judge considered Mrs E's historic relationship with other vaccines in order to determine her wishes and feelings. Her past wishes could be found in her consent to vaccines 'in line with public health advice' when she did have decision making capacity.[121] Thus, her capacitous acquiescence to vaccines was carried forward as evidence of her general wish to comply with vaccine initiatives. In other cases, the courts also gave weight to the individual's rejection of vaccines when capacitous. In *SS*[122] for example, the judge appreciated that the individual had a 'clear and consistent pattern of behaviour' in opposition to vaccination which predated her dementia diagnosis.[123] Thus her present, non-capacitous rejection of the vaccine could be situated within her lifelong beliefs and perception of medical intervention.

Giving weight to these past feelings is important in order to recognise the individual at the heart of the decision and the 'reflectively endorsed values'[124] which have influenced their life choices. With these words, John Coggon suggests that mental capacity law seeks to ascertain an individual's rationally considered and consciously selected values.[125] These intrinsic values are considered to persist throughout life, even where the individual may not be able to appreciate them, which provides narrative coherence to the individual's existence.[126] To fail to give weight to these autonomous wishes would amount to 'moral paternalism', which would obfuscate the individual from the decision.[127] In these vaccine administration cases, it seems that

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[116] *Re E* [2021] EWCOP 7*; SS v London Borough of Richmond Upon Thames & Anor* [2021] EWCOP 31.

[117] Haleem and Javaid (n 20) 78.

[118] See Paul Ward, 'A sociology of the Covid-19 pandemic: A commentary and research agenda for sociologists' (2020) 56(4) J Sociol 726, 729.

[119] *Re E* [2021] EWCOP 7.

[120] ibid [1].

[121] ibid [13].

[122] *SS v London Borough of Richmond Upon Thames & Anor* [2021] EWCOP 31.

[123] ibid [20].

[124] John Coggon, 'MENTAL CAPACITY LAW, AUTONOMY, AND BEST INTERESTS: AN ARGUMENT FOR CONCEPTUAL AND PRACTICAL CLARITY IN THE COURT OF PROTECTION', 24(3) Med Law Re*v* 396, 397.

[125] Hilary Kornblith, 'What Reflective Endorsement Cannot Do' 2010, 80(1) PPR 1, 11.

[126] Rebecca Dresser, 'Dworkin on Dementia: Elegant Theory, Questionable Policy' (1995) 25(6) The Hastings Center Report 32, 33.

[127]Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1st Vintage Books edn, Knopf Doubleday Publishing Group, 1994) 231.

present views were given extra weight when they aligned with the person's past views. In *Re E* for example, her approach to health professionals was said to 'resonate' with her previous behaviour before she lost capacity.[128] Thus, there is evidence that the judiciary uses past wishes to thread together a life narrative which prevails over the capacity threshold. In reality, this is somewhat artificial.

Whilst these pre-incapacity wishes can be assumed to have been established through a process of cognitive reasoning, there are risks that previous values may not reflect the person's present wishes.[129] This is supported by McMahan's psychological identity theory, which is premised on the idea that a person with a severe degenerative condition will not be 'psychologically continuous' with their former capacitous self.[130] Thus, because of the disconnect between their former and present self, incorporating previous views as evidence of a prevailing narrative within their life is not representative of the metaphysical reality in which they exist today. If this model is found to be convincing, then a further question must be asked. That is, should the past values of an individual hold any weight over the treatment of the 'new', post-incapacity individual? A disability rights perspective[131] can be utilised to prioritise the subjective reality of the individual in their present circumstances, where the individual's former wishes may threaten their present dignity.[132] In accordance with this perspective, an individual's previous wishes should not supersede welfare considerations, particularly where their level of vulnerability has changed.[133] Thus, it is submitted that caution ought to have been taken when treating SS' history of vaccine rejection in the same manner as Mrs E's history of vaccine compliance, given that vaccine rejection is likely to go against an individual's medical best interests.[134] Giving priority to this history of vaccine rejection could also conflict with the imperative importance of resolving cases in a way which preserves life, as necessitated in *Burke v GMC*.[135]

Finally, it must be questioned whether wishes relating to other vaccines should be used as persuasive evidence of the individual's wishes regarding the COVID-19 vaccine. There are many factors which can distinguish past vaccine behaviour from present concerns, such as the level of vulnerability of the individual at the time of the vaccination, and the prevalence of the respective disease the individual is being vaccinated against. As was stated in *SS*, 'capacitous individuals facing a frightening pandemic might very well take a different view of a vaccination which restores them to their liberty than, for example, a decision not to take a flu vaccine'.[136] Based on the

[128] *Re E* (n 119) [14].

[129] Donnelly, (n 96) 2.

[130] Jeff Mcmahan, *The Ethics of Killing* (OUP 2001) 47.

[131] This perspective advocates for disabled people to have equal access to medical intervention which benefits them; see Derrick Aarons 'The disability-rights perspective within the bioethics agenda' (2022) 27(4) Nurs Ethics 1056.

[132] Dresser (n 126) 37.

[133] ibid, 38.

[134] *SS* (n 122) [36].

[135] R (Burke) v General Medical Council [2004] EWHC 1879 (Admin) [61].

[136] *SS* (n 122) [25].

uncertain degree to which this past behaviour should be used to represent feelings relevant to the present decision, one final risk regarding the inclusion of past wishes requires exploration. That is that, if prior wishes are given too much weight, this could render past behaviour as equivalent to an advance directive, yet without the consent of the individual to bind themselves to their previous actions. Advance directives can be made by individuals in order to make arrangements regarding their future treatment if they lose capacity.[137] Where such a directive is present, 'the principle of the sanctity of human life must yield to the principle of self-determination'.[138] Thus, a great degree of respect is given to the prior autonomy of the individual in navigating their present non-capacitous medical landscape.[139] However, in the absence of an advance directive, there is no clear intention of the individual to prioritise their previous beliefs over their present best interests. Thus, it is contended that caution should be taken in applying weight to the individual's previous wishes, particularly where this goes against the medical best interests of their present self, post-incapacity. The failure of the MCA 2005 to prioritise present wishes over past wishes facilitates judgments which may overly prioritise the individual's capacitous wishes over their present welfare.[140]

B. Present feelings towards vaccines

The second requirement in section 4(6)a is to consider the present wishes and feelings of the individual.[141] Ascertaining an individual's present feelings towards the COVID-19 vaccine is complicated by the fact that the person has already been deemed to lack capacity to make a decision about the vaccine. Whilst this does not preclude the person from having wishes and feelings, it does suggest that they possess a cognitive obstruction to realising or transmitting these feelings in the form of a decision.[142] The decision maker can thus face challenges in ascertaining the wishes of the individual and evaluating the strength of these wishes.[143] As the judge stated in *SS,* despite the fact that SS' 'reality is undoubtedly delusional', it still is her reality and, thus, deserved respect.[144] This raises the question of what weight should be given to present feelings which may not be formed through rational cognitive processes.

The judgments in *Re E*[145] and *SD*[146] provide fruitful material with which to interrogate this matter. In both cases, the individual's deference to their GP was considered to be a relevant present feeling, deemed to indicate that they trusted their GPs would act in

[137] Age Concern Institute of Gerontology and the Centre of Medical Law and Ethics, *The Living Will, Consent to Treatment at the End of Life, A Working Party Report,* (London: Edward Arnold, 1988), 1.

[138] *Re A* (medical treatment: male sterilisation) [2000] FLR 549 [864] (Lord Goff).

[139] Further exploration of advance directives is beyond the scope of this paper.

[140] Alex Ruck Keene and others, 'When past and present wishes collide: the theory, the practice and the future' [2017] Eld L J 132, 132.

[141] MCA 2005, s 4(6)a.

[142] Herring and Wall (n 19) 715.

[143] Rebecca Dresser, 'Missing Persons: Legal Perceptions of Incompetent Patients' (1994) 46 Rutgers Law Review 609, 667.

[144] *SS* (n 122) [25].

[145] *Re E* (n 119).

[146] *SD v Royal Borough of Kensington And Chelsea* [2021] EWCOP 14.

their best interests.[147] In *Re E*, the judge gave weight to Mrs E's comment that she wanted 'whatever is best for me', contending that this statement must be given weight because 'Mrs E's autonomy… is not eclipsed by her dementia'.[148] Referring to autonomy here is worthy of critical consideration. If a Kantian definition of autonomy is being referred to, then this would require the cognitive capacity to act rationally.[149] In turn, this may not be possible for Mrs E due to the obstruction of her dementia.[150] Arguably, turning to the principle of dignity would have been more convincing, focusing instead on the inherent worth of every individual and their right to be facilitated in the decision-making process.

Similarly, in the case of *SD*, the individual was deemed to be unopposed to receiving the vaccine. This was illustrated by the fact that V followed other residents into the room when vaccinations were occurring.[151] The judge found that this behaviour was fitting within a trend of vaccine compliance within her history, and rejected the proposition that V was just 'following the herd'.[152] However, using V's actions here as evidence of her wishes sits somewhat problematically alongside the fact that there was 'no question' that V did not have capacity to express or formulate her wishes about the vaccine.[153] If it is the case that V cannot weigh, retain and use information in relation to this decision due to the cognitive impact of her dementia, then it seems artificial to use her actions as evidence of her desire to receive the vaccination. Claiming that a decision is representative of her wishes without assessing whether the action considers the impact of an individual's mental impairments on their cognitive functioning arguably represents a formalistic and weak conception of autonomy.[154]. Dresser contends that observers can be mystified and perplexed when observing the behaviour of people with cognitive impairments.[155] Thus, their interpretation of such behaviours may not reflect the realities of embodying a condition such as dementia,[156] which is characterised by a 'substantial global decline in cognitive function'.[157] While following a group of people into a room may be viewed as a conscious and considered choice for the observer, the reality of embodying conditions like dementia means this may not have been the reality for SD. Courts should be aware of the limits of participation and avoid making overly simplistic judgements from complex actions.

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147 *Re E* (n 119); *SD* (n 146).

148 *Re E* (n 119) [14].

149 Munro (n 79) 71.

150 *Re E* (n 119) [10]: 'Mrs E does not have the capacity to determine whether she should receive the Covid-19 vaccine'.

151 *SD* (n 146) [12].

152 ibid [24].

153 ibid, [12].

154 James Childress and Michael Quante, *Thick (concepts of) autonomy: Personal autonomy in ethics and bioethics* (Springer Nature 2022) 6.

155 Dresser (n 143) 667.

156 ibid 666.

157 John Breitner, 'Dementia—Epidemiological Considerations, Nomenclature, and a Tacit Consensus Definition' (2006) 19(3) J Geriatr Psychiatry Neurol 129, 130.

Judges frequently turn to autonomy to justify the promotion of wishes and feelings,[158] and this analysis has shown that this approach may not accurately depict the true nature of such actions. However, looking beyond the principle of autonomy, there is a strong sense that the judiciary wishes to avoid causing distress to the individual, which might arise were they to go against their present wishes. This is particularly the case where this could lead to mistrust between the individual and their carers and family members. As such, a 'persuasive' argument which contributed to the overall decision in *SS* was that the restraint required to vaccinate SS would 'most likely dismantle the tentative trust that had been established over the months'.[159] Thus, whilst the vaccine was in her medical best interests, it would not have been in her welfare interests to have the vaccine administered against her wishes.[160] Similarly, in the case of *ACCG v FZ*, 'the strongest argument the family advanced' was the impact of ignoring FZ's fear of treatment.[161] It was contended that, 'Were FZ to be subject to the treatment... it would cause FZ trauma that would last for the long term'.[162] These cases demonstrate that the wishes of the individual must be viewed relationally, with regard to their worth to the individual and their impact on the individual's surrounding network. Thus, these cases reveal that wishes and feelings have a practical value beyond simply autonomy promotion and form part of 'the wider forensic landscape'[163] in evaluating what is in the best interests of the individual.

