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Aim: The *Global Campus Human Rights Journal* aims to serve as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting multi- and inter-disciplinary perspectives, and using comparative approaches. It also aims to serve as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, NGOs and civil society.

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Editorial: Bridging Disciplines, Expanding Horizons in Human Rights Discourse

The **Global Campus Human Rights Journal** continues its tradition of critically engaging with pressing human rights issues, providing a multidisciplinary platform to explore contemporary challenges. Volume 7 exemplifies the journal›s commitment to nuanced analysis, inclusivity, and global dialogue, presenting two issues that delve into themes of justice, identity, power, and accountability.

Volume 7 Issue 1: Justice, Rights, and Inclusion

Issue 1 centres on the intricate relationship between justice and inclusion, addressing the intersectionality of identity, culture, and socio-economic rights. The seven articles in this issue examine how international and local mechanisms shape human rights, fostering discussions that bridge legal, philosophical, and societal perspectives.

The issue begins with an analysis of **United Nations Human Rights treaty bodies**, exploring their critical role in ensuring access to justice and accountability. This is followed by a compelling critique of **mandatory hijab laws in Iran**, highlighting the tension between cultural practices and universal women's rights. Another article dissects **China's tourism development in Tibet**, raising questions about economic growth's costs to cultural preservation and community welfare. Philosophical discourse takes centre stage with an Aristotelian and Arendtian reflection on **refugees' rights**, advocating for dignity and flourishing beyond survival. The article on **climate change and associativism** underscores the power of grassroots movements in linking environmental advocacy with human rights. A study of **female incarceration in Mexico** unpacks systemic injustices, particularly those faced by mothers in penal systems, while the final piece interrogates the theoretical implications of the **"state of exception",** balancing security concerns against the preservation of fundamental rights.

Volume 7 Issue 2: Power, Rights, and Accountability

The second issue broadens the scope, tackling the intersections of global power structures, rights, and accountability. Articles in this volume challenge traditional paradigms, offering fresh perspectives on issues ranging from international academic partnerships to digital governance.

The first article critically examines **UK-China university collaborations**, which underscores the ethical dilemmas of transnational education. The paradoxical dynamics of **child labour laws in Malawi** expose tensions between statutory regulations and customary norms, while graffiti is explored as a transformative medium for fostering **global citizenship and activism**. Emerging digital challenges are addressed in an article on **deepfakes and human rights**, which proposes regulatory frameworks to mitigate risks to privacy and reputation. Religious and political intersections feature prominently, with discussions on the **Serbian Orthodox Church's influence in Montenegro** and the **prohibition of the Russian Orthodox Church in Ukraine**, which navigate the complex terrain of secularism and national security. A critical **book review on international criminal law** concludes the volume, emphasizing accountability mechanisms tailored to African contexts.

The diverse perspectives presented in Volume 7 reaffirm the journal's role as a bridge between disciplines and geographies. By examining contemporary human rights issues through intersectional, theoretical, and empirical lenses, the **Global Campus Human Rights Journal** not only enriches academic discourse but also offers actionable insights to address real-world challenges. As we navigate an increasingly interconnected yet polarized world, these contributions serve as beacons of hope, urging readers to engage deeply with the complexities of justice, power, and equity in the global human rights landscape.

Mariana Hadzijusufovic & Ravi Prakash Vyas
Chief Editors

Cláudia de Freitas Aguirre. "Access to justice through the obligations developed by the United Nations Human Rights treaty bodies." (2023) 7 *Global Campus human rights Journal* 01-21
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Access to justice through the obligations developed by the United Nations Human Rights treaty bodies

*Cláudia de Freitas Aguirre**

Abstract: *Access to justice is not a new theme in the academic literature, and there are several approaches to the subject. Nevertheless, the objective of this article is not the analysis of access to justice in theory. Instead, it aims to reflect on it as a human right. Indeed, there is a close link between human rights violations and the need for remedies and/or access to justice mechanisms in general. In addition, the consideration of access to justice as a human right in itself and a precondition for all other human rights leads us to investigate the specific state's obligations. Hence, the article focuses on the general comments/recommendations of UN treaty bodies, as they represent the authoritative interpretation of legally binding treaties, consequently establishing consolidated positions on the state's obligations regarding access to justice. The article's objective is, in a legal analysis, to identify the precise duties encompassing the right to access justice. By recognizing these obligations, the article aims to systematize some trends in their evolution, striving to pinpoint which vectors drive such tendencies, with a brief contextualization in the studies on the renewal waves of access to justice. Finally, after acknowledging these obligations/standards, their implications for realizing the right to access justice in practice from the perspective of states, treaty bodies, victims, and other human rights actors, are reflected upon.*

Key words: *Access to justice, remedies, human rights treaties, UN treaty bodies, vulnerability*

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1. Introduction

Access to justice is a theme that is not new in the academic literature, and there are several approaches to the subject. For example, authors such as Paterson (2011), Garth (2015), Alves (2005), and Esteves (2017), who are the coordinators of the Global Access to Justice Project (n.d), are aligned with the legacy of the Florence Access to Justice Project and continue to develop worldwide research on access justice in its procedural and material perspectives. This background also relates to the debate on the empowerment of the poor in the ambit of the UN (United Nations), whose Commission on Legal Empowerment of the Poor (2008) produced reports covering a broad range of issues, including access to justice. In this sense, the development of legal aid for poor persons put the obstacles people face to access justice in practice at the centre of the discussions, and later on, other barriers concerning varied vulnerabilities are taken into account (Global Access to Justice Project, n.d.).

This approach allowed the perception of renewal waves of access to justice, which are briefly contextualized in section 1 of this article (as explained later on). Nevertheless, the objective of this article is not to analyze access to justice in theory. Instead, it aims to reflect on it as a human right in practice.

Considering access to justice as a right requires a legal analysis of its content. Indeed, there is a close link between human rights violations and the need for remedies, as in art. 2.3 of ICCPR (International Convention on Civil and Political Rights). Additionally, the consideration of access to justice as a human right in itself and a precondition for all other human rights (CMW 2022 §53; 2017,§14), as part of the rule of law and good governance (CEDAW 2015 §1), leads us to identify specific obligations of states.

In this manner, the article concentrates on building a legal overview of the precise duties of states that encompass the right to access to justice. Plus, by recognizing these obligations, the article aims to systematize some trends in their evolution, striving to pinpoint which vectors drive such tendencies. Finally, when acknowledging these sets of obligations/ standards comes the question of the following implications for realizing the right to access to justice in practice.

The article's envisioned hypothesis is that the recognition of trends in the work of UN Committees about access to justice, in its different angles, leads to the specification of standards regarding States' obligations that comprise the right to access to justice more as a right in itself, rather than a fragmentary accessory right. Such a result could allow an overview of access to justice as a multifaceted right as a whole.

Hence, the article focuses on the GCs/GRs (General Comments/ General Recommendations) of UN Treaty bodies, namely, HRC (Human Rights Committee), CERD (Committee on the Elimination of Racial Discrimination), CESCR (Committee on Economic, Social and Cultural Rights), CEDAW (Committee on the Elimination of Discirmination Against Women), CAT (Committee Against Torture), CRC (Committee on the Rights of the Child), CMW (Committee on the Protection of the Rights of All on Migrant Workers and Members of Their Families). CRPD (Committee on the Rights of Persons with Disabilities), and CED (Committee on Enforced Disappearances/International Convention on Enforced Disappearances). Notwithstanding the presence of relevant trends in concluding observations and individual communications, the study of GCs/GRs brings a pertinent examination of consolidated positions on the matter, as they are the authoritative interpretation of legally binding documents and, as such, provide a guide for the activities of treaty bodies, states, and other human rights actors, especially from the viewpoint of the victims of human rights violations.

The GCs/GRs were approached by using the software Orange (DEMSAR *et al.* 2013), in which keywords linked with the topic enabled the finding of texts with more relevant elaborations on the subject. The database https://lszoszk.pythonanywhere.com/ was also used for this aim. Once the main GCs/GRs were identified, a further examination was made.

Although the aim of the article is not a theoretical discussion on renewal waves of access to justice, a brief contextualization of this perspective (section 1) was, indeed, useful to shed light on the trends/standards of obligations while examining the GCs/GRs, which enabled the recognition of a broader universe of state's duties beyond the judicial field. On the other hand, it was useful to somehow keep the division between civil/ political rights' TBs (sections 2 and 3 – HRC and CAT), all other TBs (Treaty Body) whose gaze is on all human rights targeting specific persons/ groups (section 4 - CRPD, CERD, CEDAW, CRC, CMW, and CED[1]), and the economic and social rights viewpoint (section 5 - CESCR), so we could check whether the type of human rights at stake would influence the type of obligations on access to justice, as well as perceive commonalities or differences in the trends.

The importance of the present work resides in a comprehensive vision of standards on access to justice found in the UN treaty bodies, allowing the identification of issues about which the Committees can learn from each other, aiming at creating a compelling and broader interpretation of treaties – which is very important while several states have ratified only a few conventions. Additionally, the reform of the UN treaty bodies monitoring procedure, with the list of issues before states' reports, may allow the

1 CED is cited here because its first GC targets migration.

mainstreaming of certain matters. Plus, the article can give a useful map of the state's obligations, both for practical use by human rights actors and states and for pointing out new paths for further evolution and implications.

2. A Brief Contextualization: The Waves of Access to Justice

Cappelletti and Garth expose the transformation of access to justice in the last centuries. Firstly, in the 18th and 19th centuries, from the liberal perspective of the individual and the judicial proceeding, the impossibility of accessing justice institutions was not a preoccupation for states (Cappelletti & Garth, 1988, 9). Later on, as the "Laissez-faire" societies became more complex, the concept of human rights underwent a profound transformation, overcoming the individual approach to rights and putting into light the positive State's duties to realize social rights (10-11). In this context, access to justice became crucial for all rights because their existence would be meaningless without enforcement mechanisms (11-12). Still, the mere availability of courts or remedies lacked a reflection on what hinders the effective claim.

The same authors theorized about the renewal waves of access to justice due to diverse strategies to redress its barriers. The first wave dealt with "legal aid for the poor", enabling persons to participate fairly in proceedings (Cappelletti & Garth, 1988, 31-46). The second wave refers to the legislative and institutional modifications for collective and diffuse rights (49-67). The third wave involves the reform of legal proceedings to make them easier and more accessible, as well as the possibility of alternative conflict resolution means (64-73).

Ulteriorly, other authors elaborated on further waves of access to justice. When elaborating on the fourth wave, (Economides apud Orsini, 27-28) stresses the relevance of education of justice professionals, considering the ethical and political dimensions of the administration of justice as vectors of transformation of social relations. The fifth wave concerns what Trindade (2006, 426-427) calls "Lato sensu" access to justice, which includes the international judicialization and the legal personality/capacity of any human being in international mechanisms. In turn, the sixth wave, according to Carvalho and Alves (2020), acknowledges the lack of information/education about rights as an obstacle and emphasizes education on rights and the use of technology for inclusion. Finally, the seventh wave, as theorized by Lima (2022, 116-117), proposes the democratization of international cooperation through extra-judicial human rights solutions (in domestic and international fields) involving national and constitutional human rights institutions and civil society in the monitoring of policies, interinstitutional dialogues and legislative solutions.

This overview of the renewal waves stimulates us to have a wide perception of the diverse state obligations concerning access to justice.

In this manner, while investigating the GCs/GRs, it was crucial: to see access to justice beyond the judicial field or remedies; thinking about the several kinds of human rights requiring specific access to justice mechanisms, and their effectiveness. have in mind the obstacles to access to justice (and the responsibility of states to redress them); consider the international human rights environment not only as a set of available mechanisms in the case of violations but also as a public space to foment access to justice initiatives domestically; and underline the importance of education in human rights within and outside judicial/non-judicial bodies; among many other possibilities. It is from this wide viewpoint on access to justice that the article strives to identify the main trends regarding states' duties encompassing the right to access to justice.

3. Access to Justice in the Realm of Civil and Political Rights: Courts and Remedies

The first clear obligation connected to access to justice refers to court remedies, as stated in art.8 of UDHR (Universal Declaration of Human Rights). A second development on remedies deals with their various categories. While UDHR mentions tribunals, the ICCPR opens the way to any "competent judicial, administrative or legislative authorities, or by any other competent authority", although still citing the central role of "judicial remedy" (art. 2.3).

In the articles above, there is a preoccupation solely with the availability of institutions/proceedings that could enforce legislation - and is it frequent, in the HRC's work, generic recommendations in this sense (e.g., HRC 1988,§11; 1986,§10; 1992,§7; 2014,§49-50). In fact, art.14 of ICCPR refers to remedies before independent and impartial courts both in criminal and other types of proceedings and adds minimum guarantees in the criminal field, such as the rights to information, to an interpreter, and to defend himself or through legal assistance, including without payment when needed.

These minimum guarantees indicate that the mere availability of remedies is not enough to protect human rights. They suggest strategies for the persons's fair participation in proceedings in the context of a broad administration of justice (HRC 1984,§§ 5ff.). For that, the HRC extended the above-mentioned guarantees not only to criminal charges but to any procedures "in a suit law" (HRC 1984,§2).

Especially about legal assistance, the HRC acknowledges that its absence can impact fair participation in proceedings and encourages states "to provide free legal aid in other cases" beyond criminal ones (HRC 2007,§10). These cases could involve contracts, property, administrative law, social security, etc (§16).

There is another interesting change in the wording used in GC (General Comment) n.28 (HRC, 2000), on equality between men and women. Firstly, the Committee does not use the word "remedies" isolated but "access to justice and the right to a fair trial", denoting a broader meaning to the state's obligations. In this way, it does not "encourage", but imposes the obligation "to ensure legal aid for women, in particular in family matters" (§18).

In the realm of civil and political rights, where the main target was, at first, stipulating more guarantees in criminal proceedings, we find a movement pushing such protections to embrace other fields in civil proceedings and to emphasize a very important responsibility: to provide legal aid. And the angle of equality and non-discrimination – in this example, gender – strengthens this move.

A further movement concerns the substantive content of decisions. The HRC affirms that the reparation (art. 2.3 of ICCPR) may involve "restitution, rehabilitation and measures of satisfaction, like public apologies, public memorials, guarantees of non-repetition and changes in relevant law and practices", besides punishing perpetrators (HRC 2004,§16).

It is noticed that, in the HRC, the main developments in the states' obligations firstly focus on the availability of remedies when referring to courts or administrative bodies, which could be linked with a liberal perspective; then pushes forward reflections on legal aid and other guarantees in all types of proceedings, in line with the idea of "legal aid to the poor", which is corroborated in a gender perspective, targeting the obstacles; finally, it addresses the substantive effectiveness of decisions on human rights violations and starts to use the term "access to justice" beyond mere "remedies". These trends resonate with some of the renewal waves of justice, primarily with the first and third ones, while striving to redress obstacles to the full exercise of the right to access justice.

4. The Impulse from the Protection Against State's Abuses in the CAT

The preamble of the CAT refers to the UDHR and ICCPR and focuses on the violations of the prohibition of torture and other cruel, inhuman, degrading treatment or punishment committed by the state. In the context of law enforcement and custody activities, persons face a greater risk of human rights violations, which requires detailed access to justice duties to "redress" and enforce "the right to fair and adequate compensation" (art.14.1).

Therefore, besides citing the availability of remedies in both collective and individual dimensions (CAT 2008, §18; 2012, §§ 5, 20), the CAT urges the states to tackle marginalized/vulnerable groups (CAT 2012,§39) and recognizes obstacles to access to justice due to inadequate legislation,

discrimination, inadequate custody of perpetrators, amnesties, lack of legal aid and protection to victims and witnesses, and so on (CAT 2012, §38).

Hence, the Committee imposes obligations on states related to the availability of information about rights (CAT 2008, §13; 2012, §23); legal aid (CAT 2012, §30; 2017, §18.b); participation of victims in proceedings for redress (CAT 2012, §30); training of law enforcement, judicial, and immigration officials (CAT 2012, §35; 2017, §18) human rights offices in police stations targeting women, children, and ethnic/religious minorities (CAT 2012, §35); availability of civil proceedings for reparation besides criminal investigation (CAT 2012, §26); among others.

Additionally, it asseverates that redress mechanisms should avoid revictimization, ensure a non-discriminatory approach, as well as provide culturally sensitive reparation (CAT, 2012, §32). Moreover, the CAT is vigilant about the content of the "compensation" and stresses that it comprises "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition (§6). On the latter, the CAT underlines its "important potential for the transformation of social relations" as it can involve changes in legislation, elimination of impunity and preventive measures (§18).

Even though the Committee relates mostly to civil and political rights (as in HRC), it is interesting to perceive how the CAT builds another perspective by considering the greater vulnerabilities related to the state's enforcement activities and introducing the viewpoint of specific groups. In this way, it determines many other state's obligations, reflecting not only the first wave of access to justice (legal aid), but also the second (collective rights), the fourth (training of personnel and changes in the procedures to avoid discrimination, revictimization, etc), and the sixth (information on rights) waves. Similar approaches based on particular vulnerabilities are found in other committees, as exposed hereafter.

5. The Impulse from the Perspective of Equality and Non-Discrimination

When the committees deal with certain persons/groups from the perspective of non-discrimination and equality, they foment more access to justice-related duties. Truly, in the dimension of equality and non-discrimination, access to justice should consider structural processes that define distinct characteristics of human rights violations to be duly addressed. Plus, since the non-discrimination clause is a crucial element of all human rights that creates a cross-cutting obligation (CESCR 2009, §§1-6) and establishes a "duty to respect, protect and fulfill equality rights" (CRPD 2018, §14), access to justice comes to light as an essential right in an equality angle.

In the example of ICERD (International Convention on the Elimination of all Forms of Racial Discrimination), we notice that access to justice – in the form of "remedies" in art. 6 – is linked with civil, political, social, and economic rights without distinction and includes all kinds of discrimination. The terms "with purpose or effect of nullifying or impairing" the enjoyment of human rights (art. 1.1) denote not only individual and direct discrimination but also structural and institutional forms of racial discrimination (CERD, 2009, §§6-8), which could be redressed by art. 6. Equivalently, the CRPD highlights the importance of access to justice to intervene in "actions or omissions (…) that violate the right to equality and non-discrimination" regarding all human rights (CRPD 2018, §73.h).

Similar synergies between equality/non-discrimination and access to justice, as well as equality before the law, are found in other treaties – e.g., CEDAW, arts. 2. c and 15.2, in a gender viewpoint; CRC, art. 3, through the lens of children's best interest; ICMW (International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families), arts. 18 and 83, on migrant workers; and CRPD, art. 13, about the specific needs of persons with disabilities. In turn, throughout the GCs/GRs, the Committees outline several measures and concerns related to access to justice for particular groups, such as non-citizens, about racial violence and deportation (CERD 2005, §18, 25); Romanies (CERD 2000, §7); women (CEDAW 2015), migrant women (CEDAW 2008, §21); children (CRC 2002; 2003); migrant children (CMW 2007, §§14ff.), disabilities (CRPD 2018, §55.h); among many others.

Furthermore, it is perceived that discrimination imposes several obstacles to access to justice. For example, CEDAW mentions the structural impediments to women to equally access justice mechanisms due to "stereotyping, discriminatory laws, intersecting or compounded discrimination" and omission of states to ensure that judicial mechanisms "are physically, economically, socially and culturally accessible to all women" (CEDAW 2015, §3).

On the other hand, although the ICED (International Convention for the Protection of All Persons from Enforced Disappearance) does not expressly deal with discriminated persons, the CED, in its first GC targeting migration issues, acknowledges discrimination on the grounds of age, race, ethnicity, sex, gender identity, and sexual orientation as a factor of concern (CED 2023, §§8, 8.d, 50). For that, the CED notices that discrimination hinders access to justice, which results in the lack of "participation in the investigation and search", absence of legal aid and language adaptations, and deficiency of "protection and support, and presence during court proceedings" (CED 2023, §8.d).

The main idea in the realm of equality/non-discrimination is the recognition of specific vulnerabilities and the greater importance of

access to justice for discriminated persons/groups, which requires a more consistent state action targeting the obstacles in exercising such a right. Hereafter, we spotlight some of the main duties/features that give broader and stronger contours to access to justice.

5.1 Legal Aid and Co-Related Institutions as a Crucial Element of Access to Justice

From the viewpoint of equality/non-discrimination, there is a consolidated obligation to provide legal aid in criminal, civil, and administrative proceedings, as well as in individual and collective claims (e.g., CERD 2002, §5.u; CERD 2011, §35; CEDAW 2015, §17.a; CEDAW 2008, §24.f; CRC 2003, §24; CRC 2019, §89; CMW 2017, §§16,17.f). Certainly, legal support is crucial to eliminating obstacles to access to justice.

The committees present different features of how this legal aid should be provided. The CRPD introduces the provision of "affordable quality legal aid" (CRPD 2018, §55.h) and "financial support" for it (§52.d), which indicates a more private model. Differently, the CERD obliges the states to institute "free legal help and advice centres" (CERD 2005, §8) and the possibility of partnerships "with associations of lawyers, university institutions, legal advice centres, and NGOs (Non-governmental Organization) specializing in protecting the rights of marginalized communities" (§9). The CEDAW, in turn, adds the specific duty to "institutionalize systems of legal aid and public defence that are accessible, sustainable and responsive (…) in all stages of judicial or quasi-judicial proceedings" (CEDAW 2015, §37.a). Hence, there is an urge for states to create public institutional arrangements for legal aid.

Similarly, some TBs mention the critical role of NHRI (National Human Rights Institution) and Ombudspersons, which should provide specialized services for particular persons/groups, like children (CRC, 2013, §120) and women (CEDAW 2014, §81.e). Moreover, one can identify recommendations to coordinate the activities of NHRI with other "authorities, communities, civil society organizations" also in consultation with "judicial authorities and other organs administering justice" (CERD 2020, §41).

Undeniably, we observe deeper elaborations on legal aid – related, thus, to the first wave of access to justice – as the committees delineate how it should be provided and indicate certain institutions that have a vital role in this regard, pointing to more comprehensive policies/strategies targeting vulnerable persons/groups.

5.2 Information About Access to Justice Mechanisms and Education in human rights

Access to justice mechanisms is meaningless if persons do not have information on rights, remedies, or any other means to claim human

rights. Therefore, the committees underline the responsibility of states to implement education on rights and human rights, aiming at empowerment.

For example, the CERD, on the administration of criminal justice, recommends that states "supply the requisite legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights" (CERD 2005, §7).

Likewise, CEDAW refers to popularizing information on rights and justice mechanisms through activities for women, with ethnic and language adaptations (CEDAW 2015, §17.c). The Committee also prescribes the inclusion of gender and rights literacy in the schools (2015, §32.c). The CRC, in turn, refers to child-friendly information as crucial for the justiciability of human rights alongside legal assistance (CRC 2003, §24).

Surely, such trends reflect the sixth wave of access to justice, putting information/education not outside, but at the centre of measures concerning this right.

5.3 Redressing Institutional Discrimination and Seeking Structural Changes

Besides indicating the obligations of states to create mechanisms to provide access to justice, the equality and non-discrimination perspective pays attention to the fact that these exact mechanisms can be themselves vectors of discrimination. Such an outlook is evident, for example, when CERD (2020) discusses racial profiling. The committee investigates how justice systems and law enforcement activities inadequately target persons of racially discriminated groups and recommends numerous measures to eliminate these practices. Similarly, the CEDAW notices the discriminatory impacts of "the lack of capacity and awareness on the part of judicial and quasi-judicial institutions to adequately address the violation of women's human rights" (CEDAW 2015, §22).

The recognition of institutional discrimination as an obstacle to the realization of access to justice leads to the creation of other state duties, such as:

a) Training and capacity-building on human rights and non-discrimination for justice professionals and other state officials, aiming at building a non-discriminatory approach about race (CERD 2002, §5.y; 2011, §41; 2020, §42), gender (CEDAW 2013, §38.c; 2014, §§73.d, 87.c; 2015, §29.a), disabilities (CRPD 2018, §55.a, highlighting an intersectional approach), among others;

b) Consideration of the necessary cultural/ethnic and language adaptations – for example, in "non-judicial or para-judicial

procedures for dealing with an offence", especially when it comes to Indigenous peoples (CERD 2005, §36);

c) Consideration of the necessary age adaptations, such as regarding children, guaranteeing a child-sensitive approach in legal procedures (CEDAW 2014, §87.d; CRC 2003, §24; CRC 2019, §40, stressing the intersectional relation between age, gender, and disabilities; CRPD 2018, §51, underlining the intersectional perspective of age and disabilities);

d) Consideration of specific barriers faced by certain discriminated persons, which requires tailored policies and legal arrangements including, for example: the provision of access to justice mechanisms in rural and remote areas (CEDAW 2015, §§16.a); the creation of accessible centers with interdisciplinary legal and social services to address "violence against women, family matters, health, social security, employment, property, and immigration" (CEDAW 2015, §17.f); the establishment of "specialized units within the police, the judiciary, the court system, and the prosecutor's office, as well as specialized defenders" for children's rights (CRC 2019, §106); the provision of a separate legal representation for children when child's views conflict with those of his/her representative (CRC 2013, §§90, 96); the prohibition of deportation/expulsion of "disappeared migrants found alive and their relatives" due to "irregular migratory status" before "the final decision in criminal procedings" as it could result in denial of access to justice (CED 2023, §46); the establishment of "transnational, regional or subregional mechanisms for search for disappeared migrants" aiming at guaranteeing "access to justice for the victims and relatives" (CED 2023, §52); among many other measures;

e) Diversification of the participation of discriminated persons/groups in all decision-making processes, including in judicial and administrative bodies – this obligation is based on the understanding that the change of State's practices depends on the participation of discriminated groups. Besides instructions on participation and consultation (like in CERD 1997, §4.d, on indigenous peoples; CERD 2011, §4.d, on African descents; CERD 2020, §42, on racial profiling), there are recommendations related to the inclusion of professionals from discriminated groups in judicial and non-judicial institutions (e.g., CEDAW 2013, §46.b; CRPD 2018, §81). Furthermore, one can find the strategic role of access to justice to guarantee the participation of discriminated persons in all areas (e.g., CRPD 2018, §66);

f) Ensuring that the content of decisions is non-discriminatory and redress human rights issues in a broad sense – this obligation relates to the duties of states to change the mindset through which

judicial decisions and acts of public officials are taken, ensuring that they do not reproduce but redress discrimination (e.g., CERD 2002, §5.v; CEDAW 2015,§15.c). The Committees also present significant recommendations on the shift of the burden of proof when the applicant establishes a prima facie case of discrimination (CERD 2005, §24; CEDAW 2015, §15.g; CRPD 2018, §73.i).

Also, there is a tendency to widen the scope of decisions redressing violations so that they include, besides punishment, restitution, rehabilitation, satisfaction (both in individual and collective reach), guarantees of non-repetition, and changes in legislation and practices (e.g., CEDAW 2015, §§19.b, 19.f, 19.g; CRC 2013, §24; CED 2023, §44). The CEDAW, when discussing transitional justice, stresses the redressing of violations of economic, social, and cultural rights beyond the punishment of civil and political rights violations.

These trends of obligations involve further reflections in the light of the fourth wave of access to justice. If the aim is to enable access to justice mechanisms to play an important role in the transformation of social relations – which requires redressing discrimination processes – the first task must begin within these mechanisms by training professionals, adapting proceedings, including the participation of discriminated groups, and so on, which shall have the effect of both increasing the access to such systems and improve the quality of decisions.

5.4 Alternative Conflict Resolutions: Challenging the Limits of a Tribunal

Despite the importance of judicial or quasi-judicial mechanisms of access to justice, these means may not always be efficient owing to time, costs, and the subjective and cultural characteristics at stake. Thus, alternative conflict resolutions and awareness-raising activities can be valuable strategies to empower persons to enjoy human rights. In this sense, the CEDAW, in the analysis of harmful practices, requests the states support alternative dispute resolutions from a human rights perspective (CEDAW 2014, §73.b), conjointly with public discussions aiming at a collective agreement to eliminate harmful practices (§76) through the work of stakeholders, institutions and civil society organizations (§77).

The CEDAW also refers to alternative dispute resolution mechanisms and restorative justice processes combined with institutionalized legal aid and public defence (CEDAW 2015, §37). Similarly, the CRC, when elaborating on the best interest of the child, acknowledges that rehabilitation and restorative justice objectives should have a more critical role than the retribution/repression objectives in child justice (CRC 2013, §28). In turn, the CERD mentions the obligation of states to create "centres for conciliation and mediation" (CERD 2005, §8).

In a further step, the CEDAW, in its approach to transitional justice, affirms that, from the angle of women's participation, access to justice should comprise both judicial and non-judicial mechanisms - all of them aiming at ensuring democratic governance and protection of human rights (CEDAW 2013, §75). Such systems and participation should cover "international negotiations, peacekeeping activities and all levels of preventive diplomacy, mediation, humanitarian assistance, social reconciliation, and peace negotiations at the national, regional, and international levels" (§42).

Undeniably, the boundaries of "available remedies" are challenged as long as it is acknowledged that other means of conflict resolution can be equally or more successful than court decisions while empowering people to be protagonists in human rights solutions. Surely, such a viewpoint is in line with the third wave of access to justice. Also, the example brought by CEDAW on transitional justice reflects the possibilities of the seventh wave as long as it diversifies the dialogues among domestic and international mechanisms through non-judicial approaches.

6. The Impulse From the Perspective of Economic, Social, and Cultural Rights

Access to justice in economic, social, and cultural rights is closely linked with the debate on their enforceability and justiciability. The CESCR, when referring to the application of ICESCR (International Convention on Economic, Social, and Cultural Rights) in the domestic legal order, points to the redaction of art. 2.1, which enshrines the progressive realization of economic, social, and cultural rights "by all appropriated means" (CESCR 1998, §1), affirming that the CESCR has a "broad and flexible approach that enables the particularities of the legal and administrative systems of each state." Nevertheless, the Committee clarifies that such flexibility does not withdraw the responsibility of states to provide "appropriate means of redress, or remedies (…) to any aggrieved individual or group" as well as means for "ensuring governmental accountability" (§2), both through judicial or administrative bodies (§3). Further, as solid arguments reinforcing access to justice as an intrinsic aspect of economic, social and cultural rights, it highlights the indivisibility and interdependence of all human rights (§10), the rule of exhaustion of domestic remedies (§3), the redaction of art. 8 of UDHR, and the principle that the state should not "invoke provisions of its internal legislation as justification for its failure to perform a treaty" (§3).

Moreover, while elaborating on the right to equality/non-discrimination, CERD affirms the critical role of remedies (CESCR 1998, §9) and, later on, urges the states to establish "national legislation, strategies, policies and plans" for "mechanisms and institutions that effectively address the individual and structural harms caused by discrimination" in the enjoyment of economic, social and cultural rights (CESCR 2009, §40).

It is not for nothing that, in the CESCR, we find this clear synergy between access to justice and non-discrimination, as in the Committees exposed in section 5. Hence, in the work of CESCR, it is interesting to notice similar developments in the obligation of states.

Firstly, access to justice guarantees are reinforced beyond the criminal field and the mere passive role of states. Surely, issues on the enforceability of rights like the right to health (CESCR 2000, §§59 ff.) and right to work (CESCR 2006, §§48 ff.), as well as the regulations on forced evictions (CESCR 1991, §17; 1997, §13 ff.) and protection against abuses in business (CESCR 2017, §51) are examples located in the field of civil and administrative proceedings which, in its last consequences, can redress the omissions of states. In this sense, the CESCR also accentuates the monitoring of policies and affirms that both omissions and actions hindering the enjoyment of economic, social, and cultural rights are violations of ICESCR, thus requiring adequate remedies (e.g., CESCR 2016, §78-80).

Secondly, strategies to eliminate barriers to access to justice are cited. For that, the recommendations on the right to legal aid and participation/consultation of the implicated persons are strengthened (e.g., CESCR 1997, §15; 2003, §56; 2008, §77). Plus, the role of National Human Rights institutions like National Human Rights Commissions, ombudsman offices, and "defensores del pueblo", among others, with a significant degree of independence, is underlined (CESCR 1998, §2). The CESCR uses a broader meaning to NHRI than that described in the Paris Principles (UN, 1993), which allows different institutional arrangements in this regard[2].

Additionally, the CESCR points to a broader sense of access to justice that includes education and information on human rights and remedies, work on law projects, technical advice, and monitoring of policies through the above-cited human rights institutions (CESCR 1998, §3). Furthermore, there are recommendations for training professionals, like judges and public officials, in a non-discriminatory approach (e.g., CESCR 2005, §21).

A third significant contribution of the CESCR is the preoccupation with access to justice in the context of business activities. It recognizes the possibility of persons claiming negative or positive duties from private actors in several fields, such as "non-discrimination, health-care provision, education, the environment, employment relations, and consumer safety" (CESCR 2017, §4). Accordingly, it underlines the obligation of states to

2 The Brazilian Public Defender's Office, for example, is a unique model of an independent institution provided for in the Federal Constitution (Brazil 1988), comprising a public model of access to justice for persons in vulnerability with a wide judicial and non-judicial mandate described in the Complementary Law n.80/1994 (Brazil 1994). For more, see Alves (2005), Lima (2022), Moreira (2017).

provide access to justice for victims of violation" (§40), and determines certain requeriments, for example: removal of "substantive, procedural and practical barriers to remedies" by "establishing parent company or group liability regimes"; provision of legal aid; the possibility of "class actions and public interest litigation"; facilitation of "access to relevant information and the collection of evidence abroad" (§44); the shift of the burden of proof (§45); access to judicial and non-judicial procedures for indigenous peoples (§46) and the recognition of their "customary laws, traditions and practices" with "legal services" and "training of court officials" on indigenous issues (§52); protection of human rights defenders (§78); criminal liability both for companies, individuals, and authorities (§49), combined with administrative sanctions (§50) and civil remedies (§51); the presence of "labour inspectorates and tribunals, consumer and environmental protection agencies and financial supervision authorities"; and NHRIs to "monitor states' obligations with regard to business and human rights" (§54).

Finally, the CESCR has a constant focus on a broader comprehension of remedies that involve compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, as well as educational programs and prevention measures (CESCR 2003, §55; 2005, §21; 2006, §48), including with intervention of national ombudspersons, human rights commissions and other human rights institutions (CESCR 2008, §77; 2003, §55).

The trends above in states' obligations show how the perspective from economic, social, and cultural rights, as it dialogues with the link between discrimination and their enforceability/justiciability, stimulate new specific duties for states, resonating similar developments found in other committees that presupposed analogous vulnerability perspectives. Still, we underline the thought-provoking debate on the association of access to justice – and its co-related institutions - with monitoring of policies, law projects, and other actions aiming at government's accountability that goes beyond the strict sense of remedies (although remedies play an important role in CESCR's viewpoint). This approach reverberates the debate on the seventh wave of access to justice as long as it opens up possibilities of domestic and international cooperation through the protagonism of such institutions alongside persons claiming human rights.

7. Conclusion

The first outcome from the examination of the UN Committees' consolidated work is that the content of a human right should never be taken for granted. Instead, the development of a human right depends on the ability of several actors in the domestic and international fields to create and recognize more and more obligations to be imposed on states. These obligations are, thus, the specific elements that embody, in practice, a human right.

In the case of the right to access to justice, one can conclude that the UN treaty bodies, in their different angles, have established a very complex set of state duties that are not limited to a liberal view of the mere availability of courts or remedies. In reality, they have covered a wide range of responsibilities involving criminal and civil, judicial and non-judicial fields, including the redress of structural inequalities and the participation of several actors (like NHRIs, NGOs, civil society, etc). They also targeted the participation of persons affected by violations in the process, incorporated dimensions of education and training, and introduced elaborations on alternative conflict solutions. These are just a few examples from the numerous trends explored by the committees that are mapped in this article, showing the importance and reach of such an approach inspired by the work of these bodies.

A second outcome from the analysis herein proposed is inciting a dialogue between the academic/theoretical perspective and the practical, legal approach aiming at the realization of the right to access justice on the ground. In this sense, the brief contextualization on the waves of access to justice (Section 1), as a result of theoretical and interdisciplinary efforts to understand the developments in this area, provided an important lens through which we could find, in the extensive GCs/GRs consolidated understandings, trends on the obligations resonating the renewal waves of access to justice.

Therefore, the debate is not about seeing these waves from a chronological/linear viewpoint but, above all, considering them as different aspects that, through the state's obligations, comprise the right of access to justice as a multifaceted right requiring manifold measures. Additionally - which is even more interesting – acknowledging the right of access to justice in itself as this whole/multidimensional right opens ways to diverse strategies for persons/groups to have specific claims on the matter, independently of which other human right could it be linked to.

A third conclusion refers to the vectors that motivated the development of many states' obligations integrating the right to access to justice. It is perceived that the primary vector consists of the Committees' focus on varied vulnerabilities. In other words, the more attentive the Committees are to specific vulnerabilities, the more sophisticated the obligations regarding access to justice become. When it comes to recognizing these vulnerabilities, the non-discrimination/equality perspective plays a crucial role, as seen mainly in Section 5. Still, in Sections 3 and 4, whose committees dealt mostly with civil and political rights, resonances are found in the evolution of obligations in the moments that these treaty bodies address certain marginalized/disadvantaged persons/groups. In the same way, as long as CESCR refers to both enforceability/justiciability of economic, social, and cultural rights and its close relation with equality/non-discrimination, it can also go further in other varied elaborations on

states' duties. On the other hand, despite the HRC's first focus on courts and remedies, it is interesting to notice that, when it focuses on certain persons – like women – it broadens the guaranties and reinforces an important feature: legal aid in all kinds of procedures.

In summary, the main vector of vulnerabilities turns our gaze not to the type of human right to which the right to access justice could be related, but primarily to the persons/groups for which the right to access justice gains more importance and needs to be adapted. It is in this gaze that we better recognize access to justice as a right in itself, comprising its own sets of state's specific duties/standards.

A further question concerns the implications of the findings on the right to access to justice from the angle of related state's obligations. For the states, the first implication is the duty to design access to justice measures not only for "persons in general" but principally for persons in vulnerability. Consequently, states must redress the obstacles that persons in vulnerability face to access to justice. Surely, the committees designate actions tailored to eliminate these barriers, as exposed in the article. These features involve a complex set of measures that will only be accomplished if states consider access to justice an object of a comprehensive public policy. That is, states must deal with access to justice as a right in itself demanding a far-reaching public strategy comprising precise legislation, governmental planning, and institutional components.

In turn, from the perspective of victims, civil society, and other human rights actors, the recognition of the several obligations shaping the right to access to justice is critical for specific claims involving access to justice in a whole/broad sense rather than in a fragmentary view throughout other human rights. Moreover, it provides a guide for both established consolidated understandings of the obligations comprising access to justice and identifying deficiencies where further evolution is vital.

Furthermore, there are other implications for the committees. The first one connects with the concept of minimum core obligations. Could we think of access to justice as a part of the minimum core obligation of other human rights? The consolidated duties designed in the GCs/GRs illustrate a legal framework to be observed by states. However, there is no specific elaboration about the interplay between minimum core obligations and access to justice, despite the discussions on the latter as an intrinsic element of all human rights. Yet, one can also inquire about the minimum core obligations of the right to access justice. Certainly, these matters suggest directions for future elaborations.

A second implication deals with individual complaints. It is known that access to human rights mechanisms is subject to the exhaustion of

domestic remedies. What should the "exhaustion of domestic remedies" mean, having in mind all the numerous standards on the right to access to justice previously displayed? Undoubtedly, the duties imposed by the treaty bodies point to a substantive evaluation of the exhaustion of domestic remedies that considers both their formal availability and other access to justice obligations – for example, the existence of quality legal aid[3] and information, to name a few. Indeed, pushing the fifth wave of access to justice to its last consequences, the treaty bodies need to make a quite complex analysis of the right to access to justice's parameters in the reality of each country/case. And, if the committees identify that the state did not comply with all its access to justice obligations, the decision could redress this failure alongside the recommendations about the other human rights at stake in the case.

Thirdly, as access to justice as a human right demands the states to establish comprehensive frameworks, it requires that the committees, in their dialogues with states in the monitoring activities, enhance the evaluation of access to justice policies through systematized indicators[4] and appropriate data. In this task, Committees can count on the participation of civil society and other human rights institutions/actors to get qualified data and create conjointly measures to enhance the realization of the right to access to justice domestically – which is, by the way, linked with the seventh wave of access to justice.

In all manners, the main outcome from the analysis herein proposed is the acknowledgement, through an overview of consolidated understandings of the treaty bodies, of a substantial set of obligations that are to be taken seriously by the states and be used strategically by human rights actors and victims, which can continuously be further expanded.

References

Alves, C. (2005). A estruturação dos serviços de Assistência Jurídica nos Estados Unidos, na França e no Brasil e sua contribuição para garantir a igualdade de todos no Acesso à Justiça. PhD Thesis, Pontifícia Universidade Católica do Rio de Janeiro.

Constituição Federal de (1988). Brazil. (Retrieved January 19, 2024)

Lei Complementar Federal nº 80/1994. Brazil. (Retrieved January 19, 2024)

3 Also, see, e.g, ICHR (Inter-American Court of human rights) (1990).

4 The indicators from the 2030 Agenda for Sustainable Development (UN, 2017), e.g., offer some relevant data options (goal 16).

Cappelletti, M., & Bryan, G. (1988). Acesso à Justiça. Porto Alegre: Sergio Antonio Fabris Editor.

Carvalho., Willian, E., & Alves, J. (2020). A tecnologia como instrumento em favor da sexta onda renovatória de acesso à Justiça". *El Derecho Público y Privado ante las Nuevas Tecnologías. edited by J. G. González, A. A. Lozano, G. M. Rodrígues, R. M. Gonçalves, and F. Veiga, 86-94. Editorial Dykinson.* Link (Retrieved January 20, 2024)

CAT-Committee Against Torture. (2008). General Comment n.2.

CAT-Committee Against Torture. (2012). General Comment n.3.

CAT-Committee Against Torture. (2017). General Comment n.4.

CED-Committee on Enforced Disappearances. (2023). General Comment n.1.

CEDAW-Committee on the Elimination of Discrimination against Women. (2008). General recommendation n.26.

CEDAW-Committee on the Elimination of Discrimination against Women. (2013). General Recommendation n.30.

CEDAW-Committee on the Elimination of Discrimination against Women. (2014). General Recommendation n.31.

CEDAW-Committee on the Elimination of Discrimination Against Women. (2015). General recommendation n.33.

CERD-Committee on the Elimination of Racial Discrimination. (2005). General recommendation n.30.

CERD-Committee on the Elimination of Racial Discrimination. (1997). General Recommendation n.23 on the rights of indigenous peoples.

CERD-Committee on the Elimination of Racial Discrimination. (2000). General Recommendation n.27.

CERD-Committee on the Elimination of Racial Discrimination. (2002). General Recommendation n.29.

CERD-Committee on the Elimination of Racial Discrimination. (2005). General Recommendation n.31.

CERD-Committee on the Elimination of Racial Discrimination. (2009). General Recommendation n.32.

CERD-Committee on the Elimination of Racial Discrimination. (2011). General Recommendation n.34.

CERD-Committee on the Elimination of Racial Discrimination. (2020). General Recommendation n.36.

CESCR-Committee on Economic, Social and Cultural Rights. (1991). General Comment n.4.

CESCR-Committee on Economic, Social and Cultural Rights. (1997). General Comment n.7.

CESCR-Committee on Economic, Social and Cultural Rights. (1998). General Comment n.9.

CESCR-Committee on Economic, Social and Cultural Rights. (1998). General Comment n.10.

CESCR-Committee on Economic, Social and Cultural Rights. (2000). General Comment n.14.

CESCR-Committee on Economic, Social and Cultural Rights. (2003). General Comment n.15.

CESCR-Committee on Economic, Social and Cultural Rights. (2005). General Comment n.16.

CESCR-Committee on Economic, Social and Cultural Rights. (2006). General Comment n.18.

CESCR-Committee on Economic, Social and Cultural Rights. (2008). General Comment n.19.
CESCR-Committee on Economic, Social and Cultural Rights. (2009). General Comment n.20.
CESCR-Committee on Economic, Social and Cultural Rights. (2016). General Comment n.23.
CESCR-Committee on Economic, Social and Cultural Rights. (2017). General Comment n.24.
CMW-Committee on the Protection of the Rights of Migrant Workers and Their Families. (2017). General Comment n.4.
CMW-Committee on the Protection of the Rights of Migrant Workers and Their Families. (2022). General Comment n.5.
CRC-Committee on the Rights of Children. (2003). General Comment n.5.
CRC-Committee on the Rights of the Child. (2002). General Comment n.2.
CRC-Committee on the Rights of the Child. (2013). General Comment n.15.
CRC-Committee on the Rights of the Child. (2013). General Comment n.14.
CRC-Committee on the Rights of the Child. (2019). General Comment n.24.
CRPD-Committee on the Rights of Persons with Disabilities. (2018). General Comment n.7.
CRPD-Committee on the Rights of Persons with Disabilities. (2018). General Comment n.6.
Demsar, J., Tomaz, C., Ales, E., Gorup, C., Hocevar, T., Milutinovic, M., Mozina, M., Polajnar, M., Toplak, M., Stari, A., Stajdohar, M., Umek, L., Zagar, L., Zbontar, J., Zitnik, M., & Zupan, B. (2013). Orange: Data mining toolbox in Python. *Journal of Machine Learning Research.* Link (Retrieved April 24, 2023)
Esteves, Diogo Acesso à Justiça no Japão: o modelo de assistência jurídica japonês. Master thesis, Universidade Federal Fluminense.
Garth, B. (2015). Comment: A revival of access to justice research? *Access to Justice,* 255-260. Link (Retrieved April 24, 2023)
Global Access to Justice Project (n.d.)."Global Access to Justice Project". link (Retrieved June 26, 2024)
HRC-human rights Committee. (1984). General Comment n.13.
HRC-human rights Committee. (1986). General Comment n.15.
HRC-human rights Committee. (1988). General Comment n.16.
HRC-human rights Committee. (1992). General Comment n.21.
HRC-human rights Committee. (2000). General Comment n.28.
HRC-human rights Committee. (2007). General Comment n.33.
HRC-human rights Committee. (2014). General Comment n.35.
ICHR-Inter-American Court of human rights. (1990). Opinión Consultiva OC-11/90- Excepciones al agotamiento de los recursos internos.
Lima, M. (2022). A 7ª Onda de Acesso à Justiça - acesso à ordem jurídica justa e globalizada. Belo Horizonte: D'Plácido.
Moreira, T. (2017). A Constitucionalização da Defensoria Pública: disputas por espaço no sistema de justiça. *Opinião Pública.* Link (last visited 23 August 2024)
Orsini, A., & Costa, A. (2016). Educação para o acesso à justiça: a transformação dos paradigmas de solução de conflitos. *Revista da Faculdade de Direito da UFMG.* Link (last visited 23 August 2024)
Paterson, A. (2011). Lawyers and the public good: Democracy in action? *Cambridge: Cambridge University Press*. Link (last visited 23 August 2024)

Trindade, A. (2006). Desafios e Conquistas do Direito Internacional dos Direitos Humanos no início do século XXI. Link (Retrieved January 18, 2024)

UN-United Nations. (1993). General Assembly Resolution 48/134 on the Principles relating to the Status of National Institution (The Paris Principles)". link (Retrieved January 19, 2024)

UN-United Nations. (2012). Declaration of the high-level meeting of the general assembly on the rule of law at the national and international levels.

UN-United Nations. (2015). Resolution A/RES/70/1 -transforming the world: the 2030 agenda for sustainable development.

UN-United Nations. (2017). Resolution 71/313 - Work of the statistical commission pertaining to the 2030 agenda for sustainable development.

XIV Conferência Judicial Ibero Americana. (2008). Regras sobre Acesso à Justiça das Pessoas em situação de Vulnerabilidade. Brasília. link (Retrieved January 20, 2024).

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The impact of mandatory Hijab Laws on women's rights in Iran: A human rights perspective

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Abstract: *This article delves into the complex landscape of women's rights in Iran, focusing on the profound impact of mandatory hijab laws imposed after the 1979 Islamic revolution. Against a historical backdrop of ongoing struggles for human rights, particularly concerning women, this paper aims to scrutinize the multifaceted violations arising from the implementation of hijab laws, revealing their ramifications on civil, political, religious, and economic rights. The study begins by contextualizing the historical evolution of women's rights in Iran, contrasting the experiences under monarchy with the current regime. It highlights the distinctive nature of women's rights violations post-revolution, emphasizing the coercive enforcement of discriminatory laws and its contribution to widespread protests both within Iran and globally. Central to the analysis is the examination of how mandatory hijab laws infringe upon women's personal freedoms and jeopardize their fundamental rights. The recent outcry and resistance against these laws, exemplified by the nationwide protests triggered by the tragic incident involving Mahsa Amini, underscore the urgent need for political reevaluation and legal reform. The paper contends that these laws not only impede women's participation in political, religious, civil, and economic spheres but also contravene Iran's International Commitments and Human Rights Instruments.*

The article concludes by reinforcing the deep-rooted concerns about women's rights in Iran, echoing the discontent that has persisted since the 1979 Islamic Revolution. The discriminatory impact of hijab laws is unveiled through the lens of the marginalized position of women in various fields, coupled with widespread discrimination and violations of their political, religious, and economic rights. As international scholars and experts question the compatibility of these laws with International Human Rights norms, the United Nations and other human rights organizations call for the Iranian regime's adherence to international commitments, emphasizing the potential exacerbation of the vulnerable situation of women's rights in the absence of such compliance.

Key words: *Iran, women's rights, Hijab laws, discrimination, human rights*

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1. Introduction

The struggle for protection and promotion of human rights in Iran is not a new phenomenon and dates back to decades. More importantly, the issue of women rights and their protection has remained a matter of serious concern in Iran's modern history and society both during the reign of monarchy as well as under the religious theocracy after the revolution of 1979. However, the nature, frequency, and magnitude of women's rights issues fundamentally differed under the monarchy and the current religious theocratic political setup. Among other grievous, women rights violations, the implementation of mandatory hijab laws post revolution in Iran, promulgation of discriminatory laws, and arbitrary executive enforcement powers had further complicated the situation for freedom of women rights and resulted in current upheaval and large-scale protest in the country and worldwide. The repercussions of such laws and their enforcement are such that they have threatened not only the personal and fundamental freedoms of women in Iran but also endangered their civil, political, religious, and economic rights. However, despite these issues, tremendous progress has been made by Iranian women in educational and scientific fields. Recent protests and derogation of women against the mandatory hijab laws and political crackdown on the women protesters have unraveled the necessity for reproach in political strategy as well as change in such laws. The focus of this paper is to analyze how the enforcement of hijab laws violates the civil, political, religious, and economic rights of the women in Iran with particular emphasis on the current protest and resistance of such laws in Iran as well as to establish that such laws are in violation of Iran's International Commitments and Human Right Instruments.

2. Literature Review

The women in Iran both liberal and religious, participated actively disguised with the promises and slogans of equality and justice in the revolution with the hopes of securing and protecting more and greater human rights. However, their hopes were doomed soon after the removal of the shah's government and taking over of the state affairs by the religious leaders. In a volatile situation wherein the aftershocks of the revolution were still felt, the new political setup took shape in the form of religious theocracy giving absolute power to the religious head (the supreme leader). In view of the unfolding events in respect of women rights and pursuance of a religious policy, which would define the private and public lives of the citizens, the Iranian government imposed a new ethical code and made the hijab compulsory (Yeon Koo at el., 2018, 57). This religious approach was seen by women as a threat to their individual and public rights, which was not acceptable to the women, resulting in the resistance movements by women across the country.

Despite the fact that after the revolution, there were no official laws or directives regarding veiling, and only political officials emphasized the

Islamic hijab in their speeches, since the middle of 1981, the necessity of wearing a headscarf has gradually been emphasized in official policies. And the coat and pants gradually became mandatory in offices and public spaces. The offices refused to allow female personnel to enter without a hijab, and the hijab of female students was specified.

The first attempt to regulate the private and public life of women initiated with the imposition of compulsory hijab law across the country in 1983 (Majlis 1983). Inclusion of such regulations in the penal code forced women to change their dress code as defined by the religious clerics and violation of which was seen as a criminal offense and women were subjected to the punishment of 74 lashes with the approval of the punishment law as the fifth section of the Islamic Penal Code in 1997, the punishment of flogging, which was carried out before 1997 for violating the laws related to clothing by women, was replaced by imprisonment or a fine (Hashemi 2016).[1] In addition to the Islamic Penal Code, other laws have been approved which make it easier to control women's hijab, for instance, the Law of Boards for Administrative Violations (The Law of Boards for Administrative Violations, 1984)[2], the disciplinary code of school children[3] (Supreme Council of Education and Culture IRI 1992), and the disciplinary code of students.[4] (The disciplinary code of students 1995).

According to the disciplinary code of school children all female school children should wear hijab and the color of their forms and scarves must be according to the instructions of the Ministry of Education. Non-compliance will result in punitive measures. Also, by the disciplinary code of students, failure to observe Islamic clothing or use of vulgar clothing and make-up is considered a moral violation of students. A collection of laws and approvals related to chastity and hijab in higher education.

However, in addition to these laws, there exists a regulation that empowers the police and other law enforcement officers to address women as if they were criminals when dealing with those wearing an inappropriate hijab. According to paragraph one of Article 21 of the Criminal Procedure Law, the failure to observe the Islamic hijab is considered a clear violation of the law. Consequently, law enforcement officers are mandated to implement measures to preserve evidence of this

1 With the approval of the punishment law as the fifth section of the Islamic Penal Code in 1997, the punishment of flogging, which was carried out before 1997 for violating the laws related to clothing by women, was replaced by imprisonment or a fine.

2 -According to clause 13, Article 8, Non-observance of Islamic hijab by women who are government employees is considered an administrative offense.

3 According to clause 2-7-Note 2 of Article 2, all female school children should wear hijab and the color of their forms and scarves must be according to the instructions of the Ministry of Education. Non-compliance will result in punitive measures.

4 According to this law, failure to observe Islamic clothing or use of vulgar clothing and make-up is considered a moral violation of students.

violation and prevent the accused from escaping. Consequently, officers are required to apprehend the woman in question and transfer her to the appropriate judicial authorities.

In order to ensure the strict implementation of the hijab law by women in the early 80s, the punishment for uncovering the hijab was included in the Islamic Penal Code, the "Islamic Revolution Committee", "at its inception, based on its dependence on key power institutions engaged in disarming and securing certain centers, confiscating property, appointing officials for some institutions, arresting certain former officials, and other similar activities. Due to the rapid formation of the organization and weak management and oversight, there were numerous instances of legal violations and human rights abuses" (Wikipedia 2015) patrols arrested people who did not observe their hijab or if their hijab did not match the request of the Islamic Republic (Asr-e Iran 2016).

With the integration of this committee with the police force and the election of a medical reformer as the president, there was a limited decrease in the level of scrutiny on women's hijab. However, eight years after these reforms, the election of a far right and religious president marked a turning point. One of the toughest regulations of the Islamic Republic of Iran, "Executive Measures to Spread the Culture of Chastity and Hijab," was implemented during these times (Farhang Pouya 2010). The law on implementation of hijab and development of chastity culture has specially approved duties for all government agencies to make more efforts to impose hijab on women. Guidance patrol ((Gesht Irshad)). The most controversial result of the implementation of this law by the police force of the Islamic Republic of Iran is the official name of the Moral Security Police or the Social Security Promotion Plan. In 2006, these powers were delegated to government officials to charge and arrest women for not observing the hijab and not observing the Islamic veil (Yeon Koo et al., 2018, 48). After the implementation of this decree, the police created more restrictions for women's clothing, beyond the law, they created more clothing arbitrarily code. What kind of clothing is against the hijab code of the Islamic Republic of Iran has always been a controversial issue in the field of women's rights in the country. This is primarily due to the subjective nature of the authorities' preferences when deciding on appropriate clothing for women. This issue has the potential to violate individual rights, because women's citizenship should include the freedom of personal choices, including choices related to clothing. Until now, there is no law that gives a precise definition of the sharia hijab mentioned in the Islamic Penal Code. To determine how to cover the ministries and governmental institutions, each of them considered a different clothing fashion, which in some of them has caused more strictness in women's clothing.

However, the police, which has the main task of warning and arresting women, has so far announced the following as examples of "bad clothing":

wearing short pants, using small shawls that do not cover the hair, and wearing tight or tight-fitting coats or revealing body (Mahnaz 2018). Also, the police have announced restrictions for different seasons, such as hats, boots and leggings, and bad veiling in the winter season, "stating that individuals who do not comply with these rules "will be directed to designated centers for correcting their appearance"[5] (BBC Persian 2014).

So far, there have been a lot of criticism on the "Executive Measures to Spread the Culture of Chastity and Hijab", but the most severe criticism on this law has been made by the Organization of Graduates of Iran called "daftere-tahlim-vahdat" from the perspective of violating human rights, for instance "in the area referred to as "combating improper hijab," in the first two days alone, 296 people were arrested, and 4,372 individuals were warned by the law enforcement and judicial authorities. On the second day, 2,838 clothing stores were warned, and their businesses were temporarily shut down" (Kiwandakht 2008). However, it is important to note that despite these restrictions on women, the progress in academia and education has continuously grown. The literacy rate among women reached 80.34 in 2006 (Ansia 2010), which later in 2012 increased to 81 percent (Ricardo et al., 2012). According to 2015 estimates of the women literacy rate the female adult literacy rate jumped up to 87.6 percent (UNESCO 2012, 51).

So, the examination of human rights legislation reveals that compelling women to veils infringe upon their political, economic, and civil rights. We will delve into these aspects to offer a comprehensive understanding of this matter.

2. Political Rights

The issue of mandatory hijab and its relevant laws after the revolution had always remained in the political sphere as a complex issue. As a 'Grundnorm' of abstract political condition as well as a legal reality, the issue had become a crux of numerous fundamental human rights issues, including but not limited to freedom of political participation, freedom of expression, personal autonomy, and most importantly the freedom to uphold and manifest religion. Hijab laws and their authoritative implementation had disproportionately affected women rights in Iran more than that of men. In the political and legal discourse, such issues arise due to strict interpretation of religious laws and their promulgation without taking in consideration the dissenting opinions from the section of the society who they affect i.e., women. In this sense, one may rightly argue that, "the use of the hijab as a political tool against Muslims is a violation of their political rights, and the use of coercive methods to force

5 The head of the moral security police announced the examples of bad clothing in winter: Boots and savart have been declared as examples of bad hijab in winter.

individuals to wear religious dress is incompatible with "International Human Rights Laws" (Human Rights Watch 2019) .This discourse and resistance started from the very beginning of the Islamic Revolution, when the leader of the revolution asked women to appear in society with hijab, had grown over the decades, and reached its peak in recent years. The death of Mahsa Amini in custody, on the charges of violation of the hijab laws had sparked anger and distrust in the coercive nature of the laws itself as well the authoritative powers and impunity granted to the police to make detentions.

2.1 Freedom of Expression

One of the most important controversies and perhaps the biggest concern the hijab law possesses is the restrictions and limitations on the right to the freedom of expression. These restrictions and the punishments for their violations can be discussed, debated, and understood in multifold in the domain of freedom of expression. The violation of the hijab laws incorporated not only the failure to practical manifestation of hijab but also extends to the use of verbal and written disagreements and dissent against the hijab laws. Views both written, oral and audio visually expressed through social media and audiovisual platforms are prohibited and dealt with punishments through imprisonment and fines. As a response to these restrictions on the freedom of expression, women belonging to different fields of life in Iran had continuously protested it. Such protests from women are seen as a challenge to the hijab laws, which the government uses to suppress rights movements and women are arrested and detained on public order charges, which further restricts freedom of expression. Yet another method of restricting freedom of expression is forced confessions by the women arrested in the pretext of violation of hijab laws and public order charges. In this sense, a controlled version of expression, which the state authorities wish to use as a propaganda tool against women are aired on televisions and social media to deter the dissenting public voices. Forced confessions as a violation of the right of freedom of expression serves, for the government, as a necessary political tool in maintaining the power dynamic of effectively controlling the growing concerns on women rights. Secondly, as a psychological tool to deter women in particular and public in general for any future action against the hijab laws.

In this context, women had continuously been harassed, detained, and kept in unwanted conditions for refusal to comply with the hijab laws (OHCHR 2023).These confessions, which are broadcasted mostly on TV and social media platforms have heavily been criticized by public and international organizations alike for being forced and use of coercion, which are seen as violating the right to freedom of expression but also of the other related rights (Roghayeh 2022). For instance, the women are forcibly shown apologizing for their actions without their consent, which not only violates the principles of privacy but also of dignity and

honor (Iran International 2023). The women who are subjected to forced confessions (Farda, R. R. 2022) are often arrested and can face severe consequences, including imprisonment and fines. Additionally, cases like that of Armita Gravand[6] illustrate that civil resistance against forced hijab can tragically result in loss of life (Wikipedia 2023).

Strict implementation of hijab laws along with arbitrary detentions and inappropriate punishment by the state not only violates Iran international commitments on human rights but also of the human rights instruments to which Iran is a state party. In particular, in implementation of hijab laws, the relevant provisions of ICCPR (ICCPR 1966) and UDHR (Universal Declaration 1948) are blatantly violated with state impunity in the pretext of state sovereignty. A discussion and examination of provisions relevant to freedom of expression, of receiving and imparting information, freedom of political participation, of political affiliation, and right to a free and fair trial is important. Concerns have continuously been raised by the ICCPR committee and other international and national human rights organizations on failure of Iran to bring its laws in compliance with ICCPR and the implementations of its relevant provisions. The list of issues highlighted by the ICCPR committee on the annual report of 2022 submitted by Iran and Iran's reply to these issues provides a necessary understanding and glance of the state's reluctance of bringing its laws in compliance to the provisions of ICCPR and its failure to implement its provision. For instance, the ICCPR committee stressed the significance of ensuring that political rights and freedoms are upheld without discrimination or restrictions, "the Committee is concerned that the legal framework does not afford comprehensive and effective protection against discrimination on all the grounds covered by the Covenant, including gender, religion, political or other opinion, sexual orientation and gender identity" (Human Rights Committee 2021). In the context of political rights and freedoms, Article 18 of the ICCPR[7] and Article 18 of the UDHR[8] provides for the protection and safeguards the freedom of thought, conscience, religion, and belief. This includes the freedom to manifest one's religion or beliefs in worship, observance, practice, and teaching both private or in public. However, contrary to the provision, the

6 Armita Geravand, a 16-year-old student, passed away after sustaining a head injury during an encounter with Tehran's hijab police. On October 1st, Armita fell into a coma after being stopped by enforcers, and it's believed she was pushed by a woman agent, leading to her severe head injury. The circumstances echo the case of Mahsa Amini, who died last year while in custody of morality police.

7 Article 18, International Covenant on Civil and Political Rights. (1966): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

8 Article 18, Universal Declaration of Human Rights (1948): "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

government applies hijab laws to bring the freedom of thought, conscience, and religion by women in conformity with their own strict interpretation of religion, thus systematically restricting manifestation of religion in public. Furthermore, article 25 of the ICCPR obliges the states to guarantee and protect the right of every citizen to take part in the conduct of public affairs, including the right to vote and be elected through genuine and periodic elections.[9] Furthermore, Article 19 of the ICCPR protects and promotes the right of expression and information.[10] Unfortunately, the right to freedom of expression has brutally been violated through state-owned and controlled media, effectively exerting control over and limiting speech, particularly pertaining to women's rights. Such actions not only infringe upon fundamental human rights but also impede the progress toward gender equality and empowerment (Maryam 2000, 819-824). The concerns about women rights were expressed by the Human Rights Committee in response to Iran's 1992 ICCPR report in 1993. "That the discrimination against women, including the punishment and harassment they suffer, are "incompatible" with the ICCPR" (Concluding Observations 1993). Reportedly, the government passed a new law in 1998 which forbids "commercial use of women's image and texts declaring women's issues, humiliation, insult, propagation of formality, use of ornaments, and defending women's [rights] beyond the bounds of legal and religious law" (Maryam 2000, 820). This law allows the government to arrest authors who criticize the treatment of women in Iran (Maryam 2000, 890). Similarly, Convention on the rights of Child, is of particular relevance, since, girls attending schools irrespective of their age are obliged to wear mandatory hijab, which not only violates the provision of CRC but also is an arbitrary power of the government to restrict the practice and manifestation of a child's religion and belief.

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9 Article 25, ICCPR, 1966.Article 25 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, is as follows: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, in general terms of equality, to public service in his country."

10 Article 19, ICCPR, 1966:"1. Everyone shall have the right to hold opinions without interference.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals."

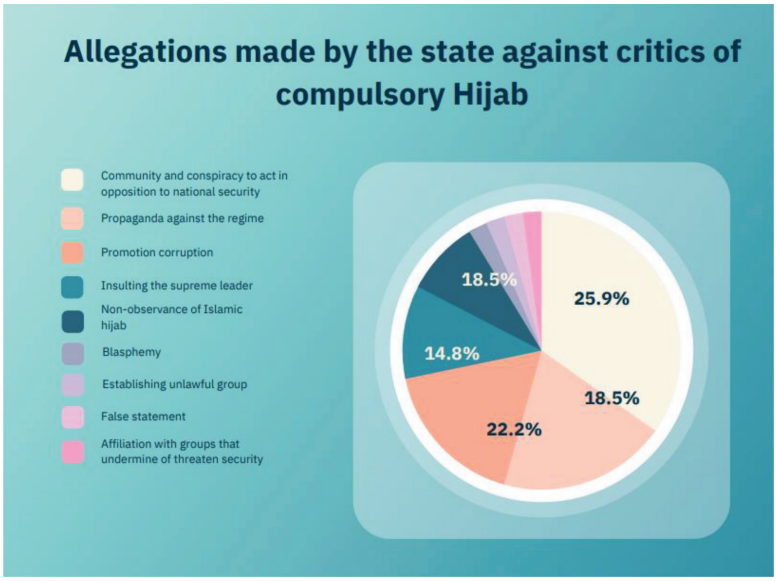

Figure 1: (Roghayeh 2023) Ratio of allegations made by the state against critics of compulsory hijab.

Iranian women have borne the brunt of a predominantly patriarchal and repressive regime that intentionally discriminates against women and denies them basic human rights. One of the most visible signs of the denial of freedom is the Islamic State's control of women's dress. (Susan W. 2007)

In September of 2022, the Atlas of Iran Prisons Group released a report that outlines the experiences of individuals, both male and female, who have been involved in protests against compulsory hijab over the past five years and have encountered legal and security actions within the Islamic Republic of Iran. This diagram shows some allegations towards them.

2.2 Freedom of Choice and Right to "Personal Life"

The right to personal life, choice, and freedom is one of the most fundamental cornerstones of the international human rights system. By virtue of which, all humans including men and women can choose their way of life and individual decisions without any interference, limitation, fear of coercion or force. This right is not limited only to the choice of personal life but also to one's religion, belief, lifestyle, as well as right to personal privacy and personal self-determination.

Such rights of personal choice and life have been recognized by a number of human rights instruments such as the European Convention of Human Rights, the UN declaration of human rights, as well as CEDAW.

Courts, such as the European Court of Human Rights (ECtHR) have not only recognized the right to respect one's private life but termed it as a real right to personal autonomy. "... include the right to intimacy, the right to be left alone, or as I put it, a right to be free from unwanted intrusions, and the right to personal autonomy"(Jill 2009, 69–76).

The right to personal privacy and personal autonomy are interrelated and one can be seen as a way of attaining and securing the other and vice-versa. Privacy can also be regarded as a "means of securing personal autonomy and independence in personal and spiritual concerns, if necessary in defiance of all the pressures of modern society" according to Clinton Rossiter (R 2021, 58-61). The right to personal autonomy includes the freedom of personal choices about personal beliefs, way of living individual life, and as well as of appearances and choice of clothing.

In societies like Iran, the choice of clothing for women can be regarded as an imposed way of wearing rather than a personal one, since the policies are formulated by the state instead of people making their personal decisions of what to wear and what not to. This includes the choice to wear or not to wear a hijab. Refusing to wear the veil, the woman may not only be signifying a lower degree of her religious conviction and contempt of the state's hijab policies. Hence, refusing to observe clothing as defined by the state, may be interpreted as her refusal to adopt a Muslim identity and maybe even her affiliation with "evil" West by the Iranian clerics and by the State. (Susan W. 2007, 47)

2.3 Freedom of Association and Protest

Freedom of association and protest are one of the most significant rights falling in the category of political rights. The mandatory hijab law has ignited various sparks of resistance and activism in Iran. Women's rights activists have campaigned for law changes and greater gender equality in the country. In recent years, the discussion to protest against the mandatory hijab has intensified in the form of various civil movements.

The protest movement of the girls of "Enghelab Street" (Delaram 2018) in January 2016 turned the issue of compulsory hijab into one of the main issues in Iran's political and social atmosphere. Women raised their scarves on sticks and stood on platforms in protest against the mandatory hijab. In this movement, women raised their scarves on sticks and stood on the platform in protest against the mandatory hijab. These protests followed the call for "White Wednesdays", which marked the symbolism in which the women took off the hijab or wore a white shawl as a symbol of protest against forceful implementation of the black hijab (Mansoureh 2022, 9–16). The UN has condemned the violent crackdown against hijab protests in Iran and called on Iranian authorities to respect the rights of protestors calling for justice for Mahsa Amini. Criminalizing refusal to

wear the hijab is a violation of the right to freedom of expression of women and girls and opens the door to a range of other possible violations of political, civil, cultural, and economic rights (UN News 2017).

2.4. Religious Rights

In the Islamic Republic of Iran, freedom of religion, which is one of the most basic human freedoms in the world, is not secured and guaranteed, while international law considers this freedom to be unconditional, and Article 18 of the Universal Declaration of Human Rights includes not only the right of religious freedom but also to change one's religion (Ann Elizabeth 1996, 196). Additionally, Article 18 of the ICCPR also guarantees, "everyone shall have the right to freedom of thought, conscience and religion" (Susan W. 2007, 47). The freedom of religion or belief is not only limited to free and unrestricted choice of the religion but also of its practice and manifestation along with the display of the religious symbols. Dress code is considered by many religions as the manifestation of their religion as well as an integral part of their respective religions. There has been a long debate since the revolution that the restrictions and choice of the dress code and choice of wearing by the women constitutes restriction on the freedom of religion and belief.

According to the revolutionary government's religious policy, everyone, irrespective of their religious affiliations and beliefs, is expected to wear the Islamic dress as defined by the state's hijab laws. Women in particular are forced to wear hijab, 'whether or not they were practicing Muslims'. The selective interpretation of Sharia law by the clerics regarding the dress code as a way of manifestation of religion had repercussions on the freedom of religion or belief, which disproportionately affects religious rights of women as well as the gender equality in the society.

3. Economic Rights

The implementation of hijab laws in Iran had not only affected civil and political rights of women disproportionately but also their economic rights. In the wake of hijab laws, women are excluded from practicing certain professions and restrictions on their participation in others. Businesses and personal property are put under strict surveillance, scrutiny, and seizure in the pretext of implementing hijab laws or the violation of the same. Furthermore, women are not permitted to work in government offices until they observe proper hijab as defined under governmental policies (Maziar 2023). Additionally, actresses are barred from continuing their work for violation of the state hijab laws. For instance, Iran's present Minister of Culture and Islamic Guidance, said regarding the presence of some actresses without hijab in public centers that "From a legal point of view, we cannot allow those who have removed the hijab to attend art programs. We announced that in this field, the law will be the focus of our

plans and anyone who acts outside the law will be dealt with according to the regulations" (Golnaz 2022).

Yet in another instance of the restrictions on the actresses, the public and revolutionary prosecutor of Tehran, announced that "several male and female actors, including Ketayoun Riahi, Panthea Bahram, Afshana Baygan, Fateme Motamedarya and Reza Kianian, have been summoned to the court" (Maryam. 2023).

3.1 Restrictions on Professional Opportunities

Immediately after the revolution, the government started to crack down on the women for implementation of the hijab laws and their conformity with it. As a result of this policy, women were forced out of universities and deprived of their teaching position due to their unwillingness to conform to Khomeini's "ideal of a Muslim woman teacher" (Azadeh 1997, 85). University faculty and students were expelled, jailed, and purged for a variety of offenses, from being "too Western in attitude" for being "an enemy of God" and for "using obscene language in class" (Susan W, 49).

Mandatory hijab in Iran is seen by women as a barrier for their involvement in professions of their choosing as well as the professional development. Workplaces, offices, and institutions have their own policies for the implementation of hijab laws, which may require strict dress codes, essentially restricting the performance of women workers in such workplaces.

In particular, recent increases in restriction and limitations are faced by the women working in the entertainment industry, including film, theater, and music, due to the hijab laws. Some artistic roles demand specific costumes that conflict with the required dress code, hence the participation of women is either restricted or banned altogether. For instance, public dancing of women is considered an activity which defies the principle of the religion and hijab provisions, therefore, such public performances by women are prohibited.

In other cases, the women participants, especially athletes are restricted from participating in international competitions because the government of Iran requires these participants to fulfill the requirements of the hijab law, while on the other hand, the international organizations organizing such activities require the athletes to follow their own standards of dress codes. However, efforts have been made by the Iranian Government to design sportswear that fulfill the requirements of hijab laws in an attempt to allow the participation of the female athletes in International Competitions, but it still remains a widely debated topic both at domestic and International Levels. Institutions highly influenced by the religion and religious norms, such as government sector and legal institutions,

women either find it difficult to find a job or development of their careers due to strict implementation of dress codes and 'high standards' of hijab regulations which they are required to follow. For example, women in jobs, such as police officers, high-ranking positions, managers, deputy directors of justice, etc., need to ensure a complete and proper Islamic Hijab as defined in the hijab laws. A classic example of how the hijab laws govern in the top government positions, is that of Leia Junadi, the legal deputy of the presidency, who before being elected as the deputy president, always observed a type of hijab, and wore a headscarf, which is mandatory according to Iran's laws today, and wore a coat with pants, but after being elected to this job, she was forced to wear a chador (complete and proper hijab as defined under hijab laws and regulations). In an interview, she said, "Mr. Rouhani (former president), due to cabinet regulations, asked me to observe the current dress code." I respected their wishes (Golnaz 2017).

3.2 Impact on Tourism and Business

Iran has a great tourist potential and a tourist destination as it is home to some of the oldest architectural places. Equally contributing is the medical tourism sector, from which Iran can benefit from. The mandatory hijab law has affected Iran's tourism industry, as some tourists may be deterred from visiting due to clothing restrictions. This in turn can affect the local economy, especially in areas that rely heavily on tourism. For instance, Iran offers a huge potential of cultural, historical, religious, and medical tourism for visitors from within the region and worldwide. While Iran boasts rich historical and cultural attractions, the enforcement of strict dress codes for both residents and visitors can shape tourists' decisions and experiences, consequently affecting the country's tourism industry and economic growth in several ways. According to the estimates of Iranian officials in the tourism departments, Iran has the potential of attracting 10 million foreign tourists each year (Tehran Times 2023). However, the actual number of foreign tourists arriving during the year 2023 was 4.1 million, less than half of the total number of tourists in 2019 (Agence France-Presse 2023). The decline of the tourists between 2019 and 2023, can arguably be explained as a repercussion of the government's policy of strict surveillance on people in general and tourists in particular for violation of hijab laws in the pretext of the massive protests after the death in custody of Mahsa Amini. Further, many western countries advised their citizens to avoid traveling to Iran for the fear of arbitrary detention in the wake of their involvement and encouragement of protest against the hijab laws, which in turn had adverse consequences on the businesses and economic rights of women associated with the tourism industry. The imposition of hijab laws in various ways, shape the changing trends in the tourism industry in Iran and its impact on the economic rights of the women. International tourists, who wish to visit Iran as a potential tourist destination, for the fear of observing mandatory dress codes, may choose

other tourists' destinations in search of personal freedoms, who offer a more comfortable dress choice. This partially explains the decline in the number of tourists arriving in Iran in recent years. The hospitality sector, which handles tourists and provides hospitality services to the tourists, had to adhere to National Hijab Laws and dress codes regulations. Tourists availing hotels and other housing establishments providing hospitality services may face restrictions on dress codes and hijab restrictions and might feel uncomfortable. Influenced by such experiences, the international tourists may change their plans regarding the length of stay and spending in Iran. Such decisions and change in plans may impact the already deteriorating economic situation of the women affiliated with the tourism industry. The mandatory observance of the hijab laws by the tourists may further impact their cultural and social engagement with the people by creating barriers by exposing the international tourists to dress norms which they are not accustomed with. Furthermore, 'hotels, restaurants, and other hospitality businesses might experience fluctuations in demand due to tourists' concerns about adhering to dress codes. Some establishments might even cater more to domestic tourists who are already accustomed to these regulations, as the tour guides, "revealed that due to the protests, Germany, Spain, South Africa, Brazil and Australia had completely canceled all their planned tours to Iran" (VOA's Persian News Network 2023). In general, international foreign investment in the country may be influenced and affected by the strict dress code policy and mandatory hijab laws.

Iran also offers a range of medical and healthcare services, including cosmetic surgery, dental procedures, fertility treatments, organ transplantation, and more. However, the availability of these services is restricted by hijab laws for the people from other countries due to the presence of restricted dress code provision. Moreover, many western countries frequently issue travel advisories, which inhibits the number of citizens traveling to Iran for medical purposes. Since, the overwhelming majority of professionals associated with the medical tourism industry are women and decreasing number of people availing such services impact their economic conditions negatively.

Brain drain from developing countries is argued by many scholars and economists to have an adverse impact on the economic growth of the countries. Iran, in recent years, has witnessed a growing trend in the number of professionals in various fields leaving the country due to various reasons. According to reports, at the end of 2022, a total of nine thousand Iranians arrived at the borders of the United Kingdom seeking asylum (Kourosh 2023). One year after the nationwide protests that took place after the death of Mahsa (Gina) Amini, various groups of people in Iran have been strongly affected. Although there are no exact statistics of irreversible departures in the past year, public reports, some confidential documents, and people's narratives on social networks indicate the formation of a

"migration wave" as well as "a sharp increase in the desire to migrate (RFE/RL's Radio Farda 2023). Additionally, according to the European Union Agency on Asylum, the number of Iranians seeking asylum reached 1,579 in the month of February 2023 alone. This exponential increase in the number of Iranian citizens claiming asylum in the European Union reached 13,444 in the year 2022 (RFE/RL's Radio Farda 2023). However, the parity in the number of females leaving the country before and after the recent protests in wake of the hijab laws, probably explains the growing concern of economic rights of women in the country. According to estimates, "due to brain drain, Iran will lose around $150 billion dollars to its economy annually" (Massaab 2023). The strict implementation of the hijab laws not only results in the loss of human resources but also in the loss of billions of dollars affecting the economic rights of the people in general and women in particular.

Also, the government may use property confiscation as a tool to enforce hijab laws. These measures include the sealing of trade unions and business centers throughout Iran. Hijab-related violations, such as violations of Islamic Law by employees or customers, lead to actions such as business closure or asset confiscation. These measures have intensified during people's protests against hijab, and moral security police have even impounded cars in case of hijab violation. By taking these actions, confiscation of business is completely in conflict with the 20th article of the Islamic Republic of Iran's Constitution, which emphasizes the equal protection of the rights of both men and women (TRT Persian 2023).

4. Conclusion

The current debate and growing concerns about women rights in Iran has deep roots since the Islamic revolution of Iran in 1979. Women had long protested and resisted the promulgation and implementation of discriminatory laws, such as hijab laws, which had disproportionately affected the rights of the women across all fields of life. The hijab laws, which are considered discriminatory against women, have restricted their participation in political, religious, civil, and economic affairs of the country. The dissent deeply rooted among women in Iran found a fresh spark with the arbitrary arrest and death in custody of Mahsa Amini due to alleged violation of hijab laws and dress code. This incident, which resulted in nationwide protests in Iran and use of unnecessary force, arrest and detention, and oppression of the protesters had increased the concerns of International Human Rights Organizations and Human Rights Defenders alike. The analysis of the hijab laws shows that such laws had resulted in marginalization of women in different fields, widespread discrimination, and violation of their political, religious, and economic rights. The nature of these laws being against the principles and norms of International Human Right Instruments and Iran's International commitments have been called to question by International Scholars and Experts. The

United Nations along with other Human Rights Organizations in general and women in Iran in particular demand the adherence to international commitments such as ICCPR provision by the Iranian regime, the failure to which has the potential of worsening the already vulnerable situation of women rights.

References

France-Presse, A. 2023. "Hoping to attract tourists, Iran looks to neighbors." *Voice of American News Network*, July 17 2023, available at Link

Al-Aloosy, Massaab .2023. "The costs and consequences of Iran's brain drain." Gulf International Forum. Sep 9, 2023, available at Link

Asr-e Iran. 2016. "An Overview of the History of Ershad Gosht." April 20. Available at Link

Badran, Mahnaz. 2018. "Collection of Rules and Regulations Related to Chastity, Hijab, Morals, and Public Modesty." Social Cultural Council of Women and Family, Public Relations. 86.

BBC Persian. 2014. "Iranian Police: A Hat Is Not a Hijab." December 12, 2014. Available at Link

Concluding Observations. 1993. Iran (Islamic Republic of), Hum. Rts. Comm., 1260th mtg., 18, U.N. Doc. CCPR/C/79/Add.25 (1993).

Esfandiari, Golnaz. 2017. "How did the tent protocol enter Iran's cabinet?" RadioFreeEurope/RadioLiberty, August 23, 2017, available at Link

Esfandiari, Golnaz. 2022. "They Have Found the Courage': Iranian Women Go Human Rights Committee Hijab-Less In Public Amid Protests." RadioFreeEurope/RadioLiberty, May 9, 2023, available at Link

Farda, RR. 2022. "Iranian Broadcast of Woman's "Confession" Sparks Outrage on Social Media." RadioFreeEurope/RadioLiberty, November 8, 2022, available at Link

Farhang Pouya. 2010. "Implementation Strategies for Spreading the Culture of Chastity and Hijab." *Journal of Farhang Pouya* 18 (Fall), no. 3:45–59, available at Link (last visited 18 September, 2024).

Farzaneh, Delaram. 2018. "An assault on peaceful protest in Iran: "The Girl of Enghelab Street". Wellesley College, Feb 1, 2018, available at Link

Ghahari, Kiwandakht. 2008. "The report of "Advar Tahkim Vahdat" about the plan to improve social security." DW, July 2, 2008, available at Link

Hausmann, Ricardo, Tyson, Laura D., Zahidi, Saadia. 2012. The Global Gender Gap Report 2012, Geneve: World Economic Forum, available at Link (last visited 18 September, 2024).

Human Rights Committee. 2021. "Report submitted by the Islamic Republic of Iran under Art 40 of the ICCPR due in 2014", Fourth periodic report. CCPR/C/IRN/4, 23 August 2021.

Human Rights Watch. 2019. "Iran: Release Anti-Compulsory Hijab Activists." Human Rights Watch. Link (last visited 18 September, 2024).

Hashemi, Hossein. 2016. "A Critique on Article 638 of the Criminal Code of Improper Hijab", Women's Strategic Studies No. 37, available at Link (last visited 18 September, 2024).

Iran International. 2023. "Hijab Rebel Arrested in Iran, Forced to Confess." Iran International. Link (last visited 18 September, 2024).

Javaherian, Maryam. 2000. "Women's Human Rights in Iran: What Can the International Human Rights System Do?" Santa Clara Law Review 40, no. 3, available at Link (last visited 18 September, 2024).

Khazali, Ansia. 2010. "*Iranian Women after the Islamic Revolution*" Beirut-London: Conflict Forum, available at Link (last visited 18 September, 2024).

Kian, Azadeh. 1997. "Women and Politics in Post-Islamist Iran: The Gender Conscious Drive to Change." *British Journal of Middle Eastern Studies* 24, no. 1: 75–96, available at Link (last visited 18 September, 2024).

Mangayarkarasi, R. (R 2021, 58-61). "Changing perspectives of supreme court interpertation on right to privacy - with special context to AADHAAR." *International Journal of Scientific Research*, no. 10(March), available at Link (last visited 18 September, 2024).

Majlis. 1983. "Islamic Penal Code (Tazirat)", Approved August 9, 1983, available at Link

Majlis. 1984. "The Law of Boards for Administrative Violations". Approved December 1, 1984, available at Link

Marshall, Jill. 2009. Chapter 5, The ECTHR's development of respect for private life into a real right to personal autonomy, In Personal Freedom through Human Rights Law? Vol. 98. Brill | Nijhoff, available at Link (last visited 18 September, 2024).

Motamedi, Maziar. 2023. "More Iranian actresses summoned for not wearing hijab", Al Jazeera Media Network, May 8, 2023, available at Link

Mayer, Ann Elizabeth. 1996. "Islamic Rights or Human Rights: An Iranian Dilemma", Iranian Studies 29, no. 3/4: 96–269, available at Link (last visited 18 September, 2024).

The International Covenant on Civil and Political Rights (ICCPR), Adopted 19 December 1966, available at Link (last visited 18 September, 2024).

OHCHR. 2023 "Repressive Enforcement of Iranian Hijab Laws Symbolises Gender-Based Persecution: UN Experts", Accessed April 4, 2023, available at Link (last visited 18 September, 2024).

Rezaei, Roghayeh. 2022. "State TV Airs Forced Confession by Anti-Forced Hijab Activist." Iran Wire. Link (last visited 18 September, 2024).

Rezaei, Roghayeh. 2023. "92 years in prison for persons against mandatory hijab; The result of a new study in Iran". Iran Wire, September 17, 2023, available at Link

RFE/RL's Radio Farda. 2023. "How Intense Is the Migration of Iranians After the Suppression of Protests?" October 3, 2023, available at Link

Shojaei, Mansoureh. 2022. "One Century and Two Uprisings: Toward the Women's Liberation Movement". *Freedom of Thought Journal*. 2022, No.9 (Summer), available at Link (last visited 18 September, 2024).

Sinaee, Maryam. 2023. "Celebrity Actresses Banned from Acting In Iran Remain Defiant." *Iran International,* May 9, 2023, available at Link

TRT Persian. 2023. "Hijab Became Mandatory in Iran since What Date?" May 5, 2023. Link

Supreme Council of Education and Culture IRI.1992. The disciplinary code of school children by the Supreme Council of Education and Culture IRI. (16/07/1992). Clause 2-7-Note 2 of Article 2, available at Link (last visited 18 September, 2024).

The disciplinary code of student. 1995. The Supreme Council of Cultural Revolution. September 5 1995, available at Link (last visited 18 September, 2024).

Tiefenbrun, Susan W. 2007. "The Semiotics of Women's Human Rights in Iran", Thomas Jefferson School of Law Legal Studies Research Paper No. 975512, *Connecticut Journal of International Law*, 23(1), available at Link (last visited 18 September, 2024).

Tehran times. 2023. "Iran Holds the Potential to Receive 10 Million Foreign Tourists Annually", February 5, 2023, available at Link

UN News. 2017. "The UN condemns violent crackdown against hijab protests", September 28, 2022, available at Link

Universal Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A (III) Link (last visited 18 September, 2024).

UNESCO. 2012. Adult and Youth Literacy, 1990-2015: Analysis of Data for 41 Selected Countries, Montreal: UNESCO Institute for Statistics, available at Link (last visited 18 September, 2024).

VOA's Persian News Network. 2023. "Tourists Accuse Iranian Authorities of Brutal Dress Code Enforcement." *Voice of America*. Link (last visited 18 September, 2024).

Wikipedia. 2023. "Death_of_Armita_Geravand." Wikipedia, Last modified 1 December 2023, available at Link (last visited 18 September, 2024).

Wikipedia. 2015. "M. P. Islamic Revolution Committee", available at Link (last visited 18 September, 2024).

Yeon Koo, Gi & Han,Ha Eun. 2018. "To Veil or Not to Veil: Turkish and Iranian Hijab Policies and the Struggle for Recognition". *Asian Journal of Women's Studies*. 24(1), 47-70, available at Link (last visited 18 September, 2024).

Ziabari, Kourosh. 2023. "Iran's brain drain accelerates as crackdown on dissent intensifies", The Henry L. Stimson Center, May 2, 2023, available at Link

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Rethinking China's challenge to human rights: The case of tourism development in Tibet

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Abstract: *In recent years, the challenge that the Chinese Human Rights Narrative poses to the human rights regime has gained a special sense of urgency as the issue has become embedded into the larger geopolitical debate on China's threat to the liberal world order. This article shifts the focus from the opposition between the liberal and Chinese Narratives to discrepancies between China's Human Rights narrative and practices and challenges liberal human rights, which have been contentious from their inception. Ironically, the Chinese government does not live up to the narrative based on which it confronts liberal democracies. Through the case of tourism development in Tibet, the article illustrates that while China emphasises the right to development by promoting human rights for all individuals, the government's implementation is anchored into violations of the cultural rights of ethnic minorities. With this perspective in mind, the study calls for a defence of human rights grounded on discrepancies between the narrative and actual practices rather than a status quo defence of the human rights regime.*

Key words: *critical studies, development, human rights, narrative, Tibet*

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1. Introduction: Confronting the Chinese Human Rights Narrative Without Defending the Status Quo

In recent years, human rights have gained a special sense of urgency in the relationship between China and liberal democracies as the understanding of these rights has become embedded into larger geopolitical confrontations. Indeed, not only have the scale of the Chinese Communist Party's (CCP)[1] violations and its foreign policy on the matter been extensively discussed by scholars (Biddulph, 2019; Cohen, 1987; Foot, 2000; Goldman, 1995; Kent, 2019; Kinzelbach, 2015; Millward, 2022; Pils, 2018; Roberts, 2020; & Svensson, 2002). In addition, the literature on the Chinese Human Rights Narrative has analysed in detail what the government tags as 'Human Rights with Chinese characteristics'. This literature highlights China's increasing assertiveness in challenging the human rights regime. Authors have demonstrated China's attempt to rewrite norms and reframe existing procedures at the United Nations (UN) to minimise scrutiny of government violations. Furthermore, they have also pointed to China's reinterpretation of key concepts such as sovereignty, universality and development based on cultural relativism, which other authoritarian countries have also used to disempower human rights (Foot, 2020; Fung, 2019; Piccone, 2018; Richardson, 2020; & Inboden, 2021). These observations have been crucial in highlighting how the Chinese Human Rights Narrative is integrated into larger geopolitical considerations in relation to the threat that China poses to the liberal world order (Breslin, 2017; Doshi, 2021; Economy, 2022; Ikenberry, 2008; Jones, 2020; Mitter, 2022; Murphy, 2019; Steinfeld, 2010 & Yue, 2008).

There is no fixed definition of 'Human rights with Chinese characteristics' as its meaning is contingent on the particular agenda of the Chinese government at a specific time (Chen, 2021), but persistent themes can be identified over time. Authors have highlighted how a recurring element which illustrates the ideological opposition between the Chinese Human Rights Narrative and the liberal understanding of these rights is the concept of development. They have described how the Chinese government presents itself as a leading voice in the promotion of the right to development initiated by developing countries and acknowledged in the UN Declaration on the Right to Development (1986) while at the same time, its state-centred interpretation contradicts this declaration (Muller, 2019; & Global Times, 2021). The literature also discusses how developing countries affirm their belief in the 'development approach to human rights' which prioritises development policies to improve the capacity of states to ensure the full enjoyment of human rights but does not integrate human

1 The People's Republic of China (PRC) is a one party-state since its creation in 1949, with the Chinese Communist Party (CCP) ruling the country without interruption. In this article, I use China/Beijing/CCP as synonymous of Chinese government. This should not overlook the fact that the Chinese government is exercising a very controlled censorship on its population, which does not necessarily identify with the CCP's policy.

rights mainstreaming in the process of achieving development (Arts & Tamo, 2016). In this sense, Worden (2017) describes Beijing's push to promote the concept of 'development promoting human rights' in the international human rights system. In contrast, most Western countries adhere to a 'human rights-based approach to development', which involves the mainstreaming of human rights in the achievement of development goals with a set of tools and essential references on how to achieve these goals. Liberal democracies recognise that economic development and the improvement of living standards help in providing support for human rights progress. At the same time, they do not equate development with human rights. In contrast, China not only prioritises economic development as a key element to achieve human rights progress (Zhang, 2012), but its view is also that the state is the primary subject of development, even though the Declaration on the Right to Development clearly states that the human person is the central subject and beneficiary of the right to development (Worden, 2019). These two conceptions of development are seen as opposed to each other and as incarnating two different visions of human rights. The liberal understanding of human rights is referred to as the post-1945 human rights consensus, which China is currently seen as challenging dramatically. In this sense, the literature on the Chinese Human Rights Narrative focuses on this precise challenge, sometimes implying that it is desirable to maintain the status quo to push back against China's weakening of human rights. For example, Richardson (2020: 1, emphasis added), 'details the ways Chinese authorities seek to shape norms and practices globally and sets out steps that the governments and institutions can take to '*reverse*' these trends, including forming multilateral and multi-year coalitions to serve as a counterweight to Chinese government influence'. At the same time, the critical literature on human rights acknowledges that the post-1945 human rights consensus has been very contentious from its onset (Goodale, 2016; Whyte, 2019; & Moyn, 2018). However, the descriptions of China's threats to the alleged post-World War II consensus on human rights have leaned towards forgetting that such consensus was never unproblematic in the first place. Indeed, this assumption ignores the fact that at the outset of the modern 'age of rights', in the post-war era, 'human rights' was a contested discursive terrain, not yet treated as synonymous with the values of Western liberalism' (O'byrne, 2019: 644). Scholars also regularly intuit deficiencies in the human rights system and the need for reforms. For example, one of its main fora, the Human Rights Council, is often criticised for being politicised[2], ineffective and weak, therefore failing to act in egregious cases (Chauville, 2015; Carraro, 2017; & Freedman, 2014). Nevertheless, these deficiencies and the contentiousness of human rights remain absent from discussions on how to handle China's challenge, positioning potential solutions within a status quo perspective more than an opportunity for reforms. This article argues that the Chinese Human Rights Narrative challenges liberal human

2 For an example of politicization outside the Human Rights Council, see Genoud (2022).

rights, which have been contentious from their inception. Ironically, the Chinese government does not live up to the Narrative based on which it confronts liberal democracies. The identification of these discrepancies offers a ground to confront China that does not focus on differences in narratives and maintenance of the status quo.

To illustrate this argument, the concept of human rights practices is used. Anthropologists (Goodale & Merry, 2007; Sarfaty, 2012) have resorted to practices to underline how transnational ideas become meaningful in local social settings. Interestingly, the focus on practices was part of a move within anthropology to skirt the universalism-relativism debate, which preoccupied anthropologists in the 1990s, and to tackle instead the social processes of human rights implementation and resistance (Merry, 2006). The endeavour to focus on implementation to circumvent ideological debates on universalism is especially relevant in the case of China. The risks that the Chinese government manipulates calls to acknowledge the contingency, contentiousness and deficiencies of human rights (Goodale, 2022; & Genoud, 2022) have rendered the questioning of universalism politically charged. Consequently, the concept of human rights practices is applied in the China case to overcome the limits of focusing on narratives and highlight instead the discrepancies between human rights narratives and practices.

In this article, the case of tourism development in Tibet is used as fostering economic development in regions inhabited by ethnic minorities is of utmost importance for China. The Chinese Human Rights Narrative presents development as the very component on which the government's legitimacy in these regions is based (State Council, 2013). In Tibet, Beijing has justified its presence since 1951 through what it calls the 'Peaceful Liberation' of the region, which it argues brings the necessary development to improve human rights enjoyment (State Council, 2011, 2013, 2019, 2021). In contrast, criticism of Chinese policies in Tibet has highlighted constant violations of human rights such as freedom of religion, freedom of expression and cultural rights, prompting protests and self-immolations of monks. The study is based on the practices of field observations in the Tibetan areas of Sichuan, Gansu, Yunnan and Qinghai between August and September 2020[3], reports of travel to the Tibetan Autonomous Region

3 The Tibetan areas spread in five provinces: Tibetan Autonomous Region (TAR), Qinghai, Gansu, Sichuan and Yunnan. The international community has centered its attention on TAR, which was created in 1965 and corresponds roughly to the territory ruled by the Dalai Lama government since 1642 until the 14th Dalai Lama's exile to India in 1959. TAR requires an authorization from the government to be visited, a constraint that elicits curiosity and fantasy. However, TAR is just one part of the Tibetan areas and Tibetans in the other provinces face the same human rights violations and share the same aspirations to enjoy these rights. To limit the Tibetan question to TAR implicitly

(TAR) by journalists and diplomats and secondary sources on development and tourism in Tibet.

2. The Chinese Human Rights Narrative on Development and its Limits

The Chinese discourse on human rights emerged as the government commenced an internal process of self-reflection after the abuses of the Mao era. The current Chinese narrative of development as key to implementing a Marxist vision of human rights was progressively articulated following Mao's death (1976) when China abandoned the conception of human rights as anchored into class struggle. Until then, citizens' rights were occasionally acknowledged as a concrete legal and constitutional existence, but the concept of human rights as natural rights was dismissed as esoteric and bourgeois with little relevance to Chinese socialist society. According to Mao, Marxist principles dictated that only the proletarian class should be accorded rights while the bourgeoisie must be deprived of rights to avoid their use against the achievement of socialism (Jain, 2021; Weatherley, 2000; & Dingding, 2005).

The major trigger for the CCP to engage with human rights has been the international pressure following the Tiananmen crackdown of peaceful protests (Foot, 2000; Weatherley, 2014). The outcry prompted by the People's Liberation Army's use of violence marked a turning point in terms of international attention to China's human rights record, as the country had until then remained largely spared of significant human rights criticism (Cohen, 1987; Kent, 2019; & Kinzelbach, 2019). As a response, the Chinese government issued its first White Paper on human rights in 1991, with the centrality on the right to subsistence establishing the role of socio-economic development to achieve the Marxist vision of human rights. Since then, the CCP has reiterated its strong emphasis on development as the best way to ensure the enjoyment of a Marxist vision of human rights (State Council, 2016, 2018).

As a socialist state with a focus on growth, from the outset China placed its priority on the rights to subsistence and development, actively participating in the drafting of the UN Declaration on the Right to Development (1986) (Chen, 2019). The Chinese narrative on the necessity of socio-economic development in the achievement of a Marxist vision of human rights has evolved from a focus on the right to subsistence in the 1980s to a focus on the right to development in the 2010s, although the two still tend to coexist (Muller, 2019). According to the 1991 White Paper

follows the Chinese division of the Tibetan populations into different provinces despite their common culture based on Tibetan language and Tibetan Buddhism. For a very insightful example of the necessity to consider the region as a whole, see Demick (2020).

on human rights (State Council, 1991), the right to subsistence outranks all the other rights because such rights cannot be achieved without first ensuring subsistence: 'It is a simple truth that, for any country or nation, the right to subsistence is the most important of all human rights, without which the other rights are out of the question'. At that time, the Chinese government prioritised GDP growth and there was an internal consensus on including some elements of the market economy to achieve this goal. Internal debates related to the extent of capitalist reforms, rather than the necessity of the reform themselves (Weber, 2021). Since 2012, Xi Jinping started including new indicators of development to GDP growth, such as managing poverty alleviation (Naughton, 2017), now claimed as one of the President's signature achievements. Progressively, the right to development gained prominence with the publication of White Papers tackling this issue from different perspectives. According to the 2016 White Paper on the right to development: 'The rights to subsistence and development are the primary, basic human rights' and 'the right to development is incorporated into other human rights, while the latter creates the conditions for people to facilitate development and realise the right to development. Safeguarding the right to development is the precondition for realising economic, cultural, social and environmental rights and obtaining civil and political rights' (State Council, 2016).

By Marxist vision of human rights, China generally refers to the protection of national stability and security as coming before individual rights, to a person's entitlement to rights as contingent upon the prior fulfilment of his duties, to collective rights – often apprehended as economic, social and cultural rights – as having priority over individual rights and by extension, to collective rights as also pertaining to the State (and not only the individual). Among these elements, the emphasis on economic, social and cultural rights has been especially important. This is illustrated in various White Papers such as the recent one entitled 'Moderate Prosperity and Human Rights' (State Council, 2021). For the Chinese government, socialism (understood as Marxism), development and human rights in particular economic, social and cultural rights are therefore intrinsically connected.

Concurrently, the relationship that the Chinese government establishes between development and a Marxist vision of human rights is quite overarching and loose. According to the Chinese government, it is not incompatible for socialism to integrate elements of capitalism to reach a certain level of development, which in turn is absolutely necessary to achieve real socialism and enjoyment of human rights, especially of economic, social and cultural rights. As Weber (2021) mentions, this argument goes round and round as any deviation from socialism towards capitalism becomes tolerated in the precise name of socialism if it is perceived as promoting development. Furthermore, as socialism also constitutes the best way to ensure human rights enjoyment and development is necessary

to achieve socialism, development is therefore elevated as the solution to all human rights concerns (State Council, 2021). In this sense, even where the process of achieving socialism has led to mistakes which damaged human rights, only by building socialism can human rights be realised (Nathan, 1994).

In recent years, China's efforts to insert its human rights language at the UN have been translated through the introduction of two resolutions on development at the Human Rights Council. Indeed, China's first sponsored resolution at the council was titled 'The Contribution of Development to the Enjoyment of All Human Rights' and was adopted by the Council in 2017 (HRC). While the resolution might look straightforward at first glance, closer scrutiny reveals how by tweaking the language, China effectively privileged the right to development over other rights and weakened certain human rights norms. Hence, the resolution has been largely seen as an attempt to reframe the relationship between development and human rights in a way that deviates from consensus texts adopted by the UN (Worden, 2017, 2018). In 2019, China again sponsored a resolution on development, which further builds on the 2017 resolution but further emphasised the need to end poverty as an indispensable requirement for sustainable development (Chen, 2021).

Overall, the Chinese government has tended to prefer the use of developmental language rather than human rights language. In practice, authors have demonstrated how, China's emphasis on the right to development has mixed human rights especially economic, social, and cultural rights and development goals, when the two are not equivalent. In addition, they highlight how development has often been applied in a way that violates human rights in the name of economic development (Philip, 2017; & Pils, 2018). In the same vein, the critical literature on development in Tibet depicts the difficulties for Tibetans to benefit from development and how it serves to extend Chinese control of the region. For Fischer (2015), it is not surprising that the intensive subsidisation of Tibet has generated high rates of GDP growth. However, these subsidies have been dominated by external interests, such as those of the outside companies building most of the infrastructure and have rendered Tibet extremely dependent on China. Fischer (2005, 2014) also describes how although such subsidies alleviate poverty and improve living standards in absolute terms, they have also perversely increased the economic marginalisation of Tibetans because of Han Chinese immigration and the discriminatory effects of the Han-centric economic system. For Yeh (2013), the narrative of the inevitability of the Chinese rule in Tibet and the legitimisation of China's sovereignty rests heavily on subsidies presented as generous gifts. In this sense, receiving development becomes an act of recognition by Tibetans of the Chinese state as their state. In addition, the discourse of development shapes the Tibetans' perception of themselves as lazy and unable to offer this gift to themselves, therefore

relying on China to do so (Yeh, 2007). This image of development as shaping Tibetans' identity is also described by Grant (2018), according to whom implicit in development is the assumption that ethnic Han are carriers of advanced skills that can be imparted to Tibetans. In this sense, urban reconstruction is one of several biopolitical techniques the state has used to enroll Tibetans into Chinese social and cultural norms, especially after the 2008 Tibetan protests.

The critical literature on development in Tibet has analysed the difficulties for Tibetans to benefit from Chinese development as well as the instrumentalisation of development for political purposes, security, stability and reinforcement of the Chinese State. Nevertheless, this literature has not directly engaged with the literature on the Chinese Human Rights Narrative on development. By highlighting the discrepancies between narrative and practices, the next section contextualises the shortcomings of Chinese development in Tibet into the wider assessment of the threat that China poses to the liberal world order. By observing China's Human Rights practices on development, field investigation illustrates how the Chinese government's implementation of human rights falls short of the narrative used to confront liberal democracies.

3. Case Study: Tourism Development in Tibet and Violations of Cultural Rights

The concept of human rights practices refers to 'what actors do and say' at a specific point in time and the overall patterns created by these practices (Adler & Pouliot, 2011). A clear definition of human rights practices is often not provided, but exceptions include Donnelly (2013), who mentions four dimensions to practices: exercise, respect, enjoyment and enforcement. In the project, the use of practices as a core unit of analysis aims to overcome the shortcomings of the focus on narrative.

The Chinese Marxist vision of development as promoting economic, social and cultural rights is an important component of the CCP's policies in Tibet. According to the Chinese narrative, before the 'Peaceful Liberation'[4], Tibetans were living under feudal theocratic serfdom with no respect for human rights. In this sense, the establishment of a socialist system and the modernisation of the region would have constituted a cornerstone for the human rights of Tibetans with the fulfilment of economic, social and cultural rights, such as the 'victory over poverty', the 'protection of traditional culture', as well as 'results in ethnic and

4 In 1950, China incorporated Tibet in its territory, affirming its sovereignty but granting the area a certain level of autonomy in the 17 points agreement. Since this 'Peaceful liberation', the Tibetan minority's enjoyment of human rights has been a significant issue of contention. Following the 1959 Tibetan uprising, the Dalai Lama fled to Dharamshala where he is still in exile. For an alternative to the narrative of 'Peaceful liberation', see Demick (2020).

religious work' (State Council, 2021). A crucial moment in China's policies in Tibet was President Jiang Zemin's intensification of the development dynamic with the 1999 Western Development Project launched to address the gap between China's western (including Tibet) and coastal areas. This development was focused on big infrastructure projects such as the building of roads and transportation, which official discourses celebrated for opening natural resources for the benefit of the rest of the country and bringing advancement in living standards (State Council, 2013). Important subsidies were allocated for the projects with the subsequent GDP growth acclaimed thanks to modernisation.

Tourism is one of the main industries that China is pushing forward to develop western regions such as Tibet. Tourism was already one of the touchstones of Deng Xiaoping's modernisation model in the late 1970s and early 1980s (Barabantseva, 2009). Nevertheless, there is a clear tension between tourism promotion in Tibet through its cultural heritage and the political grievances against the CCP that precisely take their roots in violations of cultural rights. Paradoxically, tourism in the Tibetan areas is based not only on the attractiveness of landscape and rural life but also on Tibetan culture, including monasteries and Buddhism. At the same time, monasteries in Tibet have historically acted as cultural and political centres for Tibetans and played a crucial role in their identity. As one key defining feature of Tibetan identity, Buddhism has been targeted by repressive measures, which have exacerbated Tibetans' frustration with the Chinese State and made monasteries nuclei of Tibetan political activism (Han & Paik, 2014; Tibet Watch, 2016). The traditional fusion of religious and political systems in Tibet[5] meant that the Dalai Lama is a core figure of Tibetan culture and is considered by the Tibetan people as the foremost leader of Tibetan Buddhism. However, the Chinese government considers the current Dalai Lama (the 14th) a 'splittist' and regularly accuses him and the 'Dalai clique' of using religion for political aims and of failing its people while in exile, whereas the Chinese government has brought lots of economic achievements to Tibet (Global Times, 2019).

Much against the religious sentiments of the monks and nuns, the CCP has implemented an anti-Dalai Lama policy for the last 26 years following its adoption in 1994 during the third Tibet Work Forum (ICT, 2021). This policy has been accompanied by attempts to delegitimise the authority of the 14th Dalai Lama, currently in exile in Dharamsala, for example by attributing the merits of development to the CCP. According to one Chinese State media: 'Southwest China's Tibet Autonomous Region is getting better, where railways and roads have been constantly open to traffic. Tibet is like a different planet in comparison to Dharamsala, where the 'Tibetan government-in-exile' has been set. Such a striking contrast is sufficient to frustrate every external force and exhaust the gang

5 The Dalai Lama gave up his political role in 2011 (Yardley and Wong, 2011).

of traitors represented by the Dalai Lama (Global Times, 2021a). The CCP's model of development has also been used to justify Sinicisation[6] of Tibetan Buddhism. During the 7th Central Symposium of Tibet Work held in Beijing in August 2020, President Xi Jinping declared that: 'Tibetan Buddhism should be guided in adapting to the socialist society and should be developed in the Chinese context' (Xinhua, 2020) while at the same time, efforts should be sped up to advance high-quality development. Consequently, the relationship between economic, social and cultural rights on the one hand and development through tourism on the other hand is very much a vexed one, with the CCP trying to obfuscate ways in which development can infringe upon human rights[7].

The tension between attracting tourism with cultural heritage and violations of cultural rights is especially visible with the interdiction of the 14th Dalai Lama's images and authorities regularly clamping down on possession of his picture. In monasteries, the portrait of his Holiness is nowhere to be seen. Monks in the monasteries in Tibetan areas which can be visited with organised tours, have expressed their sadness not to be authorised to worship the Dalai Lama. In remote areas inhabited by nomads where the CCP's control is more difficult due to seclusion, pictures of the Dalai Lama were exposed in some homes. These are quickly hidden in case of any police search in their homes. In addition, for many years, it is not possible anymore for foreigners to visit the birthplace of the 14th Dalai Lama in the village of Takster (Qinghai). During my visit to the Tibetan areas of Qinghai and Gansu, when passing in the proximity of Takster on the road from Xining to Labrang, I asked my Han Chinese driver whether we could stop at Takster. Various foreign and Chinese tourism agencies and guides had already informed me that visiting the birthplace of the Dalai Lama was currently forbidden to foreigners, often after having to check the status. The driver replied that he did not want to go there because the place was under surveillance.

Dalai Lamas are not all construed in the same way by the CCP, depending on the kind of relationship they entertained with China throughout history. While Beijing attempts to undermine the influence of the 14th Dalai Lama on its people, references to other Dalai Lamas might be tolerated. For example, in Litang (Sichuan) it is possible to visit the former residence of the 7th Dalai Lama in an area of the town that has recently been renovated for tourism, with bus shuttles driving visitors from one point of interest

6 Sinicization of religions as an official policy was first initiated during a Central United Front Work conference in mid-2015, reaffirmed during the National Religious Work Conference in April 2016 and finally publicly declared at the 19th Party Congress in 2017 (ICT, 2021).

7 This focus on how development contributes to human rights, while at the same time neglecting to consider ways in which development can infringe upon human rights has been anchored in a Human Rights Council Resolution sponsored by China: 'Promoting Development over Human Rights' (HRC/31/L.47) (Piccone, 2018).

to another. However, the residence still poses a problem for the CCP, as it is said that Chinese tourists are normally forbidden from entering the building. Access is free and during my visit, there was no other visitor and no visible sign of checking at the entry, except from the usual cameras present everywhere in the region. On one of the walls, there was a painting with a small representation of the Dalai Lama. Considering the size and the design of the drawing, his face was not recognisable. My Tibetan guide explained in a suddenly lower voice that the painting represents the 14th Dalai Lama, but no indication specifies it as such, illustrating the complex cohabitation of the control of religion and the promotion of culture to attract tourism.

Another example of this tension is the Tashi Lunpo monastery in Shigatse, the traditional seat of the Panchem Lama, which is a part of the guided tour of the TAR for foreigners that is allowed by the Chinese government[8]. The Panchem Lama is the second most important spiritual leader in Tibetan Buddhism. A controversy has taken place regarding the recognition of the current and 11th Panchem Lama. Three days after the 14th Dalai Lama recognised Gedhun Choekyi Nyima in 1995 as the 11th Panchem Lama, the Chinese government abducted him and nominated instead Gyaincain Norbu. Since then, Gedhun Choekyi Nyima has disappeared and Gyaincain Norbu is endorsing the role of Panchem Lama without the support of most Tibetans. In this context, the visit of Tashi Lunpo monastery on government-approved tourism tours goes hand in hand with the CCP's imposition of its narrative on Tibetan Buddhism as tourists are explained that the legitimate 11th Panchem Lama is the Chinese nominated one.

Such partial acceptance of Tibetan Buddhism shows the stakes for Beijing around the definition of what aspect of Tibetan culture can be tolerated and promoted through tourism. While on the one hand, new tourist infrastructures demonstrate an attempt to enhance the Tibetan standard of living and subsistence through tourism, development remains very controlled to legitimise the CCP's rule and avoid any questioning of its ethnic policy, therefore strongly limiting cultural human rights.

The commercialisation of monasteries shows further contradictions related to the enjoyment of cultural rights in China's promotion of tourism

8 The Chinese government policy related to tourism in TAR has varied over the years. In general, while Chinese tourism is promoted, it is much more difficult for foreigners, especially diplomats and journalists to travel there. A permit must be granted by the Chinese government. After being closed for about 1.5 year because of Covid-19, TAR has been reopened to foreigners in May 2021. However, foreigners can only visit through a government approved travel agency. The visit is a standard one, which includes the presence of a guide and a representative of the Foreign Affairs Office. I have not travelled there myself but accessed reports from people who participated in those organized tours.

development. Indeed, the arrival of Chinese mass tourism in these sacred places has impacted the daily spiritual life of the monks and nuns. For example, Kumbum, a monastery in Qinghai province, has now become a popular stop on Chinese mass tourism tours. With the high number of visitors, monks in the monastery are busy with tourism-related tasks such as ticket checking, queue managing, selling yak butter candles, playing instruments for money and teaching Tibetan prostrations to tourists. Such tasks are usually assigned daily from morning to evening. This example is representative of a wider trend, as monks have reported increasing numbers of tourists coming to their monasteries because of improved rail links and China's government promotion of Tibet as a tourist destination, disturbing their studies and way of life.

Furthermore, mass tourism in monasteries is accompanied by the implementation of infrastructures that enhance surveillance. While monks and nuns in Tibet live under constant surveillance, through security cameras and the presence of police and of CCP cadres in monasteries[9], tourism engenders more surveillance as the Chinese government's control of religious life expands to interactions with tourists. The risks that monks/nuns take if they engage in a conversation with foreign tourists are visible through their clear gazing at security cameras during the interactions or through their checking of any surrounding presence, with plain clothes escorts often interrupting the exchange[10]. In addition, ticket offices are increasingly built at the entrance of monasteries[11]. Brand new buildings of imposing size and featuring tourist information centres were often closed during my visit. However, they hint at current transformations in terms of tourism development and surveillance. Ticket offices are not only a way for the authorities to earn money, but they also reinforce surveillance by adding scrutiny of visitors. My Tibetan guide was worried that information centres may regulate visits and guides, with the risk of Tibetan guides being surveilled or replaced by Han Chinese guides.