C. Conclusion

This section has analysed the way in which section 4(6)a MCA 2005 has been utilised in cases regarding the application of the COVID-19 vaccine. Considering past wishes separately to present wishes enabled this discussion to highlight that each respective element of section 4(6)a serves a different purpose.

Pre-incapacity wishes provide the judiciary with evidence with which to thread together a life narrative for the individual. Respecting these wishes enables the decision maker to consider the former autonomous desires of the individual, when they had capacity. Contrastingly, the individual's present wishes added value to the decision by highlighting the individual's unique fears and desires in relation to the decision. Importantly, the judges sought to consider these wishes in relation to the welfare and dignity of the individual, in order to reach a decision which affected them and their relationships in the least detrimental way.

In none of these cases did past and present wishes exist in opposition to each other. However, were this to have happened, the judge may have had to grapple with the conceptual dissonance present within past and present wishes inquiries. There is no statutory prioritisation of past wishes over present wishes (or the reverse) in the MCA 2005. However, acknowledging that these two inquiries serve different purposes adds

[158] See *MC & Anor* (n 24) [11]; *SD* (n 146) [26]; *E* (Vaccine) [2021] EWCOP 7 [14]; *SS* (n 122) [32]; *TN v An NHS ICB & Anor* [2022] EWCOP 53 [25].

[159] *SS* (n 122) [37].

[160] ibid [37].

[161] *A Clinical Commissioning Group v FZ* [2022] EWCOP 21 [49].

[162] ibid [49].

[163] *TN v An NHS ICB & Anor* [2022] EWCOP 53 [11].

nuance to this discussion regarding the degree to which an individual's wishes and feelings should prevail. It enables the discussion to go further and consider *which* wishes and feelings should prevail. If autonomy is deemed to be the driving force behind the inclusion of wishes and feelings, then perhaps the answer should be past wishes and feelings which are readily justified by autonomy principles. Alternatively, if wishes and feelings inquiries are considered to be necessary to maintain continual focus on the individual at the heart of the decision, then it is submitted that the present wishes of the individual are of greater importance. This case analysis suggested that conceptual clarity needs to be achieved before the position of wishes and feelings in the decision can be properly determined. Further, the lack of a mechanism to ensure that present wishes are representative of the individual's true desires suggests that the MCA 2005 requires imminent reform to avoid artificial representations.

4. Substitute judgments under the MCA 2005

The previous section demonstrated that, when ascertaining past and present wishes and feelings,[164] an individual's behaviour can easily be misconstrued. Leading on from this analysis, this section will explore how decisions are made where it is not possible to ascertain any past or present wishes in relation to the decision. This may, for instance, be because the individual was born with a serious cognitive impairment.

Section 4(6)c MCA 2005 asks the decision maker to consider any factors which the individual may have been likely to consider 'if he were able to do so'.[165] In relation to individuals who have never had capacity, conducting this inquiry is ethically controversial. In such cases, the decision maker is not being asked to step into the shoes of the individual, but to step into the shoes of a fictional version of the individual who has capacity to weigh information and to come to a decision.[166] This section will question whether such substitute judgments should occur in relation to individuals who have never had capacity to express wishes and feelings on the matter, or whether it stretches the inclusion of the individual's (potential) wishes to an artificial level. It will do so by considering the application of section 4(6)c[167] in COVID-19 vaccine administration related decisions in the Court of Protection.

A. Substitute judgment usage under the MCA 2005

In order to achieve the objective of this section, it is first necessary to establish the position of substitute judgments within the MCA 2005.

Common law systems typically use either a substitute judgment model or a best interests model to make a decision with regards to an individual who lacks capacity.[168] The former process requires the decision maker to act based on what the individual

[164] Under MCA 2005, s 4(6)a.

[165] MCA 2005, s 4(6)c.

[166] Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' (1990) 100(1) Yale L J 1, 58.

[167] MCA 2005.

[168] Joaquin Zuckerberg, 'End-of-Life Decisions' (2009) 16(2) Eur J Health Law 139, 142.

would have wanted if they had capacity.[169] The latter procedure asks the decision maker to make an objective decision about what is in the person's best interests.[170]

The MCA 2005 decision making framework is a best interests model.[171] However, both subjective and objective considerations are required of the decision maker.[172] The ultimate decision must be made in the individual's best interests, with all relevant factors weighed up in an objective manner. However, in ascertaining what is in the individual's best interests, the decision maker must undertake subjective enquiries into the wishes - and potential wishes – of the individual.[173] A core element of the inquiry process is thus substitute judgment; that is, putting oneself in the shoes of the individual to ask what they would have wanted.[174]

The tension between these subjective and objective inquiries has a further dimension when it concerns an individual who has no previous views of relevance to the decision. Whilst caution should always be taken in contending that someone has no previous wishes on a matter, it is also important to represent the impact of a person's cognitive impairments in a realistic way, to avoid misconstruing their lived reality. Where this means they had no ability to form opinions on the subject, then it must be questioned whether it is appropriate to inquire about what a capacitous version of them would have been likely to consider. This inquiry can enter under section 4(6) MCA 2005. The decision maker must examine:

> *(b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
>
> *(c) the other factors that he would be likely to consider if he were able to do so.*[175]

In order to consider these factors, judges have sought to conduct a 'thought experiment'[176] to determine what the individual would have deemed relevant if they had the competency to make a decision on the subject. This is ethically tenuous for reasons that will be discussed imminently.

Since the case of *Aintree v James,*[177] substituted judgments have gained greater prominence within the MCA 2005. In this case, it was recognised that 'the best interests test should also contain a strong element of substituted judgment', in order

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[169] Alexia Torke and others, 'Substituted judgment: the limitations of autonomy in surrogate decision making' (2008) 23(9) J Gen Intern Med 1514, 1514.

[170] Donnelly (n 63) 329.

[171] MCA 2005 s1(5).

[172] Michael Dunn and others, 'Constructing and Reconstructing "Best Interests": An Interpretative Examination of Substitute Decision-making under the Mental Capacity Act 2005' (2007) 29(2) J Soc Welf Fam Law, 117, 123-124.

[173] MCA 2005 s4(6).

[174] *Aintree* (n 11) [24].

[175] MCA 2005 s4(6).

[176] *North Yorkshire CCG v E* (n 30) [47].

[177] *Aintree* (n 11).

to reflect on the preferences of the individual.[178] As a result of this proclamation, substitute judgments may have taken on more centrality than they were designed to possess in the drafting of the MCA 2005. The wording of the Act specifically establishes that a decision should be made in the best interests of the individual, aligning it away from substitute judgment models which had previously played a role in making financial decisions for people lacking capacity.[179] Whilst these two concepts were never deemed to be mutually exclusive,[180] the Law Commission's influential report on 'Mental Incapacity' specifically stated that imagining a person as if they have capacity is an 'unhelpful idea'.[181] Thus, a problem with *Aintree* was its failure to set perimeters for substitute judgment usage, to prevent it being extended to people with no prior wishes on the subject. Prior to *Aintree*, Judge Munby had contended that there was 'no place' for references to cases which featured the 'mental gymnastics'[182] of the previous substitute judgment case law. Now, *Aintree* is regularly cited to justify the inclusion of substitute judgments, including in cases where the individual never had capacity related to the decision.[183] Thus, it must be questioned whether the Supreme Court enabled substitute judgments to become a driving force within the MCA 2005, without the requisite scrutiny that would come with a parliamentary change to the statute. This is arguably not what the Law Commission, nor the drafters of the MCA 2005, intended. When a person has no past wishes related to the decision to reflect upon, then substitute judgments arguably lose their justification and no longer represent the individual's wishes and preferences. It is surprising that their usage has not been met with further contestation from law reformists and academics.

B. Substitute judgments in practice

With substitute judgments on uncertain – although certainly not minimal – footing, their usage can be examined in practice, through reference to their operation in COVID-19 vaccine administration decisions.

This exploration will begin with the case of *Re CR*,[184] which came before the courts in 2021. CR was deemed to have no ascertainable wishes and feelings in relation to vaccination, as his condition had endured throughout his life. Specifically, CR could not understand the consequences of receiving, or not receiving the vaccine.[185] In the absence of ascertainable wishes and feelings, the judge asked: 'What factors would he be able to consider if he were able to do so?',[186] in accordance with section 4(6)c MCA 2005. The judge listed a series of medical benefits of receiving the vaccine.[187] The judge then decided that CR's feelings on the vaccine would have been shaped by 'the

[178] Ibid [24].

[179] Janet Weston, 'Managing mental incapacity in the 20th century: A history of the Court of Protection of England & Wales' (2020) 68 Int J Law Psychiatry 1, 8.

[180] Law Commission (n 42) para 3.25.

[181] Law Commission (n 42) para 3.29.

[182] *ITW v Z* (n 68) [29].

[183] See *Re Jones* [2014] EWCOP 59 [64]; *Re CR* [2021] EWCOP 19 [3.2]; and *ACCG v FZ* (n 161) [21].

[184] *Re CR* [2021] EWCOP 19.

[185] ibid [3.3].

[186] ibid [3.5].

[187] ibid [3.5].

evidence-based advantages of vaccination'.[188]

The fact that this substitute judgment specifically revolved around medical factors of relevance may speak to the continued predominance of medical best interests within interpretations of best interests.[189] This is how 'best interests' was originally conceived of when the doctrine emerged,[190] and it is the residue of the paternalistic, protective culture towards disabled people has continued. The focus of medical considerations can be contrasted with the judge's failure to pay heed to the individual's fear of medical intervention and the impact of his family's views on his ideology. These omissions are worthy of critical reflection.

Strikingly, the judge discounted evidence of CR's history of resistance to medical intervention, which was submitted to be as extreme as a 'phobia'.[191] The judge stated that CR 'does not appear to have any anxiety about medical intervention', citing a recent incident where CR had enabled blood to be taken.[192] This is notwithstanding the fact that CR was under sedation when this blood test happened.[193] Arguably, the pattern of opposition to medical treatment exhibited by CR is indicative of a fear which would be of relevance to him, if he were to be deciding whether to get the vaccine. Detaching the substitute judgment from the reality of CR's impulses, fears and dislikes undermines the very justification for substitute decision making - that is, to try and consider matters from the individual's point of view.[194] In fact, CR's negative feelings about the vaccine were essentially counteracted by the substitute judgment, wherein it was contended that a capacitous CR would have been convinced by the benefits of vaccination. This case thus sheds light on the intersection between section 4(6)a (past and present wishes and feelings) and section 4(6)c MCA 2005. Considering the potential wishes of an individual above the feelings which they express in reality is problematic and suggests that, in this case, the individual's autonomy was subordinated beneath welfare considerations.[195]

Furthermore, the judge also omitted to consider CR's family's opposition to the vaccine in the substitute judgment. CR's father, mother and brother all expressed strong views against vaccination.[196] Expecting CR's wishes to be entirely detached from those of his family may not be fully realistic, as the beliefs of parents are strongly

[188] ibid [4.4].

[189] Renu Barton-Hanson, 'Reforming best interests: the road towards supported decision-making', (2018) 40(3) J Soc Welf Fam Law 277, 295.

[190] Best interests emerged from the term 'benefit', see Donnelly (n 96) 1.

[191] *Re CR* (n 184) [2.2].

[192] ibid [2.2].

[193] ibid [2.2].

[194] *Aintree* (n 11) [24].

[195] Marina Wheeler, 'Covid, Consent and the Court of Protection' (*U*K Human Rights Blog, 19 March 2021, <https://ukhumanrightsblog.com/2021/03/19/covid-consent-and-the-court-of-protection/> accessed 7 December 2022.

[196] *Re CR* (n 184) [1.5], [3.9].

influential in shaping the beliefs of their children.[197]

Whilst family influence was not given great weight in any COVID-19 related decision,[198] religious influence was considered in *ACCG v FZ*.[199] This case concerned the administration of the COVID-19 vaccine to a woman of Muslim heritage who was deemed to lack capacity. FZ's sister contended that, if FZ had capacity, she may not wish to receive the vaccine for religious reasons.[200] The judge first considered a statement made by the Islamic Medical Association which said that the vaccine was not anti-Islamic.[201] He then considered if the family could be said to subscribe to a particular branch of Islam, which might express a different religious perspective on the vaccine.[202] However, he dismissed FZ's sister's submissions as irrational and unconvincing, stating 'I did not find TZ's explanation of the objection at all coherent'.[203] The judge did not, in his judgment, consider the interplay between religion, Ramadan and vaccine uptake. He did not give weight to the concerns expressed by some within the religious community that vaccine administration could break Ramadan and also that vaccines often contain derivatives of pork gelatine which is not considered halal.[204] It can be questioned whether, had FZ's relatives argued more cogently about the religious reasons for non-vaccination, the judge would have taken this into account in a more understanding manner. Without further information about what the relative had argued, it is unclear whether the nature of her argument, or the way in which she argued it was deemed to be 'irrational'. However, questioning the rationality of an argument surrounding an individual's faith is arguably a judicial overstep.[205]

This rational approach to decision making can also be seen in *North Yorkshire CCG v E*.[206] Here, the judge questioned whether E, having suffered brain damage which was believed to have been caused by another vaccination, would be opposed to vaccination if he had capacity. The judge stated:

> *'It might be said that had E, with capacity to make a decision about vaccination, applied an evidence-based approach to decisions about his health, he would have elected to be vaccinated against COVID-19 notwithstanding his previous vaccine damage'.*[207]

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[197] Jacquelynne Parsons and others, 'Socialization of Achievement Attitudes and Beliefs: Parental Influences' (1982) 53(2) Child Development 310, 310.

[198] See also *A CCG v DC* [2022] EWCOP 20 [14], *Re E (*n 119) [15].

[199] *ACCG v FZ* (n 161).

[200] ibid [47].

[201] ibid [47].

[202] ibid [48].

[203] ibid [48].

[204] Yan Mardian and others, 'Sharia (Islamic Law) Perspectives of COVID-19 Vaccines' 2021 2 Front Trop Dis <https://www.frontiersin.org/articles/10.3389/fitd.2021.788188/full> accessed 15 March 2023.

[205] This has been something which the Court of Protection has previously tried to avoid. See *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWHC 1317 [34].

[206] *North Yorkshire CCG v E* (n 30) [47].

[207] ibid [47].

Whether E would really have adopted an evidence-based approach to vaccination, given his family's feelings on vaccination and his own history of harm from vaccination, is questionable. Whilst it cannot be said for certain that an individual who suffered harm from a previous vaccine would reject a subsequent one, it can neither be said that the individual would discount the harm they experienced and the fear of succumbing to that experience again, in favour of scientific evidence. Thus, this quote highlights the redundancy of considering what a person may have considered if they had capacity, but were in the same situation. Indeed, if E had capacity, he would not be in the same situation as he would not have suffered from receipt of an earlier vaccine.

Also deserved of critical scrutiny are *ACCG v FZ*[208] and *ICB v RN*[209], wherein the judge considered altruistic matters in the substitute judgments. COVID-19 vaccine related decisions expose a unique tension between the individualised framework of the MCA 2005 and the public policy aims of communitarian treatment. Indeed, vaccines can reduce the spread of disease to others,[210] which decreases hospitalisation rates across the population. Incorporating concern for others into the judgment sits uneasily alongside the individualised focus of the MCA 2005 decision making framework[211] and is thus worthy of scrutiny.

In the case of *ACCG v FZ*, the judge asked 'might FZ have behaved like a responsible citizen and consider the effect of her decision on other people had she made the decision for herself?'.[212] In *ICB v RN*, similar considerations were voiced. Altruism was deemed to be a 'powerful factor' in the decision, specifically with reference to the protection of hospital infrastructure.[213]

These cases expose a risk that substitute judgments can enable public policy concerns to enter tacitly into a decision. The individual's best interests can be configured to include their moral and social best interests if these factors are deemed to be of potential relevance. This expands the loci of the best interests test beyond the individual, to the public at large. Admittedly, altruistic motivations have been considered in other best interests decisions within the Court of Protection.[214] However, in these decisions, the altruistic considerations always related to someone known to the individual. Thus, in some way, the individual benefited by positively impacting their carer or family member.[215] The impact cannot be said to be so directly felt with regard to receiving the COVID-19 vaccine.

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[208] *ACCG v FZ* (n 161).

[209] *An ICB & RN & TN* [2022] EWCOP 41.

[210] UK Health Security Agency, 'Covid-19 vaccine surveillance report: week 1,' 6 January 2022, 11 [2] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1045329/Vaccine_surveillance_report_week_1_2022.pdf> accessed 8 April 2023.

[211] MCA 2005 Code of Practice (n 16) 4.

[212] *ACCG v FZ* (n 161) [23].

[213] *An ICB & RN & TN* (n 209) [48].

[214] See *A NHS Foundation Trust v MC* [2020] EWCOP 33; *A NHS Trust v DE* [2013] EWHC 2562 (fam).

[215] Jonathan Herring, *Medical Law and Ethics* (9th edn OUP 2022) 195.

Whether external concerns are warranted in these decisions has been considered by Schaefer et al. They argue that an individualised, autonomy centred approach to vaccine administration is not desirable where a person lacks capacity.[216] Further, they contend that public policy considerations should be brought into the MCA 2005 best interest test in order to tailor the decision to the individual's true values if they had capacity, which would not exist in a void without reference to their social context.[217] However, if this justification for the inclusion of public policy concerns is convincing to the judiciary, then it ought to be considered openly, not through tacit means, by way of a substitute judgment.

Indeed, considering altruism in *ACCG v FZ* is ironic considering FZ's history of vaccine rejection.[218] It is clear that the substitute decision making model can enable anything to be imputed as a potential factor of relevance to the individual, were they to have capacity. This is regardless of whether it conflicts with their past behaviour and personality. This renders the exercise redundant and undermines the value of an individualised model, if the individual is being considered from a capacitous perspective, rather than as the real version of them, with their genuine feelings and fears taken into regard.

C. Criticism of Substitute Judgments

Having explored the usage of substitute judgments in COVID-19 related decisions, it is clear that their usage exposes the individual to a risk of being misrepresented.

To engage fully with the subject, the merits of substitute judgments should also be considered. Substitute judgments encourage the decision maker to consider the unique circumstances within which the individual conducts his life. This may inform the decision maker about whether the action is really the least restrictive option for the individual – one of the core principles of the MCA 2005 --[219] and lead to a better understanding of their individual welfare concerns. Furthermore, from a practical standpoint Mary Donnelly argues that attempting to interpret an individual's wishes 'need not necessarily be problematic' because most people would wish to act in line with their 'broader well-being'.[220] Most decisions are not delicately balanced and the individual will usually wish to act in line with the advice of health professionals, thus seeking their 'likely' views on factors of relevance can be based on the high probability of welfare prioritisation.

However, arguably this very fact serves to highlight the redundancy of section 4(6)c when applied to people without past wishes and feelings on the subject. The MCA 2005 already asks the decision maker to consider the best interests of the individual,[221] so there appears to be no purpose in seeking a best interpretation of the individual's wishes, if the individual's wishes are assumed to match medical advice. Arguably, a

[216] Schaefer and others (n 67) 13.

[217] ibid 13.

[218] *ACCG v FZ* (n 161) [38].

[219] MCA 2005 s1(6).

[220] Donnelly (n 63), 326.

[221] MCA 2005 s 1(5).

transparent approach to best interests is more appropriate, such as openly contending to prioritise medical best interests rather than doing so under the guise of considering the individual's potential wishes. Indeed, Harmon contends that it is crucial to examine moral issues openly.[222] Deciding when the state can infringe on someone's bodily integrity is of great moral significance and factors of relevance ought not to be concealed through the employment of a legal fiction.

Furthermore, there is a risk that the ability to conduct substitute judgments 'permits the hidden exercise of power'.[223] Specifically, the decision maker could input their own views into the substituted judgment of the individual. This may not be deliberate. Indeed, this 'thought experiment'[224] requires the decision maker to consider potential subjective opinions of a person who has never had such an opinion. However, such a task cannot be conducted objectively. Indeed, in some cases where a severe cognitive impairment is present, 'no one, including the patient himself, can know what he would want'.[225] This suggests that conducting a substitute judgment, in the absence of any former views on the subject, is a redundant task which does not advance the interests of the individual in any way.

Thus, it is contended that utilising substitute judgments does not reflect the wishes and feelings of the individual. Sometimes, it even exists in paradox with the individual's true wishes.[226] Therefore, this exploration has provided strong impetus for restricting the usage of substitute judgments. At a minimum, it calls for a conceptual fission between substitute judgment and wishes and feelings inquiries.

D. Conclusion

This section explored the usage of substitute judgments within COVID-19 vaccine administration decisions. Whether these thought experiments could be said to provide any meaningful reflection of the individual's wishes was questioned. From an ethical standpoint, the utilisation of substitute judgments exposed the risk of artificial considerations coming into play, through the mouthpiece of the individual. Furthermore, whilst substitute judgments appear to maintain focus on the wishes of the individual, this analysis demonstrated that they can enable potential considerations of the individual to prevail over their true feelings.

Thus, this section has highlighted that focusing the decision around the individual can be overextended, at the risk of detaching the decision from the individual before the decision maker entirely. It highlighted that an over-emphasis on the individual's (potential) perspective can risk other factors being included tacitly, rather than in a clear and transparent fashion. Such considerations should instead be examined openly, alongside the individual's wishes, rather than through the mouthpiece of the individual, in order to respect their integrity, characteristics and experiences.

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[222] Harmon (n 166) 63.

[223] Donnelly (n 63) 326.

[224] *North Yorkshire CCG v E* (n 30) [47].

[225] Nancy Rhoden, 'Litigating Life and Death' (1988) 102(2) Harv Law Rev 375, 376.

[226] See *ACCG v FZ* (n 161).

It appears that the MCA 2005 requires clarity over its aims. If it truly aims to place 'individuals at the very heart of the decision-making process',[227] then the means of doing this should be very closely examined, to ensure that the individuals are not reconstructed from a capacitous perspective. Considerations about the individual's wishes, feelings and values should be extended no further than what is ascertainable, and should not extend to theoretics.

5. Conclusion

This paper exposed the complexities in best interest decisions and suggested that prioritising wishes and feelings above other factors may not be the best route forward. In order to reach this conclusion, it examined the theoretical underpinnings of the MCA 2005 and the rationale for the inclusion of wishes and feelings. Secondly, wishes and feelings inquiries under s4(6)a were examined in COVID-19 vaccine administration decisions. Finally, the use of substitute judgments within COVID-19 vaccine decisions was scrutinised.

Through exploring these matters, this paper enabled theoretical and practical matters to be considered simultaneously. This allowed the underpinnings of wishes and feelings inquiries to be traced in their application in practice, providing greater nuance to the debate regarding the place for wishes and feelings in the best interests decision. It found that conceptual clarity is needed in the Court of Protection regarding the purpose of these inquiries. Turning to simplified accounts of autonomy may not be justified in every case. Such justifications for the inclusion of these inquiries may have given rise to their overextension, through the means of substitute judgment. Thus, this paper has illuminated that trying to enmesh autonomy within a legal framework is inherently difficult and unintended consequences can arise.

Through the analysis of section 4(6) MCA 2005 in practice, this paper sought to consider where the line between autonomy enhancement and welfare protection should lie. It found that wishes and feelings are inherently complex and showed the importance of realistically representing the individual, with regard to their cognitive reality. It questioned the usage of substitute judgments, wherein a theoretical reality was imagined for the individual.