The commercialisation of monasteries is also accompanied by renovations, which are an ongoing activity in numerous monasteries. While the Chinese government claims that renovations are conducted with respect to the authenticity of sacred places, concerns have been raised that commercialisation is harming old structures and local religious traditions (AFP, 2013). Some monasteries have been renovated to turn them into tourist sites, or modified to create space for restaurants, hotels and shops.

9 According to ICT (2021), The state media outlet China Daily stated in fall 2015 that as many as 6,575 cadres from different levels in the party and government hierarchy work in the 1,787 monasteries in the TAR.

10 During my visit, I was sometimes followed by plain cloth escorts.

11 As access to monasteries is essential for spiritual life, Tibetans usually consider that entry should not be charged for. In general, entry is free for Tibetans and only tourists pay. Often, the money of entries goes to the Chinese government and the money of the donations to the monastery.

In the case of the monastery of Larung Gar (Sichuan), renovations have been an opportunity for the Chinese government to limit the expansion of the site and enhance surveillance. Founded in 1980, Larung Gar was considered the largest Buddhist monastic centre with around 40,000 inhabitants (monks, nuns, vow holders and lay people) in 2016, when it was partially destroyed. Destructions and harassment by the Chinese government had already started in the 2000s. However, the government used the opportunity of a fire in 2014 which spread rapidly and burned hundreds of houses because of overcrowding, proximity among houses and poor anti-fire standards to limit the number of inhabitants, as well as to reorganise the space for mass tourism. A small number of new houses have been built in less exposed areas and spatial separation is ensured by destroying a bigger number of houses to prevent the spread of potential future fires. However, there has been criticism of the instrumentalisation of the fire to restrain the influence of Tibetan Buddhism (Das, 2020). Such rearrangements have indeed led to the shrinking of spiritual practice and the 'Chinese government's promotion of Disneyland style tourism', for example by turning ancient Tibetan funerary practices into a tourist spectacle (TCHRD, 2017). While during my visit, foreigners were still forbidden to visit Larung Gar, big hotels that will welcome Chinese mass tourism are being built nearby. The foreigner ban also signals the Chinese government's uneasiness to handle the contradiction in promoting tourism in Tibet through its culture, while at the same time repressing cultural rights.

The construction of tourism infrastructure is also a way for Beijing to spread its narrative on Tibet and to promote a type of tourism that remains under its control, i.e., where any aspects of Tibetan culture and religion that put into question the legitimacy of the government are erased. In this context, Tibetan culture museums are designed to disseminate Chinese propaganda and spread the narrative of the inevitability of Chinese rule in Tibet. For example, Dodge and Keränen (2018) have analysed how Lhasa's Tibet Museum is used to celebrate the success of the CCP's leapfrog development, reproduce the state narrative of triumphant modernisation, and circulate highly questionable depictions of the situation in Tibet before its final annexation by China in 1959. In addition, the conversion of the Potala Palace[12] into a museum void of the history of Tibetan oppression has turned it into an instrument of the Chinese narrative and of the commercialisation of Tibetan culture (Vetter, 2020). The same kind of legitimisation process is at play at the Museum of the Red Army's Long March in Gyalthang (Yunnan)[13], which is situated on the main square where tourists gather to take pictures. An important part of the museum relates the arrival of Chinese soldiers in Tibet as a 'peaceful liberation'.

12 The traditional residence of the Dalai Lamas, the administrative base of the Tibetan government, and the institutional heart of Tibetan Buddhism.

13 surnamed Shangri-La in 2001.

Overall, in Tibetan culture museums, contentious issues such as the 14th Dalai Lama are left aside. For example, in the Jyekundo Museum (Yushu Museum in Chinese Kham, Chinese province of Qinghai), the very ancient roots of Chinese Buddhism are put forward, normalising the interference of China in Tibetan Buddhism. The other big cultural museum of the region, based in Xining (Qinghai), has been under renovation and closed to the public for an extended period. Renovations are usually an opportunity for the government to expand its narrative, such as the idea that 'Tibetan culture is an important part of the Chinese culture (…)' (Xinhua, 2019).

Furthermore, the construction of 'new old towns' and tourist routes helps the CCP to control tourism by concentrating areas of interest into a limited space, where only aspects of Tibetan culture that do not threaten the CCP's narrative on Tibet are showcased. For example, in Garze (Sichuan), a 'new old town' built with fake fortifications at the entrance of the city concentrates shops and restaurants for tourists. Separated geographically from the rest of the city and facing a big hotel for Chinese mass tourism, such urban planning allows the government to control what tourists see and experience as Tibetan culture by limiting the space they are tempted to explore. In the same vein, the tourist map of Litang (Kham, Sichuan) with its bus stop route reduces the area that tourists visit to nicely decorated and renovated streets with apolitical photo exhibitions of Tibet's nature and rural life. In addition to the house of the 7th Dalai Lama (see above), which makes no mention of the current revindication of Tibetans in terms of cultural and religious rights, the map already indicates a 'pilgrim mini museum' to 'honour thousands of pilgrims who travel more than 2 million times over 3,000km to reach Lhasa'[14]. Although already indicated on the map, the museum was not built yet at the time of my travel. Pilgrimage has become a manifestation of the political and cultural identity of the Tibetan people. Significant changes in its practice have occurred in the last decades, including in relation to Sinicisation and tourism development (Buffetrille, 2003). Consequently, the control of the narrative on pilgrimage will probably constitute another instrument of the CCP's legitimisation while at the same time conveying a very partial and problematic definition of cultural rights.

4. Conclusion: Practices Rather than Narrative for Liberal Democracies Too

In this article, I have offered an alternative to assess the challenge that the Chinese Human Rights Narrative poses to the liberal world order by shifting the focus from ideological differences to implementation on the ground. By looking at human rights practices in the context of tourism development in Tibet, I have highlighted the Chinese government's

14 Indication on a tourist leaflet received in a brand-new coffee shop, just in front of the Former Residence of the 7th Dalai Lama.

incoherencies in stating that development promotes economic, social and cultural rights. While China has indeed enhanced its standards of living, this improvement has been accompanied by violations of the cultural rights of Tibetans. This observation contradicts a central claim of the Chinese government according to which China is a leader in ensuring economic, social and cultural rights in contrast with liberal democracies' focus on civil and political rights.

The assessment of China's challenge to the liberal order based on practices rather than narrative has the advantage of circumventing ideological debates which have led to the deadlock of human rights discussions between liberal democracies and China. As illustrated by Taylor's (2020) analysis of the China-European Union (EU) human rights dialogue, by dismissing and refusing to engage with the Chinese perspective as well as perceiving its interpretation as uncontested, the EU undermined rather than strengthened its normative power with China. By avoiding disregarding the Chinese Human Rights Narrative out of hands, this article thus aims to open the door to a less polarised exchange, which would make possible an acknowledgement of China's contribution to human rights in terms of poverty alleviation (Bikales, 2021) while nuancing this achievement by recalling that in practice, the government's top-down and GDP centred approach has some profound limits in terms of human rights enjoyment.

Avoiding a blank dismissal of the Chinese Human Rights Narrative through the focus on human rights practices would also prevent a defence of human rights that implies the maintenance of the current status quo. As the context of the post-1945 human rights regime has deeply evolved, it is not surprising that some countries are advocating for changes by expressing disagreements. Considering the acknowledgement by liberal democracies of the deficiencies of the human rights regime, academic analysis of the weaknesses of the current liberal interpretation of human rights (Whyte, 2019; Moyn, 2018; & Hopgood, 2013) as well as calls to reinvent human rights for them to overcome the challenges of our time (Goodale, 2022a), there is a momentum to confront China's narrative by taking stock of these deficiencies, not by ignoring them. Risks of manipulation of these deficiencies by the Chinese propaganda have until now been dissuasive in embarking on such a process.

Considering such risks of instrumentalisation, this path thus might prove fruitful for liberal democracies under the condition that they avoid discrepancies between their own human rights narrative and practices. In discussing complicity in democratic engagement with autocratic systems such as China, Pils (2021) demonstrates how democratic actors are often not mere victims of authoritarian countries' activities, but rather participate or contribute to human rights violations by expanding authoritarian influence beyond national borders through international collaborations

and exchanges. In addition, Genoud and Pils (2022) demonstrate how previously dominant ideas shaping the EU's Human Rights relationship with China such as the change through trade approach have largely failed, entailing the need for the EU to acknowledge the failure of such a model despite the potential economic drawback. Furthermore, as the support that China has gathered for its narrative is also anchored into developing countries' impression of double standards and resentment against colonialism (Khannenje, 2022), only by ensuring strong credibility in Human Rights enforcement, liberal democracies will be able to conduct productive discussions based on practices.

The alternative suggested here is in no way equivalent to a silver bullet solution. As the literature on the Chinese Human Rights Narrative mentioned above (Foot, 2020; Fung, 2019; Picconne, 2018; Richardson, 2020; Sceats and Breslin, 2012; & Inboden, 2021) has demonstrated, China's challenge to human rights is very profound and has very devastating and concrete consequences for victims. Nevertheless, the current polarisation of the human rights debate and its anchoring into wider geopolitical confrontations have wiped out the prospect of reinventing human rights because of the risks of manipulation.

5. References

Adler, E., & Pouliot, V. (2011). International practices. *International Theory, 3*(1): 1-36. Link (accessed 24.08.2024)

AFP. 2013. "Contested renovation in Tibet capital complete." Link (accessed 24.08.2024)

Arts, K., & Tamo, A. 2016. "The right to development in international law: New momentum thirty years down the line?" *Netherlands International Law Review 63*, 3:221-49. Link (accessed 24.08.2024)

Barabantseva, V.E. 2009. "Development as localisation. Ethnic minorities in China's official discourse on the Western development project." *Critical Asian Studies 41*, 2:225-54 Link (accessed 24.08.2024)

Biddulph, S., & Rosenzweig, J. 2019. *Handbook on Human Rights in China*. Cheltenham: Edward Elgar Publishing. Link (accessed 24.08.2024)

Bikales, B. 2021. Reflections on poverty reduction in China. *Beijing. Swiss Agency for Development and Cooperation China Office*.

Breslin, S. 2017. "Still rising or risen (or both)? Why and how China matters." *The Pacific Review 30,* (6):870-84 Link (accessed 24.08.2024)

Buffetrille, K. 2003. "The evolution of a Tibetan pilgrimage: The pilgrimage to Amyesr Machen mountain in the 21st Century." *21st Century Tibet Issue: Symposium on Contemporary Tibetan Studies in Taipei, Taiwan*.

Carraro, V. 2017. "The United Nations treaty bodies and universal periodic review: Advancing Human Rights by preventing politicisation?" *Human Rights Quarterly 39*, (4). Link (accessed 24.08.2024)

Chauville, R. 2015. "The universal periodic review's first cycle: Successes and failures." *In Human Rights and the Universal Periodic Review*, 87-108. Cambridge University Press. Link (accessed 24.08.2024)

Chen, Y. 2021. "'Authoritarian international law' in action? Tribal politics in the Human Rights council." *Vanderbilt Journal of Transnational Law 54*,(5).

Chen, Y. 2019. "China's challenge to the international Human Rights regime." *N.Y.U Journal of International Law and Politics 51*, 1179.

Cohen, R. 1987. "People's Republic of China: The Human Rights exception." *Human Rights Quarterly 9*,(4):447. Link (accessed 24.08.2024)

Dingding, C. 2005. "Explaining China's changing discourse on Human Rights 1978-2004." *Asian Perspective 29*, 3:155-82. Link (accessed 24.08.2024)

Das, S. 2020. "Larung Gar: The world's largest monastery - and highest slum." *The Diplomat*.

Demick, B. 2020. *Eat the Buddha: Life and death in a Tibetan town*. New York: Random House.

Dodge, P.S.W. & Keränen, . 2018. "Sixty years of 'peaceful liberation' at the Tibet museum in Lhasa: Triumphant modernization at the rooftop of the world." *Chinese Journal of Communication 11*, 3:306-23. Link (accessed 24.08.2024)

Donnelly, Jack. 2013. *Universal Human Rights in theory and practice*. Third Edition. New York: Cornell University Press. Link (accessed 24.08.2024)

Doshi, R. 2021. *The long game: China's grand strategy to displace American order*. New York: Oxford University Press. Link (accessed 24.08.2024)

Economy, E. 2022. *The world according to China*. Cambridge, Medford: Polity Press.

Fischer, A.M. 2015. "Subsidizing Tibet: An interprovincial comparison of Western China up to the end of the Hu-Wen administration." *China Quarterly 221,* 73-99. Link (accessed 24.08.2024)

Fischer, A.M. 2005. *State growth and social exclusion in Tibet*. Copenhagen: NIAS Press.

Fischer, A.M. 2014. *The disempowered development of Tibet in China: A study in the economics of marginalization*. Washington D.C: Rowman & Littlefield.

Foot, Rosemary. 2020. China, the UN, and Human Protection: Beliefs, Power, Image. Oxford: Oxford University Press. Link (accessed 24.08.2024)

Foot, R. 2000. *Rights beyond borders: The global community and the struggle over Human Rights in China*. Oxford: Oxford University Press. Link (accessed 24.08.2024)

Free Tibet, 2021. "Culture & Religion". Link (accessed 24.08.2024)

2022. "Chinese occupation of Tibet". Link (accessed 24.08.2024)

Freedman, R. 2014. *Failing to protect: The UN and the politicisation of Human Rights*. London: Hurst & Company.

Fung, C.J. 2019. *China and intervention at the UN Security Council: Reconciling status*, First edition. Oxford: Oxford University Press. Link (accessed 24.08.2024)

Genoud, C. 2022. "The Beijing Olympics in retrospect: An anti-Human Rights politics machine." *China Brief 22*, 6.

Genoud, C. & Pils, E. 2022. "Confronting China, looking in the mirror: reflections on Human Rights and the rule of law in EU-China relations." *EIZ Publishing*.

Global Times, 2019. "Beijing will continue to fight against Dalai Lama's separatist goals". Link (accessed 24.08.2024)

Global Times, 2021. "China always acts for well-being of developing countries". Link (accessed 24.08.2024)

Global Times, 2021a. "Birthday greetings to Dalai Lama a futile attempt to show attitude to China". Link (accessed 24.08.2024)

Goldman, M. 1995. *Sowing the seeds of democracy in China: Political reform in the Deng Xiaoping era*. Harvard: Harvard University Press. Link (accessed 24.08.2024)

Goodale, M. 2022. *Reinventing Human Rights, Stanford studies in Human Rights*. Stanford: Stanford University Press. Link (accessed 24.08.2024)

Goodale, M. & Merry, S. E. eds. 2007. *The practice of Human Rights: Tracking law between the global and the local*. Cambridge: Cambridge University Press, 342-69. Link (accessed 24.08.2024)

Goodale, M. 2016. "Dark matter: Toward a political economy of indigenous rights and aspirational politics." *Critique of Anthropology 36*, 4:439-57. Link (accessed 24.08.2024)

Goodale, M. 2022a. *Reinventing Human Rights*. Stanford: Stanford University Press. Link (accessed 24.08.2024)

Grant, Andrew. 2018. "Hyperbuilding the Civilized City: Ethnicity and Marginalization in Eastern Tibet." Critical Asian Studies 50, 4: 537-555. Link (accessed 24.08.2024)

Han, E. & Paik, C. 2014. "Dynamics of political resistance in Tibet: Religious repression and controversies of demographic change." *China Quarterly, 217*: 69-98. Link (accessed 24.08.2024)

Hopgood, S. 2013. *The end times of Human Rights*. New York: Cornell University Press.

Human Rights Council (HRC). 2017. "The contribution of development to the enjoyment of all human rights." Adopted by the United Nations Human Rights Council in June 2017. *HRC, 35th*, 07/07/2017, A/HRC/RES/35/21. Link (accessed 24.08.2024)

Ikenberry, J. G. 2008. "The rise of China and the future of the West: Can the liberal system survive?" *Foreign Affairs 87*, (1):23-37.

Inboden, R. S. 2021. *China and the international Human Rights regime: 1982 - 2017*. Cambridge: Cambridge University Press. Link (accessed 24.08.2024)

ICT (International Campaign for Tibet). 2021. *Party above Buddhism: China's surveillance and control of Tibetan monasteries and nunneries*. Washington D.C.

Jain, D. 2021. "*Mao Zedong (1893-1976)." In Routledge handbook of Marxism and Post-Marxism, edited by Alex Callinicos, Stathis Kouvelakis, and Lucia Pradella*. New York: Routledge. Link (accessed 24.08.2024)

Jones, B. 2020. *China and the return of great power strategic competition*. Washington D.C.: Brookings.

Kent, A. 2019. "China and the international multilateral Human Rights system." *In Handbook on Human Rights in China, Sarah Biddulph and Joshua Rosenzweig (Eds)*, 61-83. Cheltenham: Edward Elgar Publishing. Link (accessed 24.08.2024)

Khannenje, H. 2022. "*What Africa really thinks about the war in Ukraine*." In The Horn 33 minutes podcast (May 19, 2022).

Kinzelbach, K. 2019. "*Human Rights in Chinese foreign policy: A battle for global public opinion*." In Handbook on Human Rights in China, edited by Sarah Biddulph and Joshua Rosenzweig, Link (accessed 24.08.2024)

Kinzelbach, K. 2015. *The EU's Human Rights dialogue with China: Quiet diplomacy and its limits*. London and New York: Routledge. Link (accessed 24.08.2024)

Merry, S. E. 2006. 'Transnational Human Rights and local activism: Mapping the middle'. *American Anthropological Association 108*, (1):38-51 Link (accessed 24.08.2024)

Millward, J. A. 2022. '*International academic signatories of the open letter regarding UH high commissioner for Human Rights Michelle Bachelet's statement and visit to the Xinjiang Uyghur region*'.

Mitter, R. 2022. China's good war: *How World War II is shaping a new nationalism*. Cambridge: Harvard University Press.

Moyn, S. 2018. *Not enough: Human Rights in an unequal world. 29*(4):296. Cambridge, Massachusetts. London: Harvard University Press. Link (accessed 24.08.2024)
Muller, W. 2019. '*Subsistence, poverty alleviation and right to development: between discourse and practice*'. In Handbook on human rights in China, edited by Sarah Biddulph and Joshua Rosenzweig. Cheltenham: Edward Elgar Publishing. Link (accessed 24.08.2024)
Murphy, D. 2019. *China's rise in the global South. The Middle East, Africa, and Beijing's alternative world order*. Stanford: Stanford University Press.
Nathan, A. J. 1994. 'Human Rights in Chinese foreign policy'. *The China Quarterly 32*, 139: 622-43. Link (accessed 24.08.2024)
Naughton, B. 2017. 'Is China socialist?' *Journal of Economic Perspectives 31*, 1: 3-24. Link (accessed 24.08.2024)
O'byrne, D. J. 2019. 'Marxism and human rights: New thoughts on an old debate'. *International journal of Human Rights 23*, 4:644. Link (accessed 24.08.2024)
Piccone, T. 2018. *China's long game on Human Rights at the United Nations*. Washington D.C: Brookings.
Pils, E. 2021. 'Complicity in democratic engagement with autocratic systems'. *Ethics and Global Politics. 14*, 3. Link (accessed 24.08.2024)
Pils, E. 2018. *Human Rights in China: A social practice in the shadows of authoritarianism*. Cambridge, Medford: Polity Press.
Philip, A. 2017. "How seriously does China take economic and social rights?" *New York: NYU Law & Devt Colloquium*.
Richardson, S. 2020. *China's influence on the global Human Rights system*. Washington D.C.: Brookings.
Roberts, S. R. 2020. *The war on the Uyghurs: China's internal campaign against a Muslim minority*. Princeton: Princeton University Press. Link (accessed 24.08.2024)
Sarfaty, G. A. 2012. *Values in translation: Human Rights and the culture of the World Bank*. Stanford, Calif.: Stanford University Press.
Sceats, S. & Breslin, S. 2012. *China and the international human rights system*. London: Chatham House.
State Council Information Office (SCIO) of the People's Republic of China
1991: *White paper on Human Rights: China's Human Rights situation.*
2011: *Sixty years since peaceful liberation of Tibet.*
2013: *Development and progress in Tibet.*
2016: *Full text: The right to development: China's philosophy, practice and contribution.*
2016: *The right to development: China's political philosophy, practice and contribution*.
2018: *Progress in Human Rights over the 40 years of reform and opening up in China*.
2019: *Democratic reform in Tibet - sixty years on*.
2021: *Full text: Human Rights action plan of China (2021-2025).*
Steinfeld, E. S. 2010. *Playing our game: Why China's rise doesn't threaten the West*. New York, Oxford: Oxford University Press.
Svensson, M. 2002. *Debating Human Rights in China: A conceptual and political history*. Lanham, Md.: Rowman & Littlefield.
Taylor, M. R. 2020. 'Inside the EU-China Human Rights dialogue: Assessing the practical delivery of the EU's normative power in a hostile environment'. *Journal of European Integration 44*,33. Link (accessed 24.08.2024)
The Tibetan Centre for Human Rights and Democracy (TCHRD). 2017.
Tibet Watch. 2016. *Tibet's 'intolerable' monasteries: The role of monasteries in Tibetan resistance since 1950*. London: Tibet Watch.
UN General Assembly. 1986. Declaration on the right to development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.

Vetter, J. 2020. 'Through the eyes of the Potala palace: Difficult heritage and memory in Tibet'. *The iJournal 6*, 1:1-17. Link (accessed 24.08.2024)

Weatherley, R. 2000. 'Human Rights in China: Between Marx and Confucius'. *Critical Review of International Social and Political Philosophy 3*,(4): 101-25. Link (accessed 24.08.2024)

Weatherley, R. 2014. Making China strong. *The role of nationalism in Chinese thinking on democracy and Human Rights*. London: Palgrave Macmillan.

Weber, I. M. 2021. *How China escaped shock therapy. The market reform debate*. New York: Routledge. Link (accessed 24.08.2024)

Whyte, J. 2019. *The morals of the market. Human Rights and the Rise of Neoliberalism*. London: Verso.

Worden, A. 2017. '*China pushes 'Human Rights with Chinese characteristics' at the UN*'. China Change.

Worden, A. 2019. '*The Human Rights Council Advisory Committee: A new tool in China's anti-Human Rights strategy*'. Paper presented at the workshop Mapping China's footprint in the World II, organized by Sinopsis and the Oriental Institute of the Czech Academy of Sciences. SYNOPSIS: China in Context and Perspective.

Worden, A. 2018. '*With its latest Human Rights council resolution, China continues its assault on the UN Human Rights framework*'. China Change.

Xinhua. 2019.

2020.

Yardley, J.& Edouard W. 2011. '*Dalai Lama gives up political role*'. The New York Times.

Yeh, E. T. 2007. 'Tropes of indolence and the cultural politics of development in Lhasa, Tibet'. *Annals of the Association of American Geographers 97*, 3: 593-612. Link (accessed 24.08.2024)

Yeh, E.T. 2013. *Taming Tibet. Landscape transformation and the gift of Chinese development*. New York: Cornell University Press. Link (accessed 24.08.2024)

Yue, J. 2008. 'Peaceful rise of China: Myth or reality?' *International Politics 45*,439-56. Link (accessed 24.08.2024)

Zhang, Chi. 2012. '*The conceptual gap on Human Rights in China-Europe relations'. In conceptual gaps in China-EU relations: Global governance, Human Rights and strategic partnerships*, edited by Pan Zhongqi, 83-96. New York: Palgrave Macmillan. Link (accessed 24.08.2024)

Clarisse Jeannette Fagard. "The right to live or to live well? Refugees' quest for entitlement: A reflection through Aristotle's and Arendt's lenses." (2023) 7 *Global Campus Human Rights Journal* 60-82
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The right to live or to live well? Refugees' quest for entitlement: A reflection through Aristotle's and Arendt's lenses

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Abstract: *The term "life" is undoubtedly a concept that legislators can no longer fail to understand in present times, certainly with a burning migration crisis at the forefront. The study explores the intrinsic relationship between the concepts of "life" and "rights" through the lens of ancient philosophy, in particular Aristotle' seminal writing. The distinction between "bios" and "zoe," as recognised by the latter, is analysed and reconsidered in contemporary contexts, within the framework of modern human rights and the challenges posed by the global migration crisis. Challenging thereby the philosopher Agamben, who maintains a dichotomy between the biological and the political body—albeit blurred by his conception of "naked life," the study argues for a nuanced interpretation of Aristotle's oeuvre, allowing for the recognition of a complementary—if not inseparable—connection between biological life and political existence. Through a further interlacing with Hannah Arendt's concept of "the right to have rights," the article aims to apply this framework to refugees' situations, emphasizing the intertwined nature of life and political recognition. In a forward-looking perspective, it is hoped to raise reflexive stances on the contemporary right to life, whose complete comprehending hinges on recognizing its innate political dimension.*

Key words: *Aristotle, biological existence, Hannah Arendt, life, political representation, refugees*

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1. Introduction

The term "life" is undoubtedly a concept that the law can no longer fail to understand in present times, certainly with a burning migration crisis at the forefront. Aristotle's writings remain of particular importance to comprehending the postulated content of modern human rights.

The ancient Greeks, including Aristotle, employed two words for "life," conveying that they could refer to different concepts: *Bios* and *Zoe*. The distinction has been taken up by many thinkers, notably within the realm of politics, the most influential of whom being Giorgio Agamben. According to the latter, the boundary would have been clear between *Zoe* "which expressed the simple fact of living common to all living beings and *Bios*, which indicated the form or manner of living peculiar to an individual or group" (Agamben, 1998, 201–202).

However, his well-known diagnosis of modern western politics seems to be rooted in a misinterpretation of Aristotle's legacy. In his account, the political life of ancient Greek citizens was conducted separately from family life, and, thus, separately from the substantive and biological aspects of its reproduction (ibid., 10). In contrast, today' state would enclose these aspects within it, or what would be called the manifestations of bare life. The latter would be both included and enclosed in political life, while simultaneously being excluded from and opposed to it (ibid., 4–7). In effect, political sovereignty would be directed against the natural existence of human beings and their biological functions, such that the latter are maintained in existence, but tightly controlled by a state (Finlayson, 2010, 100). It is through such thesis that Agamben justifies most of the atrocities committed by states over the last century, including the creation of refugee camps (Agamben, 1998, 131–145).

While an attentive reading of Aristotle's writings confirms that "life" does have a biological and biographical character, it seems that neither characteristic corresponds exclusively to one term or the other, nor whether both can be associated with both terms. Indeed, whereas it would be inconceivable for Agamben to devise—as underlined in his writings—of any "*Zôé Politikè*" (ibid., 9), it would be wrong, according to Aristotle, for biological life to be devoid of any political feature as such.

From such a premise, is it not possible to reassess the relationship and recognize a complementarity between biological life and political existence, instead of such separation? What might this complementarity, perhaps oneness, teach about the fate of refugees, when one or both are affected? Is there a *right to live*—in Aristotelian sensus—granted to refugees, and why would it be of importance in today' situation?

The article seeks to distinguish between the living and the well-living according to the ancient Greek philosopher, and to understand the

complementarity of the biological with the political. It will further attempt to explain how this distinction on the one, and the complementarity on the other, can be modelled on Hannah Arendt's theories—including her famous phrase "the right to have rights"—for application to refugees' situations.

1.1 Review of "Life" in Aristotle regarding the Distinction between βίος (Bios) and ζωή (Zoe)

Although the present study does not pretend to define an Aristotelian definition of life *per se*, it seeks to apprehend what Aristotle meant by *Zoe* and *Bios* respectively and, subsequently, to understand the possible complementarity between them, the latter predisposed to be qualified as *Politikos* above all.

1.2 Aristotle's key statements on *Bios* and *Zoe*

At the outset, it is relevant to grasp the general usage of these terms in ancient Greek. The Liddell and Scott Greek-English lexicon provides the following definitions of *Bios* and *Zoe*.

Bios is defined as "life, i.e., not animal life (ζωή) but mode of life" and also a "manner of living (mostly therefore of men […] but also of animals)"; it further signifies "a life, a biography" (Liddel & Scott, 1968, 316).

Zoe is delineated as "living, i.e., one's substance, property" but also "to get one's living by" and "life, existence" (ibid., 759).

From the above definitions, it can be assumed that *Zoe* expresses the simple fact of living, common to all animate beings—including animals and plants—whereas *Bios* signifies the form or manner of living for a singular being or group. While they provide a valuable baseline, it must be stressed these definitions are taken from extensive Greek literature and only cover partially Aristotle's use of the terms (Bagwell, 2018, 5).

From the latter two, Aristotle may be able to derive a distinction between the "living" and the "living-well". Yet, it remains to determine what he means by "living," as to ascertain whether his conception of life is respected within today's refugee camps, and what would be the incidences if such were (not) the case.

Although, according to him, living seems to be common for humans and plants, it becomes a task to identify the one specific to human beings (Klimis 2019, 89–90). In this regard, a negative definition appears possible: the nutritive life, and the growth life, are common to all living beings, i.e., humans, animals, and plants; along with sensitive life, which humans have in common with animals (ibid, 90). As such, these cannot be the particularity of human biological life.

In Book IX, Chapter 9, of the *Nicomachean ethics*, Aristotle quotes:

> Now life (ζῆν) is defined in the case of animals by the power of perception, in that of man by the power of perception or thought; and a power is referred to the corresponding activity, which is the essential thing; therefore life (ζῆν) seems to be essentially perceiving or thinking and life (ζῆν) is among the things that are good and pleasant in themselves. (NE IX, 1170a15–20).

It would suggest that any individual must demonstrate a certain power of thought, be it great or lesser, to be considered a human-being who would possess life. In fact, whereas animals might be limited to the five senses for biological sustenance, humans necessarily have a mental and rational ability (Bagwell, 2018, 29). However, in addition to the present necessity—and those shared with other living beings—to possess life, Aristotle states in the subsequent passage that: "Life belongs to the things that are good and pleasant in themselves". This affirmation infers that such would be true in that all people desire life. Subsequently, it could also be understood that activities of men—those proper to them but also those common to animals and plants—are good and pleasant in the sense of their being necessary for life (ibid., 32).

As regards the term *Bios*, the latter is valuable in appreciating what would be necessary to live well according to the philosopher. One of the mentions in *Politics* explains that: "as production and action are different in kind, and both require instruments, the instruments which they employ must likewise differ in kind. But life (*Bios*) is action (*praxis*) and not production, […]" (Politics I, 1254a5–9).

It must therefore be understood that *Bios* denotes a life where activities are ends in themselves, as opposed to productions. In the *Nicomachean Ethics,* the writings in chapter 7 of Book I, mention that "happiness, then, is something complete and self-sufficient, and it is the end of action" (NE I, 1097b14–22). Happiness is, in fact, itself desirable, especially since there is no higher end. The subsequent chapter further argues that happiness is achieved through excellent actions, which are in accordance with human's function (Bagwell, 2018, 49–52).

The question is what exactly can be called the activity of *Bios* in that thought appears, concurrently, to have an end. To understand the ambivalence, *Zoe's* activities are, as above mentioned, pursued for the pleasure they provide, whereas *Bios* embeds a specific form of pleasure—namely happiness—as the purpose of its activities. The pleasure form of the activities in relation to *Zoe* cannot be linked to it (ibid., 42–43). Moreover, the interest of *Bios'* activities is they consist of excellent actions consistent with human functions (ibid.). Therefore, it is possible to consider the activity of thinking as ambivalent, both

as an end in itself (*Bios*) and as production, necessary for biological sustenance (*Zoe*).

It must further be determined what activities, being ends unto happiness, Aristotle would connect to *Bios*. In the *Nicomachean Ethics*, Aristotle compares the *bios theoretikos,* the *bios politikos* and the *bios apolaustikos*, namely the contemplative life of the philosopher, the political life of the citizen and the life of the person who seeks pleasure above all else (NE I, 1095b14–20). In view of the examination of well-living—considering refugees' situation as political actors and (non-)citizens—the emphasis will be on the *bios Politikos*, whose aim is the well-living of the citizen.

As such, which means should citizens use to achieve the said happiness in a *bios politikos* (namely, a political way of life)? In political action, honours are sought, which risks subjecting the citizen to a dependence on those who bestow rather than on those who receive them (NE I, 1095b24–25; Klimis, 2019, 102). Seeking therefore the praise of wise men, who give credit only to virtue, the citizen will identify happiness with virtue and where virtue will be the political end (Aristotle, *Nicomachean Ethic* I, 1095 b 30–31; Klimis, 2019, 102). Consequently, the excellent actions, as mentioned above, of the political way of life appear as virtuous actions (ibid.).

To complete the present, it remains to determine what virtuous action would be, and whether it would be precluded from refugees. In view of Aristotle's definition of virtue as "a disposition concerned with choice, lying in a mean relative to us, this being determined by reason and in the way in which the man of practical wisdom would determine it" (NE II, 1106b36–1107a2), and of the preceding observation that happiness is attained by excellent actions in accordance with human's function, it can be inferred that the virtuous action of political life is that which actualizes the latter, namely its potential as a rational being. To achieve such aim, the citizen can model himself on the man of practical wisdom upon whom his honour depends, defined as having the ability to deliberate rightly on what promotes well-living as a whole and what is good or bad for human beings as such (NE IV, 1140 a25–28). The citizen will seek to realize its own living-well—which is bound to be political—and aim in each of its actions to work towards the good life of the city-state (Klimis 2019, 103).

2. Their Complementarity

The opening passage of Aristotle's politics places the emphasis on community and the role it plays in achieving a certain good (Politics I, 1252a1–6). Aristotle distinguishes three basic forms of community: the household, the village, and the city (Politics, 1252b29–31). Yet, it remains to determine how to articulate the three with the previously acquired

distinction on the *Zoe* and the *Bios*? Each community appears to have a mode of living as its target good: the house seems to ensure the simple living of biological subsistence (*Zoe*), while the city achieves the transmutation of living into living-well (*Bios*). The village, on the other hand, is an in-between, notably prolonging biological and material subsistence (Klimis, 2019, 86). Such a presentation would seem to vindicate Agamben's clear dichotomy that the political and biological existence belong to different communities. Does the city, normally the exclusive framework of a *Bios* predisposed to be qualified as political (*Politikos)*, not find a natural trait?

Agamben argues that Aristotle's semantic distinction of *Zoe* and *Bios* form a dyad and would be the primary authority for stating they are mutually opposed, and the latter excludes the former (Finlayson, 2010, 107). However, such a contention about Aristotle's use of language can be refuted by his extensive literature. In effect, these two Greek nouns have meanings that are slightly differing and—as explained earlier through their definitions—are partly overlapping (ibid., 109). No opposability or reciprocal exclusion between either term or their reflections can be inferred. Human beings can lead a political and a family life, as Aristotle nicely reminds through his "*Zoon Politikon"*[1] (Politics I, 1253a1–2).

The first book of *Politics* addresses the formation of the *Polis* from its origins in the household and the village and details the elements of the former. A rationale is given for two related claims: "the *Polis* exists by nature"; and "man is by nature a political animal" (Politics I, 12531–2). The reasoning advanced by Aristotle is that, if all the constitutive elements of a totality exist by nature, then the totality exists by nature; namely, the *Polis* (the totality) includes the village, which is itself composed of families (its components), and these elements exist by nature (Finlayson, 2010, 110). Hence, "if the previous forms of association are natural, so is the *Polis*, for it is the end of it, and the nature of a thing is its end" (Politics I, 1253al–3). Moreover, if man is by nature a political animal, and if human association has for end, for nature, to be a *political* community, it is inconceivable that the biological and material components of this same association are excluded from the said political community, or *Polis* (Finlayson 2010, 110–11).

With regard to the components of human association—whether natural or material—they are underpinned by Aristotle in his *Politics* and are, albeit summarised at present, as follows: the natural and unchosen tendency of man and woman to procreate (Politics I, 1252a3); the natural hierarchies of master-slave and man-woman in order to satisfy indispensable needs and a mutual interest in preserving each other (Politics I, 1252a31–5); the innately group-oriented social pre-disposition of human beings to live together among their fellows (ibid.); and economic and material

1 The noun zoon refers to a living or animate being. See notably Finlayson 2010, 108.

interdependence of naturally needy beings (Politics I, 1252al4). It seems apparent the first two are the fundamentals of household and biological sustenance, while the other two tend to be more material—and even social—in character.

Consequently, it can be cautiously deduced that if the communities of the household and the village—which tend to ensure biological and material sustenance—are necessities for political life, then political life could not be accessed if the latter are not provided. In other words, if man has not freed himself from the bondage of tasks ensuring his biological substance, he could not engage in the deliberations of political life. Such an assessment is of crucial importance in evaluating refugees' access to politics.

Furthermore, while Aristotle does not deny that such components are natural foundations of association in the *Polis*—and to that extent, requisite conditions for the political life—he merely denies that these foundations of association are sufficient in themselves for political living. As Finlayson well explains, "a properly political order has to have, in addition to this material, economic, and instinctual basis, a deeper (and more worthy) basis in citizenship, civic friendship, and justice" (2010, 111).

A relevant point that deserves further development is the concept of friendship. Indeed, it seems self-evident that human communities do not rest solely on the purpose of the good they pursue. There must be a mutual benevolence, a friendship, between its members (Bagwell, 2018, 87). Friendship appears to be "the bond of the state; and lawgivers seem to set more store by it than they do by justice" (NE VIII, 1155a). Hence the importance of concord, that "exists between good men, since these are of one mind both with themselves and with one another, as they always stand more or less on the same ground" (NE IX, 1167b). Friendship would be a further endorsement of how biological and political complement each other, in that it articulates the two great spheres of human life: public and private life. While in private life, natural friendships develop within the family, the public life seeks concord and a kind of general friendship of citizens towards each other.

Moreover, in addition to the referred foundations, a properly political order is "something that is embedded in the constitution, laws, practices, institutions and collective life of the *Polis* and instilled in the ethos or character of its individual citizens through education and up bringing" (Finlayson 2010, 111). As previously stated, to achieve happiness in the political way of life, the citizen will attempt to direct his actions towards the good life of the *Polis*. However, it cannot be denied that such virtuous action can be self-induced through educational policy as to inculcate in children an *ethos* by training them to develop certain qualities for the actions (ibid.).

The simple living and the well-living would therefore be layers of life that are intrinsically linked and continuous, although distinct in quality. To further appreciate the complementarity between the good life and the mere living, a comparison may also be drawn with Aristotle's writings in *Physics* and *Metaphysics* on the material, mobile, formal, and final causes, which are linked and cooperatively drive a being to its essence and inner perfection (Physics, 2:3, 1:332–34; Metaphysics, 6.2, 2:1620–22; Finlayson 2010, 112–3).

For example, and to use Finlayson's illustration, simple life can be the efficient cause of the *Polis*; its citizens, territory, walls, etc. its material cause; the constitution, laws, etc. its formal cause; and the happiness of its citizens and the *Polis* its final cause (Finlayson 2010, 112–13).

It therefore stands to reason that a complementarity, if not oneness, is evident between the biological life and the political life, demonstrating that Agamben' separation of the two—argued based on Aristotle's writings—can no longer be maintained as such.

3. Rights that would arise from Aristotle's Respective Conceptions of Living and Living-Well.

Worldwide, according to the United Nations, a staggering 108.4 million people have been forcibly displaced by the end of 2022. 35.3 million are considered refugees, of whom about half are minors (United Nations High Commissioner for Refugees [UNHCR] 2023). The uprooted life of refugees raises questions about the life they have been prescribed: indefinite location and severely restricted movement, is living-well—or living as such—even conceivable under such conditions (Gessen, 2018).

The observation of impermanence and uprootedness clashes directly with Aristotle's different *communities*: while each of them—family, village, and city—pursues a particular good, what becomes when refugees, are deprived of all communities, including the most fundamental ones aiming at providing biological sustenance? Such a starting point is of importance to appreciating how the *Zoe* and *Bios* are missed by refugees, as they are fated to be *decommunitarised.*

3.1 The Right to "Live"

In recent years, while it would be widely accepted that a right to live is pursued by refugee law—and at least seems to be supported by the international sphere—Aristotle may be able to undermine confidence in legislators to understand what such a right entail, given his understanding of *Zoe*. In fact, the right to live according to Aristotle would have a broader conception than that envisaged by international standards.

3.2 Lege Ferenda

As clarified earlier, *Zoe* is akin to the simple fact of living, which for humans includes nutritive sight; growth; sentient life, namely the five senses; and thought for biological (re)production. In addition, all these mentioned must be good and pleasurable in that they are necessary for life. It appears therefore apparent the aim is to ensure biological sustenance.

Hannah Arendt's view of Aristotle's *Zoe* is also worth discussing, as she applies it to a rather modern context. The latter could help in understanding what an Aristotelian right to live would imply in today' society.

From the "labour and life" section of *The Human Condition*, Arendt borrows Aristotle's distinction between *Bios* and *Zoe* and applies it to the modern human being (Bagwell, 2018, 2). According to her, labour, with its connection to *Zoe*—the latter referring to the "ever-recurrent cyclical movement of nature"—includes "all human activities which arise out of the necessity to cope with them and have in themselves no beginning and no end, properly speaking" (Arendt, 1998, 176–9). Arendt suggests work is an essential activity for sustaining life, encompassing thereby any activity directed towards its maintenance or reproduction (Voice, 2014, 37).

Thus, industrial activities, large-scale agriculture, resource extraction, and similar activities, all categorize as work given their aim of sustaining and/or reproducing life (ibid.). Insofar as human beings are subject to biological imperatives, the constraint upon human life is expressed as a necessity that binds until death (ibid.). Arendt directly contrasts necessity with freedom, contending that so long are individuals bound by biological needs, they cannot be free (ibid., 47). Such idea might resonate with Aristotle, who suggests that access to politics is contingent on the prior sustenance of natural needs. Moreover, the motor of biological life is shared by humans with all other living beings, and "forever retains the cyclical movement of nature," itself "endlessly repetitive" (Arendt, 1998, 179). As such, *Zoe* as biological sustenance—sought by all living organisms albeit in different ways—directly echoes Aristotle's earlier understanding.

At first sight, a right to live according to Aristotle, and modernised by Hannah Arendt's interpretation of *Zoe*, would be a right to have natural needs met, but also not to be excluded from any activities that allow for the said subsistence. In this regard, one may criticize refugees' plight in camps—dependent on humanitarian aid—who are formally excluded from social and economic activities and depend solely on international assistance to provide all material goods necessary for their minimal biological existence (Parekh, 2016, 90). They find themselves outside the common space to provide for themselves (Agier, 2008, 2). While this deprivation does not

seem to be a problem when their needs are met by international charity, the latter is not always guaranteed, and such exclusion would pose serious issues when charity runs out.

As an essential element of *Zoe*, access to labour would potentially be enshrined in a right to life in the Aristotelian and Arendtian sense.

3.3 Lege Lata

At the outset,—and as observed from the different levels of legislation whether international, European, or national—there is no explicit right to live *per se*, but rather a right to life which, although similarly termed, has a different scope.

At the international level, reference can be made to Article 3 of the Universal Declaration of Human Rights, from 1948, which states "everyone has the right to life, liberty and security of person" (United Nations General Assembly 1948). At the European level, the right to life is expressly enshrined in Article 2 of the European Convention on Human Rights (Council of Europe 1950). The additional protocol no. 13 further abolishes the death penalty in all circumstances (Council of Europe 2002).

Considered an "absolute right," the right to life in the strict sense implies that no one—thereby including governments—may attempt to end a life (Equality and Human Rights Commission 2021). It further requires a state to adopt appropriate measures, such as enacting laws to safeguard life and, in certain circumstances, by intervening to rescue lives when in danger (ibid.). Public authorities are also to take account of the said right when undertaking decisions that could endanger life or affect life expectancy (ibid.).

Article 2 of the Convention is of particular importance, not least because of its interpretation by the European Court. The first paragraph of the article declares that "the right to life of every person is protected by law" (Council of Europe 1950). The article further refers to a limited list of exceptions, where deprivation of life are not to be regarded as inflicted in its contravention when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection (ibid.).

The Court has emphasised on numerous occasions that Article 2 of the Convention may come into play even if the person whose right to life has been violated is not dead (European Court of Human Rights [ECTHR] 2020, 7). It also examined on the merits allegations under Article 2 made by persons claiming their lives were at risk, even if such risk had not

yet occurred, provided there was a serious threat to their lives (ibid.). As an example, mention should be made of the case of R.R. and Others v. Hungary (2013), in which the applicants complained that they had been excluded from a witness protection program.

The scope of the article is to be appreciated as "non-derogable" according to the Convention, subject to exceptions listed exhaustively within it (ECtHR, 2020b, 13). Indeed, Article 15 of the Convention states, inter-alia, that in time of public emergency threatening the life of the nation, any member state may take measures derogating from its obligations under the Convention, albeit without prejudice to the rights which the article considers inalienable. In fact, even in the event of war, the right to life must be guaranteed (ibid.).

International human rights instruments apply, in principle, regardless of nationality. Accordingly, the European Convention on Human Rights, as stated in Article 1, benefits "everyone" within the jurisdiction of a member state. This includes not only nationals of that member state, but also nationals of other states—whether parties to the Convention or not—as well as stateless persons (Van Drooghenbroeck, 2004, 76–8). It has sometimes been mistakenly argued that persons unlawfully present in a state's territory cannot invoke the rights and freedoms contained in international human rights instruments ratified by that state. However, such an analysis is legally incorrect (ibid.).

On the national level, including the European scene, legal systems uphold the right to life under various constitutional and legislative mechanisms. While this fundamental right may be enshrined textually in certain constitutions, it may also be inferred or derived from related rights in the absence of such enshrinement. Reference may be drawn to the Belgian constitutional court, most notably in a decision of 7 June 2006, which considers that the right to life is a logical extension of the right to integrity enshrined in Article 22 of the constitution, and of the right to lead a life in conformity with human dignity guaranteed by article 23§ 1, of the same constitution:

> Although the constitutional provisions invoked do not guarantee, as such, the right to life, the exercise of the rights they enshrine presupposes respect for the right to life, so that they can be combined with the above-mentioned treaty provisions, which explicitly protect this right (91/06, B.34.).

3.4 The Right to "Live Well"

Undoubtedly, in political terms, refugees—either stateless persons or illegal migrants—are confined to remaining apart from the common political community, as they are refused social integration and lack political rights

or influence in the states where they remain (Agier, 2008). Consequently, Refugees are often barred from integrating communities in which they are found, and very few are given the chance to be resettled—leading some to spend their entire lives excluded from any social or political community (Parekh, 2016, 90).

3.5 Lege Ferenda

As explained earlier, Aristotle's *bios* is above all predisposed to be *politikos*. In the political way of life, happiness can be achieved through virtuous actions, which were understood as actions directed towards the good life of the city.

In *The Human Condition,* Arendt deploys Aristotle's division of *Bios* and *Zoe* in her account of the modern realm of human agency (Bagwell, 2018, 5). The latter distinction is useful in demonstrating how labour (previously studied in relation to *Zoe*) is distinguished from action (said to be associated with *Bios*) which, together with work as such, form a *vita activa* (Voice 2014, 36). It is in the latter that she deems the "conditions under which life on earth was given to man" (Arendt 1998, 7). The *vita activa* is to be contrasted with the *vita contemplativa*, which finds echoes in Aristotle's thinking with his *bios theoretikos* (Bagwell, 2018, 93).

There could have been an Arendtian translation of Aristotle's political life contemplative life in her coinage of *vita activa* and *vita contemplativa* respectively. However, it was not her position, as she explains that such an equivalence would have been lost with the disappearance of the old city-state, where "*vita activa* lost its specifically political meaning and denoted all kinds of active engagement in the things of this world" (Arendt, 1998, 53). According to her, the *bios politikos—or* the domain of human affairs—would consist exclusively of action (praxis) and speech (lexis) deemed to be political and thereby excluding anything that is merely necessary or useful (ibid., 71). Meanwhile, Aristotle argues the opposite, maintaining the material and biological bases of human association are complementary to political association (Finlayson, 2010, 118).

Arendt differs from both Aristotle and the modernists: on the one hand, she further rejects the priority of the contemplative life over the political life of the former, but also refutes the latter's valorisation of work and labour over political action (Voice, 2014, 36). Arendt advocates for a *vita activa*, but also for a precise ranking of its components by prioritizing political action over work and labour (ibid., 36).

A passage from her work is worth noting:

> Limited by a beginning and an end, that is, by the two supreme events of appearance and disappearance within the world, it follows a strictly linear movement whose very motion nevertheless

> is driven by the motor of biological life which man shares with other living things and which forever retains the cyclical movement of nature. The chief characteristic of this specifically human life, whose appearance and disappearance constitute worldly events, is that it is itself always full of events which ultimately can be told as a story, establish a biography; it is of this life, bios as distinguished from mere *Zôé*, that Aristotle said that it "somehow is a kind of praxis". For action and speech, which as seen before, belonged close together in the Greek understanding of politics, are the two activities whose end-result will always be a story with enough coherence to be told, no matter how accidental or haphazard the single events and their causation may appear to be (Arendt, 1998, 176).

From this extract, it can be outlined how there would be, in the linear movement of life, a possibility of event manifestations which, together, could create the biography of individuals. As such, this type of life—which views itself as the quintessential *Bios*—is uniquely human (Bagwell, 2018, 7). However, Arendt goes further by translating Aristotle's *praxis* as "action and speech," indissociably involved in the events of the biography (Arendt, 1998, 176). From her interpretation of Aristotle, Arendt traces a modern philosophical incursion to the distinction of *Bios* and *Zoe*, the relevance of which cannot be overestimated in building a right to live well in the modern world (Bagwell, 2018, 8).

For Arendt, action is linked to plurality, in that human beings are both fundamentally similar and different (Voice 2014, 38–40). Through action, it becomes possible to satisfy the need to differentiate oneself from this sameness, thus justifying Arendt's preference for action, rather than work or labour (Parekh and MacLachlan, 2013, 21). It is not clear, however, whether she considers action and speech to be synonymous, but she often uses them as being the same (ibid.). In action and speech, "men show who they are, actively reveal their unique personal identities and thus make their appearance in a human world" (Arendt, 1998, 179). In other words, action could stand for an existential fulfilment to be achieved in human life and mark one's place in the world (Parekh and MacLachlan, 2013, 21).

However, a further point in her theory deserves attention. In her view, action is a human capacity rooted in natality, in that humans are "beginners by virtue of birth" (Arendt 1998, 303). It is therefore not so much an achievement as a capacity, in that action implies starting and setting in motion what is neither predicted nor controlled (Parekh and MacLachlan, 2013, 22). Action, or "the fact that man is capable of acting means that the unexpected can be expected of him, that he is capable of accomplishing what is infinitely improbable" (Arendt, 1998, 304). Such views on action as an innate capacity would suggest that human beings retain this same capacity to act and to begin, including in refugee camps.

As previously clarified, humankind cannot see itself as free so long as it must transcend its natural needs (Arendt, 1998, 115). It further allows to understand how Arendt identifies freedom with action, namely that "Men are free as long as they act, neither before nor after; for to be free and to act are the same" (Arendt, 1993, 153). As such, freedom should not be understood as a subjective state or inner disposition, but a human experience achieved primarily through political action, where a person reveals their uniqueness with others (Parekh and MacLachlan, 2013, 22). Indeed, while freedom would be "the reason why men live together in a political organization. Without it, political life as such would be meaningless" (Arendt, 1993, 146), freedom is inter subjective, entailing the presence and recognition of others within a shared public domain (Parekh and MacLachlan, 2013, 22).

While without "a politically guaranteed public domain, freedom does not have the global space to make its appearance" (Arendt, 1993, 149), it seems easy to appreciate the harm suffered by refugees, especially those in camps. Indeed, *decommunitarised*, they would be deprived of the reliability and sustainability of a politically guaranteed space where their actions and words could be seen and understood (Parekh and MacLachlan, 2013, 23). Though far from condemning refugee political action to impossibility, such action would nevertheless be limited as it would lack the very conditions that make it consistently meaningful (ibid.). As such, they experience a fundamental lack of the right to live well, albeit theoretically possessing certain rights, such as freedom of expression or opinion (ibid.).

For modern humankind, Aristotle's well-living would not be limited to acting virtuously for the good of the city, but necessarily require the ability to do so through a common and public domain. To "live well" would be a matter of granting a right to a "space of appearance" (Arendt, 1998, 199), where refugees could come together to act. It could involve, among other things, the granting of an institutionalised public framework in which refugees could act alongside citizens. In effect, in the absence of access to citizenship, would there be a right allowing them a political equivalent to citizenship, in that the latter seems most likely of satisfying such a demand?

3.6 Lege Lata

In the interest of coherent reasoning, it is fitting to commence with the broad conception of the right, namely in the Aristotelian and Arendtian sense. While Aristotle's deliberation would rather suppose a right of association and opinion, Arendt additionally advocates for a political equivalence of citizenship.

The former does not raise difficulties in that they are enshrined in various legally binding international instruments, irrespective of the legal

status of their beneficiaries. Examples include the ECHR, in articles 10 and 11, on freedom of expression and freedom of association and assembly respectively, which according to its first provision apply "to everyone" (Council of Europe 1950).

The Arendtian approach seems to pose greater doubts. Indeed, if equivalences to citizenship exist, one cannot fail to appreciate the inherent hardship in accessing them. Loss of citizenship can cover different realities: a formal loss, namely the stateless refugee, whose citizenship is taken away by governmental acts of denationalization; and a material loss, where a refugee retains citizenship but cannot claim it, considering the unreliability of their government to guarantee them the standard legal protections that (other) citizens usually enjoy (Maxwell *et al*., 2018, 5–6).

In view of obtaining an equivalent of citizenship, a review of the applicable national laws is necessary. A distinction is to be made between statelessness and refugee status, which have divergent paths to recognition of their legal residence. Although partial, these statuses would allow for the benefit of rights to be recognised and enjoyed under a state. Yet must they still be able to qualify for them.

A relatively limited number of countries have introduced procedures for determining statelessness, albeit not strictly regulated (UNHCR, 2014, 8). For example, Belgian legislation does not provide for a specific administrative procedure or a specific instance for the recognition of statelessness status (Lauvaux, 2012, 710). The so-called "potpourri V" law designates the "family tribunal" as competent to address disputes regarding nationality and statelessness status (Commissariat Général Aux Réfugiés Et Aux Apatrides [CGRA], n. d.). The onus is on the claimant to provide evidence they are stateless (ibid). However, it should be noted the difficulty in proving such statelessness when the claimant is unable to engage in administrative matters with the services of the country with which they have a connection (UNHCR, 2014, 34). States are not explicitly required to confer a right of residence to a person who is awaiting determination of their status as a stateless person or who has been recognised as such. In the absence of a right to remain on the territory, the person is exposed to permanent insecurity and faces hardship in benefitting from rights guaranteed by international human rights law. The recognition of stateless status, in contrast, grants certain rights, and the benefit of a "ban on expulsion," i.e., a very temporary right of residence (Van Ruymbeke and Versailles, 2018, 321–24).

Candidate refugees (or candidates for subsidiary protection), on the other hand, are subject to another extreme, namely the bureaucratization of state agencies for the reception of asylum seekers. Following the introduction of the application, the seeker will automatically be granted a legal residence permit, albeit temporary (CGRA 2022, 7). While

numerous examples can be cited, one could highlight Poland with continued restrictions on access to asylum; Hungary's inhumane policies, withholding individual protection (European Council of Refugees and Exiles, 2023); or excessive bureaucracy imposed, for example, by Great Britain (Coulten and Lilley, 2022). Mention may equally be made of a recent referral order condemning the Belgian state and *Fedasil*—the federal agency for the reception of asylum seekers in Belgium—for failing to enable asylum seekers to apply for refugee status in Belgium (Rigaux, 2022). The applicants, including several humanitarian associations, claim the Belgian state is failing to fulfil its international obligations by denying potential candidates access to the facility where to submit their application, given the lack of available places in the reception centres organised by *Fedasil* (ibid.).

Between administrative red tape and access to justice, the recognition of the refugee remains hardly guaranteed.

Strictly speaking, one can appreciate there is less of a right to live well in the different legislation levels. Such an embodiment in the relevant sources of law would rather be reflected in the "right to an adequate standard of living," a component of the so-called "second generation of rights," namely economic, social, and cultural rights (Claude and Weston, 2006, 173). The latter is guaranteed by Article 25 of the 1948 Universal Declaration of Human Rights (UDHR), as well as the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), under its Article 11.

Article 25 of the UDHR provides in its first paragraph that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (United Nations, 1948).

Aside from considering that such a right would be more in line with Aristotle's and Arendt's notion of living, its effectivity must be considered. The declaration is not legally binding but provides the groundwork for a series of legally binding texts (Smis, *et al*. 2011, 98–9). Accordingly, it remains to determine whether the article is being adopted under a binding instrument.

Article 11 of the ICESCR states:

> The states parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing, and to the

> continuous improvement of living conditions. States parties shall take appropriate steps to ensure the realization of this right (United Nations General Assembly, 1966).

Although the Covenant incorporates and complements the second generation of rights previously enunciated in the UDHR, it uses programmatic language, implying that most provisions will not be given direct effect (Hachez and Delgrange, 2014, 246). With few exceptions, not including the present article, national courts thereby refuse to allow the provisions to be invoked before them. The international monitoring system of the ICESCR fails to provide any further satisfaction insofar as it provides merely soft jurisprudence with no binding sanctions (United Nations, 1966).

Under national legal systems, constitutional and legislative mechanisms reinforce the primacy of guaranteeing human dignity, social well-being, and individual freedoms. While specifics differ by country, the overarching premise holds that states must ensure their residents—irrespective of legal status—enjoy a dignified standard of living and essential services.