Thus, this paper brought to light practical concerns emerging from the usage of section 4(6) MCA 2005 inquiries. Considering COVID-19 vaccine related cases enabled the unique tensions arising in these cases to be considered, specifically regarding the novelty of COVID-19 and the communitarian role of vaccines. Inevitably, the discussion had to be curtailed in some way and having a consistent backdrop of vaccine administration with which to explore section 4(6) enabled this discussion to remain focussed on its aims. Further research is invited to consider wishes and feelings in other contexts, particularly where the tension between wishes and feelings and welfare are more pronounced, such as in treatment refusal decisions. It is of imperative importance to understand the purpose, merits and limitations of wishes and feelings inquiries.

[227] MCA 2005 Code of Practice (n 16) foreword.

Will Pillar 1 of the National Framework for the Policing of Violence against Women and Girls enhance female confidence in the police?

EVE MCROBERTS

Abstract

A call for radical change in the policing of violence against women and girls (VAWG) comes at a time of an epidemic of VAWG combined with high-profile events such as the kidnapping, rape, and murder of Sarah Everard by serving police officer Wayne Couzens. Therefore, in December 2021, the National Police Chiefs Council and College of Policing launched a National framework for improving the policing response to VAWG in England and Wales. Pillar 1 of the framework outlined four key measures for the police to adopt to build female trust and confidence. However, an analysis of all four key measures is necessary to ascertain if they will be successful in achieving this. By utilising a library-based approach of a systematic literature review to undergo the analysis helped discover if the measures were supported by academic evidence and research to conclude if Pillar 1 will enhance female confidence. The findings presented that, theoretically, Pillar 1 has the potential to be monumental for the police in enhancing female confidence as all four key measures are embedded with supporting academic research. However, the practical application of Pillar 1 prohibits potential success due to evidence of police failures in practice and the influence of the culture that is rife in the police. In conclusion, unless the culture of misogyny and racism that is embedded in society is tackled, no cultural changes in the police will occur, and therefore Pillar 1 will not be upheld in practice and consequently fail to enhance female confidence.

1. Introduction

There is widespread public concern around the standards and legitimacy of the police, particularly with respect to their ability to protect victims of violence against women and girls (VAWG). Most notably derived from recent high-profile events: the kidnapping, rape and murder of Sarah Everard by serving police officer Wayne Couzens in March 2021 (MPS, 2023a); the response of officers Deniz Jaffer and Jamie Lewis, sharing photographs on WhatsApp groups of the murdered bodies of Nicole Smallman and Bibaa Henry in June 2020 (MPS, 2021); to the recent reports from officer David Carrick who pleaded guilty to 49 sex offences, including 24 counts of rape and sexual assault against at least 12 women from 2003 to 2020 (MPS, 2023b). This has reinforced the sense that the threat of gender-based violence is everywhere and has shown the vulnerability of women and girls even at the hands of the police.

The epidemic of VAWG is prevalent in today's society. This is evidenced by the fact that a woman is killed every 11 minutes by a family member or intimate partner (UN, 2020), and that a woman or girl is being killed every three days in the United Kingdom (UK) (Femicide Consensus, 2020). In 2022, in England and Wales (E&W), an estimated 1.7 million women experienced domestic abuse (ONS, 2023a) and an estimated

798,000 women experienced sexual assault or rape (including attempts) (ONS, 2023b). The true scale of the problem is suspected to be far worse given five in six cases go unreported (ONS, 2021). Given the problems faced by women nowadays, they desperately need the protection of the police. However, the poor attitude of the police towards them has caused them to lose confidence in the ability of the police to solve their problems. Therefore, a radical change in policing of VAWG has been enforced.

In December 2021, a National framework was released by the National Police Chiefs Council (NPCC) and College of Policing (COP) that set out priority actions for policing in E&W to improve the policing of VAWG (NPCC and COP, 2021). The framework is split into 3 Pillars: Pillar 1 focuses on building trust and confidence, Pillar 2 explains on the relentless pursuit of perpetrators and Pillar 3 relates to creating safer spaces for women. This framework is an opportunity for necessary change to the policing of VAWG. It is important to establish if the change intended is possible or whether a new direction is needed to be taken. Due to its recent publication, an analysis of each of the pillars has yet to be undertaken. The current urgency to ensure that women can have confidence in the police to combat VAWG and protect them has led the sole focus of this paper to analyse Pillar 1 of building trust and confidence.

Pillar 1 outlines the four key measures for the police to adopt when enhancing trust and confidence:

1. *Respond unequivocally to allegations of police-perpetrated abuse, learning from mistakes and best practice.*
2. *Challenge and address sexism and misogyny in policing.*
3. *Involve VAWG organisations, including charities supporting Black and minoritised women and girls, as well as individual women and girls with lived experiences.*
4. *Collect consistent local and national information on the availability of specialist VAWG investigators to build the right capability and capacity.*

(NPCC and COP, 2021, p.15).

By analysing the four key measures of Pillar 1 to ascertain if they are grounded in academic research, theory and evidence can be utilised to conclude if they will help enhance female confidence in the police. This paper set out to answer the following question therefore:

"Will Pillar 1 of the National Framework for the policing of VAWG enhance female confidence in the police?"

The overall structure of this paper takes the form of three sections. Section three provides the background knowledge and context to the relationship between women, the police, and the policing of VAWG from historical to contemporary times. This knowledge can be utilised in the consecutive sections. Section four focuses on the analysis of the first and second key measures of Pillar 1 which both coincide with the measures the police should take to challenge and respond to sexist and misogynistic behaviour in the police. Following that, Section five focuses on the analysis of the third

and fourth key measures of Pillar 1 which both reflect measures the police should take to improve police practice and prevention.

The term VAWG in this paper uses the definition provided by the United Nations General Assembly as:

"Any act of gender-based violence that results in, or is likely to result in physical, sexual, psychological harm and suffering to women including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life"

(UNGA, 1993)

It is important to acknowledge this is a live and ongoing topic as this paper was undertaken. This means there will be a constant release of new reports and evidence resulting in the issue constantly evolving in practice.

The methodology adopted to complete this paper will now be discussed in the following section.

2. Methodology

This section discusses the methodological approach implemented into the paper. It commences with the rational for conducting a library-based paper. It will then explore how this influenced the methodological approach, the methods employed to sample relevant literature and how this was analysed within the paper. It will finish with addressing the potential limitations of the methodological approach.

As this paper intended to evaluate an already published report, there was no need to gather new primary data as this was not necessary for answering the research question. This paper therefore adopted a library-based approach which included analysis of books, academic texts, journal articles, reports, reviews and any other relevant materials. Bryman (2004) and Noaks and Wincup (2004) suggested this method allows researchers the opportunity to evaluate the highest quality of material whilst permitting new interpretations to be facilitated. This is significant as the issue of VAWG is considered a live and ongoing issue, which means any new interpretations derived from new perspectives could be utilised in contributing to change. The library-based approach was predominantly chosen due to the sensitive subject-matter where several practical constraints and ethical issues would have disallowed the conduct of primary research. Adopting a library-based approach allowed for the researcher to explore their desired field of interest albeit sensitive content whilst minimising the issues of engaging with primary research. Moreover, given the available resources and time constraints of the project of an undergraduate paper, conducting library-based research was the most suitable choice.

The methodological approach best suited to undertake this library-based paper was a systematic literature review (SLR). An SLR vigorously identifies and critically appraises research in order to answer a clearly formulated research question (Gough et al, 2017; Liberati et al, 2009). Xiao and Watson (2019) highlighted the importance of utilising SLR when wanting a rigorous method of analysis from relevant material. This

was best suited for the paper as an extensive use of analysis of existing literature and research was necessary to assess the merits of Pillar 1 in enhancing female confidence. An SLR allowed the appropriate analysis to be conducted to achieve the aim of the research question.
The methods employed to explore the relevant literature for the background and context section involved searching on the University of Leeds library database, journal article databases such as JSTOR and Google Scholar using keywords and phrases such as VAWG, the policing of women, sexism and misogyny. As the contemporary policing of VAWG is currently an ongoing issue, His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), the NPCC, COP and Government websites were utilised to access recent reports and investigations into the police forces in E&W. Some key criteria for sources consisted of research or reviews conducted on all 43 police forces in E&W and research that predominantly focused on the policing of VAWG historically and contemporarily.

The decision to split the analysis of the first two and the last two key measures of Pillar 1 into two different sections occurred because the first two key measures related toward challenging sexist behaviour and misogyny in policing whilst the last two key measures focused primarily on actions to implement into practice. When analysing the four key measures of Pillar 1, the researcher selected key words and phrases derived from the wording of each and researched utilising the databases accordingly. For example, second key measure of Pillar 1 is "Challenge and address sexism and misogyny in policing" (NPCC and COP, p17), the key words the researcher highlighted were sexism, misogyny, and policing. Collecting the relevant data for each section allowed for a thorough analysis to be applied to formulate the merits of whether it would work in theory or not when enhancing female confidence.

The potential limitations of the methodological approach involved the researcher implementing bias by selecting particular information that will provide the desired answer to the research question (Owens, 2021; Uttley et al, 2023). The nature of the paper required the researcher to analyse an abundance of literature, studies and reports that supported and challenged each statement of Pillar 1 to conclude overall whether the framework will enhance female confidence in the police. The requirement of a conclusion based on such detailed analysis provided a framework that eliminated the risk of researcher bias.

The next section of the paper will be section three. This will provide the reader with an opportunity to understand the nature of the relationship between police and women whilst establishing how they historically policed and contemporarily police VAWG. This will help provide justification for the paper whilst help the reader develop necessary knowledge to best comprehend the analysis of the four key measures of Pillar 1 in Sections Two and Three.

3. Background and Context

The purpose of this section is to establish the context behind the relationship between women and their confidence in the police to help provide the reader with the knowledge on why it needs to be enhanced. It begins by focusing on the historical

context of police and women's relations, the policing legitimacy and women's trust in the police and then moves onto focus on the contemporary policing of VAWG. This knowledge can be used for comprehending the analysis in sections four and five, and help emphasise the justification for undertaking the paper.

A. Policing context and women's relations

Within the literature, there is a long-standing recognition that policing has been firmly located within the men's domain (Skolnick, 1996; Young, 1991). The occupational world has long been sex segregated and occupations that required physicality or courage in the face of danger have traditionally been reserved for men (Martin, 1980; Rabe-Hemp, 2008; Walby, 1988). This can be attributed to the patriarchal views engrained into society that created a hierarchy of male domination that maintained women in a position of subordination. According to Skolnick (1996) and Young (1991), the police service is one of the most highly gendered institutions whereby masculinised behaviours such as strength and aggression are endorsed and prized. This facilitated an "All-boys Club" to dominate the profession and create a police culture that defined the nature of policing in a way that pleased the patriarchy (Rabe-Hemp, 2008, p251). The police can be defined therefore as an organisation designed for men that allowed them to intertwine their positions of authority within society into their occupation. This is important when understanding why women become the subject of misogynistic and discriminatory treatment by the police.

The history of women in the police

In this context, early literature highlighted the exclusively male community that the police promoted substantially encouraged and justified the exclusion of women entering the profession. Research enforces the stereotypical views of women as 'naturally' more vulnerable, physically and psychologically, made them incongruent with the police role of fighting dangerous crime (Jones, 1986; Heidensohn, 2008; Silvestri, 2017). This is significant in showing the police view of women as incapable of performing the same functions as men. Martin (1980) argued the integration of females as police officers challenged male officers hypermasculine self-image. Likewise, Heidensohn and Brown (2000) argued men felt threatened that women would have equal access to legislative powers. This explains why the entrenched culture of machismo supported the marginalisation of female officers. Female official recognition as police officers only derived after the First World War and even then, they were deployed to separate departments overlooked by male authority with duties relating to vulnerable women and children (Jones, 1986; Martin and Jurik, 1996). Some academics attribute this to the patriarchal beliefs that domestic responsibilities as mothers and wives illustrate the police saw little investment in their employment (Emsley, 2003; Holdaway and Parker, 1998). By ensuring women remained spatially separate and differentiated from male authoritative positions, allowed men to remain in positions of power over women. Even when women's role in policing expanded to encompass more traditional police responsibilities such as patrol duties, women were met with extreme resistance and substantial opposition (Balkin, 1988, Flynn, 1999). This is important in conveying that the police were reluctant to view women at equal status to men and defy the patriarchy.

One of the ways male officers fought to retain their exclusivity and superiority in the police is through sexual harassment (SH) of female officers. Researchers enforce that where the man's place in the gender hierarchy is threatened, there is a greater likelihood of SH (McDonald, 2011; Silvestri, 2007). If women are in positions superior to men, it creates an unequal power dynamic favouring women and therefore SH is used to belittle them and reinstate the male hierarchy. The severity of SH in the police was exemplified by Sampson et al (1991) study on the police forces in E&W. Their original focus of the two-year study shifted to encompass SH as a fundamental point of analysis in the police after discovering its prominence in the forces. Brown et al (1995) and Hearn and Parkin (1987) argued SH emerged amongst the force predominantly in the form of misogynistic humour. This demonstrates how female officers' purpose in the police became the sexual provocation and temptation for male officers, reflective of how men viewed them in wider society. The partaking in misogynistic action is demonstrative of early signs within the literature of police acceptance of and involvement in VAWG. For the police to inflict SH on one of their own conveys why women in society could not have confidence the police would not do the same to them.

B. Police legitimacy and women's trust in the police

The policing of VAWG

Early literature relating to police trivialising male violence against women in their response toward VAWG is available in abundance. Early research conveyed that the police were reluctant to intervene when men were violent towards their wives, believing that domestic abuse (DA) incidents were 'private' matters to be resolved within the family (Hall, 1984; Hamner and Stanko, 1985; Kemp et al, 1992). The police often sided with the husband, believing that assaults on wives were rational, if not legitimate, when used to discipline a wayward wife and therefore DA remained a low priority for the police (Dunhill, 1989; Maynard, 1985). Dobash and Dobash (1979) argued the influence of the macho culture in the police resulted in them utilising the common sense of male behaviour towards women in society when formulating decisions in DA incidents. Such outcomes turned a blind eye toward VAWG and resulted in having adverse effects on female confidence for women in distrusting the police to protect them.

A commonality emerged in research that the police response to VAWG resonated an impunity for VAWG. Non-interference into matters of DA resulted in investigations, arrests and recordings for DA to be minimal; this exemplified to women a tolerance for male violence and reluctance to condemn it (Hall, 1984; Kemp et al, 1992). Even when investigations did occur, husbands were often verbally reprimanded, temporarily removed from the home and then released back to their wives who were often met with violent reprisal for denouncing them (Dobash and Dobash, 1980; Edwards, 1989). This response failed to criminalise abusive behaviour and did not deter violent husbands. This allowed VAWG to flourish in society and helped convey why women believed the police could not safeguard them from male violence. Feminists Stanko and Heidensohn (1995) revealed male officers also regularly disbelieved victims of DA as they did not align with their ideal victim who possessed physical injuries sustained by a stranger. This was defined in Edwards (1986) study of two London Boroughs as officers not comprehending the dynamics or severity of DA.

This is because DA is commonly committed by someone known to the victim and encompasses injuries other than physical harm (Dobash and Dobash, 2004). Dismissing the victim's allegation allowed the perpetrator to be protected and, in a position to continue to inflict harm. This helps to highlight the dangerous position for women facilitated by police failure to discipline actions of VAWG.

Similarly, early research displayed that officer treatment of rape victims disregarded and disbelieved their allegations. Police officers were shown to have believed rape myths that perceived women reported rape falsely to cover up their engagement in morally questionable behaviour (Gregory and Lees, 1999). This downplayed the necessity of consent, the severity of and justified sexual violence (SV) toward women. Feminist Malamuth (1996) suggested rape was motivated by the male desire to hold power over females and this can explain why male officers, who strongly enforced the patriarchy, were complaisant to dismiss allegations. Rape cases were less likely to be reported or result in a conviction (Grace et al, 1992; Kelly et al, 2005; Wright, 1984). Jordan (2004) study of police rape files highlighted the police in E&W determined a woman's credibility from their demeanour, intoxication, and concealment. This exonerated the rapist and placed blame onto the victim which upheld the rape culture that undermines rape incidents as simply regretful and "rough sex" (Stanko, 1985, p104). This is useful in showing how female victims of rape were likely to be disbelieved by the police.

Likewise, early research highlighted the police failed to treat rape victims with a sensitive approach appropriate for the nature of rape. This was captured by the 1982 Roger Graef fly-on-the-wall documentary of Thames Valley police, which conveyed, 2 male officers disbelieving and interrogating a woman reporting rape into dropping her testimony (Police, 1982). Although, reforms to officer's response to rape victims arose from this documentary, research continued to find that police remained more sympathetic to victims raped by strangers rather than someone known to them (Harris and Grace, 1999; Temkin, 1987). This conveys the police's reluctance in change to comprehend the nature and sensitive approach needed for victims of rape. Female interviews endorsed the likening of the rape reporting process as a replication of the violation they felt in the initial rape (Adler, 1987; Temkin, 1987). This conveys how police response to rape victims exacerbated their trauma and is credible coming directly from first-hand experience. This is useful in conveying why women did not have the confidence to report to the police or believe they would provide an appropriate response that considered their trauma.

Police racism

Racism was also a prominent feature embedded in the early literature regarding the police culture and their practice toward Black and minority ethnic (BME) communities (Newburn, 2005). This is important to acknowledge when comprehending the extra barriers this had for female BME victims of VAWG. Smith and Gray (1983) identified racial prejudice and racialist talk between officers as pervasive. This is confirmed by Cain (1973) and Holdaway and Barron (1997) who declare it commonplace for the police to utilise oppressive policing techniques on BME communities and label them using discriminatory stereotypes. Two inquiries, the Scarman report (1983) following the 1981 Brixton riots between primarily black youths and the Metropolitan police

service (MPS) and likewise the Macpherson report (1999) into MPS failure of investigating Stephen Lawrence's death, brought attention to the prevalence and need for change of racism within police practices. BME women, therefore, who can endure both racist and sexist treatment from the police, experience the adverse effects of both forms of discrimination which some academics have described as double jeopardy (Chaney et al, 2018; Remedios and Synder, 2018). This helps to highlight how challenging it was to be a female victim of VAWG from a BME background, which can help understand their lack of trust or engagement with the police.

Women's resistance

The police response to VAWG was not met without resistance from women's organisations (Dunhill, 1989; Jones, 1986). Utilising early research on women's fight helps to illustrate how prolonged the fight for better policing for women has been. The protection of male violence became political after the emergence of the Woman's Liberation movement in the 1960s, alongside the second wave of feminism, that facilitated public awareness of the poor treatment of VAWG victims (Oakley, 1998; Tarrow, 1994). The 1970s saw an increase in feminist campaigns and marches demanding VAWG victims be given justice and granted equal rights (Dobash and Dobash, 1992; Our Streets Now, 2020). Organisations such as Southall Black Sisters were formed to provide tailored support for BME victims (Dunhill, 1989; Southall Sisters, 2023). This is important to highlight that it was women and their organisations that gave a voice to victims of VAWG to protect them from male violence, not the police. Progression for female officers during this time emerged in the development of the Sex Discrimination Act (1975) which outlawed sexual discrimination in the workplace (Dunhill, 1989; Jones, 1986). However, Young (1991) enforces the Chief Constables, the Superintendents' Association and the Police Federation fought for the police to be exempt from the act (Young, 1991). This emphasises the substantial opposition from male officers toward fighting for change for equality for women.

There is a consensus amongst early research, that the police response to VAWG embedded in a macho culture had adverse effects on female confidence. This puts into perspective the roots of the relationship between women and the police which can be used to understand the longevity for improved policing of VAWG and justifications for this paper.

C. Contemporary policing of VAWG

The persistence of a white masculine culture within twenty-first century policing remains a dominant narrative in contemporary research (Dick et al, 2014; Loftus, 2008; Silvestri, 2017). The notion therefore of the police as a role reserved for men is continued and confirmed with males representing 66.5% of the police workforce in E&W whilst females represented 33.5% from March 2021 to March 2022 (GOV, 2022a). This signifies, that despite the presence of women within policing officially for nearly over a century, they are still struggling to gain legitimate acceptance within the police profession and is reflective of the underpinned macho culture that has prohibited this from changing. This is confirmed by HMICFRS (2022) review of all 43 police forces in E&W that a culture of misogyny and sexism remains rife in the police. As early literature confirmed women were subject to discriminatory treatment underpinned

by the macho culture suggests women in the twenty-first century remain equally at risk.

A series of high-profile incidents have been prominent in contemporary research showing the scale of police abuse of women and girls: evident in the rape and murder of Sarah Everard by MPS officer Wayne Couzens; the photographs taken and shared of Bibaa Henry and Nicole Smallman's bodies by MPs officers Deniz Jaffer and Jamie Lewis; and the estimated 49 sexual offences MPS officer David Carrick pled guilty to against at least 12 women (MPS, 2021; 2023a; 2023b). This shows women are at risk of being exposed to potentially corrupt officers and highlights their vulnerability at the hands of those supposed to protect them from such corruption. As a result, the End Violence Against Women (EVAW) survey on 1,699 women revealed 47% of women reported declining trust in the police following the case of Sarah Everard (2021a). Recent data from the NPCC (2023) reveals 1,177 cases of alleged police-perpetrated abuse (PPA) were reported across all 43 forces in E&W between October 2021 and April 2022, with 653 cases being raised by a colleague within the force and the remaining 524 from the public. The severity of PPA within a 6-month period calls attention to the persistence of perpetrators of VAWG within the police. Out of the 1,177 cases, only 1% of the accused officers were dismissed, which resonates the police enable perpetrators to abuse women without consequence. The scale of contemporary police abuse of women and the evident impunity highlights why women's confidence in the police is low.

Police response to cases of VAWG

Studies on contemporary police attitudes and responses to VAWG have revealed VAWG continues to be undermined and downplayed by officers. The HM Inspectorate of Constabulary (HMIC) (2015) concluded the quality of response and officers' attitude in E&W to domestic violence was poor. This is supported by Hester (2012) and Lea and Lynne (2015) analysis of police casefiles which conveyed male officers' tendency to blame the victims or present cases from a male perspective. Likewise, the HMICFRS (2021) report of the police in E&W highlighted some improvements to the police response to VAWG. However, there remained significant inconsistencies and improvements needed. Attitudes toward VAWG were recently highlighted in Baroness Casey's (2023) review of the MPS in the conversations between male officers regarding DA victims "love it, that's why they are repeat victims more often than not" (p271) and messages sent to a female colleague of "I would happily rape you" (p271). When questioned regarding these comments, the officers downplayed it as 'only banter' (Casey, 2023, p271). This conveys the embedded police culture of misogyny that downplays the severity of VAWG and continues to normalise predatory behaviour. This helps to understand why urgent change is needed in police attitudes and responses toward women and violence against them.

Contemporary research confirms the treatment of rape victims remains inadequate. This is highlighted in the low justice rates for rape as in 2021, only 1 in 100 rape cases resulted in a conviction, and in 2022 the highest ever number of rapes were recorded by the police in a 12-month period of 70,633, yet charges were only brought in 2,616 cases (GOV,2022c). Although this is representative of a failing criminal justice system

(CJS), the police are regarded as the gatekeepers to the CJS which illustrates their discretion holds authority when regulating the law and progression of cases (Neuster et al, 2019). Academics have argued police discretion remains influenced by the police culture and rape myths which explain the poor quality of police-recorded rapes, delays in investigations and police unwillingness to record rape without sufficient evidence (Brown et al, 2007; George and Ferguson, 2021; Hohl and Stanko, 2015; Sinclair, 2022). This helps convey why women have reservations about reporting rape and why in 2019 57% of rape victims subsequently withdrew their case (HM GOV, 2021). The low conviction rate and the low willingness to report rape show that a change in the approach of the police and in the understanding of rape is necessary.