The Belgian Constitution, for instance, devotes a place to economic, social, and cultural rights under the right to human dignity in its article 23, dating from 1993 (Hachez, 2005, 293–324). It provides that everyone has the right to lead a dignified life, and the respective legislators must guarantee economic, social, and cultural rights, including the right to social security, health protection and social, medical, and legal assistance. In the Belgian constitution, rights and freedoms apply, in principle, indistinctly to Belgian and foreign residents—Article 23 being no exception (Van Drooghenbroeck, 2004, 76–78). However, the division between legally and illegally residing refugees is relevant to the present article. Mention should be made of the right to social aid, presented as the means to live in accordance with human dignity. In effect, only Belgians and specific foreigners are eligible to apply for the right to social integration, including recognised stateless persons and recognised refugees legally residing (Van Ruymbeke and Versailles, 2018, 321–24). On the contrary, candidates for both refugee (or subsidiary protection) and statelessness status, illegally residing, are not eligible for social integration. The same applies to recognised stateless individuals who have not been issued a residence permit, owing to the differentiation of procedures for stateless persons from those implemented for asylum seekers (ibid.).

Far from an access to politics, the embodiment of living-well in positive law appears to refer primarily to Aristotle's and Hannah Arendt's sense of simple living. Indeed, it refers to the satisfaction of natural needs rather than the political realm of individuals. As the boundary between living and living-well becomes increasingly blurred, the confidence of lawmakers to understand a right to live as such, seems to be challenged.

3.7 The Complementarity between Biological Life and Political Life and "The Right to have Rights."

A first complementarity, drawn from Aristotle's writings, is to consider the natural bases of human association as complementary to political life, such that: "each lower level of human social existence is preparation and material for the higher level" (Bradley, 1991, 27). Although Hannah Arendt supports the opposite, her position whereby the biological and animal basis of human association is opposed and excluded from the political domain, will be ignored. It would somewhat be illogical to assume that "everything that is merely necessary or useful is strictly excluded" (Arendt, 1998, 71) from the political domain. Indeed, if action, like freedom, is only attainable by satisfying natural needs, it follows that everything necessary for political life should not be excluded, nor should anything useful be (Finlayson, 2010, 118–9).

While Agamben argues that the modern state politicizes natural life (Agamben, 1997, 4), notably within refugee camps (ibid., 131–45), the present account demonstrates otherwise: camps are not a political project, but rather an invention fundamentally contrary to politics itself (Klimis, 2019, 106). By analysing the concept of life, and the right to live in the Aristotelian and Arendtian sense that would derive therefrom, one should recognize that insofar as the very foundations of any human association are not fulfilled, access to political community would be impossible. Refugees in camps dependent on humanitarian aid, inscribed in a context where these foundations are weak or even absent, have no access to political life. As such, a *bios politikos* would appear almost utopian in such circumstances.

However, a second complementarity should be considered between political and biological life. In 1949, Hannah Arendt raised a statement which remains as relevant today as ever, whose famous motto "The right to have rights" (Arendt, 1949, 36). The latter merely translates her scepticism about the concept of human rights. While such rights should, in principle, accrue to every person by reason of their humanity, they were only guaranteed and conditioned on membership of a state (Gessen, 2018). If you do not have a passport, you would not only be deprived of travel, but also of your most fundamental rights.

Author Stephanie Degooyer, whose writings explore the well-known phrase, explains that "the refugee crisis after world-war II revealed to Arendt that humans can exist in a place called nowhere; they can be displaced from political community—they can be turned into abstractions" (Maxwell *et al*, 2018, 30). Through a formal or substantive loss of citizenship, refugees were differentiated from members of the political community, in that they were merely excluded (ibid., 6). Their remaining membership was that of humanity. As Hannah Arendt suggests, refugees who no longer belong

to any nation-state, became "humans and nothing but humans" (Arendt, 1978, 135).

The remaining hope for providing support and protection dawned with the concept of human rights (Gessen, 2018). In this respect, the preamble to the Universal Declaration of Human Rights seemed to indicate that the inalienable rights would apply "to all members of human family" (United Nations, 1948). They would have been covered, simply by virtue of their membership to humanity.

However, Arendt quickly identified the concept's disillusionment, in that human rights, instead of being guaranteed by humanity itself, were ultimately dependent on nation-states' willingness to recognize and enforce the rights of those who had become unprotected by the loss of their national affiliations (Arendt, 1978, 290–301). Refugees, whose sole affiliation is to humanity, have been and continue to be subjected to extreme forms of violence (Maxwell, *et al*, 7). Similarly, membership did not prevent the consequences of the Nazi regime on the Jews stripped of any legal status in the eyes of governments, they found no use in belonging to humanity when their most fundamental right to live was completely annulled by the regime (ibid., 7).

Since then, such a critique cannot be considered outdated: as the migration crisis reaches its peak and its own record, the Ukrainian war seems to have reinforced the assumption of a dependence on the will of nation-states to ensure human rights effectiveness. Indeed, while not discounting the merits of international support for Ukrainian refugees, the variable geometry of nations' migration policies seems to underline that States, or their—when considering the EU and its temporary protection—ultimately decide when and which refugees deserve protection, rather than their belonging to humanity *per se*.

Based on such considerations, Arendt suggested that the only necessary and failing right would be that of being a citizen of a nation-state, or at least of an organised political community, as previously discussed (Maxwell, *et al*. 2018, 8). It is through such a right that the enjoyment of all other civil, social, economic, and political rights can be guaranteed. Thus, a "Right to have Rights" (Arendt, 1978, 298).

The said complementarity between living and well-living appears to be conceivable as a oneness: since access to political community, dependent on the satisfaction of living according to Aristotle, appears hardly attainable, how could stateless or illegal refugees claim even the most vital rights i.e., civil and political rights enabling the satisfaction of natural needs, but also not to be excluded from any activity permitting such subsistence? It appears, in effect, that a right to live would be unattainable without one to live well, and conversely.

An unspoken but foreboding sentence might be drawn for refugees: how can one who does not belong to a community claim the rights arising from it, when the condition for claiming such rights would be membership of a community (Maxwell, *et al*. 2018, 11)? Humanitarian and camps bureaucracy present an instrument of politics fundamentally at odds with the latter, in that it greatly reduces, if not totally, the potential for refugees to act. In fact, when Aristotle asserted that human beings gather and maintain the political community also for the sake of simple living (Politics III, 1278b25; Finlayson, 2010, 111), perhaps had he already succeeded in covering the complexity of refugees' current realities.

4. Conclusion

Today's right to live appears to be a bare right, stripped of any effectiveness until an essential constituent is recognised: its political substance. To the initial question whether refugees in camps a right have to live or to live well, it appears that one can no longer be content to choose, insofar as these two terms are not to be differentiated, but rather indissociable.

Why not take notice of the "Calais Jungle" for example, which, far from fitting its appellation, has attempted to create a political representation with its "Council of Exiles" meeting once a week (De Coninck, 2017, 12–3). As Agier comments, "this is the moment, that of speaking out "in the name of the refugees," (all "vulnerable"), that politics is introduced into the camp" (Agier, 2011, 156). In a place where even biological sustenance is meagre, men and women cling to politics, for there is an inherent instinct in the human essence that the biological side depends on politics, and conversely. Man would be, as Aristotle pointed out, a true political animal (Politics I, 12531–2), for politics and biology are to be inseparable for humankind.

Far from conceding to an almost Arendtian pessimism, it would be of interest to underline the reasoning behind the above ruling of the Brussels Court of First Instance (Rigaux, 2022), which seemed, almost unwittingly, to consecrate this indissociably. The Tribunal held the Belgian state to be at fault for failing to allow all third-country nationals to submit their application for international protection and, accordingly, to benefit from the right to asylum granted by *Fedasil*, on account of their alleged lack of availability (Ghyselinck, 2022, 1). This action infringed their fundamental rights, notably the right to a dignified life (Rigaux, 2022). In its view, once an application has been registered and examined, the asylum seeker has the right to be "welcomed" in Belgium, that is, to be accommodated in a centre where they must be fed and housed until the right to asylum is recognised or refused (ibid.). Although the Court chose the terms "dignified life," it should be appreciated that this wording would refer to the Aristotelian and Arendtian concept of living, regardless of the current legislative practice. Nonetheless, the Court is

decisive: the lack of access to political recognition deprives a person of their right to live. Perhaps would it be the onset of a recognition that the right to life cannot be satisfied with a naked version to be effectively affirmed.

Today, given the finding that most essential rights, such as the right to live, are only guaranteed by the possibility of claiming them, why not consider the deprivation of the political as an infringement of the former? Why not draw on current positive law to assess the apparent incoherence that lies within it? In fact, while the European Court of Human Rights concluded a violation of the right to life when subjects maintain their life to be in danger owing a serious threat (ECtHR, 2020, 7), is there not already grounds for condemning states under the article? After all, the inability to claim one's right to life carries a serious risk for life itself.

It remains the reality of the refugee camps that a *right to life* devoid of any policy would be naked, and that its inadequacy must be acted upon today before it finds itself too easily disregarded.

References

Agamben, G. (1998). Homo Sacer: Sovereign Power And Bare Life. Translated by Daniel Heller Roazen. Stanford*: Stanford University Press*.

Agier, M. (2008). On The Margins of The World: The Refugee Experience Today. Malden, MA: *Polity Press*.

Agier, M. (2011). Managing the Undesirables: Refugee Camps and Humanitarian Government. Translated by David. Fernbach. Malden MA: *Polity Press*.

Arendt, H. (1949). 'The Rights of Man': What Are They? *Modern Review* 3/1 Summer, 24-37.

Arendt. H (1978). Origins of Totalitarianism. New York: *Mariner Books*.

Arendt, H. (1993). Essays in Understanding, 1930-1954. Edited by Jerome Kohn. New York: *Harcourt Brace & Company.*

Arendt. H. (1993). Between Past and Future. New York: *Penguin*.

Arendt. H. (1994). We refugee. In *Altogether Elsewhere. Writers on Exile*, edited by Marc Robinson, 264-74. Washington*: Harvest Books*.

Arendt, H. (1998). The Human Condition: Second Edition. Chicago: *The University of Chicago Press*.

Aristotle. (1995). Metaphysics. In *The Complete Works of Aristotle*, vol. 2, translated by William David Ross, edited by Jonathan Barnes, 2.1152-1729. New Jersey: *Princeton University Press*.

Aristotle. 1995. Nicomachean Ethics. In *The Complete Works of Aristotle*, vol. 2, translated by William David Ross, revised by James Opie Urmson, edited by Jonathan Barnes, 2.1729-1868. New Jersey: *Princeton University Press*.

Aristotle. (1995). Nicomachean Ethics Translated by Harris Rackham. Cambridge: *Harvard University Press.*

Aristotle. (1995). Physics. In *The Complete Works of Aristotle*, vol. 1, translated by Robert Purves Hardie and Russell Kerr Gaye, edited by Jonathan Barnes, 1.315-447. New Jersey: *Princeton University Press.*

Aristotle. (1995). Politics. In *The Complete Works of Aristotle*, vol. 2, translated by Benjamin Jowett, edited by Jonathan Barnes, 1.1986-2130. New Jersey: *Princeton University Press*.

Aristotle. (1990). Politics. Translated by Harris Rackham. Cambridge: *Harvard University Press.*

Bagwell, S. (2018). An examination of 'life' in Aristotle concerning the distinction between βίοσ (Bios) and ζωή (Zoe). Master's thesis, University of Saskatchewan.

Bradley, AC. (1991). Aristotle's Conception of The State. In *A Companion to Aristotle's Politics*, edited by David Keyt and Fred D. Miller, 13-56. Oxford: *Basil Blackwell*.

Claude, RP. and Weston, BH. (2006). Human Rights in the World Community: Issues and Action. Philadelphia: *University of Pennsylvania Press*.

Commissariat général aux Réfugiés et aux Apatrides. (2022). Vous êtes reconnu réfugié en Belgique. Vos droits et vos obligations. Commissariat général aux réfugiés et aux apatrides.

Commissariat général aux Réfugiés et aux ApatridesAnonymous. (n. d.). Apatrides.

Coulten, L. and Lilley, E. (2022). Refugees are facing added trauma of UK bureaucracy. *The Guardian*.

Council of Europe. (1950). European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos 11 and 14. Council of Europe Treaty Series 005. Strasbourg: *Council of Europe*.

Council of Europe. (2002). Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the abolition of the Death Penalty in all Circumstances. Council of Europe Treaty Series 187. Vilnius: *Council of Europe*.

De Coninck, V. (2017). Un conseil des migrants à Calais. Revue Project 3, 358: 12-13. Link (last visited 26 August 2024).

Equality and Human Rights Commission. (2021). Article 2: Right to life. Equality and Human Rights Commission.

European Council on Refugees and Exiles. (2023). Eastern borders: Poland continues restricting access to asylum, Hungary's inhumane policies increase smuggling crimes and deny people protection, Austrian minister calls for urgent reform of so broken EU asylum system.

European Court of Human Rights. (2020). Guide on article 2 of The European Convention on Human Rights. European Court of Human Rights.

European Court of Human Rights. (2020b). Guide to article 15 of the European Convention on Human Rights. European Court of Human Rights.

Finlayson, J.G. (2010). Bare life and politics in Agamben's reading of Aristotle. The review of Politics 72, no. 1 (Winter): 97-126. Link (last visited 25 August 2024).

Gessen, M. (2018). The Right to Have Rights and The Plight of the Stateless. *The New Yorker*.

Ghyselinck, R. (2022). FEDASIL - Saturation du réseau d'accueil - Manquement aux obligations internationales. Bulletin Juridique et Social 2, no. 688 (March): 1.

Hachez, I. (2005). Les 'obligations correspondantes' dans l'article 23 de la constitution. In la *responsabilité, face cachée des droits de l'homme*, edited by Hugues Dumont, François Host and Sébastien Van Drooghenbroeck, 293-324. Bruxelles: *Bruylant*.

Hachez, I. and Delgrange, X. (2014). Le droit international et européen des droits de l'Homme devant le juge national. Edited by S. Van Drooghenbroeck. Bruxelles: *Larcier*.

Klimis, S. (2019). Les puissances politiques du vivre: créer le commun du bonheur, par-delà la sidération de la vie nue. In *Vie bonne, vulnérabilité, commun(s). Schèmes anciens et usages contemporains*, edited by Olivier Renaut, Sandrine Alexandre, and Haud Gueguen, 79-109. *Paris: Presse Universitaires de Paris-Nanterre*.

Lauvaux, V. (2012). L'accès des apatrides à l'aide sociale. In *Regards Croisés Sur La Sécurité Sociale*, edited by Francine Étienne et Michel Dumont, 708-730. Liège: *Anthemis*.

Liddel, H.G., and Scott, R. (1968). A Greek-English Lexicon. Oxford: *University Press*.

Maxwell, L., Hunt, A., DeGooyer., S. and Moyn, S. (2018). The Right to Have Rights. London and New York: *Verso*.

Parekh, S. and MacLachlan, A. (2013). Beyond the Ethics of Admission: Stateless people, refugee camps and moral obligations. Legal Philosophy Between State and Transnationalism Seminar Series. Link (last visited 25 August 2024).

Parekh, S. (2016). Refugees and the Ethics of Forced Displacement. New York and London: *Routledge*. Link (last visited 13 January 2024).

Rigaux, MF. (2022). Le droit à la dignité humaine des demandeurs d'asile ne souffre pas d'exception. Link (last visited 14 January 2024).

Smis, S., Janssens, C., Mirgaux, S., and Van Laethem., K. (2011). Handboek Mensenrechten. Anvers: *Intersentia*.

United Nations High Commissioner for Refugees. (2014). Manuel sur la protection des apatrides.

United Nations High Commissioner for Refugees. (2023). Figures at a Glance. Link (last visited 25 August 2024).

United Nations General Assembly. (1948). Universal Declarations of Human Rights. 217 (III) A.

United Nations General Assembly. (1966). International Covenant on Economic, Social, and Cultural rights.

Van Drooghenbroeck, S. (2004). L'effectivité des droits sociaux fondamentaux de l'enfant : le contentieux de l'aide sociale aux étrangers en séjour illégal comme paradigme, in *Les Enfants et L'aide Sociale*, edited by Pierre Jadoul, 59-111. Liège: *ASBL Jeunesse et Droit*.

Van Ruymbeke, M, and Versailles, P. (2018). Les bénéficiaires de l'aide sociale, sensu stricto. In *Guide social permanent. Tome 4 - Droit de la Sécurité Sociale: Commentaire*, edited by Gaston Van Den Avyle, 151-333. Liège: *Wolter Kluwer*.

Voice, P. (2014). Labour, work, and action. In *Hannah Arendt: Key Concepts*, edited by Patrick Hayden, 36-51. New York and London: Routledge.

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Combating climate change and promoting human rights through Associativism

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Abstract: *Preserving nature and promoting human rights emerge as pressing challenges in contemporary society. Companies, as prominent economic agents, play a crucial role in building a more equitable and environmentally sustainable world. In this context, associativism stands out as a crucial tool, enabling companies to collaborate jointly with local communities and non-governmental organisations in the creation of projects and initiatives beneficial to all. In the realm of climate change, fossil fuels stand out as the primary emitters of greenhouse gases. Associativism emerges as a valuable tool in addressing climate change, through this collaborative approach, companies can cooperate with local communities and non-governmental organisations in designing projects and initiatives aimed at reducing dependence on fossil fuels and driving the transition to a low-carbon economy. This article investigates how companies, through associativism, can take effective measures for environmental preservation and the prevention of human rights violations in the context of climate change. The research was conducted through literature review and document analysis. The results obtained suggest that sustainable development practices adopted by companies committed to promoting the rights of nature and humans have the potential to reduce the environmental impact of business operations, promote social well-being, and strengthen collaboration between companies, local communities, and civil society organisations. Companies incorporating associational practices to drive sustainability are more likely to achieve the Sustainable Development Goals (SDGs) outlined in the UN's 2030 Agenda.*

Key words: *climate change, sustainable development, environmental rights, human rights, companies, associativism, fossil fuels, subsidies*

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1. Introduction

The preservation of nature and the promotion of human rights have been recurring and prominent topics in recent years due to the rising global warming indices, causing harm to both people and the environment. Rönesans Holding (2023) understands that companies, as influential economic agents, play a crucial role in building a more sustainable and just world.

According to the United Nations (UN, 2024), in the context of climate change, fossil fuels are by far the largest contributors to global climate change, accounting for over 75% of global greenhouse gas emissions and almost 90% of all carbon dioxide emissions.

Subsidies granted to fossil fuels have the effect of driving the consumption of these fuels, resulting in increased greenhouse gas emissions. As indicated in a report by the International Monetary Fund (IMF, 2023), these subsidies reached a record of $7 trillion.

As highlighted by the Carbon Majors Report, a recent survey reveals that a group of just 100 companies is responsible for over 70% of global greenhouse gas emissions since 1988. In this context, The Guardian (2017) conducted a survey of notable companies such as ExxonMobil, Shell, BP, and Chevron, identifying them as part of this group, belonging to investors with the most significant emissions during the mentioned period.

Associativism refers to the process where individuals or groups come together to form associations with shared goals or interests. These associations often play a crucial role in social, economic, and political spheres by promoting cooperation, mutual support, and collective action. Associativism is vital for building social capital and enhancing democratic engagement by fostering a sense of community and shared purpose among its members (International Labour Organization, 2014).

Given the significant impact of companies on global emissions, Associativism can be an important tool in combating climate change. Through associativism, companies can work together with local communities and non-governmental organisations to develop projects and initiatives that reduce dependence on fossil fuels and promote the transition to a low-carbon economy.

The main objective of this research is to analyse how companies, through associativism, can take positive measures for environmental preservation and the prevention of human rights violations. This article will analyse how the companies ExxonMobil, Shell, BP and Chevron have implemented measures for nature preservation and what measures can be adopted by other companies.

The research methodology included a comprehensive literature review and document analysis. Key sources encompassed reports from the International Labour Office (ILO), the United Nations (UN), and the World Commission on Environment and Development (WCED). This approach identified essential themes and practices, providing a solid foundation for understanding the relationship between associativism and climate change. Document analysis, on the other hand, was carried out using internal documents of the companies, including sustainability reports, policies, and manuals.

2. Climate Change and Associativism

Climate change stands as one of the greatest threats to human rights today. The United Nations (UN, 2024) has defined that the effects of climate change, such as intense droughts, water scarcity, severe wildfires, rising sea levels, floods, polar ice melting, catastrophic storms, and biodiversity loss, among other impacts, are affecting the lives of millions of people worldwide. These effects are violating fundamental rights such as the right to life, health, housing, food, and water.

The World Commission on Environment and Development - WCED (1987, p. 2-3) understands that the rights of nature encompass all living beings, ensuring them the right to life, integrity, diversity, and regeneration. These rights reflect the interdependence between humans and nature, recognizing it as a living entity with inherent rights, not merely a source of resources.

The concept of sustainable development emphasises that nations should formulate development strategies with an eye on environmental protection. The Brundtland Report (UN, 1987) also underscores the need for development that satisfies current needs without hindering future generations' ability to meet their own.

The precautionary principle argues that scientific uncertainty shouldn't delay actions to prevent environmental harm. The polluter-pays principle requires states to enforce laws to prevent and remedy business-caused environmental damage. These principles have significantly influenced international environmental protection documents and national legislation, as seen in the 1992 Agenda 21 (UN, 1992).

Agenda 21 tackles major environmental issues and suggests measures for short, medium, and long-term solutions, with the overarching goal of achieving sustainable development.

More recently, the UN has formulated the 17 SDG goals (UN, 2024), which are to be achieved by 2030. This document integrates the economic, environmental, and social dimensions, placing all states and individuals

with a common objective in the protection of the environment for present and future generations. Specifically, ODS 13 focuses on urgent action against climate change. ODS 7 promotes accessible and clean energy. Furthermore, ODS 11 aims to make cities more sustainable and resilient. Finally, ODS 12 encourages responsible consumption and production, thereby reducing greenhouse gas emissions.

All those steps were important to the UN in 2022, through the United Nations General Assembly, to indicate that a healthy environment is a human right. These international scenarios establish international standards to protect the environment for the present and future generations.

Although international documents are primarily directed at states it is crucial to recognize the significant role that associativism plays in protecting human rights and environmental law.

Associativism and sustainable development are interconnected concepts that focus on fostering collaborative efforts and long-term environmental, social, and economic. Associativism is the practice of forming and participating in voluntary associations organised to promote common interests, strengthen community bonds, and advocate for collective rights and interests (Warren, 2001, p. 7).

As a form of social organisation, associativism enables individuals with common interests to unite and advocate for their rights and interests. It involves forming and participating in civic associations and groups that foster social bonds and community engagement (Putnam, 1995, p. 67).

The World Commission on Environment and Development (WCED), in its report "Our Common Future" (1987, p. 16), defines sustainable development as development that meets present needs without compromising the ability of future generations to meet their own needs. It aims to reconcile economic growth, social development, and environmental preservation.

In the context of sustainable development, associativism can be a powerful tool for companies to promote the rights of nature and human rights. Associativism can help companies advocate for human rights, promote sustainable development, and respond to climate change.

With 2.6 million cooperatives, over 1 billion members, and a turnover of 3 trillion USD (Dave Grace & Associates, 2014, p.2), the global cooperative movement is the world's largest organisation. Companies serve a threefold purpose: economically, they create jobs and income; socially, they offer protection and promote equality and social justice; and democratically, they enhance communities and politics (International Labour Office, 2014).

Companies adopting associativism practices to promote sustainability can minimise the environmental impact of their operations, foster social well-being, and strengthen collaboration between companies, local communities, and civil society organisations. These sustainable development practices contribute to a fairer and more sustainable world.

Corporate responsibility stems from the necessity to mitigate and prevent the impacts generated by business activities. However, the active participation of states and civil society is crucial in responding to economic activities conducted within their territories (Ramasastry, 2015, p. 241)

Considering the "Guiding Principles on Business and Human Rights", elaborated by John Ruggie (2008) in the document "Protect, Respect and Remedy", companies have the responsibility to protect human rights as the states has the obligation to protect their citizens.

As emphasised by Silvia and Pamplona (2016, p. 10), the Guiding Principles, especially the second pillar, confer on companies the responsibility for respecting human rights, including the rights of nature, in all their operations. Thus, these principles offer a set of guidelines for companies seeking to adopt good practices for human rights, which emphasises the importance of corporations disclosing their efforts to protect human and environmental rights. Companies must implement measures to prevent and remedy any potential damage their business activities may cause to society.

The crucial role of associative organisations in advocating for human rights in the face of climate change is evident. These organisations play a vital role in promoting climate justice, ensuring the participation of the most vulnerable communities in decision-making processes, and securing access to resources for adapting to the effects of climate change.

Promoting these rights is challenging but represents an opportunity to build a more sustainable and just world. Thus, the rights of nature comprise a set of principles and norms that recognize nature as a subject of rights.

3. Case Studies: Experiences in Associativism

A study reveals that 57 major producers of oil, gas, coal, and cement are responsible for 80% of global fossil Co_2 emissions since the 2016 Paris climate agreement. This group, consisting of state-controlled corporations and multinational companies, are identified as key drivers of the climate crisis by the Carbon Majors Database. Among them, ExxonMobil is the largest investor-owned emitter, contributing 1.4% of the global total, with Shell, BP, Chevron, and Total Energies each contributing at least 1% (Guardian, "100 fossil fuel companies and investors responsible for 71% of global emissions, says CDP study", 2024).

In an effort to mitigate and reduce climate change impacts, these companies are leveraging associativism to engage with local communities and non-governmental organisations, developing collaborative projects and initiatives. This approach promotes responsible business practices and sustainable development through partnerships with various stakeholders.

ExxonMobil ("Advancing Climate Solutions Executive Summary", 2024) collaborates with communities, governments, and local stakeholders to support local needs, promote economic growth, and improve social conditions. It supports these efforts by addressing strategic local priorities globally, focusing on combating malaria, promoting STEM education, and supporting women's economic empowerment.

BP ("Who we are", 2024) and the Environmental Defense Fund (EDF, "About EDF", 2024) announced a strategic three-year commitment to advance technologies and practices aimed at reducing methane emissions in the global oil and gas supply chain. This agreement enables joint projects to test emerging technologies and strategies for better methane management. By partnering with universities and experts, BP has shown that this initiative can significantly reduce methane emissions, benefiting the entire oil and gas industry.

Shell ("Managing our impacts", 2024) operates near communities and prioritises managing its impact on people through international standards and internal benchmarks. In-house experts engage with communities, manage resettlement impacts, and protect cultural heritage. Shell supports Free Prior and Informed Consent (FPIC), an UN-endorsed principle involving open dialogue and good-faith negotiations with Indigenous Peoples. In Peru, Shell funds the "Living Forests Forever" REDD+ project, operated by the NGO Aider, to conserve Amazonian forests and strengthen local businesses, improving the quality of life for Indigenous Peoples (Shell, "Indigenous Peoples", 2024).

Chevron ("Environment, Social, and Governance from A–Z", 2024) engages stakeholders to manage risks and impacts across the business lifecycle, identifying trends, opportunities, and key issues affecting local communities. Chevron collaborates with governments, industry peers, academia, environmental NGOs, and local communities to manage biodiversity and develop environmental solutions and standards. In 2021, Chevron Australia launched an initiative to support nature-based climate solutions, restoring 10 wetlands across Australia to mitigate floods, provide ecosystem services, improve water quality, support native wildlife, and contribute to blue carbon research (Chevron, "Getting Results the Right Way: 2021 Corporate Sustainability Report", 2021).

These examples demonstrate that associativism can engage communities and organisations to mitigate and reduce the impacts

of climate change. Such practices reduce the environmental impact of business activities, promote social well-being, and strengthen partnerships between companies, local communities, and civil society organisations.

4. Conclusion

The preservation of nature and the promotion of human rights are critical challenges in contemporary society, especially in light of the rising global warming indices and their detrimental impacts on both people and the environment. Companies, as prominent economic agents, have a crucial role in fostering a more equitable and environmentally sustainable world. Associativism, defined as the practice of forming and participating in voluntary associations to promote common interests and advocate for collective rights, emerges as a vital tool in this context.

The research highlights the significant contribution of fossil fuels to global greenhouse gas emissions, with major producers like ExxonMobil, Shell, BP, Chevron, and Total Energies being key drivers of the climate crisis. Despite global commitments to reduce emissions, these companies have continued to increase their output, underscoring the need for collective action through associativism to address climate change effectively.

Through the examination of case studies, the article illustrates how companies can adopt associational practices to mitigate environmental impacts and promote human rights. ExxonMobil collaborates with communities and stakeholders to support local needs and promote economic growth. BP's partnership with the Environmental Defense Fund to reduce methane emissions and Shell's efforts to manage its impact on local communities through rigorous impact assessments and support for Free Prior and Informed Consent (FPIC) exemplify responsible business practices.

Chevron's long-standing collaboration with conservation volunteers Australia and its initiatives to restore wetlands and support nature-based climate solutions further demonstrate the potential of associativism in driving sustainable development. These initiatives strengthen partnerships between companies, local communities, and civil society organisations.

Moreover, the United Nations Guiding Principles on Business and Human Rights provide a framework for companies to adopt responsible practices. These principles, especially the second pillar emphasise the corporate responsibility to respect human rights, including the rights of nature, in all their operations. Companies are encouraged to implement measures to prevent and remedy any potential damage their activities may cause, thus ensuring transparency and accountability in their efforts to protect human and environmental rights.

In conclusion, associativism is a powerful approach for companies to engage effectively with communities and organisations, mitigating the impacts of climate change and promoting human rights. By adopting sustainable development practices companies can contribute to building a fairer and more sustainable world, outlined in the UN's 2030 Agenda. The integration of associativism into corporate strategies, guided by the UN's principles, is essential for achieving long-term environmental preservation, social justice, and economic growth.

References

BP. 2024. "Who we are". Accessed June 27, 2024. Link

Chevron. 2021. "Getting Results the Right Way: 2021 Corporate Sustainability Report". Accessed June 26, 2024. Link

Chevron. 2024. "Environment, Social, and Governance from A–Z". Accessed June 26, 2024. Link

Dave Grace & Associates. 2014. "Measuring the Size and Scope of the Cooperative Economy: Results of the 2014 Global Census on Co-operatives". Accessed August 26, 2024. Link

EDF. 2024. "About EDF." Accessed January 16, 2024. Link

ExxonMobil. 2024. "2024 Advancing Climate Solutions Executive Summary". Accessed June 26, 2024. Link

IMF. 2023. "Fossil Fuel Subsidies Surged to Record $7 Trillion." Accessed January 16, 2024. Link .

International Labour Office. 2014. "The Role of Cooperatives in Achieving the Sustainable Development Goals - The Economic Dimension". Accessed June 26, 2024. Link

International Labour Office. World Social Protection Report 2014/15: Building Economic Recovery, Inclusive Development and Social Justice. Geneva: ILO, 2014. ISBN 978-92-2-128660-8 (print). Accessed June 27, 2024. Link

Putnam, Robert D. 1995. Bowling Alone: America's Declining Social Capital. *Journal of Democracy*, Johns Hopkins University Press. January 1995, 6(1), 65-78. pp. 65-78. Accessed 27 June 2024. Link

Ramasastry, Anita. 2015. "Corporate Social Responsibility Versus Business and human rights: Bridging the Gap Between Responsibility and Accountability". p. 241. Accessed May 16, 2024. Link

Ruggie, John. 2008. "Protect, Respect and Remedy: A Framework for Business and human rights." Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. United Nations. Accessed June 27, 2024. Link

Rõnesans Holding. 2023. "The Significance and Influence of Multinational Corporations on the Global Economy." Accessed January 16, 2023. Link

Shell. 2024. "Indigenous Peoples". Sustainability Report 2023. Accessed January 16, 2024. Link

Shell. 2024. "Managing our impacts". Sustainability Report 2023. Accessed January 16, 2024. Link
Silva, Ana Rachel Freitas. Pamplona, Danielle Anne. 2016. "The United Nations Guiding Principles on Business and Human Rights: Were there advances?". p. 10. Accessed May 13 2023. Link
The Conversation Fund. 2024. "Our work." Accessed January 16, 2024. Link
The Guardian. 2024. "100 fossil fuel companies and investors responsible for 71% of global emissions, says CDP study". Accessed January 16, 2024. Link
UN. 1987. "Brundtland Report". p. 223. Accesed May 19, 2024. Link
UN. 1992. "Agenda 21". Accessed May 16, 2024. Link
UN. 2022. United Nations Department of Economic and Social Affairs (UN DESA). "World Commission on Environment and Development (WCED)." Accessed January 16, 2024. Link
UN. 2024. "Fossil fuels – coal, oil and gas – are by far the largest contributor to global Climate Change". Accessed January 16, 2024. Link
UN. 2024. "What are Climate Changes?" Accessed January 16, 2024. Link
UN. 2024. "The 17 Goals". Accessed June 27, 2024. Link
Warren, Mark E. *Democracy and Association*. Princeton University Press, 2001. ISBN:9780691050775.
WCED. 1987. "Our Common Future". Accessed January 16, 2024. Link

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A monster called justice: Female incarceration and motherhood in Mexico's prison system

*Corina Giacomello**

Abstract: *Female incarceration has been growing at a higher rate than the general prison population around the world and Mexico has been no exception: between 2000 and 2022 the country has witnessed an increase of the female prison population by 100%, vs a 60% global tendency. The main cause for women's incarceration is theft, followed by more serious crimes, such as kidnapping and homicide. Most women in prison come from poor households, have basic schooling and are primary or sole caregivers of small children. Despite a growing international and national attention to the issue of women in prison and the impacts of female incarceration on small children, the Mexican prison system is not legally designed nor practically equipped to uphold children's rights and mainstream a children rights' perspective in the adult criminal justice system. This paper aims at analyzing the conditions of female incarceration in Mexico and its impacts on children, with a focus on those living with their mothers. It is based on publicly available quantitative data and literature review as well as on semi-structured interviews and focus groups with women in prison from 2005 onwards and, more recently, with women detained in the country's federal female prison "CPS femenil Morelos" in 2023. It also draws from the lived experience of formerly incarcerated women.*

Key words: *children, female incarceration, Mexico, motherhood, national law of penal execution, non-custodial measures*

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1. Introduction

This paper focuses on two issues and their intersection: on the one hand, the growing phenomenon of female incarceration; on the other, its impact on children with incarcerated mothers in Mexico, from a legislative, quantitative and qualitative perspective.

Since 1980s, with the pioneering work of authors such as Carol Smart (Smart, 1977) and Pat Carlen (Carlen, 1983), feminist approaches to criminology have been shedding light on women's paths to criminalization, the continuum of gender-based violence that they are subject to since early childhood and how the state's faculty to punish reproduces gender stereotypes and different forms of violence, including sexual torture (Corte Interamericana de Derechos Humanos, 2018).

Feminist studies, as well as studies framed in gender studies without self-defining as feminist, unmask gender inequalities in criminal law and the prison system, in its conceptualization, design and everyday operations. They have brought forward women's lived experiences, enriching the spectrum of questions, methodologies and contributions that academic studies generally present (Gelsthorpe, 2020). Since the early works of Rosa Del Olmo (Del Olmo 1998), Carmen Antony (Antony, 2000) and Elena Azaola (Azaola and Yacamán, 1996), studies on female incarceration have been proliferating in Latin America as well. In recent years, an important activism and advocacy work has impacted on how this issue is seen and addressed in the region (WOLA 2016; Youngers, Castro and Manzur, 2020), with a prominent role being played by the Inter-American Court of Human Rights (CIDH, 2023) and the Inter-American Court of Human Rights (Corte Interamericana de Derechos Humanos 2022).

Characterized by a transformative vision aimed at improving women's life, feminist methodologies break with the positivist subject-object approach to scientific research and put women at the center, through attentive listening, active participation and horizontal peer work between the researcher and women with lived experience (Blazquez Graf *et al.,* 2012). Thus, women's own account of their life is woven with a critical analysis of the legal and prison apparatus, the visibilization of intersections in women's processes of criminalization, the multiple forms of violence that are reproduced inside prisons which comprise symbolic, geographic, psychological, emotional, physical and sexual violence-, and the enormous difficulties that the post-release process entails. They also reveal how gender-based inequalities intersect with others, particularly poverty-being the criminalization of poverty an ongoing striking aspect of criminal justice systems around the world and since the becoming of prison as the main feature of state punishment. Age, nationality, race and ethnicity, as well as disabilities, sexually transmitted diseases and substance dependence, also

intersect with gender and at times one aspect can be more prominent than others in defining a person's contact with the criminal justice system and the intensity of it.

In Mexico, the pioneering work of Elena Azaola (Azaola and Yacamán, 1996) showed that incarcerated women proceed mostly from poor households, are primary caregivers of small children and become involved in illicit conducts through their involvement by male partners. Since then, women's profile has not changed significantly, although the education level has increased (INEGI, 2021) from primary to basic secondary education and the offences women are incarcerated for have changed, mainly due to reform in the criminal justice system and the criminalization for drug offences, as well as for a changing criminal landscape; for instance, in the nineties and during the first decade and a half of the 21st century, women were incarcerated mainly for theft and for non-violent drug offences, related to their role as human couriers or to drug dependence (Giacomello, 2013). Currently, whilst theft continues to represent the first cause of incarceration, other offences, specifically kidnapping and homicide, have become the second and third cause for women's imprisonment. However, gender-based violence since childhood and social exclusion are still a staggering feature in women's accounts of their own life and experience of criminalization: not only violence before incarceration, but also during the arrest (Secretaría de Gobernación, 2022) and as part of the prison conditions. Gender intersects with other conditions of vulnerability and discrimination, with indigenous women being more subject to stigma and human rights violations during police detention and while in prison (Hernández Castillo, 2010).

For many women, the experience of incarceration is defined primarily by motherhood[1] and the anguish and the pain caused by not living with their children, not being able to take care of them and constantly being concerned about their wellbeing. Thus, deprivation of liberty becomes a pain of the soul that strikes harder and more constantly than the constriction on the body.

As profoundly and excruciatingly described by *Vale*, a woman who was incarcerated and whose testimony is included in this work (see section 1.1 of this paper):

1 Parenthood encompasses a wide spectrum of identities, attachments, aspirations, fears, possibilities and barriers. Not all people parent in the same way and not all parents choose to be one. In this paper, when talking about incarcerated women who are mothers, I refer to an arbitrarily defined middle point: women who have not necessarily planned each pregnancy nor chosen the person and the moment they reproduced with -possibly having been victims of sexual violence and rape- and who are constrained in the exercise of their parental role by their legal situation and other conditions of vulnerability, such as poor incomes and little tangible connections. I refer to mothers who are emotionally and practically interested in parenting their children in ways that do not put them at risk and that move in favor of their children's holistic wellbeing, despite the difficulties that they may encounter when trying to fulfil their aspirations as mothers.

Moving on to the subject of what it was like to let go of my children, there are no words to describe the situation. You miss out on everything, you miss their first little steps, when they start to talk, their first little tooth, when they get sick, when they finish kindergarten, when they finish primary school.

Every eight days it was seeing them arrive [visiting her in prison], see them leave, see them crying, screaming: "Please mum, I don't want to go. I want to stay with you".

And I think it's not so much the confinement, but the psychological and emotional wear and tear that kills you. It's not the walls, it's not the steel door, no! It's all this emotional wear and tear, thinking all day long: what are my children doing, have they eaten yet, has something happened to them?

All this pilgrimage of anguish, because we all share the same pain, because we are all mothers, and the government forgets this: they forget that inside the prison there are mothers, daughters, wives, sisters and friends.

Worldwide there are an estimated 21 million children with incarcerated parents[2], mostly (93%) with their father in prison. More than 10% of those children live in Latin America and about between 333,946 and 417,433 in Mexico[3]. A tiny percentage live as being *de facto* deprived of their liberty: approximately 19,000 around the world in 2017 (Nowak, 2019, 343), and 325 at the end of 2022 (INEGI, 2023, 50), in Mexico.

Parental incarceration is one of the adverse childhood experiences (Bellis et al., 2015), which are associated with health risk behaviours, chronic diseases, low life potential and premature death.

The effects of an adult referent's deprivation of liberty on their children are multiple and are felt in the economic, psychological, emotional, educational and socialization spheres (Jones and Wainaina-Woźna, 2012; Nowak, 2019). Furthermore, parental imprisonment exposes children to stigma and discrimination by the community, family and society at large (Giacomello, 2019; Murray, *et al.* 2014).

Whilst there is no evidence that the gender of the incarcerated parent directly influences the long-terms effect of parental incarceration on children, maternal imprisonment is more disruptive in the immediate

2 https://inccip.org/statistics/.

3 Information provided by Luciano Cadoni, Program Officer for Children's Rights Protection, Church World Service, Regional Office at Buenos Aires. The estimates were calculated using the methodology presented in Giacomello, 2019: 32 and the data of World Prison Brief in June 2023.

term (Murray et al. 2014). Women tend to be largely abandoned in prison and they must carry out the double role of providers and caregivers. Furthermore, it is mainly other women who, outside prisons, continue to take care of children (INEGI 2021), facing huge economic hardships and difficulties to provide for the children (Red Internacional de Mujeres Familiares de Personas Privadas de la Libertad, 2022).

With regards to prison conditions for women and their children, as shown with more detail when presenting quantitative data, in Mexico they are mostly allocated in mixed prisons, that is in female sections which can be robust structures as well as small, crowded, precarious little houses- attached to a usually larger male prison. Prison conditions will vary depending on the state in which it is located and the size of the prison but, in general terms, studies from the National Commission of Human Rights (2022 and 2023) show that women and children have little or no access to basic rights, such as food, hygiene articles, proper living conditions, specialized services and places for children living with their mothers, medication and health care, etc. They are an invisible and overlooked population amidst a deteriorated prison system. Women are generally invisible and abandoned and children are treated like de facto inmates, considered and dealt with as their mothers' appendices (Giacomello, 2018).

Whereas the increase in the female prison population worldwide has risen awareness and thus pulled in from the margins the studies and recommendations that span from abolitionist perspective, transformative ones and reformist positions- that for decades dedicated scholars and activists have developed on and with incarcerated and formerly incarcerated women, the reality of female detention, at least in Latin America and Mexico, has undergone little changes and maintains patterns of human rights violation and torture, for women and their children (Fuchs and González Postigo, 2021; CIDH 2023). According to a study on sexual torture conducted with incarcerated women in Mexico (Secretaría de Gobernación, 2022), eight out of ten affirmed to have been victims of some type of violence during arrest, including sexual torture.

1.1 Methodology and Contents

The paper contains an analysis of the national legal context on female detention. The legal critical review comprises regulations on women and children and compares them with the international standards. The paper also reviews public data on female detention and the socio-demographic characteristics of incarcerated women. The sources consulted for this component are all compiled by the federal government and are presented in the corresponding section.

The quantitative and qualitative analysis interweaves with the lived experience of three formerly incarcerated women. Before and after their release, they all have participated in public fora, conferences, trainings etc. However, their full name is not identified in this paper, whilst a pseudonym of their choice is used. One of them, Gaby, and the author befriended in 2017 during a project aimed at raising awareness on women in prison for drug offences in Latin America. Back then Gaby was still in prison, sentenced to 10 years imprisonment for marihuana trafficking and was given a non-custodial measure in 2019, after seven years in prison. *Vale* and Luisa, were met by the author thanks to the contact provided by the Aída Hernández Castillo, an internationally renowned Mexican feminist academic and activist. Gaby, Luisa and *Vale* facilitated the training and validated the questionnaire of the research project CF-2023-G-68 "Women deprived of their liberty, maternity and children's rights in Mexico. Comparative legal and empirical perspectives", which is financed by the National Council of Humanities, Sciences and Technologies. Luisa and Gaby also participated in a public seminar organised by the author in September 2023 as part of the same project. The extracts of their testimonies are taken from their participation in two workshops and the public seminar.

Furthermore, in October 2023, the author and her colleague Dr. Alicia Azzolini conducted field work in the federal female prison -"Centro Federal de Readaptación Social Número 16 "CPS Femenil Morelos"-, interviewing ten women who live in the dedicated area for women with children. The full analysis of the questionnaires is still in process; therefore, the paper does not present a full description of the women, their life stories and prison conditions, but only some of their reflections concerning the above-mentioned points of analysis. Because of the prison security level, the interviews could not be recorded, therefore their experiences are not reproduced *ad litteram* but through the researchers' fieldwork notes. The article concludes with a section of final remarks and recommendations.

As a last note, the author would like to highlight that she has been conducting qualitative research in female prisons in Mexico since 2025. Research has always been intended to create scientific knowledge but also as a privileged position from where to advocate for women's rights and the use of prison as a last resort. The life stories of the women that have generously accepted to share their experiences have been listened to attentively and with care, based on empathy as a key to objectivity. In this regard, this paper is written with a methodology of care, which has at its core women's voices and their own account of incarceration.

2. Legal framework: between Blindness and Inconsistencies

The international reference tools on women in prison and children with incarcerated parents are, respectively, the Bangkok Rules and the

Convention on the Rights of the Child (CRC). Whilst the former is not an obligatory document, it is based on an international morally binding consensus as well as on rights which are recognized in binding human rights instruments. The Bangkok Rules establish a clear minimum road map for UN State members on how to organizes and regulate women's first hours of arrest, living conditions inside prisons - with a strong focus on pregnant women and women living with infants and small children-, non-custodial measures and special categories of prisoners, such as girls and foreign women. The Bangkok Rules highlight women's history of victimization, their role as caregivers and that fact that many women in prison do not represent a threat to society. They also emphasize the negative effects of incarceration for women and their children.

The Convention on the Rights of the Child is a landmark in children's rights and human rights more broadly. It unifies civil, social, cultural and political rights and transforms the way in which children are seen from passive recipients of adults' decisions to rights' holders with the capacity and the right to form their opinions, express them and see them influencing their immediate surrounding and society at large. The CRC establishes children's rights in all the pertinent spheres (health, education, participation, family life, leisure, protection from violence, administration of Juvenile Criminal Justice, child labor, etc.) and promotes a dynamic relation between children, family members and the state in which, whilst parents and the state are equally responsible for children's holistic development, children also have a say and the appropriate mechanisms and culture for their empowerment and participation must be guaranteed. Children with incarcerated parents are entitled to all human rights and to all the rights expressed in the CRC and are explicitly referred to in Article 9.4.

Women and children's rights should be guaranteed independently, ensuring that women are not reduced to their parenting roles and that children are not seen as an extension of their parents and "appendixes" of their mothers (Giacomello, 2018). At the same time, when there is no risk for the child's wellbeing under their mothers' care, mothers and children, both those living together and those outside of prison, must be considered and treated as a dyad, given the possibility to thrive and reducing any pain associated with the imposition of disproportionate and cruel custodial measures, in appalling living conditions and inhumane prison regimes.

Unfortunately, that is not the case in Latin America (CIDH, 2023) and Mexico. This section analyses Mexico's law on prisons and reveals its main contradictions and traits, particularly the subjection of children's rights to the prison regime. The ill treatment that children and their mothers are victims of in Mexican prisons is further demonstrated in the following section on data and thorough the lived experience of incarcerated and formerly incarcerated women.

Since its approval in 2016, Mexico's prison system is regulated by the National Law of Penal Execution (Ley Nacional de Ejecución Penal), which is framed within a human rights paradigm set off by an important constitutional reform in criminal justice that took place in 2008 and led to a cascade of legal changes, of which the law under study was a much-expected consequence.

It goes beyond the scope of this paper to provide a full explanation of the reform or the law itself, but it is important to highlight some of its characteristics, before focusing on specific regulations regarding women and children. In the first place, the law implied the derogation of the 32 state laws and one federal law on the matter, unifying the regulation of prisons under national legislation. This happened in 2014 also on procedural matters, with the approval of the National Code of Criminal Proceedings (Código Nacional de Procedimientos Penales) and in 2016, with the creation of the National Law on the Integral System of Juvenile Criminal Justice (Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes).

Previous state laws and the federal law contained regulations only concerning people with a conviction, leaving people on remand (which represent about 40% of the total prison population) in legal limbo.

The current law establishes the functions of an institution created under the above-mentioned constitutional reform of 2008: the courts of penal execution. Before the constitutional reform, decisions on sentence reduction and modifications, such as the granting of a non-custodial measure, were administrative processes led by the prison authority, through "personality studies" and legal criteria: for instance, non-custodial measures were prohibited in the case of drug-related offences. This created the perfect conditions for corruption as well as a totally unbalanced relationship of power, since the authorities in charge of keeping people behind bars were also those invested with the faculty of releasing or keeping them inside. The courts of penal execution (Juzgados de Ejecución Penal) are given numerous responsibilities by the corresponding law, among them, but not exclusively, rule on non-custodial measures, a feature that, whilst still underused in Mexican criminal justice system, led to a reduction of the prison population between 2014 and 2019. This was reversed by a constitutional reform which expanded the scope of mandatory pre-trial detention and by the COVID-19 pandemic.

With the regards to the subject of this study, the Law of Penal Execution contains specific regulations on women and their children, whereas the previous laws basically only established the separation of female and male inmates, and the maximum age allowed for children to live with their mothers.

Currently, there are nine articles that directly address either women in prison or their children, namely Articles 5-separation of prison population by sex; 10-rights of women in prison and their children; 33 protocols, 34 medical care, 36 women in prison with their children, 43 restrictions on solitary confinement, 53 restrictions on transfers of women, 59 visits, 144 prison substitution for home detention for people who are primary caregivers of children up to 12 years old, with disability.

The articles echo some recommendations of the Bangkok Rules and claim the best interest of the child as a leading principle in decisions regarding children with incarcerated parents. The law establishes a whole set of rights for women with children in terms of medical care, specialized personnel, education, provision of goods and services, flexibility of visits' regime for children in the outside, etc., in compliance with international standards. However, not only the law is not implemented in practice, but it contains severe contradictions that reproduce the legal subjection of children to the prison system and the prison regime, through provisions that are clearly against the best interest of the child and the recognition of children as rights holders.

Article 10 establishes that children can live with their mothers until they are three years old and that, in the case of children with disabilities, their stay in prison with their mothers can be extended. The authority in charge of assessing and authorizing children's entry and permanence in the prison center, as well as the prolongation of their stay, is the prison authority, which is also responsible, in cooperation with the other co-responsible authorities (for example, the health and education ministries) to provide the facilities and the living conditions apt for their holistic development.

Article 36, on the other hand, states that only children born during their mother's imprisonment can live in prison with them, thus creating a contradictory legal framework that can be used against infants and small children born before their mother's incarceration. Furthermore, it establishes that the authority in charge of ruling on children's permanence in prison and the extension of their stay is the court of criminal execution.

In both cases, Articles 10 and 36 put decisions which are strictly related to children's rights in the hands of authority who oversee the adult prison population and who most likely do not have, and have no obligation to have, competences on children's matters.

The authority responsible for children in Mexico is the Office for the Protection of Children (Procuraduría de Protección de Niñas, Niños y Adolescentes). Such authority is referred to in the law under analysis, but only as the authority to be notified of decisions taken by other authorities, and not as a body directly involved in the decision-making process. In interviews with women incarcerated in the federal prison, "CPS Femenil

Morelos" they referred that the office of protection was involved in the processes of temporary leave of their children, for example, when they go to spend some time with their father or other family members outside.

The law also determines that visits of children will have no restrictions in terms of physical contact, frequency and time. However, the same Article 10 also determines that the days and times will be established according to the centre's organizational needs. This is clearly the case in the federal prison system, where the day for family visits changes every week: for instance, if a woman is allocated in module 1 of the federal female prison, she will be allowed to receive family visits on a Monday, then the week after on Tuesday, then Wednesday and so forth. Women in this prison receive very little visitors because of the prison location and the high costs it implies, but also because for a normal family, with a regular working and school schedule, it is simply impossible to go on a family visit on constantly changing days. This increases women's isolation and children's separation from their mothers, causing tremendous pain, which is equivalent to state-caused cruel treatment.

Another indicator of the law's blindness in terms of children's rights is Article 144. In summary, this article establishes a set of conditions under which a person can be granted a non-custodial measure, namely house detention -which is quite a harsh one-. One of them is persons who are sole or primary caregivers with no gender limitation of children up to 12 years go or with severe disability that prevents them from taking care of themselves. The limit "12 years old" is totally arbitrary, as is the limit of three years old for children living in prison, as a matter of fact, and its strict implementation through a formal interpretation of the law may put children in danger. The Committee on the Rights of the Child (Committee on the Rights of the Child, 2011) has been emphatic in prompting a case-by-case approach to the issue of children living in prison with their mothers and this should be the case also regarding children living outside.

3. The Numbers of Female Detention in Mexico

This section describes what offences women are incarcerated for in Mexico as well as some of their socio-demographic characteristics, with a focus on their age and income level. It also addresses women's maternal status and their access to goods and free items for their children in prison. The information presented in the following pages is based on three public sources published by the federal government based on data provided by state governments and the federal prison system: the Monthly Notebook of National Prison Statistic Information *(Cuaderno Mensual de Información Estadística Penitenciaria Nacional)* with data from November 2023 (Secretaría de Seguridad Pública y Protección Ciudadana, 2023); the National Survey on Prison Population 2021 (*Encuesta Nacional de*

Población Privada de la Libertad, -ENPOL 2021) (INEGI 2021 and 2021a) and the National Census of State and Federal Prison System 2023 (*Censo Nacional de Sistema Penitenciario Federal y Estatales 2023*) (INEGI 2023).

Since the late 1980s and with more prominence since the 1990s, the female prison population has been increasing in Latin America, with punitive drug policies representing one of the leading causes of such phenomenon. Between 2002 and 2022, the male prison population has increased by 28% (Fair and Walmsley, 2021) vs a soar of the female prison population by 60% (Fair and Walmsley, 2022). In the same period, in Latin America the number of women in prison has grown by 151% and in Mexico by 100%, going from 6,813 women in prison in 2000[4] to 13,286 in november 2023 (Secretaría de Seguridad y Protección Ciudadana, 2023: 3).

In Mexico, women in prison represent 5.68% of the total prison population, a percentage that has not variated in the last years (Giacomello, 2013). According to the national census of state and federal prison system 2023, the main cause for which women are imprisoned, either in pre-trial detention or with a conviction, are property-related, with theft occupying the first position, followed, by kidnapping, homicide and drug-related offences. Theft is also accounted for as the leading cause for the implementation of mandatory pre-trial detention (INEGI, 2023), a criminal justice figure that has been ruled as in violation of the american convention on human rights by the Inter-American Court of Human Rights in a 2023 sentence against Mexico (Corte Interamericana de Derechos Humanos 2023) and that constitutes a major cause for the increase of the prison population since 2019.

The same source and the Monthly Notebook of National Prison Statistic Information show that pre-trial detention in general and mandatory pre-trial detention are used in higher percentages for women (49% and 53% respectively) than for men (40% and 49.9%) and for longer time.

Incarcerated women are mainly young, with over 70% being between 18 and 39 years old and 4,615, that is 35%, are between 18 and 29 years old (Secretaría de Seguridad y Protección Ciudadana, 2023: 44)

About 73% (INEGI, 2021: 25) were working before being imprisoned, although the main employment lies in the informal sector or the economy of care, mainly looking after their children or other family members (CNDH, 2022).

More than 50% used to earn less than 5,500 Mexican pesos a month before being incarcerated, which are equivalent to almost 300 euros at

4 Información disponible en https://www.prisonstudies.org/country/mexico.

January 2024 exchange rate. One in three women used to earn less than 160 euros per month (INEGI, 2021a: 2.53).

In 2021 (INEGI, 2021), 67.8% of incarcerated women reported having underage children and 53% of them had between two and three children, which increases the levels of vulnerability and deprivation they are likely to suffer (INEGI, 2023). Fathers tend to be absent figures when a woman goes to prison and whilst 90% of children while their father is in prison were looked after by their mother, only 30% of women in prison reported the father of their children as the person responsible for their case. It is mainly grandparents, and grandmothers (CNDH, 2022) that become the main caregivers. This has a cascade of implications, which span from economic hardships to health issues and less supervision of older children. Children may be exposed to physical and sexual violence, discrimination in their family, school and community, little access to food and clothing, as well as child labor. For mothers, the thought of what their children are living outside is a greater pain than incarceration.

Such was the case for Luisa, who was imprisoned for 25 years for kidnapping. As many other women before and after her, the case against her was based with little or no evidence and she was subject to torture by the security forces who arrested her. Luisa was detained in 1988. She had a son who was eight years old and another who was 11 months old. She was tortured for four days before being taken before the prosecutor. The accusation was based on the alleged declaration of a ten-year-old child victim of abduction who said that Luisa was responsible for feeding her and taking care of her while she was held captive. The child, now an adult, had spoken publicly about the case and said that she had never met Luisa in her life.

However, Luisa spent 25 years in prison and is now fighting a legal battle to have her innocence recognized. In Luisa's words:

"I was detained on January 6th, 1998: I was in a restaurant when suddenly I saw some hooded men. They took me to a safe house, they tortured me for 4 days, they detained me on the 6th and handed me over to the public prosecutor's office on the 10th. Torture was the most difficult thing you can imagine. Apart from the physical torture, the sexual torture, the psychological torture, they said they had my children, they even had a child there in the safe house crying, they said they were my children, so from that moment on it was hell for me. I was handed over on the 10th to the attorney general's office and there the police were still torturing me, saying that they had my children and telling me to sign a paper so that they would let me go, they would hand them over to me, right? Since they told me that they already had them and that if I signed a paper, they were going to give them to me, I signed so many papers that day, I don't know how many, but I got prison instead of my children.