Experiences of BME women

Contemporary research confirms the continued oppression of BME female victims of VAWG. The likelihood of a successful rape conviction stands at less than 3% with odds being even lower if the woman is from a BME group (Bowling and Phillips, 2003). BME women also endured higher rates of DA in the year 2018 to 2019 than their white-led counterparts which emphasises BME women are a highly victimised VAWG group (ONS, 2019a). This can still be attributed to the racist and misogynistic culture amongst the force that has been confirmed to persist and continues to marginalise BME women (Bleur, 2008; Bowling and Phillips, 2003; HMICFRS, 2022; Lammy, 2017). This is useful when comprehending the struggles BME women endure in trusting the police.

D. Research justification

From reviewing the historical policing to the contemporary policing of VAWG it can be concluded the policing of VAWG, and the treatment of women has been frequently researched for a long time. This has led to a consensus that women and girls have been consistently neglected by the police in E&W. This implies the need for immediate change and the importance of evaluating Pillar 1 to conclude if the measures are achievable or simply unrealistic.

Although there is little research on the response to the NPCC and COP National framework for the policing of VAWG, it has received positive recognition from women-led organisations in particular (NPCC and COP, 2021). EVAW (2021b) have concluded they welcomed the framework as a potential step toward transformation and SafeLives (2021) urged the police to utilise the opportunities presented to improve the policing of VAWG. Rape Crisis (2021) enforced it to be encouraging that the standards of policing have been recognised as in need of change as it is imperative women are protected. However, it is a commonality amongst organisations and research that the duration of the existence of damaged trust and the failure of policing of VAWG has led to scepticism on the police ability to deliver on the measures, and evoke the change necessary to enhance female trust. This is why it is necessary to fill this scepticism gap with an analysis of Pillar 1 to reinforce to women and girls that the police are heading in the right direction for enhancing their trust.

The next section of the paper will be section four, an analysis of key measures 1 and 2 of Pillar 1.

4. Challenging misogyny and sexism in policing

Key measures 1 and 2 of Pillar 1 both focus upon what measures the police forces in E&W should adopt to challenge the sexist behaviour and misogyny in the police. The purpose of this section is to identify whether there is supporting research to underpin the approaches in key measures 1 and 2 of Pillar 1, to conclude if they will enhance female confidence in the police. This section begins by analysing key measures 1 of Pillar 1 and then follow onto analysing key measure 2.

A. The Analysis of Key Measure 1 of Pillar 1

Key measure 1 states the police will build trust and confidence by:

"Responding unequivocally to allegations of police-perpetrated abuse, learning from mistakes and best practice"

(NPCC and COP, 2021, p.16)

Allegations of PPA are defined within key measure 1 as allegations of sexual misconduct, DA and other VAWG-related offences against officers (NPCC and COP, 2021).

It is important when demonstrating a zero-tolerance toward VAWG that forces respond robustly and dispassionately when allegations are made against serving police officers. EVAW (2021b) argue this is because the police cannot claim to take VAWG seriously in society if they do not discipline VAWG in their own force. Implementing key measure 1 into police practice therefore will help demonstrate police seriousness about the elimination of VAWG in society and confirm this by conveying it has no place in policing. EVAW is formulated of 135 specialist women services which means their knowledge on the best approach to enhance female confidence to be credible. Gracia (2004) and Savigny (2020) enforced that failing to respond robustly to allegations or signs of potential officer misconduct will allow predatory behaviour to go unchallenged and allow abusive behaviours to manifest in the police. This was exemplified by the overlooked VAWG attitudes in the case of MPS officer David Carrick mentioned in the introduction. Carrick had come to the attention of the MPS on nine previous occasions between 2003-2020 with allegations from women of inappropriate behaviour, rape and SH yet faced no criminal sanctions (MPS, 2023b). Learning from past mistakes and disciplining VAWG behaviours unequivocally can prohibit abusive behaviours from manifesting in future policing. Research enforces therefore that implementing PPA can enhance female confidence by proving to women the police can be trusted to respond robustly to all predatory behaviour in both society and their own ranks.

Moreover, key measure 1 aligns with academic research that argues holding officers accountable is an essential part of maintaining and fostering public confidence in the police (Skogan and Frydl, 2004; Skogan, 2009). As policing in E&W is based on consent, their legitimacy in the eyes of the public is based upon the transparency in exercising police powers and being held accountable if they fail to do so (Jackson et al, 2011). Failing to hold officers accountable will consequently undermine the model of policing by consent and result in a lack of public trust (Bovens 2005; Prenzler, 2009).

Mawby and Wright (2005) study on the 43 police forces in E&W concluded upholding accountability heavily contributed to public confidence. This study encompassed all 43 police forces which reinforces the importance in the police to prioritise accountability measures when enhancing public confidence. Similarly, Stanek et al (2022) empirical study on 578 females revealed women were more likely to trust the police if they demonstrated accountability for force misconduct. This is useful coming directly from female perspectives and helps to convey accountability is key to evoking their trust. Graycar and Prenzler (2013) also suggested strengthening accountability creates habits of standards and habits of standards make high standards routine behaviour. If the police can deliver on accountability they can create habits of correct standards, and over time make this routine behaviour. Evidently, therefore, responding to PPA will be essential and beneficial for the police to utilise to enhance female confidence.

Furthermore, the flawed police vetting process in E&W has shifted importance on the police to respond adequately to PPA when detected in their forces. Every applicant must get vetted before being employed into the police and have this renewed every 10 years (UK Parliament, 2022). The vetting process includes reviews of personal details such as their employment history to assess their suitability for the police. Academic reviews of the vetting process for E&W have concluded it insufficient in preventing individuals with criminal records or previous misconduct allegations from joining or re-joining the police (Baldwin, 2017; Cubitt, 2023; Donner, 2019; Hough et al, 2016). This was confirmed by the HMICFRS (2022) review of the vetting processes in 43 forces in E&W from November 2021 to May 2022. They found out of the 725 vetting files considered, 131 featured potentially flawed decisions during the vetting process. As the vetting process has allowed potential or actual perpetrators into the police, this illustrates the police responding to PPA becomes one of the next steps to removing VAWG misconduct out of the force. Evidently, therefore, research identifies the importance of the police ensuring the opportunity to prohibit predatory behaviour from staying in policing is utilised to enhance female confidence, especially as vetting is currently inadequate.

However, research suggests the use of the word "responding" could evoke doubt into the seriousness of the delivery of disciplining PPA and consequently enhancing female confidence. This is because responding implies the police officer will be investigated, but there is no indication or emphasis this will result in removal of the perpetrator from the force. Our Watch and No to Violence (NTV), both leading organisations in the prevention of violence against women (VAW), argued organisations should terminate employment immediately if an employee has conducted VAW or demonstrated signs of predatory behaviour (2017). Academics argue if organisations fail to do so, it turns a blind eye to VAW and allows perpetrators to be absolved of responsibility for their actions and an opportunity for change will be lost (Chung et al 2012; Kennedy, 2016; Our Watch and NTV, 2017). Given the current epidemic of VAWG and previous consequences of failing to immediately dismiss officer Carrick, the police must take every chance of eliminating removing abusive behaviours immediately. If immediate dismissal is not taken, this may demonstrate to women a lack of seriousness in their approach to eliminating VAWG and not enhance female confidence. However, this does suggest that if the police were

to respond to PPA with immediate dismissal, the benefits acknowledged in the previous paragraphs could occur.

Police failure to respond to PPA in practice

Evidence shows the police have not been held accountable for misconduct in the past which undermines their ability to respond to allegations of PPA unequivocally. The HMICFRS (2022) review of the police vetting files in E&W from November 2021 to May 2022 found many officers' files contained histories of misconduct allegations of PPA that were liable to be gross misconduct yet resulted in no further action (NFA). Likewise, the GOV (2021) review of the police forces in E&W declared out of 14,393 allegations of misconduct against police officers from both officers and the public, from March 2020 to March 2021, only 1% were dismissed and 92% resulted in NFA. This shows there is a reluctance across the police forces in E&W to investigate allegations against officers. This serves to disempower women in believing their allegations of PPA will be investigated impartially without police bias. The Centre for Women's Justice [CWJ] (2020) submitted a super-complaint that highlighted the severity of failure of the police to respond to PPA. A super-complaint is designated for organisations to raise issues on the public's behalf regarding hurtful trends in policing (GOV, 2018). The CWJ super-complaint included 19 case summaries of individual women's experiences spanning across 15 police forces across in E&W and 6 DA professionals. It concluded a systematic failure within the police to hold their own accountable. Women must be able to trust that the system will not work against them if they file a complaint. In practice, however, it turns out the police do not react "unequivocally" to PPA. This may undermine the benefits previously established by academic research that it will enhance female confidence if they do not have the capabilities to deliver a response to PPA in practice without police bias.

The elimination of police culture

It could be argued that the police cannot respond to PPA unless the culture of misogyny and masculinity in the police is eliminated first. Most allegations of officer misconduct are handled by the relevant force in their Professional Standards Department (PSD) whilst the more serious ones are handled by the Independent Office for Police Conduct (IOPC) (COP, 2023; IOPC, 2023). The IOPC overlooks the police complaint system in E&W despite claiming complete independence is formed of 40% ex-police personnel (Home Affairs Committee, 2022). This has essentially facilitated a system where the police are policing themselves. As a macho culture exists within the police, investigations are likely to be conducted by officers who hold misogynistic views and therefore are complaisant to dismiss victim allegations and believe their colleague. This can explain the low dismissal rate for officers established at 1% in the previous paragraph (GOV, 2021). Kelling et al (1998) argued the police do not harness the ability to hold one another accountable with the influence of police culture. Some academics have argued that unless the PSD or the IOPC become completely independent of the police, the likelihood of inducing female confidence is low (Murphy-Oikenon et al, 2022; Senevirate, 2004; Smith, 2009). However, Savage (2013) study with 100 practitioners from police complaint bodies revealed they would experience difficulty without the police during investigations as they depend on them for resources, staff and technology. This is supported by Rowe (2020) who argued the necessity of police involvement in the complaint process for expertise on the nature of

the police role. As research suggests complete independence is aspirational, police culture needs to be eliminated to enable females to have confidence in the police to police themselves. It seems therefore engagement with this research could have led to a better understanding that police culture needs to be removed before claiming it can respond to allegations of PPA 'unequivocally'.

This section will now move onto analyse key measure 2 of Pillar 1.

B. The Analysis of Key Measure 2 of Pillar 1

Key measure 2 of Pillar 1 emphasises the police will enhance female confidence by ensuring the police:

"Challenge and address sexism and misogyny within policing"

(NPCC and COP, 2021, p.17)

The root cause of the failure to adequately police VAWG has historically, and contemporarily, been the result of a culture of sexism and misogyny that exists within the police (Dick et al, 2014; Dunhill, 1989; Kingshott, 2012). By addressing the root cause, it can be identified as a step toward improvement and enhancing female confidence that misogyny has no place within policing. This can also help break up the "All-Boys Club" and challenge the culture of misogyny within policing that has long subjected women to discriminatory treatment (Rabe-Hemp, 2008, p251). Research by Handley (2000) supports this enforcement to solve a problem, the factors causing the problem must be first recognised and understood. Similarly, Percarpio et al (2008) suggests failing to address the root of the problem can result in misdirected efforts that waste time and resources. In the perspective of the VAWG epidemic, the police do not have the time for delays and therefore by challenging the root problem of misogyny can be argued as a step in the right direction for change. Research has shown denying the existence of root behaviours delays rectification and adds to feelings of injustice felt by women (Cunningham and Ramshaw, 2019; Gracia, 2004; Sidebottom et al, 2020). Evidently, research supports this idea and suggests the acceptance of the need to address misogyny as a step toward eliminating the root problem and consequently enhance female confidence.