I didn't have a lawyer; they never gave me a lawyer to defend me. They sentenced me to 30 years for which I spent 25 years in prison.

So, you can imagine the arbitrariness I have gone through. To spend 25 years for an alleged kidnapping, for an accusation that a child made against me, and today she says that this was a lie, that she never accused me, that she doesn't know me. Can you imagine what I have lived through? What have I gone through? The most painful thing was leaving an 11-month-old child and an 8-year-old. It's a pain that I don't think I can recover from, because I left prison on February 2nd 2023 and one of my children is now 33 years old and the other is 26 years old.

I am a stranger to them; it was and is the most difficult thing that a mother can live through in prison: to be separated from her children. The State, the authorities, the competent people who are supposed to impart justice do not know the irreparable damage they do to you as a mother when you have small children."

Gaby has a son with a severe disability, who makes him completely dependent on her. She trafficked marihuana to pay for medical studies for her son and, when incarcerated, she took him with her. However, the prison system and the judiciary did not put her in the conditions of providing for both her son's health and the possibility to live with her in prison, let alone to grant her a non-custodial measure. She took the decision to allocate him to a public institution where they could give him medical treatment. At the same time, her youngest daughter she was about two years old and her brother about seven, who was also living with Gaby, her mother and her son in prison, moved out to live with her aunt and uncle. For Gaby it was a tremendous pain: she did not want to be separated from her children and worried immensely for them, but she also felt guilty for holding them in captivity they were not responsible for. In her words:

"Insomnia became my companion at night. The pain and loneliness of not being with my children became my torment: did I do right or wrong? Were they hungry? Were they cold? My life changed, but I also wanted to get out of prison to be with them, so I did everything I could to show good behavior.

I had been sentenced to 10 years in prison for transporting cannabis, but I was released after seven years. Finally, the long-awaited freedom came, and I was reunited with my children. But now I faced a new challenge: punishment and discrimination from society for being both a single mother and a former prisoner, with no possessions, as I had lost everything. Now I face another challenge in my life, but this time I am not alone, but with my children."

Gender mandates and the eternal culpabilization of mothers, exacerbated by stigma against women in prison, intrinsically considered as unfit and unworthy of motherhood, are reinforced by prison personnel. As reported by Gaby, mothers in prison were constantly brainwashed so that they would send their children away. Children are a nuisance and a risk for prisons; but since they cannot be legally forbidden to live with their mothers, psychological abuse, deceit and shaming are used instead (CNDH, 2022, 184-85):

"The reality is that in many cases there is a prevailing prejudice on the part of public servants and/or state agents who "interpret" the best interests of the child by considering that being in a center is harmful to children, that there are no conditions for them to be with their mothers and that is why they should spend as little time as possible with them and be released as soon as possible, ignoring the weighting of the right of children to receive maternal care, as well as the right of women to exercise their maternity, as this is a valid right even if they are PL (Persons Deprived of Their Liberty).

Opinions ranging from "PL women should not have children" are reproduced, to the point of committing serious violations of human rights, especially reproductive rights, as occurs in the centres in Baja California, where it was documented that they are practically deceived by being told that pregnancy is "not allowed" and those who are pregnant are forced to hand them over to the institutions in case a family member is not found as soon as the child is born."

Another implication of female incarceration is that families have less economic possibilities to visit the mother in prison, because of the time, the administrative practices and costs that this implies. The configuration of the prison system, its geography and intensity impact directly on the continuity, interruptions and intermittencies of an incarcerated woman's connectivity with her children and vice versa. In Mexico, prisons are places of severe precarities, poor infrastructure and insufficient services for all people. However, women are particularly vulnerated in most of the centres to which they are allocated.

Out of a total of 284 prison centres, only 22 are exclusively for women: a federal one, in the hot State of Morelos, in the middle of the country, next to Mexico City, and 22 state ones. Not all Mexican states have a women-only prison: some states (such as Mexico City and Coahuila) have more than one, but 15 states have none. Therefore, many women are allocated in 94 mixed state centres, that is in male prisons that have a specific female section: this can be a separate building, dedicated dorms, little houses or other forms of usually precarious constructions. Whilst in theory women only centres should provide better prison conditions than female sections in predominantly male centres, a study of the National Commission of Human

Rights (CNDH, 2022) on female detention as well as the annual national assessment of prison supervision (CNDH, 2023), indicate that women only and mixed centres alike present numerous irregularities and deficiencies in terms of infrastructure and service provision for both women and their children. Women and their children suffer all kinds of deprivation: in terms of nutrition, health and access to medication, specialized health and pedagogic personnel for children, adequate and dedicated spaces for mothers and their children, access to educational materials and toys, clothing, diapers, and so on. Incarcerated women, who dedicated themselves to the care of their children before incarceration, look after their children 24/7 inside prison, with only four states having educational facilities for the children living in prison with their mother (CNDH, 2023, 188).

The federal female prison CPS 16 Morelos is a semi-privatized complex, a monster of cement and electric wire, inappropriate for the flourishing of life and the preservation of women's wellbeing. It lies in an extremely hot region, and even if women were not confined to their cell for most of the day, they probably would not walk out their module anyway. The place is a huge emotional grave, a place for the death of the soul and, in recent times, for the death of the living: between July and November 2023, eight women died, presumably by suicide (Guillén, 2023). Non-governmental organizations and family members have denounced the living conditions, the lack of medication and the terrible quality of the food which is provided by a private company. The mothers who participated in the interviews did so mainly because they hoped to find in the researchers a channel to share what they are going through.

Children and their mothers are allocated in a dedicated area. Usually, the number of children is low, hardly more than 10, and they are small, between one and two years old. Children's lives are not conducted under the supervision of specialized personnel while their mothers can work, study, do sports, etc. but under the close watch of prison guards and prison bars. Children and mothers are 24/7 together, in a confined space: the area is huge and even colorful in comparison to the constant grey and blue of the prison's walls and electric doors but is totally prison like. Children's schedule is not free, they cannot go out when they please and have no access to education or stimulation. Medical care is scarce and, according to their mothers, there is no pediatric medication available: children are given medication for adults in reduced doses.

Women are isolated from their families because, being the only federal prison in the country, women from all Mexico are taken there and Mexico is a huge country: most families have to fly to get there and, unless women and their families come from a legal or illegal middle-middle high economic sector, it is unlikely that their family members can afford the trip and take the women's children as well. This adds to the issue of family visits' day changing every week.

While the National Law of Penal Execution establishes that women and their children will have free access to goods and services for their holistic wellbeing and development as well as specialized areas and care, the truth could not be further from the norm. Once again, the federal prison constitutes an exception, since the prison does provide women and their children with basic goods, such as items for personal hygiene, toilet paper, diapers, body cream etc. although, according to the women interviewed, in insufficient amounts. But in the rest of the country and acknowledging that there may be interesting experiences which are not known to the author, it is accurate to say that most women in prison must provide for themselves and their children.

In the National Survey on Prison Population 2021, women living in prison with their children were asked if they had access to a series of goods and services (INEGI, 2021a, 6.77). With regards to medical services, 77.4% answered affirmatively, 56.9% said that they received medication, 34% diapers, 17.9% articles of personal hygiene and so on. However, when asked what services they had to pay for, some of the answers were: medication (71.3%), medical services (61%), diapers (60%), etc.

Since basic items in prison tend to be expensive and not always available, women depend on their families to enter goods for them, particularly medications and specific items for their children. This leads to a spiral of poverty, dependence on visitors that come from poor households and the state's power to facilitate, inhibit or block the contact of the prison population with their families.

In frank terms, based on years of research, field work and long lasting relations with formerly incarcerated women and family members of people in prison, it is not an exaggeration to say that Mexican prison system relies on the work and economic efforts of family members, mainly female partners and older women, who chase lawyers -so that they do their job, they provide emotional support, food, blankets, mattresses, work materials, cloths and so on to their incarcerated family members, while looking after their children.

Women in prison have access to little or no formal employment and they support themselves and their children through self-employment, such as working for other fellow women, cooking, cleaning, etc. Educational opportunities are scarce and prison rehabilitation programs offer activities that do not provide a solid base for a subsequent economic reintegration and often reproduce gender stereotypes.

The children living in prison with their mothers are legally and de facto subject to the same legal, institutional and concrete, everyday restrictions their mothers have. For example, foods that are prohibited to inmates such as pineapple are forbidden for children as are the number of pieces of clothing that they can keep.

As explained by Gaby:

"The 3 years that I was with my son, living together and struggling, trying to survive in that place, and in cold weather: there is no access to many blankets, there is a limit to the clothes, there is a limit to the blankets. For example: we can only have five changes of clothes, we cannot have more clothes, and we cannot have more blankets, and we cannot cover the doors and the windows in cold weather. It was martyrdom.

"And, on the other hand, there was also the limitation of food: we couldn't bring in a certain type of fruit for our children because they ferment, and they (other inmates) can make alcoholic beverages with them. As a mother, I would never in my head think of doing anything illegal inside, because what I want is to get out, what I want is to behave well so that I can be released as soon as possible and to be able to be with my children.

So that was also one of the terrible sufferings, that there was no access to food, that everything had to be limited, everything had to be just a little bit, and fruit was forbidden, we couldn't have access to food for our children."

Children's possibilities to know the outside world are confined to their mothers' and their families limited economic and social capital, with no public policy addressing the right to development, education, health and recreation they are entitled to. Phone calls with and visits as well as the possibility to work are used as tools for retaliation if women claim their rights.

As explained above, since each prison center is almost a prison system per se, some realities may not coincide, but a recognizable trend is that Mexican prisons are not legally designed nor materially equipped for to fulfil the State's obligations with women in prison and even less so with their children.

The challenges for women who are mothers are enormous, both when they live with their children in prison as well as when their children live or live outside, with little or no support from the state:

In the case of children who live with their mothers, the prison system guarantees quality care only in some entities. In the case of those who are separated, responsibility is generally transferred to the family they stay with, and others are institutionalized, In both cases, the Mexican state does not lose its responsibility to guarantee the care and protection of children, as well as to provide information on the conditions of the children to their mothers and fathers; however, the reality is that in many cases, their mothers never hear from them again, as there is no timely follow-up to guarantee full respect for children's rights (CNDH, 2022, 180).

4. Final Remarks and Recommendations

A monster called justice is an expression coined by *Vale* during one of the workshops. She did not talk much about her case, but she said that, like many other women, she was incarcerated for her partner:

"The problem was with my children's father because after being a victim I became a victimizer.

These are things that mark you because, I think that out of ten women in prison, eight are innocent and the ten of us were or are there because of their intimate partner. It was very clear to me that in prison there are people who don't have the money to pay for their freedom.

Women are more attacked, discriminated against, my stay in prison was very difficult, the prison guards, the system inside, the norms, the rules and talking about motherhood, what was it like in prison?

I don't find the words to describe the pain of having your whole life taken away from you, of having everything you know taken away from you from one day to the next, it's something totally, I can't find the words.

One day you are with your family and the next day you are already in prison and the next day you have been sentenced to so many years, because the judges give you years as if they were giving you sweets, so from my perspective, if you ask me at this moment if there is social reintegration, I can tell you that there is not, I can really tell you that no, there is no social reintegration within the prisons, I experienced it firsthand. Why is there no social reintegration? Because the system itself puts obstacles in your way, it hinders you, because the real social reintegration should be here on the outside."

Female incarceration is a consequence of an ongoing victimization of women through gender-based violence since their childhood. Whilst this does not limit their agency, it creates specific conditions that often lead them to be criminalized by the state. A state which represents a further cause of violence and human rights violations, including torture.

Blindness, inconsistencies and the threat or the exercise of violence in multiple forms characterize the state's relation with criminalized women. This has uncountable effects on them and their children, and the outcomes are usually seen as a failure of their families, namely their mothers. Women are blamed for leaving their children or for keeping them in prison. But prison conditions are not women's responsibility, but rather an additional punishment and form of degradation. They are made feel that they and their children deserve poverty and suffering and that they brought it upon themselves. As a federal judge told Gaby when

she asked for a temporary permit to accompany her child to therapy so that he could continue to live with her in prison: "Crime is one thing, and children are another. You should have thought about your kids before committing a crime".

This paper argues that children are legally and concretely de facto deprived of their liberty in prison centres that are completely adult-centric and that, while proclaiming repeatedly the best interest of the child as a leading principle, subjugate children and their mothers to cruel treatment and structural deprivations. The judicial sentence becomes a daily punishment of the body and the soul, putting children's development at risk and creating for mothers a profound sense of guilt because, even if they want to be with their children, they feel that they should let them go and that they are being bad mothers for keeping them locked in.

Legal reforms must be made with the aim in mind of reversing the trend of female incarceration and eradicating the incarceration of pregnant women and women with small children, to start with, as a progressive move towards a use of incarceration as a measure of last resort. Prison conditions in Mexico do not seem to possibly undergo changes in the near or distant future. This jeopardies children's wellbeing and creates room for arguments in favor of separation for their mothers, despite the empirical evidence (Nowak, 2019) that it is recommendable that children stay with their mothers during their first years of life. It is thus in the realm of non-custodial measures that better solutions can be found.

Mexican criminal justice system requires some urgent and basic changes, among them, the abolition of pre-trial detention, which is used indistinctively and constitutes a violation of due process. In line with international standards, non-custodial measures should be privileged in the case of pregnant women and women with dependent children at all stages of the process and with no mandatory exception for specific offences. The best interest of the child should be legally and operationally mainstreamed in judicial resolutions when they concern persons who are responsible for dependent children. Children are to be treated as rights' holders and citizens whose wellbeing is a state responsibility, and not, as it is currently the case, as an extension of their parents (Constitutional Court of South Africa, 2007, 11). Mainstreaming the best interest of the child in judicial resolutions concerning their parents implies, at least, that the consequences of incarceration are weighed against the impacts on the children.

Whilst legal and judicial changes are urgently needed to reduce the growth of female incarceration and its impacts on children, non-custodial measures are not sufficient unless, as outlined by the Bangkok Rules, they

are not matched by interventions that address the needs and vulnerabilities that women often face before their criminalization.

5. References

Antony, C. (2000). Las mujeres confinadas: estudio criminológico sobre el rol genérico en la ejecución y la pena en Chile y América Latina. Santiago, Chile: Editorial Jurídica De Chile.

Azaola, E., Yacamán, JC. (1996). Las mujeres olvidadas: un estudio sobre la situación actual de las cárceles de mujeres en la República mexicana. Mexico City: El Colegio de México. Comisión Nacional de los Derechos Humanos.

Bellis, MA., Ashton, K., Hughes, K., Ford, K, Bishop, J., & Paranjothy, S. (2015). "Welsh Adverse Childhood Experiences (ACE) Study: adverse childhood experiences and their impact on health-harming behaviors in the welsh adult population". Cardiff, UK: Public Health Wales NHS Trust. Link (last visited 26 August 2024)

Blazquez, G., Norma, FP., Fátima, and Ríos E., Maribel, C. (2012). Investigación feminista. Epistemología, metodología y representaciones sociales. Mexico City: Universidad Nacional Autónoma de México. Centro de Investigaciones Interdisciplinarias en Ciencias y Humanidades. Centro Regional de Investigaciones Multidisciplinarias. Facultad de Psicología.

Carlen, P. (1983). Women's imprisonment: a study in social control. London: Routledge & Kegan Paul.

CIDH. (2023). Mujeres privadas de libertad en las Américas. Washington D.C.: CIDH-OEA.

CNDH. (2022). Informe Diagnóstico sobre las condiciones de vida de las mujeres privadas de libertad desde un enfoque interseccional. Mexico City: CNDH.

CNDH. (2023). Diagnóstico Nacional de Supervisión Penitenciaria. Mexico City: CNDH.

Committee on the Rights of the Child. (2011). "Committee on the Rights of the Child, 30 September 2011. Report and Recommendations for the Day of General Discussion on "Children of Incarcerated Parents".

Constitutional Court of South Africa. (2007). "Case CCT 53/06 [2007] ZACC 18. M versus The State". Johannesburg: Constitutional Court of South Africa.

Corte Interamericana de Derechos Humanos. (2023). Caso García Rodríguez y Otro vs. México. Sentencia de 25 de enero de 2023. Resumen oficial emitido por la Corte Interamericana. San José, Costa Rica: Corte Interamericana de Derechos Humanos.

Corte Interamericana de Derechos Humanos. (2022). "Opinión Consultiva Oc-29/22 de 30 de mayo de 2022. Solicitada por la Comisión Interamericana de Derechos Humanos. Enfoques Diferenciados Respecto de Determinados Grupos de Personas Privadas de la Libertad". San José, Costa Rica: Corte Interamericana de Derechos Humanos.

Corte Interamericana de Derechos Humanos. (2018). "Caso Mujeres Víctimas de Tortura Sexual en Atenco Vs. México. Sentencia de 28 de Noviembre de 2018 (Excepción Preliminar, Fondo, Reparaciones y Costas)". San José, Costa Rica: Corte Interamericana de Derechos Humanos.

Del, O., & Rosa, C. (1998). Criminalidad y criminalización de la mujer en la región andina. Caracas: Programa de las Naciones Unidas para el Desarrollo.

Fair, H., & Walmsley, R. (2021). "World Prison Population List (thirtheenth edition)". London: World Prison Brief. Institute for Crime & Justice Policy Research.

Fair, H., & Walmsley, R. (2022). "World Female Imprisonment List (fifth edition)". London: World Prison Brief. Institute for Crime & Justice Policy Research.

Fuchs, MC., & Postigo, LG., dirs. (2021). Sistemas penitenciarios y ejecución penal en América Latina. Una mirada regional y opciones de abordaje. Valencia: Tirant Lo Blanch. Centro de Estudios de Justicia de las Américas. CEJA, KONRAD-ADENAUER-STIFTUNG E. V.

Gelsthorpe, L. (2020). "Feminist perspectives in criminology: early feminist perspectives". In The Emerald Handbook of Feminism, Criminology and Social Change, edited by Sandra Walklate, Kate Fitz-Gibbon, Jude McCulloch and JaneMaree Maher, 17-33. Leeds, England: Emerald Publishing. Link (last visited 26 August 2024)

Giacomello, C. (2013). Género, drogas y prisión. Experiencias de mujeres privadas de su libertad en México. Mexico City: Tirant Lo Blanch.

Giacomello, C. (2018). Niñas y niños que viven en prisión con sus madres. Una perspectiva jurídica comparada. Mexico City: Suprema Corte de Justicia de la Nación.

Giacomello, C. (2019). Niñez que cuenta: El impacto de las políticas de drogas sobre niñas, niños y adolescentes con madres y padres encarcelados en América Latina y el Caribe. Buenos Aires: Church World Service. https://www.cwslac.org/nnapes-pdd/docs/Estudio-Regional-Ninez-que-cuenta-web.pdf. Link (last visited 26 August 2024)

Guillén, B. (2023). "El Cefereso 16, un cementerio para vivas: alarma en la cárcel federal por una ola de suicidios". El País.

INEGI. (2021). "Encuesta nacional de población privada de la libertad 2021. Principales resultados". Mexico City: INEGI.

INEGI. (2021a). "Encuesta nacional de población privada de la libertad 2021. Tabulados básicos". Mexico City: INEGI.

INEGI. (2023). "Censo Nacional de Sistema Penitenciario Federal y Estatales 2022. Presentación de resultados generales". Mexico City: INEGI.

INEGI. (2023). "Comunicado de prensa núm. 420/23, 26 de julio de 2023. El INEGI presenta los resultados de la Encuesta Nacional de Ingresos y Gastos de los Hogares (ENIGH) 2022". Mexico City: INEGI.

Jones, AD., & Wainaina, W., Agnieszka E. (2012). Children of Prisoners. Interventions and mitigations to strengthen mental health. Huddersfield: University of Huddersfield. Link (last visited 26 August 2024)

Murray, JB., Catrien CJH., Farrington, David P., & Loeber, R. (2014). Effects of parental incarceration on children. Cross-national comparative studies. Washington D.C.: American Psychological Association.

Nowak, M. (2019). The United Nations Global Study on Children Deprived of their Liberty.

Rosalva Aída Hernández Castillo, (Coord) *Bajo la sombra del guamúchil. Historias de vida de mujeres indígenas y campesinas en prisión*, 2010. Mexico City: CIESAS. Centro de Investigaciones y Estudios Superiores en Antropología Social IWGIA. Grupo Internacional de Trabajo sobre Asuntos Indígenas

Secretaría de Gobernación. (2022). Diagnóstico nacional sobre tortura sexual cometida contra mujeres privadas de la libertad en México. Mexico City: Secretaría de Gobernación.

Secretaría de Seguridad Pública y Protección Ciudadana. (2023). "Cuaderno mensual de información estadística penitenciaria nacional. Noviembre 2023". Mexico City: Secretaría de Seguridad y Protección Ciudadana.

Smart, C. (1977). Women, crime and criminology: a feminist critique. London: Routledge & Kegan Paul.

WOLA. (2916). Women, Drug Policies, and Incarceration: A Guide to Policy Reform in Latin America and the Caribbean. Washington D.C.: WOLA. IDPC. Dejusticia. CIM-OEA.

Youngers, C., García CT, & Manzur, M (Kiki). (2020). "Women behind bars for drug offenses in Latin America: What the numbers make clear". Washington D.C.: WOLA.

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The State of Exception: An insight into its theoretical background

Dilan Ates[*]

Abstract: *This article aims to carry out a critical examination of the state of exception within the context of modern constitutional state, to shed light on this legal anomaly that entails the suspension of rights, freedoms, and norms. The state of exception, wielding the power to annul the fundamental rights and freedoms enumerated and enshrined before it, finds its form in almost all manifestations of modern law (constitutions, laws, international law, conventions). The ambiguous position of the concept has widened the theoretical debates that accompany it. This article is an attempt to elucidate the theoretical discussions revolving around the state of exception: namely Carl Schmitt, Giorgio Agamben and Judith Butler's perspectives. The central objective is to discuss one of the aspects of the intricate relationship between modern law and sovereignty.*

Key words: *state of exception, emergency, subject of rights, suspension of the norm, rule of law*

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1. Introduction

Modern constitutional states increasingly invoke the state of exception in an extensive, prolonged, and penetrative way. The state of exception manifests itself when the sovereign authority assumes a superior position to the legal system, leading to the suspension of established norms and the annulment of fundamental rights and freedoms. This occurrence is typically triggered by a threat that is deemed to pose a significant danger to the nation's very existence. Therefore, the proclamation of a state of emergency and the suspension of the norm are justified on grounds of safeguarding law and order. However, practical instances often reveal that the suspension of the norm not only creates a new form of the law itself but also precipitates a legal vacuum, thereby paving the way for setting up a violence[1] scene especially for the subject of rights.

A prevailing argument asserts that contemporary governments, often leveraging a discourse of perpetual crisis, exploit both genuine and/or fictitious crises to suspend the norm. The normalisation of the state of exception, whether manifested as a state of emergency or a state of siege, is a growing phenomenon, frequently observed in responses to migration, terrorist attacks, natural disasters, civil wars, and various other scenarios. This issue significantly curtails the exercise of fundamental rights and freedoms, thereby eroding the safeguards that should be afforded to individuals as subjects of rights.

Therefore, in this article, I will attempt to explain the reasons for such a widespread application of the state of exception based on the perspectives of Carl Schmitt, Giorgio Agamben, and Judith Butler's perspectives, as they offer an opportunity for us to approach this lacuna inside the law from a critical point of view. Schmitt, as a Nazi jurist, views the exception as a miraculous tool to navigate the limitations of constitutional democracies. In contrast, Agamben explores the concept of exception itself, unravelling contemporary manifestations of sovereignty. Essentially, for Schmitt, the exception serves as a means to achieve his central political objectives, whereas Agamben undertakes a genealogical study of the concept. Judith Butler focuses on the state of exception, arguing that it creates a hybrid structure that combines governmentality as a technology of power with sovereign power.

2. Introductory Remarks on the Relationship Between Law and the State of Exception

While my primary focus will revolve around these three figures, the state of exception has been largely deliberated within the existing literature

1 In this study, 'violence' does not only refer to an aggression that is often suggests a physical action. I consider 'Gewalt' in German conveys the best meaning for the concept as it refers to a kind of violence that grows through the elements of the legal system and connotates as the "(public) force, (legitimate) power, domination and authority" (Larsen, 2013).

around the legalist and extra-legalist paradigms. The answer to the question of what a duly constituted government should do when faced with a crisis threatening its existence is usually divided into those two camps. In succinct terms, legalists posit that crises imperilling the state and constitutional order must be addressed or resolved using means and solutions strictly derived from the legal framework. Although responses may differ from peacetime or normal circumstances, they must always fall within constitutional limits, ensuring that the crisis does not compromise the constitutional state's legitimacy. Only in this way can the constitutional state preserve its existence and survive the crisis still (Scheppele, 2009). Extra-legalists, on the other hand, inspired by the necessity theory, contend that serious crises that jeopardise the existence of the state can only be averted by means beyond the law. They assert that norms, designed for predictability and governance under normal conditions, inevitably prove insufficient and dysfunctional in times of chaos, aligning with the maxim: "Necessitas legem non habet" [Necessity does not have a law] (Agamben, 2008: 9).

Although this conceptual distinction provides us with theoretical latitude to some extent, its inadequacy becomes apparent when a discussion is conducted at the empirical level. Today, the state of exception is extensively codified in the written statutes of many nations: albeit under diverse nomenclatures and employing different methodologies (e.g., state of siege in the French tradition, state of emergency in the German constitution, etc.) (Özbudun, 1996; Scheppele, 2009). Moreover, it has also found a considerable place in international law. Consequently, the question shifts from the mere inclusion of the state of exception in legal frameworks to a more nuanced inquiry: Does the fact that it has been integrated into law, regulated by constitutions and legislation, imply that states and sovereign entities consistently adhere to these regulations and operate within the confines delineated by these legal frameworks?

Examining the most telling example of 9/11, it becomes evident that the matter lies not in whether the state of exception derives its legitimacy from the jus scriptum, but rather in the potential scope of arbitrary executive authority. In the aftermath of 9/11, the global stage witnessed an array of excessive and arbitrary measures, the suspension of human rights conventions, and substantial infringements on rights, particularly in the UK. This unfolding of events underscores that the state of exception, while ostensibly grounded in legal frameworks, has, in practice, forged its legal order. Consequently, this has precipitated the erosion of the rule of law regime.

In essence, the issue lies not in the preservation of the legitimacy of the constitutional state in responding to crises within the legal frameworks, but rather in the unprecedented expansion of executive powers, rendering them unpredictable and capable of creating the law of exception. That

is to say, the distinction between legalists and extra-legalists and their respective oppositions becomes blurred in practice. The core predicament stems from the intertwining of this rights-suspending situation with the legal framework, sovereignty, and its justification derived from executive discourse. Rather than a categorical notion, it should be underscored as a phenomenon emerging from within the law. The examination should focus on the 'withdrawal' of the law, making room for such violence. That is why I believe it is important to elaborate on the theoretical underpinning of the state of exception and to shed light on the locus of this ambiguous phenomenon, i.e., its controversial position in the modern constitutional state and its relationship with sovereignty and law.

3. Sovereign, Decision, and the Law: Carl Schmitt

If the state of exception presents itself as an anomaly within the legal structure of the modern constitutional state, Carl Schmitt regards this anomaly as a possibility to resurrect the individual sovereign and restore its indivisibility once more. For this very reason, according to him, it amounts to a miracle. In doing so, he assigns an autonomous meaning to the act of *decision* as the fundamental manifestation of sovereignty, as his famous quote displays: "Sovereign is he who decides on the exception" (Schmitt, 2005).

In exploring the nexus of political theology, sovereignty, and the state of exception, Schmitt mainly criticises liberal constitutional doctrine which includes neo-Kantian elements. Influenced by Hobbes, he seeks to consolidate sovereign power, particularly in times of crisis threatening the state's existence. As a Nazi jurist, his objective is to transcend the constitutional limitations of the modern state structure for the sake of the continuity of the Weimar State. Schmitt challenges the views of some liberal constitutional theorists and, notably, examines the ideas of Kelsen, one of the neo-Kantian rationalist jurists. According to Kelsen's liberal doctrine, the state is neither the founder nor the source of the legal order (Schmitt, 2005: 18), it simply enacts law and does not interfere with beyond. Liberal thought, which places the state in an apolitical and neutral position, thus either ignores the problem of sovereignty or tries to evade it by negation (Schmitt, 2005: 23). Therefore, the liberal approach puts the norm at its centre and builds the entire legal system on norms. Neither sovereignty nor the exception, in which sovereignty manifests itself most clearly, can find a place in this legal order; jurists of this system completely exclude the exception, and hence the decision. However, according to Schmitt, the legal order has two pillars: norm and decision. Norm can never be applied to chaos or crisis, since it can only foresee the normal and undisturbed situation. Therefore, by its very nature, it cannot contain or subsume the exception. In a chaotic situation, where the norm cannot be the answer, there is a decision arising *ex nihilo*. Schmitt assigns an autonomous status to the act of decision, and it is a constitutive element.

According to him, every legal order is based on a decision (Schmitt, 2005: 10) and this very decision brings us to the exception. Schmitt (Schmitt, 2005: 36-40) thinks that the common definition of sovereignty as the supreme and primary ruling power is not functional, and prefers to construct an account of sovereignty in concrete cases, that is, in the event of a dispute, based on who will decide on issues such as the public and/or state's interest, public security and order, public welfare, etc (Schmitt, 2005: 6). However, the exception is not a catch-all concept that comprises of all kinds of security measures as already mentioned, but its decisive dimension is that of granting unlimited power to the authority. Thereby, a sovereign appears, who can suspend the entire existing order and manifest itself with its new order. The preeminence of the sovereign as an authority is not to be erased, but to prevail, as he realises himself through the decision on the exception.

In this respect, the sovereign entity or agent is the one who decides 1) whether there is an emergency and 2) what measures to be taken to eliminate it. That is to say, it is the sovereign who determines which emergency threatens the survival of the state and order, and to what extent, and at the moment of the decision, it comes to play the role of the guardian of the legal order.

Then where exactly is the guardian of the law located in the law? In *Political Theology*, Schmitt puts it this way: "By making such a decision, the sovereign is on the one hand outside the normal legal order, but on the other hand, since it is in his hands whether the constitution can be suspended in its entirety or not, he is at the same time inside this order" (Schmitt, 2005: 7). In other words, it is an authority that is situated both "here and there", an authority that can determine its position according to the urgency of the situation, and it is both legal and beyond legality. It is right inside the legal system because it can create its order, it is beyond legality because it can suspend the rule of law, constitution, rights, parliament, and/or legislation. This is the area where Schmitt posits law (positive law in the literal sense) as a subordinate entity compared to the political one, so politics prevails over the law. As supra, Schmitt aimed to restore the sovereign's power and he saw this possibility at the moment of deciding on what constitutes the exception. The rule of law could therefore be bent in the ruler's favour at the moment of suspension.

4. Exception-as-a-rule: Giorgio Agamben's Theory on the Suspension of Law

Whereas Schmitt is considered to be the most controversial theorist of the state of emergency in the 20th century, the new angle Giorgio Agamben has brought to the conceptualisation of the state of exception should also be emphasised. Agamben's theory on the state of exception bears reflexions on Benjamin's concept of law-making violence and Foucault's biopolitics

thesis and situates them on a different trajectory; one of the theorists he is undoubtedly most influenced by is Carl Schmitt. I will be focusing on the last of his trilogy: state of exception to unveil his perspective.

Agamben considers it to be a great missing element of the legal doctrine that, after Schmitt, public law has not addressed the concept of the state of exception comprehensively and critically. He argues that the state of exception has been treated by jurists as a "*quaestio facti*", whereas it is a "genuine juridical problem" (Agamben, 2008). The absence of such an assessment, that is, the confinement of the state of exception to a factual setting, corresponds to a significant gap. As discussed above, there is a zone of ambiguity where the state of exception is located. Agamben states that "only if the veil covering this ambiguous zone is lifted will we be able to approach an understanding of the stakes involved in the difference -or the supposed difference - between the political and the juridical, and between law and the living being" (Agamben, 2008: 2). Agamben's explicit effort is to incorporate the state of exception into a theory of sovereignty as well as politics. In constructing his theory, he frequently engages with the present and antiquity, mostly with Roman Law.

Throughout the Middle Ages, necessity was the basis for justifying exceptional measures. According to this view, since the state of exception is reduced to a necessity (civil war, confusion, crisis, etc.), it is asserted that the necessity is, by definition, not an element of the law. In this way, the whole problem of legitimisation of the state of exception can be puzzled out: it was done because it was necessary. In this period, the necessity was a sufficient reason for transgressing the legal order and was considered sufficient to explain it, especially in isolated cases. After all, laws were enacted for the common good of humankind, but in a case of necessity, it is legitimate to derogate from laws if they are not sufficient in an unexpected, conflictual situation.

As for the modern epoch, if we take a look at the historical panorama given by Agamben (Agamben, 2008: 27-51) we see that the state of emergency is pervasive and that it can easily be found in constitutions and laws, as well as its practical presence. Indeed, today, almost all of the constitutions include the state of emergency provisions or enact laws in their national legislations specifically for regulating the state of emergencies. Contemporary examples from many countries and the abundance of the state of exception proclamations in especially Western political traditions prove that the provisional abolition of the distinction among the legislative, executive, and juridical powers is a lasting practise of government (Agamben, 2008: 7). For example, it can be observed in Germany in 1923, in France several times in 1925, 1935 and 1937, in the UK in 1920, in Italy after the 1908 earthquake and many other instances (Agamben, 2008: 11-22).

All these examples are essentially fuelled by and are contemporary political manifestations of a view that grounds the state of exception in *necessity* and *urgency*. If we are to discuss the state of exception through necessity, this can only mean that necessity implies a lacuna inside the law. The problem is that this perception claims to fill this gap, which was supposedly declared to have emerged at a time of necessity with the law while ignoring that the decision was taken directly from the realm of politics. Far from being an answer to a normative lacuna, this explanation of the state of exception opens another fictional gap to protect the norm and the order: a lacuna that is, for sure, beyond the realm of legality.

Giorgio Agamben posits a prominent notion in his work, specifically the concept of "exception-as-a-rule," contending that the exception has transformed into a norm within contemporary political landscapes. This idea, supported by historical instances from the twentieth century, continues to echo in academic discourses, with scholars such as Butler (2004), Hardt and Negri (2000), Neocleous (2006), and Neal (2012) contributing their interpretations. But what does Agamben mean when he argues that the exception has become a rule? He interprets Schmittian perspective towards the miraculous aspect of exception. As mentioned above, Carl Schmitt aims to attribute the qualities of saviour to the act of deciding on what constitutes an exception. Only then, will the personal element of sovereignty revive, and the exception carries saviour qualities.

When exception became a routine part of the legal order, it lost its miraculous and redemptive significance. This state of exception/moment of decision, therefore, has become nothing but a repetitive entity, a usual part of the law. Therefore, Agamben contends that Schmitt's attempt to attribute of the exception to the norm failed when the exception became a routine part of the legal order, losing its significance. Agamben's work state of exception is a declaration of the bankruptcy of the Schmittean diagram of exception (Huysmans, 2008). That is to say, if the exception becomes a rule (if it is resorted to too much and often), what Schmitt foresaw/wished for is destroyed: The sovereign/exception ceases to be regulative/saving and becomes just an ordinary part of an order: a mere repetition.

5. A Brief Account of Butler's Theory

Judith Butler comes into play when the state of exception becomes a governmental technique, that is when the law is being instrumentalised by the ruling authorities when the suspension of law is deemed to be necessary. In her book *Precarious Life: The Power of Mourning and Violence*, Butler refers to the theories of sovereignty and the state of exception when discussing the indefinite detention that took place in Guantanamo Bay

after 9/11. It is necessary to touch on Butler's theory, as her work represents a fitting intertextuality of the theories we have analysed so far.

Butler challenges the general misconception of Foucault's theories on the exercise of power. According to her, Foucault does not draw a strict chronological line between the premodern understanding of sovereignty and governmentality[2]. Although Foucault says in his *Security, Territory, Population* lectures that 'the more I have spoken about population, the more I have stopped saying 'sovereign'" (Foucault, 2007), his theory is generally understood as if governmentality has completely replaced sovereignty. However, instead of presenting such a chronological order, Foucault states that the triad of governmentality, sovereignty, and discipline reign simultaneously and is employed whenever the power deems it necessary to do so: As a historical formation, it progresses by layering, rather than replacing each other.

What Butler problematises is the perception of governmentality that has been employed as a remedy for the supposed collapse of imperious sovereignty: that is, governmentality does not coincide with the collapse of coercive sovereignty, and it does not appear as a solution to revitalise it. In other words, these are not two separate things in which one is extinguished while the other intensifies its power, they exist at the same time. Yet, governmentality does not work to hide the vulgar aspects of sovereignty, on the contrary, it reveals those violent aspects and reproduces the sovereign. According to Butler, a state of exception is when the governmentality and sovereign power form a hybrid structure and one consolidates the other.

The dual and simultaneous exercise of these two operations also works through the self-consolidation of sovereignty. When the power of making decisions is granted to a President or a political entity, it results "as if we have returned to a historical time in which sovereignty was indivisible, before the separation of powers has instated itself as a precondition of political modernity" (Butler, 2004: 55). Therefore, the suspension of law in the modern constitutional state breaks the assumed chronological order in the state power: and verifies the coexistence of sovereign power and governmentality: "Whereas the suspension of law can be read as a tactic of governmentality, it has to be seen in this context as also making room

2 According to Butler's definition, governmentality "is broadly understood as a mode of power concerned with maintenance and control of bodies and persons, the production and regulation of persons and populations, and the circulation of goods insofar as they maintain and restrict the life of the population" (Butler, 2004: 52). In Foucault's thinking, governmentality is a field in which the state "vitalises" itself: and if it were not for this vitalisation, we would have witnessed the state's decay. According to Foucault, it is precisely governmentality that "allows the state to remain in existence" (quoted in ibid: 52).

for the resurgence of sovereignty, and in this way both operations work together" (Butler, 2004: 54-5).

Butler's scholarly contribution holds significance in illuminating the concrete reality and contemporary politics, unveiling the intricate ways in which law functions as a tool for the objectives of governmentality and the resurgence of an omnipotent sovereign. Her work encapsulates the idea that sovereignty, traditionally understood, does not re-emerge in its erstwhile guise, but instead assumes a different form, manifesting itself in an ethereal manner. This underscores the transformative nature of sovereignty, challenging preconceived notions about its disappearance, and emphasising its elusive, ghost-like presence in contemporary contexts.

6. Final Remarks

Butler has written her book after the US state of emergency proclamation and the article that I have cited the most is about the situation of the captives in Guantanamo Bay, who are stripped of their status as a subject of the law. The state of emergency declaration of 2001 has the most important and prevalent impacts on the global sphere and those impacts have resonated in Butler's effort to understand and explain the present characteristics of the state of exception. After September 11, President Bush constantly referred to himself as the "Commander in Chief of the Army", and this "must be considered in the context of this presidential claim to sovereign powers in emergency situations" (Agamben, 2008: 34) and eventually, as making the emergency the rule. Neocleous (2006), alludes to Schmitt and points to the moment of decision, and claims that the key date for us is 9/14, the date when George W. Bush declared a state of emergency. In a *de facto* suspension of law at both national and international levels, on 21 March 2002, the US Department of Defence and the Department of Justice introduced regulations (irregularities) for military tribunals to try prisoners detained domestically and at Guantanamo Bay. According to these rules, in some cases, indefinite detention is possible even without a court order.

Thus, for those persons, the law ceases to exist. These people are indefinitely deprived of the protection of the law, and at this point the unlawful exercise of sovereignty becomes unlimited. That is to say, the sovereign both confirms its place outside the law by suspending the law, creates its system by establishing a new law, and leaves some people in a gap created by the suspension of the law. While 'indefinite detention' is an illegitimate exercise of power, it is an important part of a broader tactic to neutralise the rule of law in the name of security, "It becomes the occasion and how the extra-legal exercise of state power justifies itself indefinitely, installing itself as a potentially permanent feature of political life in the US" (Butler, 2004). In that sense, Butler

seems to agree with Agamben regarding the permanent character of the exception.

Today, not only in the USA, but also in many other countries around the world, the state of emergency has become a form of governance that can be invoked quite often, extensively, and penetrative. The discussion has also aimed to question the legal paradigm that enables the executive power in modern states to do so. That is to say, this form of authoritarianism arising from the gap in the law (whether the law would be national or international) and the state of being entrenched in this gap should lead us to question the relationship between the law and, in this case, the executive power, the excessive usage of the exception.

Owing to this relation of intrinsicness, the state of exception no longer manifests itself as an anomaly, but as a governmental technique, as a constitutive and self-preserving paradigm of the legal order. The practical consequence of this paradigm is the extension of executive powers to include legislative power through various decrees and legal measures. As Durantaye says, one of Agamben's main aims is to "show that exceptional circumstances are not so exceptional in state life" (Durantaye quoted in Aydin, 2006).

As a result, throughout this article, I aimed to elaborate on the theoretical foundations of the state of exception and to shed light on the position of this ambiguous and controversial situation and its relationship with sovereignty and law. The distinction between legalist and extra-legalist approaches, which comprise the broadest area of discussion in the literature, is insufficient in this sense, as it does not address the sovereignty factor. Suspension of the norm is undoubtedly a problem of sovereignty, and today it is essential to evaluate this problem from the executive point of view. For this reason, I think it is more critical to rely on the contributions of thinkers who discuss the state of exception intertwined with the issue of sovereignty and to analyse its relationship with law. For legal order to co-exist with such a lacuna, makes civil liberties, fundamental rights, in short, life itself a matter of subject for the politics which instrumentalises the law. At the moment of state of exception, the relationship of the subject of rights with the law becomes an exclusionary one, they are being included in the legal order through exclusion. They are exposed to the law, but the norm is no longer functional. In essence, the exception has become an entity that creates its law.

It is imperative to analyse this form of sovereignty exercised through the executive power and the administrative bureaucracy and to dissect its relationship (instrumental, internal, or external) with the law. Sovereignty,

which emerges with a "ghostly" structure with the process of constant legitimisation and self-justification, reminds us that we are positioned in a very precarious condition as the subject of rights. Similarly, as Agamben states, "We can all be drawn into this space absent of norm". This is not so much a warning, but rather a call to challenge the violence that emerges out of the law.

References

Agamben, G. (2008). *State of Exception*. University of Chicago Press.

Aydın, A., (2006). Giorgio Agamben: Etten Ibaret İnsan ve Biyopolitika Makinesi. *Biyopolitika (2. Cilt): Foucault'dan Günümüze Biyopolitikanın İzdüşümleri (Ed: Onur Kartal)*, Notabene.

Butler, J. (2004). *Precarious Life: The Powers of Mourning and Violence*. Verso.

Foucault, M. (2007). *Security, territory, population: Lectures at the Collège de France, 1977-19 78.* Palgrave Macmillan, London

Hardt, M., Negri A., *Empire*. (2000), Harvard University Press, Link

Huysmans, J. (2008). The jargon of exception: On Schmitt, Agamben and the absence of political society. *International Political Sociology*, *2*(2), 165-183. Link (last visited 26 August 2024)

Larsen, S. (2013). Notes on the thought of Walter Benjamin: Critique of violence. *Critical Legal Thinking.*

Neal, A. (2012). Normalization and legislative exceptionalism: Counterterrorist lawmaking and the changing times of security emergencies. International Political Sociology. 6(2), 260–276. Link

Neocleous, M. (2006). The problem with normality: Taking exception to a permanent emergency. *Alternatives*, *31*(2), 191-213. Link (last visited 26 August 2024)

Özbudun, E., (1996). Human rights and the functioning of the democratic institutions in emergency situations. *Venice Commission*.

Scheppele, K. L. (2009). Legal and extralegal emergencies. In: G. A. Caldeira, R. Daniel Kelemen, & K. E. Whittington (Eds.), *The Oxford Handbook of Law and Politics* Oxford Academic. Link (last visited 26 August 2024)

Schmitt, C. (2005). *Political theology: Four chapters on the concept of sovereignty*. University of Chicago Press. Link (last visited 26 August 2024)

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Universities' responsibilities to respect and protect human rights transnationally: A critical discussion of collaboration and exchange between the UK and China

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Abstract: *Engaging with a debate on universities' responsibilities to protect human rights amidst rising concern about the influence of autocratically governed China, we argue that the United Nations Guiding Principles on Business and Human Rights apply to universities, be it because universities are business enterprises, or because the principles contained in the UNGP are a fortiori relevant to universities. Drawing on the example of UK universities, we show that the UNGP are relevant for universities as "education providers and exporters" to protect academic freedom against China's transnational repression. A review of selected current 'hard' and 'soft' law documents shows not only that to protect academic freedom, there is a need to further concretize the UNGP for the higher education sector, but also that effective protection requires corrections to universities' overly commercialised funding structures.*

Key words: *academic freedom, human rights, UNGP, China, universities*

1. Introduction

The Chinese and other autocratic governments' potential adverse influence on academic freedom and integrity in democratic systems is increasingly an issue of concern for diverse stakeholders in academia, including university staff, management, and students; governments; and civil society actors. This influence can be exacerbated by the marketisation of higher education, a phenomenon that is especially pronounced in the United Kingdom (UK).

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Taking these observations as a starting point and focusing on UK universities' interaction with the People's Republic of China ('China'), we advance the argument, firstly, that the United Nations (UN OHCHR, 2011) Guiding Principles on Business and Human Rights (the 'UNGP') must inform a discussion of the responsibilities borne by UK universities about the human rights of their members and other stakeholders. We argue that the UNGP are relevant, be it because UK universities are 'business enterprises' within the meaning of the UNGP, or because the UNGP apply to universities *a fortiori* in settings involving third-state actors. The UNGP therefore shape universities' responsibilities to protect academic freedom and other human rights at risk of transnational violation by autocratic regimes.

Secondly, we discuss how the human rights responsibilities of universities in academic exchanges have begun to be articulated and concretised by the creation of codes of conduct and other guidance documents. We critically analyse the extent to which this developing body of 'soft' law does justice to universities' responsibilities for academic freedom and other human rights in contexts of transnational collaboration and exchange, focusing on the case of the UK's academic relations with China, and juxtapose evolving soft law with new UK legislation purporting to address some of the issues raised in this article through new coercive 'hard' law norms, potentially including the criminalisation of 'foreign interference' introduced in 2023.

Building on these arguments, lastly, we examine the limitations of the application of the UNGP in the context of a broader rethinking of the marketised conception of academia. Marketisation engenders vulnerabilities and dependencies, including funding insecurity and competition, that can act as transmitters of autocratic influence in universities, and that can only be overcome by more profound and radical reforms to university funding structures.

2. Liberal-Democratic Academia's Vulnerability to Autocratic Influence: The UK as Example

Exchange and collaboration between universities, academic staff, and students (institutional and individual 'academic actors') has grown in the wake of globalisation, with some variation across different individual country settings and academic fields (Kaczmarska & Yıldız, 2022). The internationalisation of academia has many well-understood advantages. Democratic academic actors' collaboration and exchange with institutions and individuals in autocratic regimes can have particular benefits (Johnson *et al.*, 2021), as academia has long been a site for learning and understanding across geopolitical divides (O'Mara, 2012).

Such internationalisation has, however, also brought some new challenges, especially in contemporary circumstances of a global 'third

wave of autocratisation.' (Lührmann & Lindberg, 2019). As different systems of academic governance, embedded in different legal political systems, come into contact and at times appear to clash, they can lead to instances of 'autocratic influencing' discussed with increasing concern (Johnson *et al.*, 2021). Research reports on interaction with academic actors in China, for example, have documented attempts to direct the activities of academic visitors and students going abroad from China (HRW 2021a,b; Al Jazeera, 2018) blocking academic staff seeking to go to China (BBC 2021; Yan 2022), pressures on academics to self-censor (de Vise, 2011), monitoring of communication, including digital communication and virtual teaching platforms (Prelec *et al.*, 2022), attempts to exert pressure on academic publishers to self-censor (Kennedy & Phillips, 2017), and attempts to control personnel and curriculum -related decision-making of collaborative programmes and institutions (Sharma, 2022). Some of the evidence in this regard remains anecdotal but there is a growing systematic understanding of the issue:

Firstly, the financial dependency of universities in liberal democracies on funding from autocracies has often been depicted in terms of reliance on overseas students paying high tuition fees, especially in the UK and the US, where tuition tends to account for a big share in university revenues (Minter, 2022). UK trade in education exports was the UK's largest service export in 2018, worth £23.3 billion in 2018, compared to £20 billion for financial services (Johnson *et al.*, 2021). As of 2024, international tuition fee income has become less reliable, partly due to immigration constraints, and is regarded as a factor of growing financial insecurity affecting UK universities (Hillman, 2024; UUK & pwc, 2024).

There is, secondly, an increasingly detailed understanding of the infrastructure of the Chinese party state's management of engagement with the world, including through the Chinese Communist Party's United Front Work Department (Brady, 2018). The Chinese authorities' instructions to academic staff and students going abroad from China have included the exhortation to 'tell China's story correctly' (Ministry of Education of the People's Republic of China, 2016; Bislev, 2017; Greitens & Truex, 2020).[1]

Thirdly, a growing body of quantitative empirical work provides insights into the serious effects of autocratic governance practices on academia in the UK. For example, a survey published in 2021 suggests that 40% of the respondent academic staff surveyed self-reported that they had self-censored to accommodate PRC students in their classes.[2] Concerning any

1 The Ministry of Education of the People's Republic of China (2016) mentions: *'Promote the "going out" of Chinese culture and Chinese language, tell the Chinese story well to the world, spread the Chinese voice well, and enhance the world's understanding and recognition of Chinese culture.'*

2 *'40% of academics specialising in China report self-censoring when teaching students from the nation, according to a survey looking at attitudes …on whether academic freedom is at risk from internationalisation.'* (Prelec *et al.,* 2022).

practices of censorship or self-censorship, they inevitably also raise the spectre of stigmatisation of students 'on whose behalf self-censorship or censorship may take place.

In summary, there is clear evidence of autocratic pressures building up on academic life in liberal democracies. China is the to date most widely discussed example of this issue, even though the discussion has extended to other countries including (earlier on) Libya (Vasagar & Syal, 2022) and Russia (Ruddick, 2017).

3. Higher Education Laws and Policies Shaping Transnational Collaboration and Exchange

International and domestic law on academic governance and academic freedom, including norms governing the creation of revenue for academic research, are limited; they do not tell us much about the specific transnational concerns discussed here.

The regulation of UK universities reflects a long history encompassing academic institutions created by the ancient Royal Charter as well as institutions established under the UK Further and Higher Education Act 1992 (Barendt, 2010). Statutory legislation including the UK Education Reform Act (1988; UCU, 2022; Karran & Mallinson, 2021), which also determines the dual status of universities in the UK as public authorities subject to laws binding the state in some contexts,[3] establishes universities' duties to protect academic freedom, even as universities are also rights-holders when it comes to academic freedom, which has institutional, as well as individual dimensions – requiring, for example, that institutional academic actors have freedom to make personnel decisions and set research agendas without interference from the state (Barendt, 2010). Universities' duties to protect academic freedom were codified only after the academic governance framework had been changed 'from self-governance to regulation,' (Shattock, 2019)[4] 'plac[ing] a legal duty on universities and other HEPs to take 'reasonably practicable' steps to ensure

3 For an overview regarding the UK, see McFarland (2018); in Germany, universities are generally public bodies (Körperschaft des öffentlichen Rechts) and public / state institutions by virtue of legislative definition (staatliche Einrichtungen). S 58 Hochschulrahmengesetz.

4 Relevant legislation includes the 1988 Education Reform Act with its abolition of academic tenure security & codification of a university duty to protect academic freedom, the 1998 Teaching and Higher Education Act re-introducing tuition fees, and the 2017 Higher Education and Research Act which created the Office for Students. Also relevant are the 1999 Human Rights Act in conjunction with Art 10 ECHR: 'freedom to conduct research, distribute knowledge and truth' and the 2010 Equality Act (protected criteria include race, religion or belief)

freedom of speech within the law for their members, students, employees and visiting speakers.'[56]

At the same time, the increasing role of management in a differently regulated academic environment has led to pressures and the individual academic actors coming increasingly from their management, and correspondingly to the creation of stakeholder organisations representing the interests of university management, University staff, etc. Changes in legislation, such as the 1992 Higher Education Act, incrementally reduced the contribution of state funding, reversing the 1960s law on student grants and replacing it with tuition fees collected from the students at steadily increasing rates from the 1990s onwards (Glavin, 2019). As a result, under UK statutory law, universities derive their autonomy vis-à-vis the state not from principles of academic freedom, but rather from the fact of being charitable corporations, a circumstance that shapes UK universities' rules and practices on external research funding.

As charities, universities can generate external research funding, since research is one of their central purposes. However, recent legislation imposes some direct or indirect restrictions: The UK Higher Education (Freedom of Speech) Act, on the one hand, imposes duties on universities and student unions to protect freedom of speech and on government offices to monitor, regulate and, in the event of complaints upheld by the office, sanction universities for failures to defend the principles of freedom of speech and academic freedom (UK Parliament, 2022). An amendment to the Higher Education Research Act 2017 requires higher education providers to provide the Office for Students (universities' principal state regulator) with information on their overseas funding related to, inter alia, gifts and endowments, research grants and contracts, and educational and commercial partnerships.[7] In a similar vein, the revised National Security

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5 Equality and Human Rights Commission, *Freedom of Expression: A Guide for Higher Education Providers and Students' Unions in England and Wales* (Cardiff: Equality and Human Rights Commission, 2019) Link (accessed September 23, 2024)

6 For competing definitions see s. 43 vs. 'UCU Statement on Academic Freedom' (UCU, 2022).

7 The 2022 Freedom of speech (Higher Education) Bill envisages, inter alia, 'free speech complaints' to OfD and civil litigation avenue in case of breach of duties to protect free speech/ academic freedom 2022 Freedom of speech (Higher Education) Bill on overseas funding:

(1) The Higher Education and Research Act 2017 is amended: … The OfS must monitor the overseas funding of registered higher education providers …with a view to assessing the extent to which the funding presents a risk to (a) freedom of speech within the law, and (b) the academic freedom of academic staff …

(3) The duty in subsection (1) includes a duty to consider in a case where the OfS has found that a registered higher education provider is in breach of its duty [to protect freedom of speech and academic freedom], whether overseas funding was relevant to the breach.

(4) The information which the…higher education provider may be required to provide: (a) information as to relevant funding from a relevant overseas person [exceeding an OfS-specified threshold] and (b)…such other information as the OfS may reasonably require.

Act criminalises certain acts of 'foreign interference,' including conduct '*(c) causing spiritual injury to, or placing undue spiritual pressure on,* a person,'[8] that might apply in academic exchange contexts of challenging intellectual interaction. Even beyond changes to legal frameworks, immigration policies may affect numbers of students and researchers from certain countries, apparently including China (Colbran, 2023).

The effect of recent legislation and policies enabling the government to stop funding sources for UK higher education providers should not be underestimated. Even if the new laws are intended to protect values central to academia, however, their actual effects are at this point unclear and will likely remain limited because they would require state intervention based on the new legislation. It is therefore all the more important to turn to the roles and responsibilities of academic actors themselves:

4. Universities and the United Nations Guiding Principles on Business and Human Rights

Soft law norms originally drafted to determine the human rights responsibilities of business enterprises can help us understand the human rights responsibilities of universities, as already discussed earlier on, universities in many jurisdictions operate according to commercial principles, albeit to different degrees (Collini, 2018). In the academic exchange context, universities in liberal democracies are facing pressure not from their governments, but rather from repressive autocracies or actors within them. This structural feature of transnational threats to academic freedom renders universities comparable to transnational business enterprises with operations in or related to multiple states. It is therefore useful to turn to the United Nations Guiding Principles on Business and Human Rights (UNGP)[9].

The most notable normative innovation of the UNGP is their articulation of responsibilities on the part of businesses to exercise human rights due diligence. The UNGP three-pillar structure not only recognizes that states '*must protect against human rights abuses by third parties, including business*' but also that '*business enterprises have an independent responsibility to respect human rights: that is, to avoid people's human rights being harmed through their activities or business relationships, and to address harms that do occur.*'(Ruggie, 2017)[10] According to the UN Office of the High Commissioner for

8 The foreign power condition is defined in section 32 of the Act. Link

9 The UN Guiding Principles on Business and Human Rights (2011) were annexed to a final report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to the Human Rights Council (A/HRC/17/31). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

10 They also demand that '*where individuals' human rights are harmed, they should have access to effective remedy, and both states and enterprises have a role to play in enabling this*

Human Rights, the UNGP requires that business enterprises must '*seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships*, even if they have not contributed to those impacts.' (Ruggie, 2017: Emphasis added) Principle no 23 requires them to '*comply with all applicable laws and respect internationally recognized human rights, wherever they operate*,' and to '*seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements*.'(Ruggie, 2017)

Taken together, these principles enunciate the idea that, a business enterprise operating in an environment of systematic human rights violations is not a neutral entity but must '*seek ways to honour'* human rights principles. They do not constitute a new international treaty but, rather, derive their normative force through the recognition of pre-established obligations and of social expectations regarding business enterprises' duty to respect human rights, linked to reputational concerns that also affect universities. Indeed, universities' mission statements, which usually specify universities' *raison d'être*, the scope of their operations and their overall purpose (Sauntson & Morrish, 2011), commonly cite academic freedom and closely associated notions, affirming social expectations towards universities, while also resonating with human rights principles that, as observed earlier on, have been understood as duties legislatively imposed on universities in jurisdictions like the UK[11].