However, the police in E&W have shown reluctance to change or challenge the existing norms of misogyny and sexism in policing for a long time. This is evident from early literature that declared a macho culture of misogyny in policing existed (Fielding, 1988; Jones, 1986; Young, 1991) to later research confirming its existence within contemporary police (HMICFRS, 2022; Loftus, 2008). The duration of the culture demonstrates it is embedded into the police to the extent that expecting the police to challenge and evoke change may be argued to be unrealistic. Even when policies and reports have advised the police force to challenge misogyny and sexism previously, it persists. For example, since 2014, the HMIC have produced numerous reports raising concerns for the police forces in E&W to challenge misogynistic behaviour (2015; 2016; 2017). However, HMICFRS (2017;2019) found most forces were slow to or failed to implement its recommendations. Their failure to change has been once again confirmed by HMICFRS (2022) inspection into police forces in E&W that confirmed a culture of sexism and misogyny still exists. This conveys the inability of

the police to challenge sexism and misogyny in the past which confirms the unlikelihood of challenging it in contemporary practice. In turn, research suggests as evidenced in police practice, misogyny and sexism will continue to manifest in the police and female confidence will not be enhanced.

Change in wider societal misogyny

To be able to challenge sexism and misogyny within the police would require misogyny to be tackled in society first. As the police are comprised of members of society, Farrell (1992) suggests policing reflects the normalised societal standards of the day and therefore if society remains misogynistic so will the police. The root of the problem goes beyond police capabilities which suggests why the misogynistic culture has existed in the police from historic to contemporary times discussed in Section One. This also coincides with research from feminist Bindel (2021) who argues women's fear of male officers stems further into their distrust of men in society which suggests it would take a lot more than police challenging misogyny to enhance female confidence in male officers. Zoë Billingham argues tackling the misogyny in the police will not be enough for this needs to extend to the education of male attitudes toward VAWG in wider society (Barnett, 2021). Billingham served the HMICFRS for 12 years and therefore is credible in knowing the persistence of misogyny in the police and how to best tackle it. It could be argued that key measure 2 has not acknowledged the research that misogyny is an endemic societal problem, and that priority needs to be attributed to societal change otherwise misogyny in the police will remain.

Alternatively, the education of male officers should have been emphasised in key measure 2 as a more realistic approach to challenging misogyny in the police. This is because educating males on areas of consent and female oppression have been viewed as a step necessary to take when challenging misogyny (Hearn, 1999; HMICFRS, 2019). Implementing male education programmes consistently into the police could help to convey to the public the responsiveness of the police in adopting measures known to be effective in tackling misogynistic behaviour. Moreover, De La Rue et al (2017) meta-analysis conveyed VAWG prevention-based programmes in schools have been beneficial to male students' knowledge that demonstrated lower adherence to rape myths and minimised aggressive responses. This is further supported by previous studies that argued education programmes aimed at educating men on violent behaviours can produce positive changes in attitudes and knowledge (Fellmeth et al, 2013; Whitaker et al, 2006). However, although these studies do not convey if this corresponded to a long-lasting change in behaviours, it did facilitate positive signs of temporary change which is necessary given the epidemic of VAWG and confidence in the police. If police officers are able to think about their role as individual men as well as police officers, this will be valuable in helping to shift the culture in society and as a result shifting the culture inside the police.

C. Conclusion

It can be concluded from the analysis of key measures 1 and 2 of Pillar 1 that its underpinnings are supported by academic research as measures that have the potential to contribute towards enhancing female confidence. However, when examining the evidence of police failure in practice to deliver on responding to PPA unequivocally or challenging sexism and misogyny in the police, seems to prohibit

the benefits from emerging. This stems from the influence of the macho police culture that has prohibited their ability to respond to PPA impartially or be able to challenge the culture they are part of. This is because the misogyny that has formed this culture in the police is deeply rooted in societal misogyny suggesting societal change in culture is necessary before changes in the police culture emerge and consequently start to enhance female confidence.

The next section of the paper will be section five, an analysis of key measures 3 and 4 of Pillar 1.

5. Improving police prevention and practice

Key measure 3 and 4 of Pillar 1 both focus on what measures the police forces in E&W should precede with to help improve police prevention and practice when policing VAWG. The purpose of this section is to analyse key measure 3 and 4 of Pillar 1 and, like section four, identify whether there is supporting academic evidence and research to underpin their approaches. This section begins by examining key measure 3, followed by key measure 4 of Pillar 1.

A. The Analysis of Key Measure 3 of Pillar 1

Key measure 3 focuses on how the police can build trust and confidence by ensuring that in practice they:

"Involve VAWG organisations, including charities supporting black and minoritised women and girls, as well as individual women and girls with lived experience"

(NPCC and COP, 2021, p.18)

VAWG organisations in the context of key measure 3 refers to the voluntary third-sector organisations or charities that support women, girls, and victims of VAWG (NPCC and COP, 2021, p18).

Involving VAWG organisations

Seeking to expand the reach of communications through engaging with third sector organisations will provide the police with an opportunity to learn from expertise in the field and implement such guidance into policing practice. Some leading VAWG organisations such as Womens Aid (2023) and Victim Support (VS) (2023) were both founded in the 1970s which illustrates there is a depth of experience on what is needed to end VAWG. Likewise, the VAWG organisations within E&W already work closely with vulnerable women and girls every day. This has allowed them to establish a foundation of knowledge, innovation and pioneered the development of specialist forms of provision that best supports and protects women (Imkaan et al, 2013; Kelly and Dubois, 2008). This is confirmed in the Government Equalities Office (2009) analysis of 27 VAW organisations across E&W that conveyed a commonality in staff of a commitment to providing an accessible environment that works for women. Evidently, given the scale of organisations analysed, it can be concluded the VAWG sector treat women as a priority. By involving VAWG organisations, the police can learn from and implement their expertise and knowledge on prioritising women's

needs into police practice. Evidently, research conveys implementing key measure 3 can help the delivery of appropriate policing for women and girls and build their confidence in the police to protect them from violence.

Research confirms establishing a relationship with VAWG organisations is important for the police to adopt particularly when protecting victims of DA. When a woman chooses to report DA, the police are often the first professional agency to be alerted. It is important therefore, for the victim's safety, that the police refer them to third-sector specialist agencies immediately. This is because some VAWG organisations provide essential services for DA victims such as housing or refuge centres that are not usually provided by the police (GEO, 2009; Womens Resource Centre, 2011). Involving VAWG organisations can help educate the police on the importance of this referral and establish a system of communication to facilitate this. Research from SafeLives (2018) suggested survivors who are referred to specialist DA services by the police would experience abuse for a significantly shorter period estimated at 2.1 years, compared to self-referral cases at an estimated 4.9 years.
It is significant that this comes from a leading organisation in E&W working to end DA and shows the importance of involving VAWG organisations to ensure the safety of victims of DA. Evidently, implementing key measure 2 will be beneficial to enhance female confidence, especially of DA victims, in showing if they choose to report their protection is a police priority.

Furthermore, there is already an established foundation of trust between the public and VAWG organisations which should be utilised and adopted by the police. The Charity Commission for E&W (2022) revealed public trust in charities in E&W remains higher than that of the police. Albeit for all charities, this still confirms the importance of utilising charitable sectors and learning from their strategies rather than relying solely on the police for combatting VAWG. This is supported by Campbell and Raja (1999) study that enforced the involvement and support from SV charities when reporting to the police improved their stress levels in dealing with the incident and willingness to report to the police in future. This study was derived from mental health professionals which adds credibility given their relationship and first-hand observations with victims of SV. Similarly, VS (2021) research revealed victims who were involved with VS felt confident to report to the police and satisfied with their police interaction (Victim Support, 2021). The fact that VS is one of the leading organisations for working with victims makes them credible, because they are experts in victims' experiences. Involving VAWG organisations during investigations and reporting processes is therefore important to utilise to help encourage positive experiences of the police. Positive experiences can help enhance female confidence to report VAWG to the police and trust their case will be handled adequately with the support of VAWG organisations.

Including charities supporting BME women and girls
The discussion, advocating the inclusion of charities that support BME women and children, shall now be analysed.

Involving the VAWG organisations that specialise in supporting BME women and girls will help educate police officers on the tailored approach necessary for BME

victims of VAWG. This is because charities supporting BME women and girls are equipped with the knowledge and expertise to challenge the extra barriers they experience when accessing appropriate policing, services and support (Imkaan et al, 2013). Utilising BME charities are beneficial in helping to generate a specific approach that values their voices and experiences that are often racially oppressed. This is important as established BME women are subject to double jeopardy of oppression, which means their voices are paramount to be used in changing the policing of VAWG. Imkaan (2010) and South Blackhall Sisters (2023) argued without access to BME charity services, it is unlikely that marginalised backgrounds would see justice or have the support necessary to recover or heal. This is derived from leading organisations that have supported BME women for a long period of time which gives it credibility. The work carried out by BME charities is evidently impactful and necessary for BME victims which implies involving them in changing the policing of VAWG to be beneficial for BME communities. Research therefore shows that involving BME charities that support BME women and girls will enhance female confidence that the policing of VAWG is tailored to meet their needs and provides extra support for additional barriers they experience.

However, the police cannot be expected to work with charities supporting BME women and girls without eliminating the racism within the police first. HMICFRS's (2022) review of the police forces in E&W confirmed a culture of racism remained in the force that subjected both BME female officers and BME female members of society to discriminatory treatment. This brings into question the ability of the police to involve the views of BME charities without addressing and eliminating the racist culture first. From 2007 to 2019, the percentage of BME females within the police service went up from 3.9% to 5.7% (GOV, 2019). However, in 2020, of the 9 female chief constables in E&W, none were BME women (Home Office, 2020). Clearly, the police do not include BME people in their own force, which calls into question their ability to engage BME people and charities in society. Research from Safelives (2015) showed BME individuals often choose not to disclose their abuse with the police due to the risk of racial prejudice and discriminatory treatment. This suggests, even if the police were to work with BME organisations, a cultural change within the police needs to happen first to ensure racial treatment is prohibited. Similarly, to the culture of misogyny, the culture of racism in the police stems from the wider societal racism that places BME communities disproportionately in positions of inferiority (Banaji et al, 2021; Bowling et al, 2019). To ensure the benefits of working with BME organisations are achieved, there is a suggestion that societal racism must be tackled first to change the racist culture of the police. Whilst societal change is underway, an emphasis should have been placed on continuous diversity training programmes for officers to help shift their individual views in society to help in changing the culture in the police.

Involving women and girls with lived experience

The involvement of women and girls' voices with lived experience to contribute toward the policing of VAWG shall now be explored.

Involving voices of women and girls with lived experience in the policing of VAWG can help induce tailored change best suited for victims of VAWG. Brazelton (2019) and Nichols (2009) explored how the importance of the survivor being listened to

helps them moving from an isolated individual in crisis to being part of a community of others. It is very satisfying for victims to know that their voices will be taken into account in amending future policing for VAWG to prevent further acts of VAWG and protect future female victims. Giving value to their voice contributes to a victim-centred approach and increases women's confidence in the police as their strategies are prioritised and adapted to best protect women (Ailwood et al, 2022; Brazelton, 2019). Rape Crisis (2023) and Gum (2020) enforce involving victim voices provides the police with an opportunity to learn from past mistakes and facilitate a better support system for dealing with victims of VAWG. This can help enhance female confidence that the police approach to VAWG is best suited to their protection. However, as established in Section Two, a misogynistic culture remains rife in the police. So, the question is whether the police are able to include or value women's voices when there is still a culture of misogyny in which they are disregarded. Perhaps therefore, the key measure 2 of Pillar 1 of challenging sexism and misogyny needs to be achieved before the benefits of key measure 3 of Pillar 1 can be optimised in practice.