It is important to note that the UNGP refrain from clearly defining business enterprises.[12] One of the main challenges that Ruggie encountered while drafting the UNGP was the variety of business enterprises that the principles aim to cover and the difficulty of articulating actionable recommendations despite this variety. At the time of the drafting, the economic context had focused attention on the human rights impact of extractive industries. With the evolution of this context, new sectors have become increasingly attuned to / aware of their human rights responsibilities, as conceived by the UNGP (Aaronson & Higham, 2013). In this sense, the UNGP were just 'the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built' (Report of the United Nations Special Representative, 2011: 5). The question of which enterprises are subjected to human rights responsibilities has remained under debate, as illustrated by the negotiations on a binding international human rights law instrument to regulate the activities of transnational corporations and other business enterprises (FIDH, 2018).

to occur. (Ruggie, 2017).

11 Art. 15 International Covenant on Economic, Social and Cultural Rights: Link; General comment 25 on art. 15: Link

12 The challenge to provide such a definition has been revived with the latest attempt to develop a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (FIDH, 2018; Human Rights Council, 2022).

The proposition that the UNGP apply to universities can seem counterintuitive because the same liberal principles that inspire the argument that businesses have human rights responsibilities also urge us to consider universities as sites of free academic research and teaching in the sense of public services exempt from the pressures and calculations of market actors (Burnay & Pils, 2022). But we need to engage with the reality of current university governance designs and practices (Rowlands, 2017; Collini, 2020; Shattock, 2019; Calhoun, 2011). In the UK at least, universities, not only act as market participants but also often interpret and justify their actions by reference to market principles. Moreover, the UNGP could be applied to universities also through *a fortiori* analysis, if not directly (LII, 2022; Miron, 2018): if even businesses operating exclusively in the private interest have human rights responsibilities, how could we argue that hybrid institutions with private and public components, claiming to act in the public interest, did not have such responsibilities?[13]

In summary, there are good arguments to the effect that the human rights responsibilities affecting business enterprises under the UNGP apply to at least some universities, depending on their characteristics as well as those of the legal systems in which they are embedded (Precht, 2017). Even insofar as an entity can be characterised as a business enterprise, however, the mere applicability of the UNGP leaves many definitional and interpretive questions about the specific human rights responsibilities thereby engendered unanswered. Following the publication of the UNGP, different business sectors have developed sectorial company guidance on human rights due diligence. [14] The legitimacy of such guidance developed by actors who arrogate the power to create self-governance norms is rightly debated;[15] but such sectorial initiatives constitute the modus operandi in most activities,[16] sectors and their substance at least merits scrutiny as a different kind of 'soft law' instruments. [17]

13 To give but one example, King's College London describes itself as 'a civic university with a mission to serve society,' e.g. at Link (accessed September 23, 2024).

14 For example, financial institutions have developed the Equator Principles, a risk management framework to implement due diligence in project finance, which is committed to the UNGP Link (accessed May 16, 2022). In the same vein, the Thun Group of Banks was formed to discuss the implications of the UNGP for the banking sector and produce a practical application guide of their implementation Link (accessed May 16, 2022).

15 The literature on transnational private regulation analyses dynamics at play when private actors appropriate themselves the power of producing soft norms, such as issues of legitimacy, power struggles, consultation and the retreat of the State. (For a critical approach, see Cutler et al., 1999, Graz & Nölke, 2008, Loconto & Busch, 2010, Ponte et al., 2011).

16 See for example the label Fair Trade for the agricultural sector, the Kimberly process for diamonds, the Round Table on Sustainable Palm Oil for palm oil, etc.

17 The concept of soft law generally denotes agreements, principles and declarations that are not legally binding. Link. There non-binding nature does not reduce their importance, as some soft law documents sometimes then become integrated into hard law.

5. Concretising Universities' Human Rights Obligations

The understanding of universities' institutional and corporate responsibilities has been affected by the many transformations of higher education including marketisation and the rise of autocratic influence that have taken place over the past few decades (Burnay & Pils, 2022). As growing attention has been paid to the challenges that China and other authoritarian regimes pose to academic freedom abroad, various actors have mobilized to offer guidance. The emergence, over the past years, of significant sets of norms and guidance documents reflects a recognition amongst academics and their organisations that universities do have human rights responsibilities. Yet as we argue in this section, much of this guidance has remained disconnected from the marketisation dynamics taking place in universities, even though civil society and university initiatives challenging marketisation should interact with efforts to protect academic freedom to overcome current protection gaps.

At the level of international and supranational organisations, an early attempt to provide a detailed description of the necessary parameters for academic freedom, seek international support for their implementation, and provide a mode of redress is the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (UNESCO, 1997), the first UN-based international statement (Savage & Finn, 2018), and arguably the most important international instrument linking academic freedom and institutional autonomy to this day.[18] While defenders of the marketisation of higher education – have contested the Recommendations (Savage & Finn, 2018), the UK University and College Union (UCU) presented in 2019 a submission to the UNESCO/ILO committee of experts on the application of the recommendations concerning teaching personnel on allegations relating to '*the low levels of de jure protection for academic freedom offered by the constitution and legislative instruments in the United Kingdom, which has led to academic staff experiencing a low level of de facto academic freedom in their day to day activities as researchers and teachers*'(UK University and College Union, 2019).

In the decades since the UNESCO Recommendation, further documents have clarified the scope of international human rights law provisions such as the right of science as protected in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Beiter, &

18 V.A.17: "The proper enjoyment of academic freedom and compliance with the duties and responsibilities listed below requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights. However, the nature of institutional autonomy may differ according to the type of establishment involved".

Appiagyei-Atua, 2016)[19] A comment published in 2020 by the affiliated treaty body stresses the need for transparency to ensure that science 'is not subject to interests that are not scientific or are inconsistent with fundamental human rights principles and the welfare of society' while also affirming the need for State parties to cooperate internationally and the benefits of such cooperation.[20] In the same vein, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in a 2020 report,[21] discussed the special role played by academics and academic institutions in a democratic society when assured of institutional autonomy and self-governance and identifies a broad range of threats to academic freedom '*often based on, among other things, political, financial, ideological, and/or social and cultural pressure'*. Similarly, beyond the scope of the UN, regional mechanisms including, the Inter-American Commission on Human Rights and the European Commission have produced soft law guidance documents, namely 2021 the Inter-American Principles on Academic Freedom and University Autonomy (Inter-American Commission on Human Rights, 2020), and a 2022 Commission guidance document directly addressing academic freedom as one of its concerns in "Tackling Research and Innovation Foreign Interference" (European Commission, 2022).

At the transnational civil society level, the NGO Human Rights Watch (HRW) in 2019 produced a 12-point code of conduct focused on the risks posed to academic freedom by the Chinese government (HRW, 2019). The Code of Conduct is the result of investigations that the NGO conducted, which found that the Chinese government attempts to restrict academic freedom beyond its borders. The HRW recommendations are very concrete guidance, addressed to colleges, universities, and academic institutions worldwide, that reflects a 'human rights due diligence' approach, notable including funding screening recommendations. HRW has produced

19 See also ILO ad UNESCO, "The ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and The UNESCO Recommendation concerning the Status of Higher-education Teaching Personnel (1997) with a user's guide," (2008). Link (accessed July 18, 2022); And General comment No.25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights.

20 General comment No.25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights.

21 In UN OHCHR (2020) *Report on Academic Freedom and the Freedom of Opinion and Expression*, the Special Rapporteur recognizes that there is no single, exclusive international human rights framework for the subject. "Within the corpus of civil and political rights, protected under the UDHR and codified in the ICCPR, the rights to peaceful assembly and association, privacy, and thought, conscience and religious belief can promote and protect academic freedom. Art 13 (right to education) and 15 (right to scientific advancements) of the ICESCR expressly promote rights at the centre of academic freedom".

further research and recommendations on the case of academic freedom at Australia's Universities (HRW, 2021a, b; 2022)[22].

In the UK, too, organisations representing different academic stakeholders have produced guidance that reflects a 'human rights due diligence' approach echoing the ideas of the UNGP (UN OHCHR, 2011). An organisation representing university management, Universities UK (UUK), in a 2021 guidance document on management of collaborative and exchange relationships with academic actors abroad, '*provides information and guidance that will help institutions to develop due diligence processes that assess the security-related risks and mitigate potential damage to the institution'* and states that *'senior management should provide assurances to the institution's governing body that security-related issues are fully incorporated into due diligence* (…)' (UUK, 2020). While national security concerns must surely be taken seriously, the UUK guidance approach is at risk of 'securitisation' of the university if it transposes the state obligation to keep us safe to university actors, for example in the recommendation that '*[u]niversities should place security measures at the centre of their governance and culture and set up processes for reviewing security risks'*(UUK, 2020). As Chubb has critically argued, '*government response to PRC influence is urgent and necessary, but should take a form that strengthens liberal democracy in the UK, rather than undermining it. It can do so by implementing deliberate policy in a way that differentiates between issues of national security, human rights, and academic freedom*' (Chubb, 2022).

Alternative guidance principles have been developed by a group of academic actors not representing university management and arguably at a greater distance from the (UK) state. A group of scholars with which both co-authors are associated, the Academic Freedom and Internationalisation Working Group (AFIWG), has drafted a Model Code of Conduct for universities to acknowledge challenges posed by the internationalization of higher education beyond a national security perspective (AFIWG, 2020). While the Model Code of Conduct, in this regard like the UUK guidance and international guidance documents, adopts a 'due diligence' approach to academic internationalisation, it also seeks to push back against top-down decision-making structures mimicking corporate management by insisting on academic experts' bottom-up participation in the decision-making process of universities, emphasising universities duties of care towards their members (including students) (Fulda & Heathershaw, 2021), and drawing attention to the problems of excessive reliance on private over public sources (AFIWG, 2021). Beyond its Model Code, AFIWG has drawn

22 HRW recommendations were considered and reiterated by the Australian Parliament (HRW 2022). Australian parliament's Joint Committee on Intelligence and Security in its "Inquiry into national security risks affecting the Australian higher education and research sector" Parliamentary Joint Committee on Intelligence and Security, "Inquiry into national security risks affecting the Australian higher education and research sector," 2022 (Issue March).

attention to the wider problem of marketisation.[23] While no university to date has fully adopted the 'Model Code of Conduct,' some universities have updated their self-governance rules on international cooperation and on the acceptance of donations in ways that also reflect a 'due diligence' approach – for example, the University of Cambridge (2022a;b), one of whose colleges, Jesus College, found itself under criticism for accepting donations from Huawei in 2021 (The Statesman, 2021), emphasises freedom of thought and freedom of expression in its mission statement (University of Cambridge, 2022c).

In summary, there is clear evidence of structural correspondence between the UNGP, the codes of conduct and similar guidance documents adopted by UK academic actors in response to a growing threat of the corrosion of academic freedom through their international exchanges and collaborations and their generally rising dependence on international funding sources. Yet as some of the authors of these new guidance documents acknowledge, the 'due diligence' approach they adopt is not fully able to address the wider, structural concerns or to change the power relations shaping academic institutions.

6. Conclusion: Taking the UNGP Seriously

This article has examined how different actors, including universities, can address the rising problem of authoritarian influence adversely affecting the academic freedom and integrity of its members. It has argued, firstly, that although relevant legal frameworks such as international human rights law, domestic constitutions, and statutory law regulating higher education institutions, tend to endorse the rights and freedoms underpinning thriving, independent academia, the regulation of research and higher education also contains norms that enable the transmission of autocratic pressure into universities in liberal democracies, for example by allowing universities to be run based on external funding resources, and by supporting universities' self-perception as competitors in a higher education and research 'market' that requires them to engage with autocratic actors. Although available empirical evidence of the precise impact of 'marketisation' upon higher education and research institutions remains limited, the trajectory of institutional design change of academic governance in the UK, not to mention the evidence on income streams and the rhetoric around university incomes, indicate a significant degree of vulnerability to autocratic pressure, transmitted through the quest for teaching and research funding opportunities in a competitive institutional environment.

Secondly, we have argued that existing normative frameworks to address autocratic pressure can usefully be examined through the

23 For example, at the launch event, House of Commons, 29 June 2022.

analytical frame of the UNGP. Even if universities cannot be understood as business enterprises within the meaning of the UNGP, a *fortiori* analysis suggests that they have human rights responsibilities analogous to those of transnational business enterprises. Recognising these responsibilities here is important because it helps us understand that universities have comprehensive human rights obligations not only for rights such as academic freedom and freedom of speech but also for anti-discrimination rights, which impose special obligations towards potentially stigmatised or excluded members of the academic community, including scholars and students from countries under autocratic pressure. Understanding the significance of the UNGP also allows us to consider universities' responsibility to conduct human rights 'due diligence' in the context of its international engagements, especially with partners in autocracies.

However, if we take the UNGP seriously, there is a further conclusion to be drawn, building on the realisation that even if better due diligence mechanisms are adopted, UK universities will remain institutionally vulnerable to autocratic pressures, as long as they remain dependent on autocratic actors for funding to support their operations, and that the effectiveness of the prohibitive and punitive approaches adopted in recent UK legislation is inherently limited. As noted earlier, the UNGP 'three-pillars' approach also reiterates states' duties to protect human rights: states '*must protect against human rights abuses by third parties*'.'(Ruggie, 2017)[24] The duty to protect academic freedom, understood as a human right interdependent with other human rights such as freedom of expression, association, etc, also extends to a state obligation to ensure that overly marketized academic funding structures do not result in unacceptable dependencies from other, nondemocratic states: states which, as potentially powerful third parties, can undermine academic integrity through their 'business partner' roles. Even if we consider universities as 'business enterprises' in some respects (as argued here), we must not overlook their crucial and indispensable public function, e.g. in the fulfilment of a 'right to science,' as discussed above: universities cannot simply be expected to go out of business, or to compromise on academic freedom and integrity when their non-public income streams subside. This insight is not new; it was articulated in the 2009 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, which observed that '*[t]he relationship between human rights and science is further complicated by the fact that private and non-State actors are increasingly the principal producers of scientific progress and technological advances. It is the responsibility of States to ensure that all relevant interests are balanced, in the advance of scientific progress, by human rights*.'(UNESCO, 2009) Under these principles, democratic states must accept their ultimate

24 They also demand that '*where individuals' human rights are harmed, they should have access to effective remedy, and both states and enterprises have a role to play in enabling this to occur.* (Ruggie, 2017).

responsibility for university funding to protect these institutions against transnational autocratic erosion of their most central values.

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References

Aaronson, Susan Ariel, and Ian Higham. 2013. "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms." *Human Rights Quarterly 35: 333–364.*

Academic Freedom and Internationalisation Working Group (AFIWG). 2020. *Draft Model Code of Conduct*. Link (accessed September 23, 2024).

Al Jazeera. 2018. "No Escape: The Fearful Life of China's Exiled Dissidents." Doha: Al Jazeera. Link *(accessed September 23, 2024)*.

Australian Parliament's Joint Committee on Intelligence and Security. 2022. "Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector." *Parliamentary Joint Committee on Intelligence and Security*. March.

Barendt, Eric. 2010. *Academic Freedom and the Law: A Comparative Study*. London: Bloomsbury Publishing.

BBC News. 2021. "Chinese Sanctions on Newcastle Academic 'Counter-Productive'." March 26, 2021.

Beiter, Klaus D., Terence Karran, and Kwadwo Appiagyei-Atua. 2016. "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right." *European Journal of Comparative Law and Governance 3 (3): 254-345.*

Bislev, Ane Katrine. 2017. "Student-to-Student Diplomacy: Chinese International Students as a Soft Power Tool." *Journal of Current Chinese Affairs 46 (2).*

Brady, Anne-Marie. 2018. "China in Xi's 'New Era': New Zealand and the CCP's 'Magic Weapons'." *Journal of Democracy 29 (2): 68-75.*

Burnay, Matthieu, and Eva Pils. 2022. "The Implications of China's Rise for Cosmopolitan Academic Citizenship." *The International Journal of Human Rights*. Link (accessed September 23, 2024).

Business and Human Rights Resource Centre. "Human Rights Due Diligence." Link (accessed September 23, 2024)

Calhoun, Craig. 2011. "The Public Mission of the Research University." In *Knowledge Matters: The Public Mission of the Research University*, edited by D. Rhoten and C. Calhoun, 1–33. New York: Columbia University Press. Link (accessed September 23, 2024).

Chubb, Andrew. 2022. *Rights Protection: How the UK Should Respond to the PRC's Overseas Influence*. London: King's College London Lau China Institute.

Colbran, Hannah. 2023. "Evidence of Shrinking Chinese Market for UK Study Continues to Mount." *Global Student Living*, May 12. Link (accessed September 23, 2024).

Collini, Stefan. 2018. "The Marketisation of Higher Education." *Fabian Society*, February 22. Link *(accessed September 23, 2024)*.

Collini, Stefan. 2020. "Universities and 'Accountability': Lessons from the UK Experience." In *Mission of Universities. Past, Present, Future*, edited by L. Engwall, 115–130. Cham: Springer. Link (accessed September 23, 2024).

Cutler, A. Claire, Virginia Haufler, and Tony Porter. 1999. "Private Authority and International Affairs." In Private Authority and International Affairs, edited by A. C. Cutler, V. Haufler, and T. Porter, 412. New York: SUNY Series in Global Politics.

de Vise, Daniel. 2011. "U.S. Scholars Say Their Book on China Led to Travel Ban." *The Washington Post*, August 20.

Equality and Human Rights Commission. 2019. *Freedom of Expression: A Guide for Higher Education Providers and Students' Unions in England and Wales*. Cardiff: Equality and Human Rights Commission. Link *(accessed September 23, 2024)*.

Equator Principles. 2020. The Equator Principles EP4. Link (accessed May 16, 2022).

European Commission. 2022. "Tackling R&I Foreign Interference." *European Commission*. "Commission Publishes a Toolkit to Help Mitigate Foreign Interference in Research and Innovation." Link (accessed July 1, 2022).

Fédération Internationale pour les Droits Humains (FIDH). 2018. *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. Preliminary Comment on the "Zero Draft" Convention*. Paris: FIDH. Link *(accessed September 23, 2024)*.

Fulda, Andreas, and John Heathershaw. 2021. "University Governance and Academic Freedom." Link (accessed September 23, 2024).

Glavin, Chris. 2019. "Higher Education Governance in the United Kingdom." *K12 Academics*, March 13. Link *(accessed September 23, 2024)*.

Graz, Jean-Christophe, and Andreas Nölke. 2008. "The Limits of Transnational Private Governance." In Transnational Private Governance and Its Limits, edited by J.-C. Graz and A. Nölke, 225–242. London and New York: Routledge.

Greitens, Sheena Chestnut, and Rory Truex. 2020. "Repressive Experiences among China Scholars: New Evidence from Survey Data." *The China Quarterly 242: 349–75*. Link (accessed September 23, 2024).

Hillman, Nick. 2024. "At Amber: The Financial Position of UK Universities." HEPI, January 13. Link (accessed September 23, 2024).

Human Rights Council. 2022. "Report on the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises concerning Human Rights." A/HRC/49 (Issue 49th session).

Human Rights Watch (HRW). 2019. *Resisting Chinese Government Efforts to Undermine Academic Freedom Abroad*. New York: Human Rights Watch. Link *(accessed July 3, 2022)*.

Human Rights Watch (HRW). 2021a. "They Don't Understand the Fear We Have: How China's Long Reach of Repression Undermines Academic Freedom at Australia's Universities." New York: Human Rights Watch.

Human Rights Watch (HRW). 2021b. "Academic Freedom Best Practice: A Guide for Australian University Administrators and Teaching Staff on Protecting Students from China, Hong Kong, and Taiwan from Harassment, Intimidation, and Self-Censorship." New York: Human Rights Watch. Link *(accessed July 20, 2022)*.

Human Rights Watch (HRW). 2022. "Australia Inquiry on Beijing Academic Freedom Threats: Foreign Interference, Harassment of Students and Academics,". Link (accessed July 20, 2022).

ILO and UNESCO. 2008. *The ILO/UNESCO Recommendation Concerning the Status of Teachers (1966) and The UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997) with a User's Guide*. Link *(accessed July 18, 2022)*.

Inter-American Commission on Human Rights. 2021. *Inter-American Principles on Academic Freedom and University Autonomy*. Washington D.C.: Inter-American Commission on Human Rights.

Johnson, Jo, Jonathan Adams, Janet Ilieva, Jonathan Grant, Jess Northend, Niall Sreenan, Vivienne Moxham-Hall, Kristin Greene, and Seema Mishra. 2021. "The China Question: Managing Risks and Maximising Benefits from Partnership in Higher Education and Research." Cambridge and London: Harvard Kennedy School Mossavar-Rahmani Center for Business and Government and King's College London (KCL) The Policy Institute. Link (accessed September 23, 2024).

Kaczmarska, Katarzyna, and Yeşim Yaprak Yıldız. 2022. "Introduction to the Special Issue on Academic Freedom and Internationalization." *The International Journal of Human Rights* 26 (10): 1691-1697. Link (accessed September 23, 2024).

Karran, Terence, Klaus D. Beiter, and Lucy Mallinson. 2021. "Academic Freedom in Contemporary Britain: A Cause for Concern?" *Higher Education Quarterly*. Link *(accessed September 23, 2024)*.

Kennedy, Maev, and Tom Phillips. 2017. "Cambridge University Press Backs Down over China Censorship." *The Guardian*, August 21.

Legal Information Institute (LII). 2022. Link (accessed July 7, 2022).

Loconto, Allison, and Lawrence Busch. 2010. "Standards, Techno-Economic Networks, and Playing Fields: Performing the Global Market Economy." Review of International Political Economy 17 (3): 507–536. Link (accessed September 23, 2024).

Lührmann, Anna, and Staffan I. Lindberg. 2019. "A Third Wave of Autocratization Is Here: What Is New about It?" Democratization 26 (7): 1095-1113. Link .

McFarland, Christopher. 2018. "Are Universities, Higher Education Institutions and/or Further Education Colleges Operating in Wales Considered Public Authorities for the Purposes of the Human Rights Act 1998?" *Public Law Q&A, Legal Guidance, LexisNexis*. Link *(accessed September 23, 2024)*.

Ministry of Education of the People's Republic of China. (2016). Implementation Opinions of the Party Group of the Ministry of Education of the Communist Party of China on Deepening Patriotic Education in the Education System. Link (accessed September 23, 2024)

Minter, Adam. 2022. "Decline in Chinese Students in the US Is a Bad Sign." *Bloomberg*, August 15. Link *(accessed September 5, 2022)*.

Miron, Alina. 2018. "Per Argumentum A Fortiori." In *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law*, edited by J. Klingler, Y. Parkhomenko, and C. Salonidis, 197-210. Wolters Kluwer. Link (accessed September 23, 2024).

O'Mara, Margaret. 2012. "The Uses of the Foreign Student." Social Science History 36 (4): 583–615. Link (accessed September 23, 2024).

Ponte, Stefano, Peter Gibbon, and Jakob Vestergaard. 2011. "Governing through Standards: An Introduction." In Governing through Standards: Origins, Drivers and Limitations, edited by S. Ponte, P. Gibbon, and J. Vestergaard, 1–24. London: Palgrave Macmillan.

Precht, Robert Edward. 2017. "Engagement versus Endorsement: Western Universities in China." *Open Global Rights*. Link.

Prelec, Tena, Saipira Furstenberg, John Heathershaw, and Catarina Thomson. 2022. "Is Academic Freedom at Risk from Internationalisation? Results from a 2020 Survey of UK Social Scientists." *The International Journal of Human Rights 26: 1–25.* Link.

Rowlands, Julie. 2017. "Academic Governance in the Contemporary University: Perspectives from Anglophone Nations." In *Academic Governance in the Contemporary University*, 1–33. Singapore: Springer. Link.

Ruddick, Graham. 2017. "Should Oxford and the V&A Take Millions from Ukrainian-Born Billionaire Len Blavatnik?" *The Guardian*, September 3. Link *(accessed August 25, 2022)*.

Ruggie, John Gerard. 2017. "The Social Construction of the UN Business and Human Rights Principles." Corporate Responsibility Initiative Working Paper No. 67. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

Sauntson, Helen, and Liz Morrish. 2011. "Vision, Values and International Excellence: The 'Products' That University Mission Statements Sell to Students." In *The Marketisation of Higher Education and the Student as Consumer*, edited by M. Molesworth, R. Scullion, and E. Nixon, 73–85. London and New York: Routledge.

Savage, Donald C., and Patricia A. Finn. 2018. The Road to the 1997 UNESCO Statement on Academic Freedom. Ottawa: Canadian Association of University Teachers CAUT. Link (accessed September 23, 2024).

Sharma, Yojana. 2022. "University Funding Row Raises Chinese Influence Fears." *University World News*, January 26. Link (accessed September 23, 2024).

Shattock, Michael. 2019. *The Governance of British Higher Education: The Impact of Governmental, Financial and Market Pressures*. London: Bloomsbury Higher Education Research.

The Statesman. 2021. "Huawei infiltrates Cambridge University", Sept. 13, Link (accessed August 29, 2022).

Thun Group of Banks. "The Implications of the UNGP for the Banking Sector." Link (accessed May 16, 2022).

UK Education Reform Act. 1988. Link (accessed 25.08.2023).

United Kingdom Parliament. 2022. Higher Education (Freedom of Speech) Bill Link; Link (accessed 25.08.2024)

UN Working Group on Business and Human Rights. Link (Accessed July 7, 2022).

United Nations Educational, Scientific and Cultural Organization (UNESCO). 1997. Recommendation Concerning the Status of Higher-Education Teaching Personnel.

United Nations Educational, Scientific and Cultural Organization (UNESCO). 2009. "Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications."

United Nations Office of the High Commissioner on Human Rights (UN OHCHR). "UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework." New York and Geneva: United Nations. Link. (accessed July 20, 2022).

United Nations Office of the High Commissioner on Human Rights (UN OHCHR). 2020. *Report on Academic Freedom and the Freedom of Opinion and Expression*. New York and Geneva: United Nations. Link (accessed July 1, 2022).

United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Ruggie, John G.). 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. UN Doc A/HRC/17/31. Link (accessed September 23, 2024).

Universities UK (UUK). 2020. *Managing Risks in Internationalisation: Security Related Issues in Higher Education*. London: Universities UK. Link (accessed July 1, 2022).

Universities UK (UUK) and PricewaterhouseCoopers LLP (pwc). 2024. "UK Higher Education Financial Sustainability Report." January. Link (accessed September 23, 2024).

University and College Union. 2019. "Submission to the UNESCO/ILO Committee of Experts on the Application of the Recommendations Concerning Teaching Personnel." January.

University and College Union (UCU). 2022. 'UCU Statement on Academic Freedom'. 25 January 2022. Link (accessed 26.11.2022)

University of Cambridge. 2022a. 'Handling and acceptance of donations.' Link (accessed August 25, 2022)

University of Cambridge. 2022b. 'International Engagement – Principles and Guidance.' Link (accessed August 25, 2022).

University of Cambridge. 2022c. 'The University's mission and core values.' Link (accessed August 25, 2022).

Vasagar, Jeevan, and Rajeev Syal. 2011. "LSE Head Quits over Gaddafi Scandal." *The Guardian*, March 4. Link *(accessed August 24, 2022)*.

Yan, Sophia. 2022. "I Could Be Extradited to China, Says Sanctioned British Academic." *The Telegraph*, April 9, 2022.

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The paradox of child participation in child labour: An interface between statutory and customary child labour laws in Malawi

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Abstract: *The ratification of the International Labour Organisation's Convention 138 on Minimum Age and Convention 182 on the Worst Forms of Child Labour, as well as the enactment of the Employment Act, 2000 and the Child Care, Protection and Justice Act, 2010, among other critical legislation by the Malawi government, was a contribution towards the elimination of child labour. These efforts have been complemented by the reinforcement of customary laws and an inclusive formulation of rules and regulations set by traditional and religious leaders at the community level. Despite these efforts, child labour is on the rise. The interface between statutory and customary laws in the fight against child labour raises questions about the contributions that each of them or their combination is making in ending child labour. This paper examines various reasons and tensions associated with the application of these laws, simultaneously or independently, in the effort to combat child labour. Application of weak legal pluralism, where modification of the existing norms and practices is allowed while allowing room for input from statutory law, is being suggested as one of the ideal integrations of laws in the fight against child labour and ensuring their meaningful participation.*

Keywords: *child labour, legal pluralism, child rights, human rights, Malawi*

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1. Introduction: Global Child Labour Problems

According to ILO's Convention 138 on minimum age, children under 15 are prohibited from working (ILO, 1973). Thus, children under 15, also the age of compulsory schooling, are not considered capable and eligible for paid employment (Eldring *et al.*, 2000). On the other hand, according to the United Nations Convention on the Rights of the Child (CRC), child labour is work performed by a child that is likely to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development (CRC 1989, art 32 (1)). This definition looks at the effects of the phenomenon.

The ILO's understanding of child labour is based on the kind of work, duration, and conditions in which the work is performed (ILO & UNICEF, 2020). It describes child labour as work depriving children of their childhood, potential, and dignity (ILO, 2021). On the one hand, a child is identified as a labourer if they are engaged in the worst forms of child labour, which include slavery, forced labour, prostitution, trafficking or exposure to illicit drugs (ILO, 1999, C182). On the other hand, Article 3 of the Convention on the Worst Forms of Child Labour provides that child labour comprises work that, by its nature or the circumstances in which it is carried out, is likely to harm children's health, safety or morals.

UNICEF and ILO opine that child labour is a global problem robbing children of their childhood due to the physical, emotional and psychological damage it has on them (ILO & UNICEF, 2021). Furthermore, child labour violates several rights and fundamental freedoms, disturbs the enjoyment of rights of children and disrupts their transition into adulthood (AU 2016). To overcome this problem, the international community agreed to protect children through the adoption of the Convention on the Rights of the Child (CRC, 1989, GA/44/49), the ILO's Convention 138 on Minimum Age and Convention 182 on the Worst Forms of Child Labour to eliminate child labour (ILO, 1973; ILO, 1999). On a regional level, the African Union adopted the African Charter on the Rights and Welfare of the Child (ACRWC), which advocates for eliminating child labour and calls upon State parties to implement appropriate measures to curb the vice (OAU, 1990). On a national level, Malawi ratified Conventions 138 and 182 in 1999 (ILO, 2022a). The ratification and adoption of these international and regional human rights frameworks was a commitment by Malawi to join the battle against child labour. In addition to the international obligations, Malawi has the Constitution of Malawi, 1994 (amended 2017); Trafficking in Persons Act 2017; Employment Act 2000; and the Child Care, Protection and Justice Act 2010 (CCPJA, 2010), among other vital legislation that make several practical prescriptions for the elimination of child labour.

These bodies of law create a basis for several initiatives to eliminate and prohibit child labour. Besides, initiatives that include the legal ban

on children's engagement in hazardous work and direct interventions by governments and ILO incentive-based schemes inspired by the legal frameworks have been taken to combat the problem (Posso, 2020). For instance, the ILO's International Programmes on the Elimination of Child Labour (IPEC) displayed how introducing school feeding programmes and promoting technical education helped address child labour (ILO-IPEC, 2014). This is on top of other recent special action programmes to fight child labour, forced labour and human trafficking, which have proven to be effective (ILO, 2022d). These programmes have been carried out in the African region with specific priorities considering the country-specific contexts and the forms of child labour manifest in these countries (ILO, 2020). Despite these efforts, child labour is still a concern globally and in Africa (ILO, 2020).

While statutory laws explicitly prohibit child labour, there exists a divergence in the narrative regarding customary and religious laws. On the one hand, customary laws and procedures, for example, emphasise the value of hard work in children and encourage their participation in employment to develop society and enhance their life skills (Abebe & Bessell, 2011). On the other hand, religious teachings and doctrines perceive children as innocent and a gift from God, created in His image (New International Version, Genesis 1: 27). These religiously followed teachings and beliefs call upon all individuals to ensure the respect and value of this divine Image, which includes protecting children from all forms of exploitation (Gondwe, 2015). Similarly, both the Malawi Constitution (Article 23) and the Employment Act 2000 (Article 22) explicitly prohibit the involvement of children in child labour. This demonstrates that the fight against child labour and the promotion of children's rights exist within a complex framework of normative orders, which may not always align with popular opinion or support for children's rights (Corradi & Desmet, 2015).

This legal plurality is a characteristic feature of African societies, where customary laws are integral to the legal system governing people's behaviour (Ndulo, 2011). The legal orders in these societies encompass African customary law, religious laws, and received laws, which can be either common or civil laws depending on the country's colonial history (Ndulo, 2011). Against this background, using desk-based research, this article discusses the role of legal pluralism and its implications in the fight against child labour in Malawi, whose cases of child labour remain a concern in the context where the pluralistic legal systems discussed above are recognised (United Nations, 2016). The subsequent section will delve into the child labour situation in Malawi, examining its underlying causes. This will be followed by an analysis of legal pluralism and its implications in the fight against child labour. Subsequently, the article explores the conflict between protecting children from child labour, guided by the principles of child participation of the CRC, and its manifestations within Malawi's customary laws and practices. Finally, attention will be given to how this

conflict can be balanced by considering the right to education for children affected by child labour, culminating in a comprehensive conclusion, which could be slightly different if complemented by empirical research.

1.1 Child Labour Situation in Malawi

Malawi has a robust legal system at various levels that champions children's rights. (Mwambene & Mwaodza, 2017). At the same time, it also upholds customary laws, religions and traditions that emphasise children's respect for adults and the value of hard work (Mogra, 2022). With an impressive legal framework that protects children from all forms of abuse on different levels, one would expect that cases of child labour will be uncommon. Still, the latest statistics suggest otherwise (ILO Fundamentals 2018).

According to the ILO's global estimates on child labour in 2020, the number of children in child labour has risen to 160 million worldwide – an increase of 8.4 million children in the previous four years – with millions more at risk. Furthermore, the ILO estimates indicate that 79 million children – nearly half of all those in child labour – were in hazardous work that directly endangered their health, safety and moral development (ILO & UNICEF, 2020). The same trend is reflected in Malawi, where an estimated 38 per cent (about 2 million) of children aged 5 to 17 are engaged in child labour, most of whom are in the agriculture sector (ILO & UNICEF, 2020; NSO, 2015). Several factors have been implicated as causes of child labour globally and are also applicable to Malawi, as discussed below.

1.2 Push Factors of Child Labour

While there is a litany of causes and factors implicated as causes of child labour, Eldring, Nakanyane and Tshoaedi found that child labour is mainly influenced by economic and social factors such as poverty, failure of the education system and lack of law/legislative enforcement agencies (Eldring *et al.*, 2000). In the context of poverty and demand for cheap labour, it is argued that employers are aware that if they employ children, they will give them a wage below the minimum standard. Furthermore, they know that the children, given their vulnerability, will not complain about unfair labour practices as they have nowhere to go and lodge a complaint, such as trade unions, on top of limited alternative sources of income (Eldring *et al.*, 2000). In such situations, the employers have all the freedom to exploit the children in whichever way possible. Such exploitative conditions have been reported in child labour-related cases from Malawi in *R v Mponda* (2017), where it was found that children were forced to work in a bar when the initial agreement was that they would be working in a restaurant. The same exploitative practices have been reported in *Josiya & Ors v British American Tobacco Plc & Ors* (2021). In this case, 7,263 Malawian tobacco farmers, comprising 4,066 adults and 3,197 children, alleged working

under exploitative working conditions, including the widespread use of child labour, sued British American Tobacco companies and Imperial Groups who enrich themselves from these proceeds (Traver, 2021).

Additionally, it has been found that parents from impoverished households are more likely to send their children into child labour as a coping mechanism (Frempong, 2019). Thus, parents with limited income sources are more likely to engage their children to either help them do their work on farms or find alternative employment that will support the family in reaching a minimum standard of subsistence (Posso, 2020). In such contexts, poverty pushes the parents to engage children in child labour to complement what they are sourcing. Such situations are even worse when the parents' economic stability has been affected due to the devastating effects of climate change (FAO, 2023).

Furthermore, it has been found that a lack of quality education facilities also pushes children into child labour (Posso, 2020). When schools are expensive, far away, and do not offer competitive advantages over child labour, parents are less likely to see the need to send their children to school. Instead, they allow their children to work, which will help the households' livelihood (Nwazuoke & Chinedu, 2016). Likewise, in natural disasters, schools are often disrupted and destroyed. In such scenarios, the parents find it even harder to push their children to school than work, contributing to the family in dire need.

Additionally, cultural practices are reported to be a cause of child labour. These cultural practices and beliefs include practices that perceive girls' education as a waste of resources (Nwazuoke & Chinedu, 2016). In these practices, the performance of work by children is considered a fulfilment of their cultural obligation and beneficial to the family, as well as cultural practices that regard work by children as a contribution to the survival of a family unit and human development (D-Avolio, 2004). Relatedly, studies have found that some parents prefer their children to work because manual work teaches children to be hard-working adults and helps in skills transfer (Tauson, 2009; Okoye & Tanyi, 2009). Therefore, observing these cultural practices makes it hard for children to be secluded from work and are most likely exposed to work that harms their overall development.

In addition to the above, climate change has been implicated as an emerging culprit pushing children into the worst forms of child labour in African countries (Myers & Theytaz-Bergman, 2017). It is argued that the devastating effects of climate change can potentially disrupt social services, countries' economies, and the fulfilment and enjoyment of human rights (Sanson & Burke, 2020), which are linked to the other causes discussed. In this context, climate change elevates the existing problems of poverty, access to social services and enjoyment of rights by different people. It is

worth noting that while everyone in society is affected by these effects, children are excessively and uniquely affected (Landrigan & Garg, 2005) and are pushed further into child labour practices, among other problems.

Despite the presence of a comprehensive legal system for the protection of children from child labour (Madziwa, 2014), Hoque argues that limited capacity in implementing and enforcing these laws permits the proliferation of child labour cases (Hoque, 2021). This finding is consistent with the observations that poor implementation of laws for combating child labour and forcing children into school are among the leading causes of child labour in most African countries (Kitambazi & Lyamuya, 2022).

In as much as child labour is frowned upon by different sectors of society because of its health, educational and psychological effects on the lives of the children, contrary views perceive the same as beneficial to a certain degree. For instance, it is contended that the earnings of children in vulnerable families have been used to support the welfare of the families by buying everyday needs (Islam & Choe, 2013). Additionally, it is argued that children have used earnings from child labour to pay for their school needs (Clacherty, 2009; Hilson, 2010). Nevertheless, the common denominator that supersedes these seemingly positive outcomes of child labour is that the long-lasting effects are more detrimental to the children as it affects their investment in education outcomes, health and wellbeing as well as the economic benefits that a family and a country could realise if children are kept off from child labour (Islam & Choe, 2013; Bhat, 2010).

2. Legal Pluralism and Child Labour

In the promotion of children's rights and the fight against child labour, one is often conflicted with the idea that a child is part of society and should, therefore, be involved in the affairs of the household and the community on the one hand (Hoque, 2021). On the other hand, a child is subject to specific rights that need protection within their society as they are confronted with the required social obligations. These seemingly contrasting ideas are more prominent in an African setting where a child, apart from being promised several rights, has also been accorded responsibilities to the family and the community through Article 31 of the African Charter on the Rights and Welfare of the Child (ACRWC). On the one hand, a child is accorded all the freedoms and rights alongside responsibilities through the statutory legal frameworks (ACRWC, n.d., Art 31). On the other hand, the child is considered rude, disobedient and disrespectful of parents, cultural and traditional values if they do not listen to counsel or instruction from their parents, including denying to take part in the economic activities of the household (Pereira, 2010). This is probably the reason that cements the claim that the protection of children's rights is caught within multiple norms that coregulate the lives of children (Corradi & Desmet, 2015). The authors claim that this is explicitly

provided in the preambular section of the CRC, where the importance of the traditions and cultural values and the responsibility of caring for the child is bestowed on all members of the society according to local customs such as *kafalah* of Islamic law (Corradi & Desmet, 2015). This suggests that in dealing with children and their protection from social ills such as child labour, human trafficking and child marriage, one has to recognise that there is an application of customary, religious and statutory laws and the parallel application of each one of these laws in their respective legal systems, which Gebeye contends as a dominant context in the discussion of legal pluralism expounded below (Gebeye, 2017).

According to Griffiths, legal pluralism is an attribute of a social field where the law of various provenance may be operative (Griffiths, 1986). For instance, there might be state law on the one hand and, on the other hand, customary law, with its provisions, institutions and procedures for governing how children relate to parents, how marriage is officiated, and even how community social gatherings are controlled- as long as it concerns the governance of people. In such a social setting, therefore, multiple social orders might govern how these situations are carried out or how they are limited. This is a better fit for Griffiths' definition of legal pluralism, which states that it is the presence of more than one legal order in a social field (Griffiths, 1986). He further contends that in the application and organisation of the law, the state reigns domination over other legal orders that might be borne from family, community, churches and other social organisations, which essentially puts the state as the only source of law (3).

However, Benda-Beckmann *et al.* (2018) contend that Griffiths' definition above is more state-centric and inconsistent with the social sciences studies of law, resulting in two schools of thought on legal pluralism. Tamanaha expounds on these schools of thought by contending that legal pluralism is either weak or strong/deep pluralism. The former accommodates the existence of other forms of law with various degrees of plurality and is recognised by the state. These include traditional courts and other indigenous norms and traditions. On the other hand, deep legal pluralism is where all other legal orders are recognised as having equal standing as state law (Tamanaha, 1993).

Furthermore, in their discussion of legal pluralism and governance of small-scale fisheries, which is also linked to the involvement of children in child labour practices, other scholars propound that the state is not the only source of law and should, therefore, not claim dominance over other legal systems and how things are governed (Jentoft *et al.*, 2019). They argue that where different legal systems converge, what is perceived as right or wrong is mainly determined by the values the society considers relevant in that particular setting (274). In this case, while statutory law frowns at children's engagement in child labour in one community,

customs and values in the same community might permit the involvement of children in household enterprises such as fishing and farming to develop the children's life skills and contribute to the household income. Consistent with this opinion, Makwinja observed children's participation in carrying heavy tobacco and working long hours in Malawi even though the country's child protection laws prohibit the employment of children under 14 years in work, which is detrimental to their health (Makwinja, 2010). Similar observations are noted in communities involved in artisanal mining, cocoa, tea and tobacco farming, and fishing. It has been contended that in these communities, children are engaged in different industries as a source of labour and as part of socialisation (Jentoft *et al.*, 2019). It has been contended that this is where they learn the skills that will be material for their everyday life, and frequently, the general perception in these communities holds that the only legitimate and honourable way of teaching children to fish is by taking them fishing (Jentoft *et al.*, 2019). In this sense, cultural and traditional tenets dictate that children be involved in the trade, while human rights law almost always forbids the practice. This observation is likely to be prominent in most African communities where the community's perception of child protection and their work involvement is somehow different when perceived through customary, religious and statutory laws. To ably articulate how the just discussed legal pluralism either suppresses or protects children's rights, the following section discusses the principle of child participation and its application in the context of child labour.

3. Participation and Child Labour

According to Article 12 (1) of the CRC, state parties are called upon to assure children a right to express their views in all matters that affect them and ensure that these views are given due weight by the age and maturity of the child. The Article further states that the child shall be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (CRC, 1989, art, 12 (2)). The Committee on the Rights of the Child (the Committee) contends that although the word participation does not appear in the provision's wording, a widespread practice has emerged at regional and national levels conceptualised as participation. Through such widespread practices, participation includes information sharing, dialogue, and processes where children can voice their views (CRC, 2009, GC/12/5).

Most importantly, in the discussion in this paper, the Committee recognises that younger children, who are permitted to work as provided for in the laws, have to be heard with specific consideration (CRC, 2009 C/GC/12, para 116). The Committee opines that the discussions with children who work have to be in a child-sensitive manner that allows

them to express their best interests in the search for solutions concerning the economic and socio-structural constraints and the cultural context under which these children work. Furthermore, the Committee provides that during the inspection of worksites and working conditions, working children must meet the labour inspectors to express their views and opinions without restrictions (CRC, 2009 C/GC/12, para 117).

However, it has been reported that the Committee frequently notes with concern that while many countries have made strides in ensuring that children enjoy the right to participate and be heard, its application remains limited to family, society and judicial proceedings. It attributes such slow progress to traditional, cultural and societal attitudes (UNICEF, 2007). Consistent with this observation, it has been observed that in a majority of African countries, in the presence of their parent or adults, children are supposed to be seen and not to be heard; children remain to be talked about rather than being spoken to, and their participation in big decisions remains tokenistic (Toros, 2021). Arguing that this might not solely be peculiar to African societies alone, Kaime contends that all perceptions that indirectly or directly affect the right of the child to participate should be challenged by developing a culture that values listening to children (Kaime, 2005, 231). Similarly, it is propounded that a deeper analysis of the relationship and institutional setup of an African society reveals that intimate discussions between children and their grandparents provide an avenue for participation (Corradi & Desmet, 2015). This assertion resonates with Kaime's (2011) findings, where he discovered that the close ties provided in the social fabric of the Lomwe society in Malawi allow child protection, let alone participation, through their grandparents as intermediaries (Kaime, 2011, 123).

Nevertheless, more has to be done in matters of child participation and child labour. For example, where a family's income can no longer sustain the needs of its members, children are pushed to support the income-generating activities of their household. The adults in the family will mainly decide how the family will find food, clothing and shelter, and children will only be told what to do as parents think that giving children a chance to speak and be heard reduces their power and authority over children (Fokala, 2020). This assertion is supported by the luxury axiom theory on child labour, which indicates that when the income equilibrium of a household can no longer meet the economic demands of its members, children are brought into the equation to balance the needs and supply of labour out of necessity (Basu & Tzannatos, 2003) Likewise, it is asserted that parents are typically the decision-makers in child labour practices. They usually do so in dictatorial forms (Edmonds, 2007). In this situation, therefore, a child finds it almost impossible to voice out their opinion as children who voice out their ideas when called to work are considered disrespectful, cursed, and are called all sorts of names (Twum-Danso 2009, 421) that are meant to discourage any thought and action that might be

deemed as an expression of one's thoughts and opinion as encouraged by the international human right laws.

4. Striking the Legal Pluralism Balance in Child Labour

As discussed in the previous sections, child labour has physical, psychological, moral and health effects on the child. This is due to the children's physical attributes that make them less likely to cope with the working conditions that they encounter. Most importantly, it affects their education and health to an extent where other interventions to overcome the problem have been to invest in quality education, whose benefits surpass the immediate gains attained from involvement in child labour. This section, therefore, discusses whether customary or statutory laws, on their own or alongside each other, provide enough protection for children against child labour. This discussion will be made by looking at the right to education for children as it is one of the fundamental rights affected when children are involved in child labour (Heady, 2003).

The role of education in addressing child labour is undeniable. Education and schooling have been spotlighted as both a strategy for ending child labour and a means of keeping children away from child labour practices. Posso (2020) believes that if the poverty dynasty of child labour is to be broken, a high investment in education has to be made as instruction ensures a future social and economic capital that will enable the children to break the poverty cycle in their families. In this case, it is assumed that once the children are educated, they are most likely to have transferable skills that will enable them to find employment, which will be used to support other family members to keep them away from child labour. Meanwhile, education is also considered a means of saving children from child labour practices (Nath & Hadi, 2000). It is contended that often, children who are not in school are more prone to be engaged in work around the household enterprises, look after younger siblings or work on other people's farms because they are seen as an immediate extra pair of hands to maximise labour demands more especially in agriculture enterprises (Admassie, 2000). In such cases, schooling is being proposed to keep children away from homes and subsequently prevent their engagement in child labour practices.

Furthermore, the ILO has noted a positive correlation between compulsory primary education and eradicating child labour through Article 1, read together with Article 2 (3) of Convention 138 on Minimum Age. The Convention calls upon each member to design national policies to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment, which shall not be less than the age of completion of compulsory schooling. Subsequently, the Malawi government has made education a matter of national policy and provided compulsory free primary education for all citizens of Malawi

through section 13 (f) of the Malawi Constitution. Furthermore, the Malawi Employment Act prohibits the employment of persons under 14 in any occupation or activity likely to harm such a person's health, safety, education, morals or development (Employment Act, 2000, S 22 (1) a.). These provisions justify the perceived role of education in tackling child labour. Likewise, they are also meant to protect children's right to education.

While customary laws also advocate for the right to education for children in society, it is a form of education which can mainly be attained through involvement in work that the adults in the family and the community are doing (Jentoft *et al.*, 2019). This observation resonates with the sociocultural perspectives of child work, which suggest that children's work is connected to the social and cultural realities of where children are based (Abebe & Bessell, 2011). In this perspective, children learn skills and attributes that formal schools cannot provide through their participation. Similarly, Takyi proposes that understanding child labour needs to come from ecological perspectives that pay attention to the interaction between individuals, their contexts, opportunities, and threats that surround them, which gives reason as to why children are involved in child labour practices sometimes at the expense of their education among many things (Takyi, 2014). According to Takyi, this explains why children work alongside adults to acquire skills they will use in their adult lives, which is another form of education necessary for both the children and their parents (Takyi, 2014, 36). Similarly, it has been revealed that a need to learn a skill is among the motivations and reasons why children participate in work, alongside the need to help their family members deal with poverty and family struggles. In some cases, the children are compelled by a desire to earn their own money, which gives them confidence and independence (Kulakow et al., 2017).

Even though culture, traditional values, and practices may have different approaches to imparting skills to children, such as involving them in work, policies, legislations, and institutions are in place to promote children's education. However, these legal orders alone cannot effectively protect children's right to education and guarantee their right to participation. Hence, safeguarding children from child labour and promoting their meaningful participation relies not only on statutory laws but also on customary and religious laws. Such is the case as provisions or practices in one order or law address a gap in another (Msukwa, 2017).

Subsequently, other than drawing conclusions and lines of comparison between customary, religious and statutory laws on how strong each of these legal orders accords optimal protection of children from child labour, an understanding of the lived realities of children will inform how different policy reforms can be applicable and consequently be accepted in a given society and offer the needed protection (Corradi & Desmet, 2015).

Moreover, legal pluralism helps bring justice and protects the people in places where the government has limited capacity to support access to justice for the people through formal statutory arrangements (Gebeye, 2019). In this case, it will be more convenient for the community to apply the laws and orders that they easily identify and have legitimacy among themselves for promoting the right to education for its children and, subsequently, protection from child labour and guaranteeing their participation.

To effectively promote children's rights, it's essential to have a thorough understanding of their daily experiences and the societal norms surrounding them. When these norms conflict with established rights, exploring alternative solutions and deconstructing harmful practices is necessary (Corradi & Desmet, 2015).

5. Conclusion

Child labour as a global problem is affecting the welfare of the children involved as well as their families. It is robbing children of their childhood and affecting the enjoyment of their rights. Recognizing this, the international community promise children protection of their rights through different laws that the Malawi government has domesticated. This commitment to protect and promote children's rights is evident in the Malawi Constitution and several provisions in the Employment Act 2000 and the Child Care Protection and Justice Act 2010. These statutory laws complement, reinforce, and even sometimes contradict the protection of children from child labour through customary and religious orders. In other words, there are multiple legal systems that children navigate as they try to help their families survive, source an income of their own, pursue an education, and learn the ways of life in their communities. As they participate in all these everyday activities and as life happens around them, they are conflicted in living within these legal systems, which are sometimes consistent, others not so much.

Discerning from the discussion above, one would be justified in concluding and ascertaining that child labour is a complex problem that can be understood from different perspectives. One would also not be wrong to join the claim that child labour is a complex problem that calls for multiple players and stakeholders as well as a diverse approach to deal with it (ILO & UNICEF, 2021). Through this understanding, it is comprehensible to conclude that customary, religious, and statutory laws converge in carrying a common undertone that states that child labour is intricate and challenging to deal with and has multiple and interrelated push factors, causes, and consequences. This provides ground and reasons to believe that addressing this challenge cannot be from one angle but from numerous approaches, including legal pluralism, where depending on the lived reality, either the statutory or the customary laws have to be applied

simultaneously or at different times. This can effectively be done when the children involved in child labour are provided a platform to participate in ways that will not harm their physical, emotional, psychological, educational and moral well-being.

Ultimately, it is being proposed that better protection of children from child labour can be guaranteed where the state recognises and acknowledges the existence and the power of customary and religious laws alongside the binding force of statutory regulations. Thus, some of the seeming weaknesses or gaps in the customary or religious legal orders are most likely to be covered by the provisions or practices provided for in the statutory legal frameworks on child labour or vice versa.

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References

Abebe, T., & Bessell, S. (2011). Dominant discourses, debates and silences on child labour in Africa and Asia. *Third World Quarterly*, *32*(4), 765-786. Link (last visited September 02, 2024) PMid:21961185

Admassie, A. (2000). *The incidence of child labour in Africa with empirical evidence from rural Ethiopia* [Discussion Papers]. Development Policy, No. 32, 2000, University of Bonn, Center for Development Research (ZEF).

African Charter on the Rights and Welfare of the Child (ACRWC). (n.d.). *African Union Ethiopia.* Link (last visited September 02, 2024)

African Committee of Experts on the Rights and Welfare of the Child (ACERWC). (2016). *Agenda 2040, Africa's Agenda for Children: Fostering an Africa Fit for Children*. Link (last visited September 02, 2024)

Basu, K., & Tzannatos, Z. (2003). The global child labor problem: What do we know and what can we do? *The World Bank Economic Review*, *17*(2), 147–173. Link (last visited September 02, 2024)

Benda-Beckmann, K. von, & Turner, B. (2018). Legal pluralism, social theory, and the state. The *Journal of Legal Pluralism and Unofficial Law*, *50*(3), 255-274. Link (last visited September 02, 2024)

Bhat, B. A. (2010). Gender, education and child labour: A sociological perspective. *Educational Research and Reviews*, *5*(6), 323-328.

Child Care, Protection and Justice Act (CCPJA). (2010). Malawi. Link (last visited September 02, 2024)

Clacherty, G. (2009). *Hard work, Long hours and little pay*. Plan Malawi, Clacherty and Associates Education and Social Development (Pty Ltd.) Auckland Park South Africa.

Committee on the Rights of the Child. (2009). *General comment no. 12: The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 116-117.

Convention on the Rights of the Child (CRC), adopted November 20, 1989, (entered into force 2 September 1990) GA Res. 44/25. (1989). Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

CRC General Comment 12. (2009). *(C/GC/12)*, Geneva. Link (last visited September 02, 2024)

Corradi, G., & Desmet, E. (2015). A review of literature on children's rights and legal pluralism. *The Journal of Legal Pluralism and Unofficial Law*, *47*(2), 226-245. Link (last visited September 02, 2024)

D-Avolio, M. 2004. Child labor and cultural relativism: From 19th century America to 21st century Nepal. *Pace International Law Review*, *16*(5), 109-34. Link (last visited September 02, 2024)

Edmonds, E. (2007). *Child labour in Handbook of Development Economics*. In: T. P. Schultz, & J. Strauss (Eds.), (pp. 3609-3700). Elsevier Science, Amsterdam, North-Holland.

Eldring, L., Nakanyane, S., & Tshoaedi, M. (2000). *Child labour in the tobacco growing sector in Africa*. Elimination of Child Labour. Link (last visited September 02, 2024)

Employment Act. (2000). Malawi. Link (last visited September 02, 2024)

FAO. (2023). *The relations between climate change and child labour in agriculture - Evidence on children's work trends after climate-related events in Côte d'Ivoire, Ethiopia, Nepal and Peru*. Rome, 140. Link (last visited September 02, 2024)

Fokala, E. (2020). Calibrating children's rights to participate in a family setting 30 years after the adoption of the convention on the rights of the child and the African children's charter. *Speculum Juris*, *34*(2), 116, 127.

Frempong, R. (2019). *Child labour in Sub-Saharan Africa: Empirical evidence and new perspectives*. Universität Bayreuth, Germany.

Gebeye, B. A. (2017). Decoding legal pluralism in Africa. *The Journal of Legal Pluralism and Unofficial Law*, *49*(2), 228-249. Link (last visited September 02, 2024)

Gebeye, B. A. (2019). The Janus face of legal pluralism for the rule of law promotion in sub-Saharan Africa. *Canadian Journal of African Studies*, *53*(2), 337-353. Link (last visited September 02, 2024)

Gondwe, J. A. (2015). Theological investigation into Malawian child labour: A challenge to CCAP Livingstonia synod. [Master's degree (Practical Theology and Missiology), Stellenbosch University, Master's Degree Thesis, South Africa].

Griffiths, J. (1986). What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law*, *18*(24), 1-55. Link (last visited September 02, 2024)

Heady, C. (2003). The effect of child labour on learning achievement. *World Development*, *31*(2), 385-393. Link (last visited September 02, 2024)

Hilson, G. (2010). Child labour in African artisanal mining communities: Experiences from Northern Ghana. *Development and Change*, *41*(3), 445-473. Link (last visited September 02, 2024)

Hoque, M. M. (2021). Reviewing child labour and its worst forms: contemporary theoretical and policy agenda. *Journal of Modern Slavery*, *6*(4), 32-51.

ILO, Minimum Age Convention, C138. (1973). Link (last visited September 02, 2024)

ILO, Eliminating the Worst forms of Child Labour, C182. (1999). Link (last visited September 02, 2024)

ILO-IPEC. (2014). *IPEC action against child labour 2012-2013: Progress and future priorities*. ILO, IPEC, Geneva. Link (last visited September 02, 2024)

ILO and UNICEF, Child Labour. (2021). *Global estimates 2020, Trends and the Road Forward, ILO and UNICEF, New York*. Link (last visited September 02, 2024)

ILO Fundamentals. (2018). *Understanding child labour and youth employment in Malawi (International Labour Office, Fundamental Principles and Rights at Work Branch (Fundamentals), - Geneva: ILO*.

ILO and UNICEF. (2020). *COVID-19 and Child Labour: A time of crisis, a time to act, ILO and UNICEF, New York*. Link (last visited September 02, 2024)

ILO. (2021). *2021: International Year for the Elimination of Child Labour' ILO Newsroom*. Link (last visited September 02, 2024)

ILO. (2022a). Ratification by country. Link (last visited September 02, 2024)

ILO. (2022d). *International programme on the elimination of child labour and forced labour (IPEC+)*. Link (last visited September 02, 2024)

Islam, A., & Choe, C. (2013). Child labour and schooling responses to access to microcredit in rural Bangladesh. *Economic Inquiry*, *51*(1), 46-61. Link (last visited September 02, 2024)

Jentoft, S., & Bavinck, M. (2019). Reconciling human rights and customary law: Legal pluralism in the governance of small-scale fisheries. *The Journal of Legal Pluralism and Unofficial Law*, *51*(3), 271-291. Link (last visited September 02, 2024)

Josiya & Ors v British American Tobacco Plc & Ors. (2021). *EWHC 1743 (QB)*. Link (last visited September 02, 2024)

Kaime, T. (2005). The convention on the rights of the child and the cultural legitimacy of children's rights in Africa: Some reflections. *African Human Rights Law Journal*, *5*(2), 221-238.

Kaime, T. (2011). *The convention on the rights of the child: A cultural legitimacy critique*. Europa Law Publishing. Link (last visited September 02, 2024)

Kitambazi, A., & Lyamuya, R. (2022). Effects of child labour on school attendance in Muheza district, Tanzania. *East African Journal of Education Studies*, *5*(4), 1-19. Link (last visited September 02, 2024)

Kulakow, L., Schmidt, K., Austria, K., Göbel, S-L., & Bolay, D. (2018). Hi there! My name is Paul and I will share working children's views, reflections and experiences with you. Link (last visited September 02, 2024)

Landrigan, P. J., & Garg, A. (2005). Children are not little adults. In: J. Pronczuk-Garbino (Ed.), *Children's Health and the Environment-A Global Perspective: A Resource Manual for the Health Sector*, (pp. 1-16). Geneva, World Health Organization.

Madziwa, T. (2014). *A critical analysis of child labour protective laws in Southern Africa: A case study of Malawi, South Africa and Zimbabwe* [LLM dissertation, University of KwaZulu Natal].

Makwinja, S. M. (2010). *Child labour and the violation of child rights: A case of child workers on tea and tobacco plantations in Malawi* [MA thesis, Universitetet i Tromsø].

Mogra, I. (2022). Developing essential values through traditional tales: Voices of Malawian primary school teachers. In: B. Collet, & Y. Matemba (Eds.), *The Bloomsbury Handbook of Religious Education in the Global South*, Bloomsbury Publishing. Link (last visited September 02, 2024)

Msukwa, W. (2017). Legislation and child labour policy in Malawi [Paper for the National Conference in Eliminating Child labour in Agriculture]. Link (last visited September 02, 2024)

Mwambene, L., & Mwaodza, O. (2017). Children's rights standards and child marriage in Malawi. *African Studies Quarterly*, *17*(3), 21-44

Myers, L., & Theytaz-Bergman, L. (2017). *Child Labour Report 2017 - The Neglected Link: effects of climate change and environmental degradation on child labour*. Link (last visited September 02, 2024)

National Statistics Office of Malawi and International Labour Office (NSO), Malawi. (2015). *National child labour survey report, Fundamental Principles and Rights at Work Branch, - Geneva: ILO, 2017*. Link (last visited September 02, 2024)

Nath, S. R., & Hadi, A. (2000). Role of education in reducing child labour: evidence from rural Bangladesh. *Journal of Biosocial Science, 32*(3), 301-313. Link (last visited September 02, 2024) PMid:10979225

Ndulo, M. (2011). African customary law, customs, and women's rights. *Indiana Journal of Global Legal Studies*, *18*(1), 87-120. Link (last visited September 02, 2024)

Nwazuoke, A., & Igwe, C. (2016). Worst forms of child labour in Nigeria: An appraisal of international and local legal Regimes. *Beijing Law Review*, *7*(1), 69-82. Link (last visited September 02, 2024)

Okoye, U. O., & Tanyi, P. L. (2009). Perception of child labour in southeastern Nigeria: A study of Onitsha metropolis. *International Journal of Research in Arts and Social Sciences*, *1,* 426-440.

Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child (ACRWC). (1990). CAB/LEG/24.9/49 (1990). Link (last visited September 02, 2024)

Pereira, J. (2010). Spare the rod and spoil the child: Samoan perspectives on responsible parenting. *Kōtuitui: New Zealand Journal of Social Sciences*, *5*(2), 98-109. Link (last visited September 02, 2024)

Posso, A. (2020). Introduction. In: A. Posso (Ed.), *Child Labor in the Developing World*, Palgrave Macmillan, Singapore. Link (last visited September 02, 2024)

Mponda, R. V. (2017). MWHC 114. Link (last visited September 02, 2024)

Sanson, A. V., & Burke, S. E. L. (2020). Climate change and children: An issue of intergenerational justice. *Children and peace: From research to action* (pp. 343-362). Link (last visited September 02, 2024)

Takyi, E. (2014). Child labour in Ghana: Ecological perspective. *Developing Country Studies*, *4*(10), 35-44.

Tamanaha, B. Z. (1993). The folly of the 'social scientific' concept of legal pluralism. *Journal of law and Society*, *20*(2), 192-217. Link (last visited September 02, 2024)

Tauson, M. (2009). Child labor in Latin America: Poverty as cause and effect. *Human Rights and Human Welfare*, 31-43.

Toros, K. (2021). A systematic review of children's participation in child protection decision-making: Tokenistic presence or not? *Children and Society*, *35*(3), 395-411. Link (last visited September 02, 2024)

Smith, T. High Court declines to strike out value chain negligence claim (Legal Briefing). Link (last visited September 02, 2024)

Twum-Danso, A. (2009). Reciprocity, respect and responsibility: the 3Rs underlying parent-child relationships in Ghana and the implications for children's rights. *The International Journal of Children's Rights*, *17*(3), 415-432. Link

UNICEF. (2007). *Implementation handbook for the convention on the rights of the child*. Maldives. UNICEF. Link (last visited September 02, 2024)

United Nations Office of the High Commissioner for Human Rights. (2016). *Human rights and traditional justice systems in Africa*. UN.

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The construction of global citizenship and human rights through graffiti in Europe

*Marissa Gutiérrez-Vicario**

Abstract: *The article explores hip-hop culture's global impact, specifically focusing on graffiti art to shape global consciousness and human rights education among youth. Originating in the Bronx in the 1970s, the art form of hip-hop emerged as a unifying force in traditionally marginalised communities and communities of colour, transcending borders to become a catalyst for social change around the globe. Emphasizing graffiti's significance within hip-hop, the article delves into its role as a voice for marginalized communities and a form of resistance against societal norms. It examines how graffiti fosters a sense of global consciousness and reinforces human rights among young artists, particularly in the German hip-hop scene, creating inclusive communities and diverse spaces. The article examines specific educational initiatives like Hip Hop Mobil and the Graffiti Research Lab in Germany. It discusses how these initiatives have played pivotal roles in educating youth about hip-hop culture, using technology, and fostering cross-cultural connections through digital graffiti. Furthermore, the article raises critical questions about the future of graffiti, especially in its integration with digital technologies, and its potential to democratize public spaces further. Lastly, this article considers the evolving nature of graffiti to expand public participation, shape a collective global identity among youth, and help reinforce human rights within communities. In essence, the article highlights hip-hop culture's transformative power, focusing on graffiti art as a tool that empowers marginalized community members, fosters a global sense of belonging, and encourages human rights activism among the younger generation while examining the trajectory of graffiti amidst technological advancements.*
Keywords: *global consciousness, graffiti, hip-hop, human rights, technology, youth*

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1. Introduction: Hip Hop as a "Way of Life"

Hip-hop is a culture. It is a way of life for us.

Words Painted on Neighbourhood Mural (King, 2001)

But one thing about hip-hop has remained consistent across cultures: a vital progressive agenda that challenges the status quo. Thousands of organizers from Cape Town to Paris use hip-hop in their communities to address environmental justice, policing and prisons, media justice, and education.

(Chang, 2007)

Since its emergence in the United States during the 1970s, popular hip-hop, or rap,[1] music and culture have had a significant impact on the rest of the world. From its inception at a 1973 house party in the Bronx, New York City, it was arguably an art form used for unifying what was considered "broken" communities plagued by gang violence (Chang, 2005) and systemic state violence and oppression. Since then, hip-hop has continued to be used as a mobilizing tool for social change and for advocating for human rights. Yet as the world has become more globalized, especially through the proliferation of the internet and digital technology, hip-hop as an art form has transformed various communities, and simultaneously also has been transformed by communities, as hip-hop culture has transcended across borders, an exemplification of what is considered as "cultural globalization." Undoubtedly, there have been countless examples of positive social change in communities through the globalization of hip-hop. Some prime examples of this positive social transformation are non-profit organizations that have used hip-hop in the United States to encourage youth empowerment and youth voting registration, such as the Hip-Hop Summit Action Network, founded in 2001[2] by Def Jam Records co-founder Russell Simmons, along with the mobilization of more radical, grassroots community-based organizations that have used hip-hop as a tool to promote positive social change (Hip-Hop Summit Action Network, 2014).

In efforts for communities in the United States and across the globe to construct more democratic public spaces, one often finds that these spaces manifest themselves as murals or similar forms of public art. Using the framework of hip-hop, this article explores the idea of the construction of the global consciousness and engagement of young Europeans through

[1] "Rap" music and hip-hop are often synonymously used, however, hip-hop organizations like the Universal Zulu Nation will argue that this is incorrect, as "rapping" and "rappers" are only one aspect (MCing) of the entire hip-hop culture. (Universal Zulu Nation. 2024. "Hip-Hop History." Link.) For the purposes of this paper, the author will exclusively utilize "hip-hop" when referring to its connection with graffiti.

one of its primary components, graffiti art or public muralism. Some questions to be explored include:

- What are more creative ways of building a more democratic form of community art? Specific case studies will focus on Berlin, Germany, including the Berlin Wall and other current projects.

- How has the "beauty and intense vitality of graffiti art" (Chalfant & Martha, 2021) been used as a resource for developing a youth global consciousness and what does the future of this look like?

- How can art be used to cultivate global understanding, global consciousness, and a definition of global self among young people, most specifically through graffiti and public artworks?

2. Background on the Origins of Hip-Hop Culture

2.1 Bronx, New York City: The Birthplace of Hip-Hop and the Graffiti Movement

As previously stated, the very first instance of hip-hop in the United States came out of the New York City borough of the Bronx, ridden with gangs, bloodshed, and state neglect in the late 1960s, and seeking an alternative to violence in the early 1970s.

By no means an overnight process, a few young leaders of a predominately Puerto Rican gang known as the Ghetto Brothers, sought to unify the deeply segregated gangs of the Black and Puerto Rican communities. After a member of the Ghetto Brothers was murdered by a rival gang, leaders of the Ghetto Brothers did not seek retribution and instead developed a four-point "peace treaty" to help initiate a truce between gangs within the Bronx community (Chang, 2005). It was during this period of borough unification that the foundation of hip-hop was laid.

On August 11, 1973, Cindy Campbell and her brother Clive, more famously known as DJ Kool Herc, by many considered the father and the "alpha DJ [Disc Jockey, or record player] of hip-hop," held the famous party that has been credited as the single event leading to the birth of hip-hop at 1520 Sedgwick Avenue address in the Bronx (Gonzalez, 2007). This was one of the first of many parties and community social gatherings where DJ Kool Herc would spin the records of such famous U.S.-American musicians as James Brown and Jimmy Castor, enticing the crowd to dance (Gonzalez, 2007). In time, DJ Kool Herc created what was known as the Herculords: a "clique of DJs, dancers, and rappers (Chang, 2005)," representing three of the four official classical elements of hip-hop culture. Today these four elements are considered: DJing (one who utilizes the turntables), MCing (also known as the "Master-of-Ceremonies, or rapping), B-boying (or the

form of dance known as break-dancing), and lastly, graffiti, which emerged originally before the other four artistic elements and eventually becoming one of its elements of hip-hop (Vancouver Visual Art Foundation, 2023).

Along with DJ Kool Herc, another hip-hop pioneer attending that very first party in the fall of 1973 was Afrika Bambaataa, widely considered the "grandfather" and "godfather" of hip-hop (Official Site of the Universal Zulu Nation, 2024). During this period through the efforts of Bambaataa, the Bronx gang the Black Spades was transformed into the Universal Zulu Nation, which considers itself the "world's oldest, largest most respected grassroots Hip Hop organization" (Official Site of the Universal Zulu Nation, 2024). Along with the four classical elements of hip-hop culture mentioned, the Universal Zulu Nation advocates for a fifth, which is considered "knowledge." It is this last element, the Universal Zulu Nation believes, that acts as the essential "glue" for the entire hip-hop culture and thus "knowledge" remains a critical part of its organizational mission in educating the world about hip-hop (Official Site of the Universal Zulu Nation, 2024).

2.2 Use of Hip-Hop as a Tool for Democratic Participation and Amplifying Voice

The sixties were undoubtedly a turbulent time in the United States, as Black Americans struggled against racism and overt oppression throughout the Civil Rights Movement. Although there is a movement within the hip-hop genre to primarily focus on social justice and human rights issues, better known as "conscious hip-hop;" hip-hop in the United States during the 1970s was just in its earliest stages, just as the peak of the Civil Rights Movement had come to an end. During this period, hip-hop was birthed out of a period of neglect and structural violence enacted against poor Black and Latino urban youth by the state. In its earliest stages, it had become a part of the "marginal New York subculture," (Simon, 2003) and eventually became a tool for intense political mobilization or as an invitation for democratic participation, as it is more commonly utilized today. From its earliest roots in the United States, the hip-hop culture celebrated by the Universal Zulu Nation was "not about politics," but rather the attainment of knowledge for oneself (Chang, 2005). According to some of the written Infinity Messages of the Universal Zulu Nation, hip-hop and the Organization were most about "wisdom and understanding of everything, freedom, justice and equality," which would help lead to one's own positive, personal transformation (Chang, 2005). It was only when hip-hop, became a phenomenon that had "saturated mainstream [U.S.] America," (Simon, 2003) and through the forces of cultural globalization, had a considerable impact on the rest of the world, did it became used on the political mobilization front. Yet, while music, lyricism, and turntablism are some of the more well-known aspects of hip-hop culture, graffiti muralism remains an integral component of the phenomenon, especially

as a vehicle in which the traditionally "invisible" voices of those within cities across the globe, including those across Europe, which will be more closely discussed, became finally heard and amplified.

3. Background on Graffiti as a Tool for Voicing Injustice

We also feel that after thirty years the beauty and the intense vitality of graffiti art have made the point that it is art and that graffiti has developed within itself the strength to overwhelm the naming power of the oppressors.

(Chalfant & Martha, 2021)

On the most basic level, "graffiti primarily refers to spray-painted, written and scratched words or motifs on exterior surfaces," (Walde, 2007) utilized in predominately public spaces, meant to be consumed by a larger audience. Others, like scholar Ronald Niezen, argue that graffiti "is a form of communication…in which the message is amplified by illegality" (Niezen, 2020), yet an art form ironically calling for a more "fair application of the law" (Niezen, 2020). Niezen also notes that street graffiti is often tied to "significant currents of justice claims" (Niezen, 2020), meaning this often-anonymous street art is connected to issues of injustice, frequently what is viewed as "liberal" social causes, yet not exclusively.

Gaining momentum with the hip-hop culture that emerged in New York City in the 1970s, graffiti became a movement within itself. Challenging the "ownership of public space" (Walde, 2007) graffiti artists, or taggers, used subway cars travelling throughout each of the five boroughs as their canvasses. Through globalization and the spread of media, like the films Style Wars, Wild Style, and Beat Street, (Walde, 2007) graffiti spread throughout the globe, particularly around the 1980s, when young graffiti artists like "Jean-Michel Basquiat, Futura 2000, Lee Quinones, and Keith Haring" became icons overnight (Kan, 2001). Into the 1990s, graffiti, along with other aspects of hip-hop became what was considered "commercialized," being used in corporate advertisements seeking to reach out to a younger, "more hip" generation (Kan, 2001). This generation would become captivated by this illegal art form through the work of famous street artists like Banksy and Shepard Fairey. Some of these young people would even engage in the creation of graffiti themselves, as in the early 2000s, the age of most graffiti artists in the United States was "estimated to be between the ages of 12 to 30, with the majority younger than 18 years old" (Kan, 2001). Either way, graffiti has always been alluring to the young, closely intertwined with hip-hop culture, it has symbolized an active resistance to the status quo, through scrawled messages made by invisible hands for all to see across the urban landscape.

We also see on a global level how graffiti has been used as active resistance on a political level. While their book on the subject matter

primarily focuses on graffiti being used as a tool of resistance in Ireland and Palestine, authors Philip Hopper and Evan Renfro outline how graffiti is used as a tool by "occupied and oppressed peoples" (Hopper & Evan, 2023) in their political struggles. Some of these include:

- As a tool for individuals to express themselves "against the establishment in a public and often provocative manner" (Hopper & Evan, 2023)

- To raise awareness on particular issues, especially those that are intentionally or unintentionally "ignored by mainstream media" (Hopper & Evan, 2023);

- Lastly, it also allows for "an alternative form of the historical record and serves as a reflection of the political climate at a particular place and time" (Hopper & Evan, 2023).

While all valuable points, for this paper, most of the focus will be on how individuals (and/or collectives of individuals) use graffiti as a tool to be able to express themselves, particularly within the public arena, in often provocative or unconventional manners, as global citizens utilizing a global consciousness to be discussed in the next section.

4. Definitions of Global Consciousness for Youth and Global Citizenship

In their article From Teaching Globalization to Nurturing Global Consciousness, two Project Zero researchers based at Harvard University, Veronica Boix Mansilla and Howard Gardner reflect on the necessity of young people understanding the problems that exist in the world around them (Gardner & Mansilla, 2007). Similarly, they explore the development of the "globally conscious mind" of youth, one that understands the "local expressions of global phenomena;" from their neighbourhoods to communities that they might know only digitally, thousands of miles away (Gardner & Mansilla, 2007).

In further exploring these ideas of global citizenship, particularly in terms of global sensitivity, global understanding, and the global self as mentioned by Mansilla and Gardner, graffiti and public art can be explored through this framework, which together all three "lie at the heart to global consciousness" (Gardner & Mansilla, 2007). In their work, Mansilla and Gardner describe these concepts as the following:

> Global sensitivity, or our awareness of local experience as a manifestation of broader developments in the planet; global understanding, or our capacity to think in flexible and informed ways about contemporary worldwide developments; and global self,

> or a perception of ourselves as global actors, a sense of planetary belonging and membership in humanity that guides our actions and prompts our civic commitments (Gardner & Mansilla, 2007).

One can argue that through hip-hop culture, specifically graffiti and public muralism, artists, particularly young people, are expanding their global consciousness, reaching out to a larger "manifestation of broader developments in the planet" (Gardner & Mansilla, 2007). While graffiti may exemplify many aspects of local culture, in participating in such practices, they are (whether consciously or unconsciously) gaining a sense of global self, through connecting through the wider cultural phenomenon of hip-hop culture. In the article, "German-Turkish Transnational Space: A Separate Space of Their Own," Ayhan Kaya reflects on youth engaged in hip-hop culture as "global constituents," citing Turkish youth in Germany as an example (Kaya, 2007). Being an ethnic minority, Kaya argues that through hip-hop culture, including designing graffiti and even developing their bilingual graffiti magazines, Turkish youth were able to resist "the dominant regimes of representations" and contribute to and even help build the globalized mainstream culture of graffiti (Kaya, 2007).

Overall, when one considers global citizenship, it is a reference that extends beyond the traditional concept of being a citizen of any country. Rather, this is a reference to a larger connection to a "broader global community" and according to UNESCO, this concept refers to any individual who "understands how the world works, values differences in people, and works with others to find solutions to challenges too big for any one nation" (UNESCO, 2024). A global citizen, like a graffiti artist, might also be interested in issues that go beyond any one community, country, or region, for instance, humanitarian border crises and the plight of refugees, global poverty, and climate change. Scholar William F. Fernekes further describes the concept of global citizenship as interdisciplinary with "its foundations heavily rooted in the study of cosmopolitanism" (Fernekes, 2016). Furthermore, a global citizen is also connected to human rights and is more simply, someone who embraces upholding universal human rights and possesses the competencies required to educate others on human rights (Fernekes, 2016), which in many cases the tool of graffiti allows young people to do. In the following sections, a further analysis of the role of graffiti in the lives of young people in the German hip-hop scene and its connection to global citizenship and global understanding will be explored.

5. Graffiti In Germany and Hip-Hop in Diasporic Communities

East Side Gallery is quite possibly the most dispiriting art showcase mankind has ever produced. If you like art, the chances are that you've seen much better. Nothing is stunning here. I expected much more from a place that is said to be one of the must-see art exhibits in the city.

James W., London, UK

One of my favourite things in Berlin and one of the greatest community art projects of all time. I love how they took something so ugly and heavy and turned it into a wonderfully beautiful piece of art, even if some of the artwork has serious commentary on the situation.

Anya R., New York City, USA

The East Side Gallery, however, tops my list. The artwork is both thought-provoking and amazing. It's also a great walk and doesn't strain the wallets of us budget travellers. Don't miss it.

Alea G., San Jose, California, USA (Yelp, 2014).

As reflected by the random assortment of Yelp reviews from tourists across the globe, the attraction elicits a wide range of feelings emotions and opinions about the art of the Berlin Wall. Outside of serving as a significant memorial commemorating the wall's demolition, the East Side Gallery in Friedrichshain also serves as one of the longest open-air galleries in the world since 1990 (East Side Gallery, 2024). For some scholars in the late 1980s, the graffiti of the wall appeared restricted to tourists and non-Berliners (Stein, 1989), but as the decades went on, the Berlin Wall soon found itself as the canvas for artists from around the world, including several notable international artists, like the UK's Banksy and Brazil's twin graffiti crew, Os Gemeos (Tzortzis, 2008).

The German hip-hop and graffiti scene birthed in the early 1980s was heavily influenced by Western media and culture, especially that of New York City (Tzortzis, 2008), the birthplace of hip-hop. However East and West Germany underwent two unique experiences. While the latter was influenced by the U.S. American forces stationed there, the East, through "state control of popular life," was stymied by the lack of access to popular media and the import of Western music, which caused a slower evolution in the development of hip-hop technology, like turntables (Hoyler & Christoph, 2005).

Early on in West Germany, influential graffiti films like the previously mentioned Beat Street, Wild Style! (Hoyler & Christoph, 2005) and Style Wars, along with seminal graffiti books like Subway Art by Henry Chalfant and Martha Cooper (Tzortzis, 2008), found their way into youth populations interested in learning, replicating, and also creating their graffiti, distinctly relevant to their communities.

During this time, graffiti and hip-hop in general, served as a tool for bringing diverse communities of young people together, particularly diaspora communities congregating at local youth clubs or community centres (Hoyler & Christoph, 2005). As young people sought to share their talents with others

and gain respect, they hosted "jams," or community-based hip-hop performance spaces, in their communities and travelled to others hosted nearby (Hoyler & Christoph, 2005). These hip-hop communities often included a wide range of ethnic backgrounds, as one scholar notes that in the late 1980s in Nuremberg alone, there were Turkish, Italian, and Peruvian artists performing alongside their German counterparts in public spaces together (Hoyler & Christoph, 2005). Arguably, this creation of diverse hip-hop and graffiti communities is an example of the increased global sensitivity of young people from varying ethnic backgrounds and furthering a perception of themselves as global actors (Gardner & Mansilla, 2007). Through creating graffiti using their artistic styles and personal backgrounds, in these communities, these artists are simultaneously sharing their narratives and becoming informed about those of others, fostering their sense of global understanding.

A few examples of hip-hop and graffiti projects from Germany that intentionally or unintentionally foster these concepts of global citizenship and global understanding, particularly within youth populations, will be briefly explored in the next section.

6. The Past, Present, and Future of German Graffiti Art

Below are a few examples of hip-hop and graffiti projects that were created in Berlin, Germany from 1993 through 2024. Some of the projects appear to no longer be active at the time of writing this article, but their legacy has arguably left a significant impact on the graffiti movement in both Germany and throughout Europe.

6.1 Hip Hop on Wheels: The Hip Hop Mobil Project

Started in 1993 in Berlin, Hip Hop Mobil was a mobile studio unit that carried various technologies for hip-hop artists, including turntables, a mixer, and recording equipment (Hoyler & Christoph, 2005). Since its inception, Hip Hop Mobil offered educational workshops on hip-hop culture and its five elements, including graffiti. The project was originally sponsored by Arbeitskreis Medienpädogogik (AMP) and had previously received funding from the Berlin city government (Templeton, 2005). Hip Hop Mobil also had an educational component, having travelled to schools, educating young people on hip-hop history, while also encouraging them to create their artwork. Many of its alumni who have related to the program are now considered some of Berlin's "most successful" hip-hop artists (Templeton, 2005), thus the impact of Hip Hop Mobil remains.

6.2 Hip-Hop Technology Spanning Countries: Graffiti Research Lab – Berlin

Although prominent, Hip-Hop Mobil is only one of the many examples of hip-hop educational spaces throughout Germany. Less tied to the cultural

roots of hip-hop yet committed to a new manifestation of the graffiti element of the culture, is the more recent Graffiti Research Lab (GRL) in Germany. Founded in 2010 in Berlin, the GRL is self-described as "a collective of hackers, coders, artists and vandals who considered themselves activists that use technology as a tool for intervention in the public space" (Graffiti Research Lab, 2024). In the age of digital technology, graffiti itself is being transformed from an art form that relies solely on paint, spray cans, and concrete walls to one that involves digital projections, open-source technologies, and collaborations of several artists who may not even be in the same time zone as one another. The GRL itself is committed to providing tools, particularly "participatory media interventions that bring together open-source technologies and the philosophy and aesthetics of graffiti" (Graffiti Research Lab, 2024).

One of the GRL's most famous digital graffiti events was PWN THE WALL in October 2012, a digital graffiti installation that lasted 25 hours connecting the cities of Vancouver, Berlin, and Seoul. Through open-source technology, digital graffiti artists were able to connect with other artists from three different continents, allowing for a simultaneous exchange of digital art that was also open to the rest of the public (Graffiti Research Lab - Cannada, 2014). This project, like many others from the GRL, is another clear example of graffiti, in this case digital, creating awareness and a sense of global citizenship among young people of the "local experience as a manifestation of broader developments in the planet" (Gardner & Mansilla, 2007) by literally connecting them from distant parts across the globe.

6.3 Documenting the Hip-Hop Movement: Martha Cooper Library at Urban Nation – Museum for Urban Contemporary Art

In the last several years, one may argue the emergence of more institutionalized spaces for graffiti within Germany. For instance, since November 2021, Berlin now boasts the Martha Cooper Library at Urban Nation, Museum for Urban Contemporary Art in Berlin, Germany (Urban Nation, 2024). This is especially significant as Martha Cooper, a photography pioneer of graffiti art, once captured the images of prominent graffiti artists of the 1970s, particularly within the United States, many of whom risked legal consequences for their actions. Today, the Museum "specializes in the literature on street art, graffiti, and urban art since 1960" (Urban Nation, 2024), ensuring that these same artists' contributions are being celebrated as relics and as a critical part of hip-hop as a global movement. The Museum is especially significant as it allows for the preservation of "an alternative form of historical record" of graffiti during a particular "political climate," as previously referenced (Hopper & Evan, 2023).

We have yet to see the repercussions of this institutionalization (some may argue co-optation) of the art form. Yet, significantly, the graffiti of the

past is no longer restricted only to the streets, as its memories are now being housed in a museum. One hopes that this will allow the art form to live on, long after the paint has dried and peeled off, allowing another future generation of global citizens to learn about this artistic movement that has crossed so many borders and spanned so many decades.

7. The Future of Public Art and Graffiti in Europe

Through open-source graffiti projects like these, young people will continue to learn how to use these new tools to create a dialogue; a new way to engage with others in their city and others in cities across the globe. One can argue that when graffiti artists roam the city to find empty walls and seek permission to do graffiti, they are forced to think deeply about the construction of their city, the events that take place, and the way that people live together in one city. Similarly, when young people are asked to connect with other artists in a different country, they must consider both the global and local implications; often asked to consider and explore communities outside of their neighbourhoods for the first time, a critical component of being a global citizen.

Through the efforts of the GRL and other networks of artists using graffiti as tools for activism and providing educational instruction on open-source technologies, young people will be able to share projects, ideas, and tools with other young people across the globe. Arguably, this will further the potential for cross-cultural graffiti projects, allowing for the creation of more democratic public spaces and community-based discourses to flourish. Undoubtedly, as the GRL and other groups mobilize and amplify their work through social media networks and other democratic means of participation, the use of digital art will proliferate throughout Germany and other parts of Europe as the more contemporary form of graffiti muralism, transforming the idea of what is considered public art and accelerating a movement of young people who are building an actual "global consciousness."

8. Implications for Graffiti and Global Consciousness in Europe

"I'm an urban artist, not a writer. I love and worship everything in the city. Cities have an abundance of personalities who are forced to integrate and deal with each other every day. Cities are fully fabricated and organized by us. What does the city tell us about ourselves and one another? How is it that people from unique backgrounds can come together and follow the same general rules to function as this mass in our creation? These are the questions I work out every day by making what I make…

Cade, graffiti artist (Ganz, 2006)

As the graffiti artist, Cade suggests, the concept of the city is constantly being constructed and reconstructed, as its very narrative is developed

by those who live within it. This is especially true of the graffiti artists, who both literally and figuratively, construct anonymous messages for the rest of the city to see, most often by transforming aspects of the metropolis in ways that best suit them personally. Thus, the city becomes the graffiti artist's canvas and the very idea of "public art" relies on the idea of connecting with an audience. The graffiti artist may ask a question of the public through their art, and even if rhetorical, its success rests on the simple notion that someone within the public will indeed "experience" it in some way.

As people from "unique backgrounds" come together in the city, graffiti is one form of uniting them through a shared experience. While this article primarily reflected on the building of global consciousness, global sensitivity, global understanding, and global self of the artists who create graffiti, one may believe that these global lenses are also constructed for the very society that participates in the graffiti experience. The level of participation will undoubtedly change as the tools for transmitting messages become more technologically complex and convoluted through digital means. As previously mentioned, as digital graffiti becomes more intricate, there exists greater possibilities of increasing public participation. People will no longer be simply passers-by of a graffiti mural painted on the wall, but rather through digital tools, members of the city will be able to participate in the graffiti experience in a way never thought possible.

9. Is Graffiti Here to Stay? Conclusions and Further Questions

Just as hip-hop helped to transform communities within the United States by mobilizing young people during politically turbulent times, arguably a similar phenomenon occurred in Germany during the aftermath of WWII. In efforts to rebuild their own social identities on an individual level and cultivate community-based spaces on a more societal level, hip-hop, specifically graffiti, was a tool that many young people easily and willingly gravitated to.

Graffiti was also a tool that supported and continues to support the construction of more democratic spaces within the city, along with serving as a vehicle for greater democratic participation, including the cultivation of the notion of global consciousness.

One will be curious to see how global networks will continue to be fostered through digital graffiti networks. In Germany alone, it will be interesting to see how youth of the diaspora community connect with their home countries through this technology. One must also consider the implications this will have on these youth's connection with other young Europeans as they continue to build upon the concept of their global self. One may also consider if more traditional forms of graffiti, like that which

emerged with the inception of hip-hop culture back in the Bronx, New York City will soon be eradicated or if it will be allowed to grow alongside the newer forms of graffiti, including those that may or may not incorporate the use of AI and social media. Scholars like Ronald Niezen continue to argue that graffiti, one of the "oldest [forms of] media to sway opinion continue[s] to be used "alongside social media and journalistic media coverage" (Niezen, 2020) in various campaigns, perhaps demonstrating to us that the street artform, regardless of the influence of technology, is here to stay. Yet, that is something for the graffiti community and the street artists themselves to decide.

10. References

Chalfant, H., & Martha, C. (2021). *Subway art history.* London: Thames & Hudson.

Chang, J. (2005). *Can't stop, won't stop: A history of the hip hop generation.* New York: St. Martin's Press.

Chang, J., & Watkins, S. C. (2007). It's a hip-hop world. *Foreign Policy.* 163: 58.

East Side Gallery. 2024. The longest open-air gallery in the world from 1990 to the present. Link (last visited 24 June 2024).

Fernekes, W. R. 2016. Global citizenship education and human rights education: Are they compatible with U.S. civic education? *Journal of International Social Studies*. 6(2):34-57. Link (last visited on 24 June 2024).

Ganz, N. (2006). *Graffiti women: Street art from five continents*. New York: Harry N. Abrams.

Gonzalez, D. (2007). Will gentrification spoil the birthplace of hip-hop?" *New York Times*. Link (last visited 24 June 2024).

Graffiti Research Lab. (2024). Graffiti Research Lab. Link (last visited 24 June 2024).

Graffiti Research Lab – Canada. (2014). PWN THE WALL – Details, Details. Link (last visited 24 June 2024).

Hopper, P., & Evan, R. (2023). *Political graffiti and global human rights: Take another look*. Lanham, Lexington Books.

Gardner, H., & Mansilla V. B. (2007). 1. From teaching globalization to nurturing global consciousness. *In Learning in the Global Era: International Perspectives on Globalization and Education*, pg. 47-66. Berkeley: University of California Press. Link (last visited September 02, 2024)

Hoyler, M., & Christoph, M. (2005). Hip Hop ist im Haus: Cultural Policy, Community Centres, and the Making of Hip-Hop Music in Germany. *Built Environment*, *31*(3): 246.

Kan, K. (2001). Adolescents and graffiti. *Art Education, 54*(1):18-23. Link (last visited 24 June 2024).

Kaya, A. (2007). German-Turkish transnational space: A separate space of their own. *German Studies Review, 30*(3):483-502. Link (last visited 24 June 2024).

King, S. (2001). *Stolen moments: The globalization of hip-hop.*

Niezen, R. (2020). #HumanRights: The technologies and politics of justice claims in practice. Stanford: Stanford University Press.
Simon, S. (2003). NPR Music. Hip Hop: Today's civil rights movement? Author Says Musical Culture More Relevant than King's Speeches. Link (last visited 24 June 2024).
Stein, M. B. (1989). The politics of humour: The Berlin wall in-jokes and graffiti. *Western Folklore*, *48*(2):85-108. Link (last visited 16 September 2024)
Templeton, I. H. (2005). What's so German about it? Cultural identity in the Berlin hip-hop scene. University of Stirling. Link (last visited 24 June 2024).
Tzortzis, A. (2008). One wall down, thousands to paint. *New York Times*. Link (last visited 24 June 2024).
UNESCO. (2024). What you need to know about global citizenship education. Link (last visited on 24 June 2024).
Universal Zulu Nation. (2024). Hip-Hop history. Link (last visited 24 June 2024).
Universal Zulu Nation. (2024). Afrika Bambaataa. Link (last visited 24 June 2024).
Urban Nation: Museum for Urban Contemporary Art. (2024). Martha Cooper Library. Link (last visited on 24 June 2024).
Vancouver Visual Art Foundation. (2023). The emergence of graffiti and its association with the hip-hop movement. Link (last visited 24 June 2024).
Walde, C. (2007). *Sticker City – Graffiti Paper Art*. London: Thames & Hudson.
Yelp. (2014). "East Side Gallery." Link (last visited 24 June 2024).

Mujib Jimoh. "A prolegomenon on deepfakes and human rights in the African Charter." (2023) 7 *Global Campus Human Rights Journal* 49-66
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A prolegomenon on deepfakes and human rights in the African Charter

*Mujib Jimoh**

Abstract: *Deepfake, the manipulation of videos, audio and images using Artificial Intelligence (AI) technology, is popularly gaining attention in different areas of law since its first creation in 2017. Recent scholarships have considered its impacts on evidence law and proofs in courtrooms. Other areas of law that have been tested with deepfake include criminal law, torts, intellectual property and national security law, among others. In Africa, one of the challenges in addressing issues relating to deepfake is illiteracy. Most Africans are said to be ignorant of what deepfake is. Yet, with its nature and as a form of AI, deepfake impacts almost all known human rights since human rights are interdependent and interrelated. This paper seeks to introduce and underscore the impacts of deepfake on human rights in Africa, particularly the rights contained in the African Charter on Human and Peoples' Rights (African Charter). Although an analysis of the impact of deepfake on all the rights contained in the African Charter is outside the scope of this paper, the most impacted human rights—the right to dignity, privacy and information—will be discussed. As a prolegomenon (introduction) on this topic, the paper aims to highlight the human rights violations in the creation of deepfakes in Africa. The paper argues that while most deepfakes are created by private individuals, under the 'duty to respect' framework of human rights, both individuals and State Parties have obligations to respect human rights.*

Keywords: *African Charter, AI, deepfake, human rights, technology*

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1. Introduction

Perhaps, one of the best ways to introduce a paper of this nature is to narrate a personal experience and a practical example of the impact of deepfakes. At a conference titled 'technology and the Future of human rights,' organised by the Centre for human rights, University of Pretoria, in September 2022, this author presented a paper titled *deepfakes and Shallowfakes as Artificial Misinformation in the Era of technology: Effects on Democratic Participation in Africa*[1]. The presentation commenced with three short videos. In the first video, President Obama was seen saying:

> We're entering an era in which our enemies can make it look like anyone is saying anything at any point in time. Even if they would never say those things. So, for instance, they could have me say things like… "Killmonger was right" or "Ben Carson is in a sunken place" or, how about this, simply, "President Trump is a total and complete dipshit." Now, you see, I would never say these things. At least, not in a public address. But someone else would…This is a dangerous time… (Romano, "Jordan Peele's")

As it would turn out, the "someone else" was indeed, President Obama. Sorry, Jordan Peel (Caldera, 2019).

In the second video, David Beckham, the former English football player, spoke nine languages including Kiswahili and Yoruba in a call to end malaria (Westerlund, 2019). In the third, a Nigerian Governor was seen stuffing his babaringa with bundles of United States dollars (This Day, 2021). Thereafter, the audience seeing the videos for the first time were asked if they knew which ones were real and fake, but none could tell, with certainty. And it made no difference either for those who had seen the videos a couple of times, as the Nigerian Governor, whether true or false had argued that the video was 'cloned' (This Day, 2021). Everyone saw the videos but doubted their eyes.

In the simplest words, a deepfake is a forged video, audio or picture, using AI (Caldera, 2019; Winter & Salter, 2020). Although the manipulation of videos, audio and pictures, is not a recent vintage (Langguth, *et al.,* 2021), the advancement in technology and the proliferation of deepfake software apps, have particularly triggered critics about the need to address the dangers posed by deepfakes. While not all uses of deepfakes are bad (Citron & Chesney, 2019; Naruniec *et al.,* 2020), when they are created, they mostly set out to achieve one underlying aim: to deceive the audience.

[1] This author has published an article on the paper presented at this conference. *See* Mujib Jimoh, "The Right to Democratic Participation in Africa in the Era of deepfake," *Pretoria Student Law Review* 17 (2023): 106.

However, the deception is not as much a problem as the inability of the audience to spot it. If the audience could spot it, nonetheless, only one-third of the problem would be solved. There are two other major problems. First, once a deepfake is released to the public, its forged nature cannot be corrected in the minds of the audience. "The truth becomes irrelevant in the heat of the moment while feelings and opinions dictate the perspective on reality" (Faragó, 2019). Second, there is a futuristic problem, an "information apocalypse," where people feel information cannot be trusted again (Westerlund, 2019).

Noteworthily, the underlying deceptive aim in creating deepfakes is usually geared towards other objectives. It could have some political connotations, like Jordan Peele's Obama video or it could be to spite or defame a character, like the user "u/deepfakers"'s 2017 post on Reddit, superimposing faces of female celebrities such as Scarlet Johansson and Gal Gadot, into porn video (Cole, 2017). The objective could be harmless, like David Beckham's video or it could be for fun, yet the aim to deceive is not eroded. The foregoing raises many legal issues ranging from evidence law (LaMonaga, 2020; Maras & Alexandrou, 2018), criminal law (Citron, 2019), Torts (Kocsis, 2022), intellectual property (Nema, 2021), national security law (Chesney & Citron 2019), among others. Also, within the spectrum of issues arising from deepfakes is human rights. Since human rights are said to be interrelated and interdependent (Scott, 1989) and since deepfake is a form of AI (Kocsis, 2022), all known human rights are potentially implicated by the effects of deepfakes.

Deepfake is a relatively recent concept as it emerged in 2017 and scholarship on it is still growing[2].

In Africa, one of the challenges in addressing issues relating to deepfake is illiteracy. Most Africans are said to be ignorant of what deepfake is (Ndebele, 2023). This paper, thus, seeks to introduce and underscore the impacts of deepfake on human rights in Africa, particularly the rights contained in the African Charter on Human and Peoples' Rights (African Charter or Charter). It aims to contribute a timely scholarly work on the deepfake–human rights discourse from an African Human Rights perspective. Although an analysis of the impacts of deepfake on all the human and peoples' rights contained in the African Charter is outside the scope of this paper, the most impacted human rights, the rights to dignity, privacy and information will be discussed. This paper will be broadly divided into four parts. After this introduction, Part II will provide an overview of the African human rights system. Part III discusses the impacts of deepfake on the rights to human dignity, privacy and information. Part IV will conclude the paper.

[2] But see Milena Popova, "Reading out of Context: Pornographic deepfakes, Celebrity and Intimacy," *Porn Studies* 7, no. 4 (2020): 367.

2. The African Human Rights System[3]

The foundation of the African Human Rights System is the African Charter (Jimoh 2023a, 1). The Charter was adopted in 1981 and came into force in 1986 (Samb, 2009). Almost all African countries have ratified it (Adigun, 2024). Despite the flaws and criticisms by eminent scholars, the impacts of the African Charter on the African Human Rights System have been described as "legendary" (Osuntogun, 2016). The main reason attributed to this bold complement to the Charter is its broadness in the recognition of human rights, particularly Economic, Social and Cultural Rights (ESCRs) (Swanson, 1991 & Jimoh, 2024). For instance, one widely publicised praise for the African Charter is the equality it maintains with respect to ESCRs and civil and political rights (Ssenyonjo, 2011). The Charter is said to place ESCRs above civil and political rights (El-Obaid & Appiagyei-Atua, 1996), though the African Commission on Human and Peoples' Rights (African Commission or Commission) is, at the same time criticised for giving them less attention (Murray, 2001).

Notwithstanding, the Charter is said to have taken the maximalist approach. Other reasons include the fact that the Charter presents the idea "that rights are interdependent and indivisible" (Samb, 2009), its adoption of a liberal approach to the issue of *locus standi* (Osuntogun, 2016), its recognition of a contextual approach to human rights (Motala, 1989 & Bondzie-Simpson, 1988), its recognition of both human rights and peoples' rights and its imposition of duties on individuals (Jimoh, 2023b). For these reasons, the Charter is said to have provided a strong legal framework for the promotion and protection of human rights in the continent and that the "jurisprudence of the African Commission attests to this achievement" (Centre for human rights, 2016).

The two main regional human rights judicial and quasi-judicial bodies where the rights contained in the African Charter may be claimed are the African Commission and the African Court on Human and Peoples' Rights (the African Court or Court). The state parties to the Charter enjoy a margin of appreciation, however narrow, (Born, Morris & Forres, 2020)[4] and may, as in

[3] Notable human rights scholars have written extensively on the African Human Rights System. Professor Rachel Murray has a lot of work on this. See for instance, Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford: Oxford University Press, 2019); Rachel Murray, *human rights in Africa from The OAU to the African Union* (Cambridge: Cambridge University Press, 2004); Rachel Murray and Steven Wheatley, "Groups and the African Charter on Human and Peoples' Rights," *human rights Quarterly* 25, no. 1 (2003): 213. Professors Heyns and Viljoen have written extensively on this too. See for instance, Christof Heyns, "The African Regional human rights System: In Need of Reform," *African Human Rights Law Journal* 2 (2001): 155; Frans Viljoen, *International Human Rights Law in Africa* (2nd ed, Oxford University Press, 2012).

[4] See the African Court's narrow application of the margin of appreciation principle in *Applications 009&011/2011 – Tanganyika Law Society and The Legal and human rights*

dualist states, enact the provisions of the Charter into their local law, placing it on the same pedestal as their local legislation[5]. While the African Commission is established by the African Charter, the African Court is established by the protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights.

Both the African Commission and the Court can receive communications from both State Parties and individuals alleging violations of rights guaranteed under the Charter (Gumedze, 2003). For a communication made by an individual on a breach of any rights under the Charter to be seized and admissible by the African Commission, it must fulfil fourteen conditions (Jimoh, 2022). If the application is made to the African Court, there are eight conditions to be satisfied (Heyns, 2001). Since its establishment in 1987, the African Commission has been instrumental in the development of human rights jurisprudence in Africa. It has, through its four mandates under the Charter, adopted several resolutions, declarations and guidelines, in promoting human rights in the continent. It has also adopted different international law interpretation theories and the derivative human rights approach in construing the rights contained in the African Charter (Amin, 2021 & Jimoh, 2024). In addition, through the provisions of articles 60 and 61 popularly referred to as the "decompartmentalisation" articles, the African Commission has drawn inspiration from the decisions and general comments of the human rights Committee, the decision of the International Court of Justice, decisions of the European Court of human rights and the decisions of the Inter-American Court of human rights (Burgorgue-Larsen, 2018 & Jimoh, 2023c). Although the jurisprudence of the African Court is still developing, it has also contributed to the promotion of human rights in Africa (Makunya, 2021).

3. The Impacts of deepfake on the Rights in the African Charter

3.1. Deepfake and the Right to Human Dignity

Due to the superior nature of the dignity of the human person,[6] it has been described as a value rather than a norm. According to Petsche, values are the foundation of the normative system and they give rise to

Centre and Reverend Christopher Mtikila v The United Republic of Tanzania. The Commission did the same in Communication 255/2002 – *Garreth Anver Prince v. South Africa.*

5 For instance, Nigeria has done this by placing the Charter on equal footing with its local legislation. See *Abacha & Others v Fawehinmi* (2001) AHRLR 172.
But see also Muyiwa Adigun, "The Implementation of the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child in Nigeria: The Creation of Irresponsible Parents and Dutiful Children?," The Journal of Legal Pluralism and Unofficial Law 51(3) (2019): 320, 328 (arguing that the Charter is superior to other Acts in Nigeria, though inferior to the Constitution).

6 But see critical criticisms of the notion that dignity is a superior right in Ruth Macklin, "Dignity is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy," *British Medical Journal* 327 (2003): 1419; Stephen Pinker, "The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Ploy," *The New Republic,* May 28, 2008, https://newrepublic.com/article/64674/the-stupidity-dignity.

norms (Petsche, 2010). "Thus, for example, the prohibition of degrading treatment (a norm)," states Petsche, "is based on the dignity of the human person (a value) and gives rise to the corresponding individual right not to be made subject to such treatment" (Petsche, 2010). The African Charter follows this value→norm approach. It provides that "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status (value). All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited" (norms) (African Charter, Article 5).

Although the origin of the right to human dignity is unclear (Dan-Cohen, 2011), some sources describe Kant as the father of the concept (Smith II, 2016), while others attribute it to the writings of Cicero (Weatherall, 2015). It is clear that the right has its roots in natural law. It is an intrinsic right of a human person (Glensy, 2011). According to Weatherall, Cicero's *Dignitas hominis* denotes "the inherent status of 'worthiness' of every individual by virtue of his being human" and "the honourable authority of a person, combined with attention and honour and worthy respect paid to him" (Weatherall, 2015). By the concept of African humanism (*ubuntu*), an African worldview—dignity is firmly engrained in the value system (Metz, 2011 & Van Binsbergen 2001).

Under the African Human Rights jurisprudence, the right to human dignity is both substantive and procedural. In addition to the provisions of Article 5 of the African Charter, the preamble to the Charter in two clauses makes express reference to dignity (African Charter, Clauses 2 and 8). Gelaye explains thus:

> Here one may ask what significance is of an express incorporation of dignity in the preamble of the African Charter. The scholarship on treaty interpretation underscores the importance of statements incorporated in preambles. Accordingly, one of the core functions of preambles is to specify the purpose that specific provision of the treaty seeks to achieve. As such, they serve as guidance in the interpretation of treaties by judicial bodies. This helps to minimise the misapplication of specific provisions of the treaty. If preambles have such a role, the presence of human dignity in the African Charter is a positive development, since the adjudicatory bodies will have the mandate to use the concept in the discovery, explication, application and limitation of rights in it. Hence, it could be argued that human dignity is a value that shapes the interpretation of human rights in the African Charter (Gelaye 2021, 126).

Dignity is a rule of *jus cogens* (Kleinlein, 2017). Under international law, a *jus cogens* is an overriding and compelling rule for which no

derogation is permitted except by a subsequent norm of the same character (Brownlie, 1979). While *jus cogens* cover many areas of international law, most eminent scholars accept that norms of *jus cogens* are mainly human rights. "A brief look at the peremptory norms," state den Heijer and van der Wilt "beyond contestation, prohibition of apartheid, slavery, torture, genocide, crimes against humanity immediately confirms this contention" (den Heijer & Van der Wilt, 2016). A cautious reading of Article 5 of the African Charter reveals that when the norms contained in the second clause are violated, the right to human dignity is, by implication, violated (Ukaj-Elshani, 2019). Thus, under the African Charter, all forms of exploitation and degradation of human persons are a violation of the right to dignity. Both the African Commission (see for instance Huri-Laws v. Nigeria) and the Court (see for instance Mugesera v Rwanda) have considered communications and applications alleging a violation of this right. For instance, in Purohit and Another v. The Gambia, the African Commission held that human dignity is an inherent basic right to which all human beings are entitled without discrimination.

Most deepfakes are pornographic in nature (Winter & Salter, 2020). In recent years, *Porn Studies* has published different papers on the use of deepfakes to shame and demean celebrities through the creation of nonconsensual porn. Deepfakes superimpose the faces of celebrities on different bodies without their consent, thus, violating their human person (Popova, 2020). Most of the time, deepfakes are created to humiliate the character of a person, such as showing people doing abhorrent things like paedophilia (Hall, 2018) and rape (Citron, 2019) and as such, constitute degradation or violations of human dignity (Öhman, 2022). A key component of the right to dignity is respect and deference (Mahlmann, 2012; & Caldwell, 1976). The first of Schachter's twelve conducts antithetical to the right to dignity are "statements that demean and humiliate individuals or groups" (Schacter, 1983). Certainly, if a picture is worth a thousand words (Citron & Chesney, 2019), a video is worth more. The foregoing negative uses of deepfakes, therefore, constitute a violation of this right. Although neither the African Commission nor the Court has addressed the question of human rights responsibility in the use of deepfake, the extant African Human Rights jurisprudence leads to the conclusion that deepfake constitutes a violation of this right. For instance, in Modise v Botswana, the African Commission acknowledged that indignity could take many forms and that exposing victims to "indignity" violates the right to human dignity in the Charter (Modise v Botswana, para 92).

Noteworthily, deepfakes are mostly created by private individuals. However, the framework of human rights responsibility demands an obligation to respect, protect and fulfil (Alston & Quinn, 1987). The obligation to respect places a responsibility on both individuals and

the States not to harm the human rights of others[7]. Thus, while States have the obligation to ensure that human rights in their jurisdictions are respected, this duty is also on private individuals (Meron 1989; Nampewo, Mike & Wolf, 2022). Moreover, the *jus cogens* nature of the right to dignity demands that the right be respected by both States and individuals. In its decision in Purohit v. The Gambia, the African Commission stated that dignity is an inherent right that every human being is obliged to respect by all means possible, and it confers a duty on every human being to respect this right (Purohit, para 57). In addition to private individuals, governments are under an obligation not to authorise and disseminate deepfakes to manipulate the citizenry against its opposition members.

Considering the nature of deepfakes, one important provision in the African Charter that relates to the admissibility of communication by the African Commission and Court is the provision of Article 56(4) of the Charter. It provides that "communications…shall be considered if they are not based exclusively on news disseminated through the mass media." As a form of mass media (Kasturi, 2014), social media represents the platform where most deepfake contents are released. Where an allegation of a breach of human dignity is based exclusively on deepfake content posted solely on social media, would the African Commission and Court still require that such communication not be based exclusively on the mass media? In Jawara v The Gambia, the African Commission observed that:

> While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'. There is no doubt that the media remains the most important, *if not the only source of information*. It is common knowledge that information on human rights violations is always obtained from the media. The genocide in Rwanda and the human rights abuses in Burundi, Zaire and Congo, to name but a few, were revealed by the media. *The issue therefore should not be whether the information was gotten from the media, but whether the information is correct* (paras 24, 25 and 26).

The foregoing decision is confusing. In the earlier part of the observation, the African Commission suggested that some other form of evidence must be adduced. In the latter part, the Commission

[7] But see David Jason Karp, "What is the Responsibility to Respect human rights? Reconsidering the 'Respect, Protect, and Fulfill' Framework," *International Theory* 12 (2020): 83 (arguing for a reconsideration of the understanding of the duty to respect).

seemed to suggest that truth is the yardstick and not exclusivity. The extant jurisprudence seems to lean towards the former and suggests that other evidence reinforcing the violation, however minimal, should be adduced (Gumedze, 2003 & FIDH, 2016). Thus, a political opponent whose deepfake video is circulated online to sway the minds of the electorates may need to support their communication with other evidence apart from the social media platforms where the deepfake is circulated.

3.2. Deepfake and the Right to Privacy

Most scholars in the early part of the last century described privacy as the seclusion of oneself or property from the public (Winfield, 1931). By the later part of that century, scholars began to reject this description and found that it difficult to define and conceptualise privacy (Uniacke, 1977). "The year is 2021, and privacy is still a concept in disarray" (Hartzog, 2021). One, if not the most influential scholar of privacy of our time, Professor Daniel Solove, has written extensively on the concept and has advised that the obsession over the meaning of privacy should stop[8]. Rather, he suggests that the appropriate question should be what is privacy for (Cohen 2013). This paper heeds Solove's advice.

In Africa, Professors Roos and Makulilo are perhaps the leading scholars on privacy law and have written brilliant works on the concept (Roos 2006; Roos 2012; & Makulilo, 2014). Professor Solove in his book *Understanding Privacy* after acknowledging that the existing taxonomy on privacy needed revision in light of modern technology,[9] opines the following new taxonomy of the ambit of privacy:

1. Information collection, which comprises surveillance and interrogation.

2. Information processing, which comprises aggregation, identification, insecurity, secondary use and exclusion.

[8] For consideration of some of Professor Solove's work on privacy, see Daniel Solove, "Conceptualizing Privacy," *California Law Review* 90 (2002): 1087; Daniel J. Solove, "The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure," *Duke Law Journal* 53 (2003): 967; Daniel Solove, "A Taxonomy of Privacy" *University of Pennsylvania Law Review* 154 (2006): 477; Daniel Solove *Understanding Privacy* (Massachusetts: Harvard University Press, 2008); Daniel J. Solove and Paul M. Schwartz, *Privacy Law Fundamentals* (4th ed. IAPP, 2017).

[9] This taxonomy was described by Professor William Posser in William Posser, "Privacy," California Law Review 48, no. 3 (1960): 383. These are:
(a) Intrusion upon seclusion or solitude, or in private affairs.
(b) Public disclosure of embarrassing private facts.
(c) Publicity that places a person in a false light in the public eye.
(d) Appropriation for the defendant's advantage of a person's name or likeness.

3. Information dissemination, which comprises breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation and distortion.

4. Invasion, which comprises intrusion and decisional interference (Solove, 2010).

Privacy is implicated by deepfakes (Citron & Chesney 2019). Using Solove's taxonomy (3) and (4), negative deepfake uses could constitute blackmail and distortion and are in fact, an appropriation, intrusion and interference. One key aspect of privacy law is the protection of individuals from harassment and manipulation (Hartzog 2021, 1683). But deepfake does exactly the opposite. The most often cited case to illustrate this point is the case of Rana Ayyub, an Indian journalist. Ayyub wrote about corruption in Hindu national political parties (Chesney & Citron, 2019). Thereafter, a deepfake video of her appeared online with the malicious purpose of labelling her as "promiscuous, immoral, and damaged goods" (Citron & Chesney, 2019). Such intent to control, expose and damage the identity of Ayyub invaded her privacy. As Citron states, "Those who wish to control, expose and damage the identities of individuals routinely do so by invading their privacy" (Citron, 2019). Perhaps, the best description of the impact of deepfake on privacy is that given by Professor Citron:

> Machine-learning technology is used to create digitally manipulated "deep fake" sex videos that swap people's faces into pornography. Each of these abuses is an invasion of sexual privacy—the behaviours, expectations, and choices that manage access to and information about the human body, sex, sexuality, gender, and intimate activities… Much like nonconsensual pornography, deep-fake sex videos exercise dominion over people's sexuality, exhibiting it to others without consent. They reduce individuals to genitalia, breasts, buttocks and anuses, creating a sexual identity not of the individual's own making. They are an affront to the sense that people's intimate identities are their own to share or to keep to themselves (Citron 2019, 1870, 1921).