Funding impacts on VAWG charities

The current epidemic of VAWG is having its effect upon VAWG organisations as the increased demand for their services and resources are occurring at the same time as their resources and funding is decreasing (EVAW et al, 2022). The charity sector has endured a funding crisis for a long time and particularly impacted the VAWG organisations who are critically under-funded (EVAW et al, 2022; Government Equalities Office, 2009). In 2020, only 3% of funding to civil society organisations in London went to women's organisations despite the essential work they are doing for VAWG victims (EVAW et al, 2022). The funding crisis has also impacted specialist BME women's organisations who have historically been underfunded in comparison to their white-led counterparts, despite dealing with more complex cases due to intersectional impact of oppression BME women experience. As of 2021, BME VAWG services in the UK supported approximately 129,765 BME women whilst operating at a funding shortfall of 39% (EVAW et al, 2022). However, the Government (2022b) have released a new plan to help fund the elimination of VAWG by awarding £8.4 million to be shared amongst the VAWG organisations which gives hope they can contemporarily remain open to collaborate with the police. This is positive for the police as it has been established utilising VAWG organisations is key to helping enhance female confidence. However, it must be acknowledged that, if this funding is subject to change in future, the long-term success of enhancing female confidence may be limited.

The next part of this section will analyse key measure 4 of Pillar 1.

B. The Analysis of Key Measure 4 of Pillar 1

Key measure 4 focuses on how the police can build trust and confidence by ensuring in practice they are:

Collecting consistent local and national information on the availability of specialist VAWG investigators to build the right capability and capacity"

(COP, 2021, p.19)

The rationale behind key measure 4 is to commission a skills gap analysis on the number of specialist trained VAWG investigators relative to current demand to be able to build the right capacity within police forces in E&W.

VAWG investigations conducted by specialist VAWG investigators are more effective and appropriate for victims. This is highlighted by Westmarland et al (2012) review of the police specialist rape teams within the 43 police forces in E&W which revealed forces with specialist teams saw benefits in improved victim-care. Likewise, Dalton's et al (2022) SLR of specialist policing for VAWG offences revealed specialist investigation teams are better equipped to provide appropriate care for VAWG victims. This is particularly important as Section One identified, that the police failure to comprehend and deliver an appropriate response to their VAWG crimes impacted their willingness to trust the police. Building the right capacity of specialist VAWG investigators may be beneficial in ensuring tailored support for the nature of VAWG crimes is available and help enhance female confidence. Operation Soteria, a collaborative programme of research led by the NPCC, confirmed the need for specialism and investigative practice for VAWG offences after declaring on review the police force investigators lacked sufficient specialist knowledge for tackling VAWG crimes (GOV, 2022b). Research highlights the necessity of specialism in the police for victims to have confidence the police will deliver on consistent and appropriate care for victims and their trauma.

The use of specialist VAWG investigators has often resulted in improved justice outcomes for victims. Tidmarsh et al (2021) long-term study found specialist investigators had a better understanding of the appropriate and tactical questioning which influenced the openness of the victim and their continuation through the investigation. This is important to utilise as previously mentioned VAWG offences are underreported and withdrawn, particularly rape, with 57% of rape cases in 2019 being withdrawn by the victim (HM GOV, 2021). Focusing on hiring specialist VAWG investigators can help facilitate an environment that ensures continued cooperation with the victim to continue their case through the CJS. Research revealed that investigations conducted by specialist rape and sexual offences investigators have been linked to higher prosecution and conviction rates (Powell and Wright, 2012; Rumney et al, 2021). This highlights the importance of inclusion of specialist investigators especially due to the current low conviction rate for rape of only 1 in 100 cases resulting in conviction (GOV, 2022c). Utilising specialist VAWG investigators can help enhance female confidence that justice outcomes for victims of VAWG will prevail.

Funding impacts on the police

Research conveys the benefits of specialist investigators are subject to change depending upon the impact of funding. Westmarland et al (2012;2015) revealed there is a reluctance of official agencies to resource specialist units due to cost issues or resources required to staff them. This is evidenced by the downfall of the Operation Crystal in Hampshire Constabulary, a Home-Office funded pilot of a new style of specialist rape investigation teams in the mid-2000s. Despite succeeding in providing support and protection for victims, once the pilot money was used up, the investment into the specialist rape teams was pulled (Westmarland, 2015). This failure highlights

the dependency on resources and finance for specialist investigators to survive which is difficult under the consequences of austerity cuts (HMIC, 2012; Millie, 2014). The austerity measures reduced the central funding provided to the police service by 20% between March 2011 and March 2015 (HMIC, 2012). The validity of police force's ability to build the right capacity of specialist VAWG investigators is questioned as without appropriate funding it removes this possibility. The dependency upon funding suggests even if the police hire new investigators, it could be subject to change if funding impacts them and therefore is not a long-term solution for enhancing female confidence.

As a result of the police funding cuts and shortage of investigators throughout the police in E&W, there is a demand for all officers to be omnicompetent (Dalton et al, 2022; Stelfox, 2011). The staffing cuts evident in the Office for National Statistics (2019b) convey that the total number of police workforce in E&W has fallen by 40,000 between March 2010 and March 2019. It could be argued therefore a naive suggestion for the police to hire specialist investigators when the police in E&W are currently understaffed. The demand for specialist investigators to partake in other roles would be likely and therefore the delivery of appropriate specialist care to victims of VAWG to be limited. However, the Conservative Pledge for an extra 20,000 additional police officers across E&W over 3 years has been achieved by March 2023 (GOV, 2023). This helps reinforce the possibility of delivering on hiring VAWG investigators without the risk of their role changing and consequently reap the benefits which help enhance female confidence in the police. This may only be temporary success however as if funding issues or staffing cuts occur again problems could resurface.

Moreover, it must be acknowledged the influence of the culture of misogyny to be detrimental to the benefits of specialist VAWG investigators. As previously established in Section Two when analysing key measure 2 of Pillar 1, there is a culture of misogyny within the police that is thriving and influencing officer's discretion. As the specialist investigators of VAWG are part of the police community, there is a likelihood they could be and consequently their handling of VAWG cases to be influenced by the police culture of machismo and misogyny. This once again, places priority onto challenging misogyny in the police in key measure 2 of Pillar 1 before the benefits to hiring specialist VAWG investigators prevail and female confidence in the police is optimised.

C. Conclusion

It can be concluded; key measures 3 and 4 are both grounded in academic evidence and research that advocates they will be beneficial to enhance female confidence in the police. However, providing the police culture of racism and misogyny remain, the benefits that could be achieved may not be fulfilled in practice. Likewise, the demand for funding for both the survival of VAWG organisations and specialist investigators through police funding and staffing cuts brings to question the long-term success of enhancing female confidence when implementing key measure 3 and 4 into police practice.

6. Conclusion

This paper sets out to analyse Pillar 1 of the National framework for the policing of VAWG if it may enhance female confidence in the police. This was undertaken due to the ongoing epidemic of VAWG, the urgent public concern regarding police ability to protect female victims of VAWG and the longevity of the fight for better policing for women. As Pillar 1 presents an opportunity for the police to enhance female confidence, it is significant to conclude whether four outlined key measures can be successfully achieved or not.

This paper adopted a library-based approach utilising an SLR method to undertake an analysis of existing research to assess the merits and reality of Pillar 1 in enhancing female confidence in the police. The method was effective because the extensive analysis required for an SLR allowed the researcher to utilise an abundance of literature, studies, and reports to reach a conclusion. This allowed the researcher to undertake a thorough analysis of each key measure of Pillar 1 and be able to draw conclusions as to whether the approaches were grounded in previous research.

As identified in the methodology section, the possible limitations of the SLR methodology were that the researcher was biased when selecting the information required to answer the desired question. The researcher overcame this bias through the thorough analysis of each key measure that both supported and challenged them. Due to the time constraints and word restriction required for an SLR on Pillar 1, the researcher only focused on one Pillar of the National framework. However, if the research was to be undertaken again, it could have added another layer upon the completion of a rigorous analysis of Pillar 2 and Pillar 3. This would help facilitate a bigger picture on whether the merits of the National framework as a whole report will help improve the policing of VAWG.

The findings presented that if the key measures of Pillar 1 can be adopted by the police, it has the potential to be instrumental in enhancing female confidence. This was made evident by discovering each key measure was embedded in academic research that supported each measure as a beneficial step to utilise when enhancing female confidence. In Section Two, the action of responding to PPA was identified as beneficial to convey a VAWG intolerance in policing and accountability measures were identified as key to build confidence especially as vetting is currently inadequate. Addressing the root cause of sexist and misogynistic behaviour was identified as a step toward eliminating misogyny in the police. In Section Three, research showed the expertise and knowledge derived from the involvement of VAWG organisations, particularly those supporting BME women, to be valuable for the police to adopt in facilitating solutions and shaping police practice that will work for women and girls. Similarly, evidence regarding the success and benefits of utilising specialist VAWG investigators indicates the police will improve investigations and victim-care for VAWG victims and in turn enhance female confidence. Although, key measure 3 and key measure 4 identified potential issues with funding for long-term success, with sustained funding the success of the measures would prevail. It can be concluded that, the NPCC and COP did engage

with the research, knowledge and expertise from academics and organisations when facilitating Pillar 1. Theoretically, Pillar 1 will enhance female confidence in the police.

However, for meaningful change to occur and enhance female confidence, the actions of Pillar 1 must be translated into practice. Utilising evidence of police practice concludes the police forces in E&W do not have the capability or convey signs they will be able to successfully implement Pillar 1. This is due to the influence of the macho police culture of misogyny and sexism embedded in the police reflected the deep-rooted misogyny in society. It has been established that, unless the culture of misogyny and racism in society is tackled first, the misogynistic police culture will remain and Pillar 1 will not be upheld in practice. It can be concluded therefore the practical application of Pillar 1 without the influence of police culture will prohibit it from enhancing female confidence despite each key measure being supported by research. The findings implement like evident in earlier literature, women will therefore continue to be unable to have confidence in the police. The importance of the findings indicates the NPCC and COP need an urgent rethink and redirection on the ability and expectations of the police to deliver on Pillar 1 when enhancing female confidence.

As research has shown the potential benefits of the four key measures for enhancing female confidence, this should be utilised as a drive for everyone in society to move toward tackling its misogyny and racist behaviours, so that the police culture can then be eradicated. If such culture changes in the society, there would be some recommendations the researcher would implement into Pillar 1 to enhance female confidence as follows:

In key measure 1 of Pillar 1:

- The use of the word "responding" to be changed to a word that indicates immediate dismissal for VAWG behaviour.

In key measure 2 of Pillar 1:

- Implement continuous male education programmes in the police on consent, female oppression and misogynistic behaviours.

In key measure 3 of Pillar 1:

- Prioritise the maintenance of funding for VAWG organisations.
- Implement continuous officer diversity education programmes in the police.

In key measure 4 of Pillar 1:

- Ensure a large proportion of the new 20,000 officers are hired as specialist VAWG investigators and stay in this role.
- Prioritise maintenance of police funding and staff.

A limitation of the findings is that the policing of VAWG is an ongoing live issue and therefore new information is being released consistently which is likely to have some influence on the research. This also means that, due to the publication date and the limited time frame, not all new research and findings could be taken into account when writing this paper.

A recommendation for future research would be to analyse the upcoming outcomes and performance reports on the National framework which will be released consistently every 6 months for the foreseeable future (NPCC and COP, 2021). The findings of future research can then be compared to the findings of this paper to help track the necessary progress for the better policing of VAWG. As previously mentioned, another recommendation for future research would be to apply the same methodology of SLR as the researcher did in Pillar 1 to Pillar 2 and Pillar 3 of the National framework to assess its overall success in improving the policing of VAWG.

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