However, the African Charter contains no privacy provision. One reason attributed to this is that at the time of drafting the Charter, privacy was understood as an individualistic right, which was incompatible with the communal tenets promoted by the Charter (Jimoh, 2023d). Although a recent Declaration by the African Commission, the 2019 African Declaration on Freedom of Expression and Access to Information contains privacy provisions, the African Commission has been adjudged to have been deficient in the promotion of the right (Jimoh, 2023a). Moreover, declarations are not binding under international law. Notwithstanding, there is little reason to believe that the right to privacy may not be claimed

at both the African Commission and the Court. There are three ways this may be done.

First, privacy may be pleaded as part of the right to human dignity contained in the Charter (Bloustein, 1964 & Gavison, 1980). The African Commission has been implored to use its derivative approach as it did concerning the right to water, to derive privacy from the right to dignity (Singh & Power, 2019). Second, both the African Commission and the Court can take inspiration, using the decompartmentalisation articles of the African Charter, from other human rights instruments to which a State Party to the African Charter is a party in upholding this right (Jimoh, 2024).

Third, where these two approaches fail, it may be argued that Africans up to at least age 35, have a guaranteed privacy right under the African Human Rights System. The basis for this submission is that the African Charter on the Rights and Welfare of the Child guarantees the privacy right of the African Child defined as a person below the age of 18 (African Charter on the Rights and Welfare of the Child, art. II). Similarly, article 7 of the African Youth Charter safeguards the right to privacy of young persons defined as a person up to 35 years. Both Charters are in force. Importantly, while the African Committee of Experts on the Rights and Welfare of the Child and the African Union Commission have the responsibilities of protecting the rights in the Charters respectively, it has been argued that other regional human rights bodies, including the African Commission and Court by the decompartmentalisation articles, can entertain a question on the violations of these Charters (Adeola, 2015).

3.3. Deepfake and the Right to Information

The Right to Information (RTI) is a right to the truth. It is a necessary norm in a democratic society. "Democratic discourse is most functional," states Professor Citron, "when debates build from a foundation of shared facts and truths supported by empirical evidence" (Citron & Chesney, 2019). RTI has been classified as an intrinsic right and not just an instrumental right (McDonagh, 2013). One advantage of the intrinsic classification of RTI is its good fit for unlimited access to information in "terms of the nature of the information to which it applies" (McDonagh 2013). When seen as a right to the truth, the unlimited access to it must be seen as an unlimited access to the truth, as the truth must be seen as part of RTI, without necessarily stating it. Yet, deepfake does no less than distorting the truth. Even without deepfakes, safeguards for RTI are weak in Africa, the provisions of the African Charter, notwithstanding (Adu, 2018). Article 9 of the Charter provides:

(1) Every individual has the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinion within the law.

It is important to state that Article 9 contains two different rights, RTI and the right to freedom of expression. The jurisprudence on RTI under the European human rights System, until recently, has been interwoven with the right to freedom of expression (McDonagh, 2013). Perhaps, this may be because RTI is moulded into the right to freedom of expression in other international instruments.[10] The Charter, on the other hand, separates the two rights, with the advantage being that RTI could be considered as a stand-alone right without necessarily espousing the jurisprudence on RTI's relationship with the right to freedom of expression. The importance of this separation may be useful in a jurisprudential analysis of the scope of these rights within the African Human Rights System. This is because, unlike the right to freedom of expression, RTI is not limited by the clawback clause which the Charter is notorious with (Naldi, 2001 & Sibanda, 2007). A literal interpretation of the provisions of Article 9 of the Charter may lead to a finding that while the right to freedom of expression may be limited by "law,"[11] RTI may not, except under Article 27(2) of the Charter which contains the legitimate reasons for limitation (Media Rights Agenda v. Nigeria).

Deepfakes affect RTI in two main ways. First, it has a direct effect on RTI. This is because the nature of RTI, as the right to receive the true information, is distorted. The very essence of deepfake is to utilise neural networks that can analyse different sets of data samples to learn how "to mimic a person's facial expressions, mannerisms, voice, and inflections… feeding footage of two people into a deep learning algorithm to train it to swap faces" (Westerlund, 2019). When this is done, the information received by the recipient is forged and tampered with and thus, the benefits of RTI to be able to know the truth cannot be guaranteed. The resultant effect is artificial misinformation (Segun, 2021). Secondly, deepfake has indirect effects on RTI. Because human rights are interdependent and interrelated, the distortion of RTI may indirectly affect the enjoyment of other rights which benefit from RTI. Rights like the right to participate freely in the government (Charter, Article. 13), the right to health (Charter, Article. 16), and the right to education (Charter, Article. 17), benefit mostly from RTI (UNICEF 2015).

African States must respect and protect RTI, particularly with the proliferation of deepfake technology. Governments are under obligation to ensure that they do not sanction deepfakes as a tool for repressing their opposition. The African Commission and Court have, in numerous of their decisions, upheld RTI (Article 19 v. Eritrea). It has been suggested that one way State Parties may make RTI guaranteed under the Charter effective, is

[10] See for instance Universal Declaration of human rights art 19; European Convention on human rights, art 10. Of But the Inter-American Court of human rights in *Claudio Reyes v Chile* IACHR 9 September 2006 Series C No 151 para 77, treated both rights as separate and distinct.

[11] Insofar as it is in accordance with Charter, international law and domestic law. *See Article 19 v. Eritrea* (2007) AHRLR 73 (ACHPR 2007).

to enact laws which strengthen RTI and criminalise the creation and use of deepfake for manipulation (Westerlund, 2019). In the performance of this duty, however, measures taken by State Parties should be legitimate and proportional to prevent clamping on other rights (Citron &Chesney, 2019).

4. Conclusion

Technological advancements necessitate a corresponding legal change to avoid a gap (Moses, 2007). In responding to the legal implications of deepfakes, most scholarships on this have been written by American Professors addressing the issues within the U.S. legal system. The contribution of this paper to the discourse is the regionalisation of the human rights issues in the use of deepfakes in Africa. The paper discusses the effects of deepfakes on the rights to human dignity, privacy and RTI. Both individuals and State Parties to the African Charter must respect these rights. In addition, States have the obligation to protect these rights and to create a framework ensuring that they are respected. Certainly, there are other human rights implicated by deepfake since human rights are interdependent and interrelated. This paper creates a pathway for human rights scholars to continue the discourse.

5. References

Abacha & Others v Fawehinmi (2001WW) AHRLR 172.

Adeola, R. (2015). "The African youth charter and the role of regional institutions in an age of Africa rising." *Afric Law*. Link (last visited September 16, 2024).

Adigun, M. (2024). "The status of the African charter on human and peoples' rights under the South African legal system." *South African Journal on Human Rights. 39*:113-114. Link (last visited September 02, 2024)

Adu, K.K. (2018). "The paradox of the right to information law in Africa." *Government Information Quarterly 35*(4):669-74. Link (last visited September 02, 2024)

African Union. African Charter on the Rights and Welfare of the Child. (1990). Adopted July 1990. Link (last visited September 16, 2024).

African Union. African Youth Charter. (2006). Adopted July 2, 2006. Link (last visited September 16, 2024).

Alston, P. & Quinn, G. (1987). "The nature and scope of states parties' obligations under the international covenant on economic, social and cultural rights." *Human Rights. 9*(2):156-229. Link (last visited September 02, 2024)

Amin, A. (2021) "The potential of African philosophy in interpreting socio-economic rights in the African charter on human and peoples' rights." *African Human Rights Yearbook 5*(1):23-50. Link (last visited September 02, 2024)

Applications 009 & 011 (2011). *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*.

Article 19 v. Eritrea. (2007) AHRLR 73 (ACHPR 2007). Link (last visited September 02, 2024) PMid:26952817.

Bloustein, E. (1964). "Privacy as an aspect of human dignity: An answer to Dean Prosser." *N.Y.U. Law Review 39*: 962.

Bondzie-Simpson, E. (1988). "A critique of the African charter on human and peoples' rights." *Howard Law Journal 31*: 643.

Born, G., Morris, D. & Forres, S. (2020). "A margin of appreciation": Appreciating its irrelevance in international law." *Harvard International Law Journal 61*(1): 64.

Brownlie, I. (1979). *Principles of public international law*. 3d edition, The Netherlands: Brill | Nijhoff.

Burgorgue-Larsen, L. (2018) '"Decompartmentalization": The key technique for interpreting regional Human Rights treaties." *International Journal of Constitutional Law 16*(1):187. Link (last visited September 02, 2024)

Caldera, E. (2019). "Reject the evidence of your eyes and ears: Deepfakes and the law of virtual replicants." *Seton Hall Law Review 50* (2019):177.

Caldwell, M.E. (1976) "*Well-being: Its place among Human Rights.*" edited by W. Michael Reisman and Burns H. Westin, 169, Cambridge: Cambridge University Press.

Centre for Human Rights. (2016). *A guide to the African Human Rights system*. Pretoria: Pretoria University Law Press.

Chesney, R. & Citron, D.K. (2019). "21st century-style truth decay: Deep fakes and the challenge for privacy, free expression and national security." *Maryland Law Review. 78*(4):882.

Citron, D.K. (2019). "Sexual privacy." *Yale Law Journal. 128*(7):1870-960.

Citron, D.K & Chesney, R. (2019). "Deep fakes: A looming challenge for privacy, democracy and national security." *California Law Review 107*:1753.

Claudio Reyes v Chile IACHR 9 September 2006 Series C No 151.

Cohen, J.E (2013). "What privacy is for." *Harvard Law Review* 126:1904.

Cole, S. (2017). "AI-assisted fake porn is here and we're all fucked." *Motherboard*. Link (last visited June 30, 2024).

Communication 255/2002. *Garreth Anver Prince v. South Africa*.

Communication 97/1993. *Modise v Botswana*.

Dan-Cohen, M. (2011). "The concept of dignity." *Israel Law Review. 44*(9):9. Link (last visited September 02, 2024)

den Heijer, M. & Van Der Wilt, H. (2016). "*Jus cogens* and the humanization and fragmentation of international law." *Netherlands Yearbook of International Law. 46*(1):3-21. Link (last visited September 02, 2024)

El-Obaid, E. & Atua, K.A. (1996). "Human Rights in Africa - A new perspective on linking the past to the present." *McGill Law Journal. 41*(4):819.

Faragó, T. (2019). "*Deep fakes - An emerging risk to individuals and societies like*." MA thesis, Tilburg University.

FIDH. (2016). "*Admissibility of complaints before the African court: Practical guide.*" Link (last visited June 30, 2024).

Frans, V. (2012). *International Human Rights law in Africa*. 2nd ed, Oxford University Press. Link (last visited September 02, 2024)

"*Ganduje in the eye of the storm*." (2021). This Day. Link (last visited June 30, 2024).

Gavison, R. (1980). "Privacy and the limits of law." *Yale Law Journal. 89*(3):421. Link (last visited September 02, 2024)

Gelaye, T.A. (2021). "The role of human dignity in the jurisprudence of the African commission on human and peoples' rights." *African Human Rights Yearbook. 5*:116-34. Link (last visited September 02, 2024)

Glensy, R.D. "The right to dignity." (2011). *Columbia Human Rights Law Review 43*:65.
Gumedze, S. (2003). "Bringing communications before the African commission on human and peoples' rights." *African Human Rights Law Journal 3*;118.
Hall, H.K. (2018). "Deepfake videos: When seeing isn't believing. "*Catholic University Journal of Law and technology*. *27*(1):51.
Hartzog, W. (2021). "What is privacy? That's the wrong question." *The University of Chicago Law Review. 88*(7):1677.
Heyns, C. (2001). "The African regional Human Rights system: In need of reform." *African Human Rights Law Journal. 2*:155.
Huri-Laws v Nigeria. (2000). AHRLR 273 (ACHPR 2000).
Jawara v The Gambia. (2000). AHRLR 107 (ACHPR 2000).
Jimoh, M. (2022). "A critique of the seizure criteria of the African commission on human and peoples' rights." *African Human Rights Law Journal. 22*:362-78. Link (last visited September 02, 2024)
Jimoh, M. (2023a). "Investigating the responses of the African commission on human and peoples' rights to the criticism of the African charter." *Rutgers International Law and Human Rights Journal 4*:1. Link (last visited September 02, 2024)
Jimoh, M. (2023c). "The evolutive interpretation of the African charter on human and peoples' rights." *Indonesian Journal of International and Comparative Law 10*:43. Link (last visited September 02, 2024)
Jimoh, M. (2023b). "The place of digital surveillance under the African charter on human and peoples' rights and the African Human Rights system in the era of technology." *African Journal of Legal Issues in technology and Innovation. 1*:113. Link (last visited September 02, 2024)
Jimoh, M. (2023d). "The quest for information privacy in Africa: A critique of the Makulilo-Yilma debate." *African Journal on Privacy and Data Protection. 1*:1. Link (last visited September 02, 2024)
Jimoh, M. (2023). "The right to democratic participation in Africa in the era of Deepfake." *Pretoria Student Law Review. 17*:106.
Jimoh, M. (2024). "The status of new rights before the African commission and court." *Oregon Review of International Law. 25*:147. Link (last visited September 02, 2024)
Karp, D.J. (2020). "What is the responsibility to respect Human Rights? Reconsidering the respect, protect and fulfil. Framework." *International Theory. 12*: 83. Link (last visited September 02, 2024)
Kasturi, S.K. (2014) "Social media: Key issues and new challenges - A study of Nalgonda district." *Global Media Journal.* 5(1):2.
Kleinlein, T. (2017). "*Jus cogens* re-examined: Value formalism in international law." *The European Journal of International Law. 28*(1):295. Link (last visited September 02, 2024)
Kocsis, E. (2022). "Deepfakes, shallowfakes and the need for a private right of action." *Dickinson Law Review. 126*:621.
LaMonaga, J.P. (2020). "A break from reality: Modernizing authentication standards for digital video evidence in the era of Deepfakes." *American University Law Review. 69*(6):1945.
Langguth, Johannes *et al*. (2021). "Don't trust your eyes: Image manipulation in the age of Deepfakes." *Frontiers in Communication. 6*:1. Link (last visited September 02, 2024)
Macklin, R. (2003). "Dignity is a useless concept: It means no more than respect for persons or their autonomy." *British Medical Journal. 327*:1419. Link PMid:14684633 PMCid: PMC300789.

Mahlmann, M. (2012). "*Human dignity and autonomy on modern constitutional orders*." edited by Michel Rosenfeld and Andras Sajó, 370, Oxford: Oxford University Press. Link (last visited September 02, 2024)

Makulilo, A.B. (2014). *Privacy and data protection in Africa*. Chisinau: Scholars' Press, 2014.

Makunya, T.M. (2021). "Decisions of the African Court on human and peoples' rights during 2020: Trends and lessons" *African Human Rights Law Journal. 21*:1230. Link (last visited September 02, 2024)

Maras, M.H. & Alexandrou, A. (2018). Determining the authenticity of video evidence in the age of artificial intelligence and in the wake of Deepfake videos" *The International Journal of Evidence & Proof. 23*(3):255. Link (last visited September 02, 2024)

McDonagh, M. (2013). "The right to information in international Human Rights law." *Human Rights Law Review. 13*: 25. Link (last visited September 02, 2024)

Media Rights Agenda v. Nigeria. (2000) AHRLR 200.

Meron, T. (1989). "State responsibility for violation of Human Rights." *American Society of International Law Proceedings. 83*:372. Link (last visited September 02, 2024)

Metz, T. (2011). "Ubuntu as a moral theory and Human Rights in South Africa." *African Human Rights Law Journal. 11*:532

Moses, L. (2007). "Why have a theory of law and technological change." *Minnesota Journal of Law, Science and technology.* 8(2):589.

Motala, Ziyad. (1989). "Human Rights in Africa: A cultural, ideological and legal examination." *Hastings International and Comparative Law Review. 12*:373.

Mugesera v Rwanda. (judgment) (2020). 4 AfCLR 834.

Murray, R. & Wheatley, S. (2003) "Groups and the African charter on human and peoples' rights." *Human Rights Quarterly.* 25(1):213. Link (last visited September 02, 2024)

Murray, R. (2001). "A feminist perspective on reform of the African Human Rights system." *African Human Rights Law Journal*. *1*:205.

Murray, R. (2004). *Human Rights in Africa from the OAU to the African Union*. Cambridge: Cambridge University Press, 2004. Link (last visited September 02, 2024)

Murray, R. (2019). *The African charter on human and peoples' rights: A commentary*. Oxford: Oxford University Press. Link (last visited September 02, 2024)

Naldi, G. J. (2001). "Limitation of rights under the African charter on human and peoples' rights: The contribution of the African commission on human and peoples' rights." *South African Journal on Human Rights. 17*(1):117. Link (last visited September 02, 2024)

Nampewo, Z., Mike, J.H. & Wolf, J. (2022). "Respecting, protecting and fulfilling the human right to health." *International Journal for Equity in Health*. 12(36):1. Link (last visited September 02, 2024) PMid:35292027 PMCid: PMC8922072.

Naruniec J. *et. al*. (2020). "High-resolution neural face swapping for visual effects." *Computer Graphics Forum. 39*(4):173. Link (last visited September 02, 2024)

Ndebele, L. (2023). "*Deepfakes worrying threat to democracy, says report*." News24, February 23, 2023. Link (last visited June 30, 2024).

Nema, P. (2021) "Understanding copyright issues entailing Deepfakes in India." *International Journal of Law and Information technology. 29*(3):241. Link (last visited September 02, 2024)

Öhman, C. (2022). "The identification game: Deepfakes and the epistemic limits of identity." *Synthese. 20*: 319. Link (last visited September 02, 2024)

Organisation of African Unity. 1981. *The African charter on human and peoples' rights*. (African Charter). Adopted 17 June 1981.

Osuntogun, A. (2016). "An appraisal of the rights in the African charter on human and peoples' rights and notable institutions for their enforcement." *Akungba Law Journal*. *4*(1):332.

Petsche, M. (2010). "*Jus cogens* as a vision of the international legal order." *Penn State International Law Review*. *29*(2):235.

Pinker, S. (2008). "*The stupidity of dignity: Conservative bioethics' latest, most dangerous ploy*." The New Republic, May 28, 2008. Link (last visited June 30, 2024).

Popova, M. (2020). "Reading out of context: pornographic Deepfakes, celebrity and intimacy," *Porn Studies*. *7*(4):367. Link (last visited September 02, 2024)

Posser, W. (1960). "Privacy." *California Law Review*. *48*(3):383. Link (last visited September 02, 2024)

Purohit and Another v The Gambia. (2003). AHRLR 96 (ACHPR 2003).

Romano, A. (2018). "Jordan Peele's simulated Obama PSA is a double-edge warning against fake news." *Vox*.

Segun, M. (2021). "Human Rights abuses escalate in Africa during the pandemic." *Human Rights Watch*. Link (last visited 25 April 2023).

Roos, A. (2006). "Core principle of data protection law." *The Comparative and International Law Journal of Southern Africa*. *39*(1):102.

Roos, A. (2012). "Privacy in the Facebook era: A South African legal perspective." *South African Law Journal*. *129*(2):375.

Samb, M. (2009). "Fundamental issues and practical challenges of Human Rights in the context of the African Union." *Annual Survey of International and Comparative Law 15*(1):61.

Schachter, O. (1983). "Human dignity as a normative concept." *American Journal of International Law*. 77: 848. Link (last visited September 02, 2024)

Scott, C. (1989). "Interdependence and permeability of Human Rights norms: Towards a partial fusion of the international covenants on Human Rights." *Osgoode Hall Law Journal*. *27*(3):769. Link (last visited September 02, 2024)

Sibanda, S. (2007). "Beneath it all lies the principle of subsidiarity: The principle of subsidiarity in the African and European regional Human Rights systems." *Comparative and International Law Journal of Southern Africa*. *40*:425.

Singh, A. & Power, M. (2019). "The privacy awakening: The urgent need to harmonise the right to privacy in Africa." *African Human Rights Yearbook*. *3*:202. Link (last visited September 02, 2024)

Smith, II. & George P. (2016). "Human dignity as a normative standard or as a value in global health care decision making?" *North Carolina Journal of International Law*. *42*:275.

Solove, D.J. (2003). "The virtues of knowing less: Justifying privacy protections against disclosure." *Duke Law Journal*. *53*:967. Link (last visited September 02, 2024)

Solove, D.J. & Schwartz, P.M. (2017) *Privacy Law Fundamentals*. 4th ed. IAPP.

Solove, D. (2006). "A taxonomy of privacy." *University of Pennsylvania Law Review*. *154*:477. Daniel Solove Understanding Privacy (Massachusetts: Harvard University Press, 2008). Link (last visited September 02, 2024)

Solove, D. (2002). "Conceptualizing privacy." *California Law Review*. *90*:1087. Link (last visited September 02, 2024)

Solove, D. (2010). *Understanding privacy*. Massachusetts: Harvard University Press.

Ssenyonjo, M. (2011). "Analysing the economic, social and cultural rights jurisprudence of the African commission: 30 years since the adoption of the African charter." *Netherlands Quarterly of Human Rights. 29*: 358. Link (last visited September 02, 2024)

Swanson, J. (1991). "The emergence of new rights in the African charter." *New York Law School Journal of International and Comparative Law. 12*:307.

Ukaj-Elshani, V. (2019). "Historical overview of *Jus cogens* norms, Their applicability by international courts and necessity for unification." *Socrates. 3*(19):68. Link (last visited September 02, 2024)

Uniacke, S. (1977). "Privacy and the right to privacy." *Bulletin of the Australian Society of Legal Philosophy.* 1: 1.

UNICEF. 2015. "*What are Human Rights*."

Van B.W. (2001). "Ubuntu and the globalization of Southern African thought and society." *Quest: An African Journal of Philosophy. 15*:53.

Weatherall, T. (2015). *Jus cogens: International law and social contract*. Cambridge: Cambridge University Press, 2015. Link (last visited September 02, 2024)

Westerlund, M. (2019). "The emergence of Deepfake technology." *technology Innovation Management Review. 9*(11):39. Link (last visited September 02, 2024)

Winfield, P.H. (1931). "Privacy." *Law Quarterly Review. 47*:23.

Winter, R. & Salter, A. (2020). "Deepfakes: Uncovering hardcore open source on GitHub." *Porn Studies. 7*(4):382. Link (last visited September 02, 2024)

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Montenegro, a secular state? A discussion on the power of the Serbian Orthodox Church in Montenegro

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Abstract: *This paper is concerned with explaining the reason for and how the Serbian Orthodox Church (SOC) managed to influence the perceptions of half of the population in Montenegro, thereby impacting the voting outcome of the 2020 parliamentary elections. The paper presents a historical overview of the political and religious situation in the country, focusing on the two main orthodox churches- the Serbian Orthodox Church and the Montenegrin Orthodox Church (MOC), as well as their relationships with the government of Montenegro and the president, Milo Đukanović specifically. The reason for the discussion between the SOC and the government was the passing of the law on the freedom of religion and legal property, article 52 to be exact. The paper also provides an insight into the agendas and rhetoric of both the SOC and MOC, as well as the Đukanović government. To address this issue properly, this paper combined various legal documents, such as the Constitution of Montenegro and the law of the freedom of religion and legal property issued in 2019, with various regional and global news outlets that reported on this heated argument between the two parties. The paper also provides an insight into the agendas and rhetoric of both the SOC and MOC, as well as the Đukanović government. Lastly, it serves as a study of the influence of religious institutions on democratic processes. The work concludes that the SOC in Montenegro still has a growing influence that has recently been exercised to impact their position and power through the shaping of public opinion.*

Keywords: *Church, democracy, elections, law, property, rhetoric*

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1. Introduction

In the revolutionary and historic referendum of May 2006, 55.5% of the 484,718 voters in Montenegro voted for the independence of their state (Joannine, 2024). This separation from Serbia after twenty-six years of belonging to a confederation of mixed and merged identities marked the beginning of the creation of the modern Montenegrin nation. The country was declared a constitutional democracy adopting the roles of a secular state and keeping the nation-state symbols that were decided upon in 2004- the national flag, anthem and crest. One year after independence, the government of Montenegro officially announced the recognition of the Montenegrin language as well, thereby putting a stamp on the creation of a contemporary and reborn identity of the state and the people of Montenegro (Vlada republike Crne Gore, 2024).

The recognised autocephalous churches are divided into four categories, in accordance with the seniority of recognition: Ancient Patriarchies (Ecumenical Patriarchate of Constantinople, Greek Orthodox Church of Alexandria, Greek Orthodox Church of Antioch and Greek Orthodox Church of Jerusalem), Junior Patriarchies (Bulgarian Orthodox Church, Orthodox Church of Georgia, Serbian Orthodox Church, Russian Orthodox Church and Romanian Orthodox Church), Autocephalous Archbishoprics (Church of Cyprus, Church of Greece and Orthodox Church of Albania) and Autocephalous Metropolises (Polish Orthodox Church, Orthodox Church of Czech Lands and Slovakia, Orthodox Church in America and Orthodox Church of Ukraine). Visibly, the divisions are geographically and nationally based (Clark, 2009).

However, even though autocephalous churches hold the most power and influence due to their longevity in particular geographical locations (for instance the Russian Orthodox Church being accepted and followed in China and Japan and the Serbian Orthodox Church being followed in BiH, Croatia, Montenegro and Kosovo). In the previous century, there have been attempts to separate from the large autocephalous church and create new orthodox churches specifically for that state in question (Drljević, 2009). This phenomenon has recently been the most present in the Balkans, whereby the Macedonian Orthodox Church has been autonomously operating, having been separated from the Serbian Orthodox Church for nearly 60 years, however still lacks the status of autocephaly, even though it's slowly becoming more canonically recognised by the Orthodox Churches (Dawisha & Parrott, 1994). Moreover, this isn't the only example of a nation (allegedly) separating its religious identity and institution from the SOC. The most recent one is that of the MOC seeking independence and formation in 1993, established by Antonije Abramović, a former Serbian SOC monk. The independence was announced under the claim that it represented the restoration of the autocephalous Montenegrin Church (Sekulović, 2010). However, the history of the MOC has been an

issue of great debate and polarisation in the orthodox community, as well as in the Montenegrin society, due to the severely different interpretations of the origins and nature of the church from its beginning, especially recently. To take a proper look into the issue and to understand it more closely, both perspectives are presented.

According to the official statements and stance of the MOC, the first time the autocephalous orthodox church of Montenegro was mentioned in any official document was in 1832 by Petar II Petrović Njegoš in a formal letter to Josif Rajačić, whereby he mentions the name of the Montenegrin Orthodox Church (Montenegrina, 2024). Its operations were active until the 1918 unification of Serbia and Montenegro by King Nicholas when the operations slowed down and were finally terminated with the creation of the Kingdom of Serbs, Croats and Slovenes and 1920 of merging the autocephalous MOC into the SOC by the royal decree of regent Aleksandar Karađorđević. In 1993, Abramović announced the restoration of the church and formed the MOC, as it is known presently. After his death, Mihailo became the new head of the MOC (European Commission for Democracy Through Law, 2019).

However, the other side of the coin of the history of the MOC stands from the SOC, as well as the wider orthodox community. As was expected after the declaration of independence in 1993, this newly independent church in Montenegro was met with an array of backlash and harsh criticism from the SOC, especially since Montenegro was still a part of the confederation of Yugoslavia, and later Serbia and Montenegro (Sekulović, 2010). The SOC in Montenegro (official name: Metropolis of Crnogorsko-Primorska County and the eparchy of Budimljansko-Nikšićka County) had been operating as the main religious institution and body and the creation of a potential rival claiming legitimacy seemed blasphemous. They had thus far been the only recognised autocephalous body, representing the regional junior patriarchy, existing since 1219 and therefore having the authority to decide upon important religious matters (World Council of Churches, n.d.). In Montenegro, their status was the same as in Bosnia and Herzegovina, for instance. The SOC had been the only existing orthodox body recognised by both the Eastern Orthodox Churches and the believers (Davidović, 1998).

The reasons why the SOC, as well as the majority of the wide Orthodox community, were so strictly against the proclamation of independence and had announced publicly that the MOC was nothing other than an aspiring organisation, rather than any sort of recognised church, was their point of view on the history of the alleged Autocephalous Church of Montenegro (Radio Slobodna Evropa, 2019). According to this tide of thought, the merge of the churches instructed by regent Karađorđević in 1918 had the full support of the people as well as the orthodox community to incorporate the autocephalous Montenegrin Orthodox

Church into the SOC because it represented the reconstruction of *Pećka Patrijaršija*, named originally *Srpska Patrijaršija* (Radio Slobodna Evropa, 2020), (Radio Slobodna Evropa, 2019). The history of *Pećka Patrijašija* has not been under debate and it is claimed that although the exact date of its establishment is unknown, it is believed to date from 1219, firstly as an archbishopric and then in 1345 when it gained the title of patriarchy (Bogdanović, 1986). It is considered to be the first eparchy of the SOC. In 1459, *Pećka Patrijaršija* ceased to exist as it merged with the Orthodox Ohrid Archbishopric, after which it was renewed in 1577, when its borders were widened to include new areas in Bosnia and Herzegovina, Dalmatia, Croatia, Hungary and Slavonia, as the territory had at this point been under the Ottoman empire, allowing *Pećka Patrijašija* to increase its magnitude (ćorović, 2001). However, as an outcome of the Ottoman-Austrian wars, in 1766, this institution was terminated and right after its termination the Cetinje Metropolis was created in Montenegro, known today as the Metropolis of the Crnogorsko-primorska county (one of the eparchies of the SOC), occurring in 1918 with the Karađorđević decree (Tomanović, 2001).

The local Serbian authorities, primarily President Slobodan Milošević, followed the rhetoric of the SOC, harshly criticising the blasphemy, however, the Montenegrin authorities remained silent. The most prominent political actor in Montenegro at the time of the MOC creation was Milo Đukanović who had been the Prime Minister under the president of Yugoslavia, Slobodan Milošević. Đukanović had remained rather silent about the Montenegrin identity within the borders of Yugoslavia, right until the Yugoslav dissolution and the end of the bloody war in Bosnia and Herzegovina, which ended with the Dayton Peace Accords in 1995 (Tromp, 2017); (Marović, 2020). After having publicly criticised Milošević and his political leadership, the two parted ways and commenced with different policies, Đukanović's being that of proposing the independence of Montenegro an independent state for an independent nation. This proposal was met with harsh critiques, however, in vain. Montenegro declared independence through a referendum in 2006, and ever since the nation-building process in Montenegro has been strengthening and increasing, through first the constitution, flag, language and soon enough, religion (Tomović, 2018).

The physical and political separation from Serbia, followed by the creation of their national symbols indicated the need for the separation in national identity, tradition and language, but not necessarily religion. The dominant religion in Serbia and Montenegro throughout the prior century had been Christian Orthodoxy and the main religious institution within it was the SOC (Mappes-Niediek, 2020). After the Montenegrin independence and the creation of their national symbols, alongside the embracing of the Montenegrin culture and tradition, the religious aspect, however, did neither separate nor lose its integrity. The hegemony of the

SOC was transferred through the newly established borders and the SOC became the dominant religious institution in the independent State of Montenegro (Vlada republike Crne Gore, n.d.).

However, this isn't to say that the SOC was the only orthodox institution that was active in Montenegro, even before its independence. The date of the establishment of the MOC, to this day, represents a mystery and dispute that causes various issues for the State and the believers. On one hand, there are claims that the MOC has existed ever since the end of the First World War and on the other hand it is said that it was founded in the late 90s, of the 20th Century (Pinter, n.d.). This mystery not only influenced and impacted the religious community and historical scholars in Montenegro, but ever since 2019, it has immensely contributed to the political sphere. The influence of the Churches in Montenegro has over the years proven to be quite strong, as the country's leader Milo Đukanović had a very open and transparent relationship with the religious institutions and authorities. However, the nature and essence of these relationships differed tremendously (BBC News, 2019).

Former President, Milo Đukanović, has been quite an important politician in Montenegro, serving as both the President for two terms, one of which is current and Prime Minister for four terms, over the past two decades. He is also the president of the prominent Democratic Party of Socialists in Montenegro. His party's reign ended in 2020, with a defeat in the parliamentary elections, for the first time since Montenegrin's independence (Pejić, 2008). His relationship with the Churches in Montenegro is, as aforementioned, of a rather dual nature. Over the years, Đukanović did not have a particularly strong and amiable relationship with either the Serbian Government or the SOC. This relationship did not however put in question the actions of neither side the political sphere operated secularly and the religious sphere operated without the interference of the Đukanović Government. His agenda and public political discourse almost always included an emphasis on the Montenegrin national identity and their independence (BBC News, 2019).

In correspondence with this rhetoric, his relationship with the MOC differed quite largely from that with the SOC. Đukanović has been a public supporter of the MOC and their operations, which was rather uncanny due to the fact that the MOC and its autonomy and independence were yet to be properly recognised by the High Orthodox Institutions[1] under the Orthodox laws (Arbutina, 2020). Moreover, this lenience towards the MOC was never so blatant as in 2019, when the Montenegro government passed a law on religious freedoms, legitimacy and legality of the Church properties, thereby allowing for greater autonomy of the MOC and relieving the SOC of religious properties that would fall into the ownership of the

[1] The concept of *autokefalnost*

state, causing outrage from the SOC, its followers and even the Serbian government. This event occurred several months before the parliamentary elections in Montenegro and represented a sharp turn in the rule over Montenegro. It is believed that this sway was heavily influenced by the abovementioned law and the backlash of the SOC (Radio Free Europe, 2020).

This paper aims to explain the reason and how had the SOC influenced public opinion regarding the upcoming parliamentary elections, by challenging and criticising the current government for illegitimately undermining the importance of the SOC and its followers, thus splitting civil society into those in favour of the SOC and those against its hegemony.

The posed research question is answered by utilising and analysing legal documents, including the Montenegrin constitution and the 2019 law on the freedom of religion, as well as news articles from local and regional news portals and the election results and analytics. This paper's relevance lies in the fact that the topic is very current and hasn't yet been discussed in great detail. The correlation between democracy and the Church is a global phenomenon that is being observed- and it is being witnessed currently in Montenegro. However, the applicability of this research cannot go beyond this particular case due to differences like the conflict between the State and the Church. The paper does not cover the legality of both the Churches' claims on their property or the legitimacy of their rule due to the technical limitations of this paper.

The paper presents the public's reaction to the religious law passed in 2019 and revoked in 2020, focusing particularly on Article 52, followed by the SOC's and MOC's reaction and narrative before and during the election campaign period. Furthermore, the very relationships that both Churches have with the government that is in power at the moment are to be explained, followed by the impact the Church's narratives on the people of Montenegro are also the inspiration for protests against the law and the change in leadership. The paper lastly presents the election results and the effect of the results regarding the above-mentioned article on religious freedoms and legal ownership, as well as the overall status of the Churches in 2021.

2. The Legal Dispute Between the Church and State

Article 14 of the Montenegro Constitution states that – The separation of the religious communities from the State, indicates very clearly that all the religious communities and institutions are to operate freely and with equal status, whilst being separate from the State: "Religious communities shall be separated from the state. Religious communities shall be equal and free in the exercise of religious rites and religious affairs" (Constitution of Montenegro, 2007).

Under this context, the Government of Montenegro has every right to separate its operations from the interests of the Church, regardless of whether it is the SOC or MOC. However, this does not necessarily entail that the government has to conduct all its businesses without considering how they would affect the religious institutions, especially because the majority of the population in Montenegro declares themselves as religious in particular as members of the SOC and a smaller portion as members of the MOC (Ambasada SAD, 2011). Furthermore, this in essence means that the Montenegrin Government and the decision-making bodies quite often have to consider the potential backlashes and consequences of making decisions that leave the Church(es) worse off. Although completely legal, some decisions might be considered illegitimate due to the lack of public support and perception of the validity of particular decisions (Al Jazeera, 2019).

The most recent example of such a move made by the Government of Montenegro was the introduction of the newest religion-related law that would allow for more freedom amongst religious institutions, thereby dispersing the structural and essential hegemony of the SOC, and also elevating the secularism of the Montenegrin State by allowing it to furthermore transfer the ownership of particular lands and monasteries from the SOC on to the state itself (Radio Slobodna Evropa, 2020). The law was introduced in December 2019, approved by the parliament and signed by the current president Milo Đukanović in January 2020 (BBC News, 2019). The law on the freedom of religion and belief and the legal status of religious communities was initially sent to the European Commission for Democracy Through Law in Venice in 2015 but was returned and disapproved due to a large number of illegalities and unclear claims (European Commission for Democracy Through Law, 2019). In 2019, the renewed law was sent and approved. The entire law consists of 55 Articles, however, the one that received the most criticism and created a year-long battle between religious and political groups in Montenegro was Article 52 which stated the following:

> Religious objects and land that are used by religious communities on the territory of Montenegro, that have been proven to have been built, or received from public state funds, or were in the ownership of the state until 1 December 1918, as the cultural heritage of Montenegro are state property. Religious objects for which it is determined that had been built on the territory of Montenegro with joined investments of the citizens until 1 December 1918 are state property (Ministarstvo za ljudska I manjinska prava, 2015).

In essence, this article makes the statement that all religious monuments, objects, or any other types of institutions that do not have proof of legal existence and ownership before 1918 are to be claimed

by the State of Montenegro. Needless to say, this article brought about immense polarisation in the opinions of both the Churches in the country and the neighbouring states, but also amongst the people. The primary polarisation occurred between the SOC and the MOC and their attitudes towards the aforementioned article (Maksimović, 2020).

The SOC's reaction was quite negative, as can be imagined, as the signing of this law with this article remaining as such would immensely impact their importance as a religious hegemon, as well as an important political asset. Although they did not put into question their ownership over the SOC monasteries and objects, they did however harshly criticise the government for such an outrageous attack towards the Church (Radio Slobodna Evropa, 2020). The very legal documentation necessary for the proof of ownership exceeds the scope of this paper, so the focus shall remain on the Church's rhetoric and agenda against the Montenegrin Government decision.

2.1 Reaction and Action of the Serbian and Montenegrin Orthodox Church

After the law on religious freedom was passed, it did not take long for the SOC to react with harsh criticism and commence a public debate. The SOC and the former Patriarch of SOC, Irinej, delivered a public complaint about the article on property rights. Although it did neither deny nor accept the assumptions that the SOC does not have the legal proof necessary to keep their land and monasteries, the SOC proclaimed the law as discriminatory and as an open attack on the Church and all Serbians living in Montenegro (Kajosević, 2020). One of the holiest monasteries of the SOC, Ostrog, was under scrutiny regarding the legality of its ownership. The SOC's followers and the Church itself were extremely concerned about the possibility of losing one of the most important monuments and symbols of Serbian Orthodoxy (Janković, 2019). This panic and concern created even more incentive to label the Government as "anti-Serbian". Consequently, the Church started a series of protests throughout the country to counter the government and speak out about the alleged illegitimacy of their claims over Church property. The protests were massively joined by the SOC followers and the situation largely escalated, as these protests received support from the Serbian Government (Al Jazeera, 2019).

On the other hand, the Patriarch of the MOC, Mihailo, had the opposite reaction and quite a short and direct statement. He claimed that the Montenegrin Government was not whatsoever taking away anyone's property, but was rather simply taking back what has always been rightfully theirs (Radio Slobodna Evropa, 2020). This statement also managed to consolidate the actions of the SOC, strengthening their rhetoric that was focused primarily on the anti-Serbian context and the desire to undermine the SOC and repress the Serbian population in Montenegro, thereby

strengthening the "false" MOC. The SOC never approved of the open operations and existence of MOC, considering it to be more a cult than a valid Orthodox community (Aljović, 2020).

To further increase the complexity of this issue, parliamentary elections were approaching, and the election campaigns were armed with one question- does the Government have the right to claim the SOC's property?

3. The Parliamentary Election Campaign

According to the *Deutsche Welle*, the 2020 elections in Montenegro were to represent the most uncertain and potentially dangerous elections the country has ever seen (Kračković, 2020). After over two decades of semi-authoritarian rule in Montenegro, as Florian Bieber classifies it, there was a chance for a turnover, a chance that was practically allowed by the DPS[2] lead Government itself after the signing of the controversial law (Bieber, 2017); (Radio Free Europe, 2019). With the support and incentive of the SOC, the Milo Đukanovič Government's opposition finally stood a chance at overthrowing them.

The influence of the Church in any political process in Montenegro was never more blatant and powerful. After the law was passed, the SOC began their protests and anti-governmental agenda, heavily influencing the views of the Church's followers concerning whom to vote for in the upcoming elections (Tomović, 2020). Similarly, the MOC had its agenda regarding these elections and their take on the reasoning behind the passed law. The MOC in contrast to the SOC, was a strong supporter of the property clause, as well as of the government that signed it (N1, 2014). The relationship between the Đukanović Government and the Montenegrin Orthodox Church became even more visible during the pre-election period.

3.1. The Montenegrin Orthodox Church and Milo Đukanović

Đukanović's infamous reputation as a European-oriented reformist after the secession of Montenegro from Serbia and Montenegro did not have a long-lasting life. Not long after the consolidation of his power in Montenegro, his policies and general political discourse and agenda heavily shifted towards a more Montenegro-oriented national identity building, that included the official language being separated from that of Serbia and similarly, the Orthodox Church being separate from Serbia (International Institute for Middle East and Balkan Studies, 2020). This meant the exclusion of the SOC's prevalence in the country and the strengthening of the church that would support his agenda and goals in Montenegro- the MOC.

[2] Democratic Party of Socialists in Montenegro

The entire law on the freedom of religion and legal ownership was suited well for the MOC. It consisted of not just articles that would increase its legitimacy as an Orthodox Church, but also of the Articles (precisely Article 52) which would help it gain a more equal status of power in the country, as the power of the SOC financially, legally and ownership wise, would decline drastically (Al Jazeera, 2020). The support of the MOC for this law was quite transparent and so was their support for DPS in the Parliamentary Elections of 2020. As aforementioned, Đukanović although having led the country rather semi-autocratically, still wished to preserve external legitimacy as a western-lead politician (Bieber, 2017). The legitimacy of the MOC was denied by the Vaselian patriarch Bartolomeo, emphasising that the only Orthodox Church in Montenegro is the SOC. However, there is another option for the legitimisation of the MOC. The Vatican did not deny the possibility of the creation of the Uniat MOC. This would mean that a canon recognition of the MOC would give it legitimacy as an Eastern Orthodox church, but the official canon jurisdiction over the Church would be in the hands of the Roman Catholic Church of the Vatican as is the case of the Uniat Greek Church (International Institute for Middle East and Balkan Studies, 2020).

This option would allow both parties MOC and Đukanović to achieve their goals. The MOC would become legitimate and recognised under the Holy Law and Đukanović would strengthen his ties to the West even more. However, his ties to the East, most notably Russia and Serbia were not neglected either. During his election campaign, Đukanović promised to slightly alter the law in the favour of the SOC if his party won the elections, to appease the Serbian Government, as well as the Serbian people in Montenegro. Unfortunately for him, the latter discourse strategy did not quite work (Radio Free Europe, 2020).

3.2 The Serbian Orthodox Church Versus Milo Đukanovič

Contrary to the relationship that the MOC has with the President, the SOC has always had a rather thin and distant relationship with Đukanović. As his discourse and actions are quite usually pro-Montenegrin identity and the creation of a fully national identity in every sphere, it was natural for the two to have differing points of view (International Institute for Middle East and Balkan Studies, 2020). However, until this particular law, their relationship was more or less stable. After it was approved by the Parliament and signed by Đukanović, the tensions emerged ever so evident and what were once merely different stances, now became tools that would polarise the nation like never before and would result in what many would refer to as the end of Đukanović and his idea of a Montenegrin national identity embedded in all spheres of society (Maksimović,2020).

By claiming the property of the SOC to the state, SOC would immensely lose its influence in Montenegro, and with that alone the idea of MOC

being more present and existing on a relatively equal playing field would allow for the State to have more control, thereby pushing out what might be the last standing Serbian mark in the identity of Montenegro (Radio Slobodna Evopa, 2020). The SOC was perfectly aware of this, as was the Serbian Government and a counterattack was necessary to protect their power and influence in the country. As abovementioned, the SOC started protests as a sign of opposition and criticism. However, it did not end there. The Church did not hesitate to publicly speak out about the alleged injustice that was being handled to the Serbian believers in Montenegro and the people joined in (Sinanović, 2020).

With each day, more and more turmoil was created and the predictions for the upcoming elections started to shift towards the opposition of Đukanović. The SOC with the support of the Serbian Government persuaded its audience and followers of the bad intentions of DPS and their aim to minimise the power of the Serbian people in Montenegro which is nearly 30% of the population according to the census of 2011 (Statistics Office of Montenegro, 2011). In addition, around 72% of the population in Montenegro declares themselves as Orthodox and almost 90% of those Orthodox believers belong to the SOC, so the SOC was gaining a lot of support in numbers (European Parliament, 2020); (Ambasada SAD, 2011).

By the time of the pre-election silence, the people were extremely polarised and the DPS Government was more than aware of the fact that there was a large chance of losing the elections because of the Church, which inevitably happened.

3.3. Final Outcome

As was predicted, the electoral race was an extremely polarised and tight battle between the believers in the Đukanović cause and those opposed to it. In other words, it was a battle between the SOC and the twenty years long autocracy (Martinović, 2013). The elections took place on 30th August and out of 622,000 registered citizens over 410,000 citizens voted, according to the 2019 census (Državna izborna komisija Crne Gore, 2020). It is crucial to note that out of these 410,000, several thousand votes came from the neighbouring countries. There have been several incidents of voting manipulation since the country closed its borders for tourists due to the worsened epidemiological situation in the country and opened them solely for those eligible to vote. However, there were reports of border riots, fuelled by the words of the Church, whereby members of one or the other voter side were prohibited from entering the country (Kajošević, 2020). Although these accusations weren't considered official voting manipulation, it isn't to say that there were attempts to prevent particular votes from being cast, all influenced by a non-political (at least theoretically) actor. The final results were split with a bit over 35% for

the ruling DPS, and nearly 33% for the "For the Future of Montenegro" opposition party. The ruling power depended on a final coalition, that was in the end taken by the opposition, ending the parliamentary prevalence of DPS (Državna izbrna komisija Crne Gore, 2020).

This moment marked the win of the SOC by default, which was proven a few months after the new Parliamentary Assembly, which decided to adjust the religion law's controversial Articles (Tomović, 2020). The Article on the ownership question was completely taken out, therefore allowing the SOC to keep all its property without being questioned (Kajošević, 2020). However, before the law was made official after the amendment, it needed to be signed by the President, which as can be imagined, took quite the bargaining (Radio Free Europe, 2021). Once it was signed, it represented the final defeat of the DPS rule and the idea of strengthening and legitimising the MOC through Government action, so one could claim that the current situation of the Churches in Montenegro is as it was before December 2019 (AP News, 2020).

4. Conclusion

In conclusion, the influence and power of the SOC have never been more prominent and have never been exercised to the extent of impacting the democratic political processes in the country. After the passing of a highly controversial law on religious freedoms, the Government received a backlash, both from the citizens of Montenegro and from the SOC. The SOC claimed that Article 52 of the said law was discriminatory, illegitimate and an open attack on the SOC, as it would allow the Government to take away the Church's property if they were unable to provide legal proof of their ownership over that property before 1918. In contrast to the SOC, the MOC supported the law and the mentioned Article, as it would help establish more legitimacy in the Orthodox community. Moreover, the reaction of the SOC contributed immensely to the opinions of the public that was soon to elect a new parliament in the upcoming elections.

Almost half of the voting body in Montenegro belonged to the SOC. Their perceptions and voting behaviour were heavily influenced by the rhetoric of the Church, as they proclaimed that the Government was trying to undermine the importance and operations of the Serbians in the country. The elections resulted in the favour of the opposition (the SOC supporters), after which the law was adjusted in the favour of the SOC, removing the discussed article. However, it must be noted that the grand switch in electoral power and the voting tides were not solely influenced by religious issues and rhetoric. General dissatisfaction, year-long frustration, economic issues and many other reasons have contributed to this change, but this is not to undermine the influence religious institutions have in countries whose leaders primarily rely on religious nation-building. These elections, ultimately, represent the turning point in the Montenegrin Government, as well as an interesting case of how even in secular states, the Church still plays a vital role in decision-making.

5. References

Al Jazeera, "Zakon o Slobodi Vjeroispovijesti u Crnoj Gori Neustavan", Al Jazeera, Link (accessed 11 January 2024).

Aljovic, Armin, Crnogorski mitropolit za AJB: Srpska pravoslavna crkva je politička organizacija", Al Jazeera, Link (accessed 11 January 2024).

Ambasada SAD, "Crna Gora", Ambasada SAD, Link (accessed 11 January 2024).

AP News, "Montenegro lawmakers change religious law opposed by church", AP News, Link (accessed 11 January 2024).

Arbutina, Zoran, "Crna Gora I Politički Koncept Autokefalnosti", Deutsche Welle, Link (accessed 11 January 2024).

BBC News, "Crna Gora, usvojen zakon o veroispovesti, šta treba da znate?" BBC, Link (accessed 11 January 2024).

Bieber, Florian, "Patterns of competitive authoritarianism in the Western Balkans", *East European Politics*, no. 34, (2017): 337-354.

Bogdanović, Dimitrije. *Knjiga o Kosovu*. Beograd: Srpska Akademija Nauka i Umetnosti, 1986.

Clark, Katherine. *Orthodox Church: simple guides*. London: Kuperard, 2009

Constitution of Montenegro (2007), Article 14, *entered into force*: 2007: Link (accessed 11 January 2024).

Ćorović, Vladimir. *Istorija Srpskog Naroda*. Beograd: Janus, 2001.

Davidović, S. *Srpska pravoslavna crkva u BiH (960-1930)*. Novi Sad, 1998.

Durovic, Aneta, "Predizborno Prizivanje Crnogorske Dijaspore", Radio Slobodna Evorpa, Link (accessed 11 January 2024).

Drljević, Sekula *Balkanski sukobi 1905-1941*. Zagreb: Putovi. pp. 162–166. 2009.

Drzavna Izborna Komisija Crne Gore, "Ukupni Rezultati Izbora za Poslanike u Skupstinu Crne Gore", Link (accessed 11 January 2024).

European commission for democracy Through Law, (24 June 2019), No. 953, *entered into force*: 2019: Link (accessed 11 January 2024).

European commission for democracy Through Law, (24 June 2019), No. 953, *entered into force*: 2019. Link (accessed: 20 January 2024).

European Parliament, "Parliamentary Questions", European Parliament, Link (accessed 11 January 2024).

International Institute for Middle East and Balkan Studies, "Parlamentarni izbori u Crnoj Gori 2020: Da li će EU priznati rezultate izbora u Crnoj Gori?" IFIMES, Link (accessed 11 January 2024).

Jankovic, Marija, "Čiji je Manastir Ostrog?" BBC, Link (accessed 11 January 2024).

Joannine, Pascale, "Montenegro - Referendum on independence", Foundation Robert Schuman, Link (accessed 11 January 2024).

Kajosevic, Samir, "Montenegro Alters Contentious Religion Law, Satisfies Serbian Church", Balkan Insight, Link (accessed 11 January 2024).

Kajosevic, Samir, "Serbian Church, Montenegro Govt to Discuss Disputed Religion Law", Balkan Insight, Link (accessed 11 January 2024).

Kajosevic, Samir, "Veljović: Na dan izbora u Crnoj Gori planirani nereid", AA Balkan, Link (accessed 11 January 2024).

Karen Dawisha, Bruce Parrott. *1997 Politics, Power and the Struggle for Democracy in South-East Europe*. Cambridge: Cambridge University Press, pp: 257-265, 1994.

Krackovic, Radomir, "Neeizvijesni Izbori I Strah od Incidenata", Deutsche Welle, Link (accessed 11 January 2024).

Maksimovic, Sandra, "Montenegrin Law on Religious Freedom: Polarization that benefits the government(s)?", European Western Balkans, Link (accessed 11 January 2024).
Mappes-Niediek, Norbert, "Prevelika Crna Gora ili Premala Srbija?", Deutsche Welle, Link (accessed 11 January 2024).
Marović, Jovana. "Đukanović's Montenegro and Serbian Nationalism; Closing the Circle". ISPI. Link (accessed 20 January 2024).
Martinovic, Marina, " Posljednji Autokrat Balkana", Deutsche Welle, Link (accessed 11 January 2024).
Ministarstvo za Ljudska I Manjinska Prava, "Nacrt Zakona o Slobodi Vjeroispovijesti", MLJMP, Link (accessed 11 January 2024).
Montenegrina. "Vladimir Jovanović – Njegoš 1832. O crnogorskoj pravoslavnoj crkvi" Montenegrina. Link (accessed 20 January 2024).
N1, "Montenegrin Orthodox Church warns of efforts to re-annex Montenegro to Serbia", N1, Link (accessed 11 January 2024).
Pejic, Nenad, "The Smartest Man in the Balkans", radio Free Europe, Link (accessed 11 January 2024).
Pinter, Zlatko, "Crnogorska pravoslavna crkva bila je samostalna 154 godine prije nastanka SPC", Politika, Link (accessed 11 January 2024).
Radio Free Europe, "Lawmakers in Montenegro Back Changes to Contentious Religious Law Amid Protests", Radio Free Europe, Link (accessed 11 January 2024).
Radio Free Europe, "Montenegro's President Rejects Changes to Controversial Religion Law", Radio Free Europe, Link (accessed 11 January 2024).
Radio Free Europe, "Montenegrin President Signs Controversial Law on Religion", Radio Free Europe, Link (accessed 11 January 2024).
Radio Slobodna Evropa, "U Crnu Goru Stupio na Vlast Zakon o Slobodi Vjeroispovijesti", Radio Slobodna Evropa, Link (accessed 11 January 2024).
Radio Slobodna Evropa. "Mitropolija SPC: CPC nikad nije bila autokefalna" Radio Slobodna Evropa. Link (accessed 16 January 2024).
Radio Slobodna Evropa. "U Crnu Goru Stupio na Vlast Zakon o Slobodi Vjeroispovijesti" Radio Slobodna Evropa Link (accessed 16 January 2024).
Sekulović, Goran. *Crnogorski Identitet*, Matica. Podgorica. 2010. Link (accessed 11 January 2024).
Sinanovic, Ermin, "The Serbian Orthodox Church and the 2020 Montenegro Elections", Berkley Centre for Religion, Peace, and World Affairs, Link (accessed 11 January 2024).
Statistics Office of Montenegro, "Census of Population, Households and Dwellings in Montenegro 2011", MonStat, Link (accessed 11 January 2024).
Tomanović, Milorad. *Srpska Crkva u Ratu i Ratovi u Njoj*. Beograd: Medijska knjižara Krug, 2001.
Tomović, Dušica. "Montenegro spends a lifetime with Đukanović" Balkan Insight. Link (accessed 20 January 2024).
Tomovic Predrag, "Izmjene vjerskog zakona po mjeri SPC u Crnoj Gori", Radio Slobodna Evropa, Link (accessed 11 January 2024).
Tomovic, Predrag, "Onlajn Kampanja Primat Predizborne Crne Gore", Radio Slobodna Evropa, Link (accessed 11 January 2024).
Tromp, Nevenka. "Profile: Montenegro's Game-Chinging Leader Milo Đukanović". Clingendael Spectator. Link (accessed 20 January 2024).
Vlada republike Crne Gore, "Simboli", Republika Crne Gore, Link (accessed 11 January 2024).
World Council of Churches. "Serbian Orthodox Church" World Council of Churches. Link (accessed 20 September 2021).

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*Oriola O. Oyewole**

Abstract: *This edited book provides a comprehensive analysis of various aspects of the international criminal justice system, focusing on the significance of international criminal law in achieving accountability for Atrocity Crimes in Africa and globally. The contributors examine the complexities and challenges involved in holding individuals accountable for these crimes, addressing concerns about legitimacy, the regionalisation of justice, the application of universal jurisdiction, and the importance of international cooperation. While acknowledging the marginalisation of female experiences in conflict, and the investigation and prosecution of conflict-related sexual and gender-based violence, it underscores the need for a thorough understanding of gender dynamics in conflict-related crimes and advocates for urgent action to address accountability gaps. Interestingly the themes of the book accentuate the sustainability of international criminal law. There is a demand for justice and accountability in Africa, highlighting the importance of engaging in productive conversations to develop and implement successful approaches to achieve these objectives.*

Key words: *atrocity crimes, gender-based violence, international criminal justice, international cooperation, legitimacy, universal jurisdiction*

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1. Introduction

The international criminal justice system has experienced an evolution in its scope, progressing from the Nuremberg and Tokyo tribunals to the establishment of ad hoc tribunals and, subsequently, the International Criminal Court (ICC). The establishment of the ICC marked a significant milestone in the evolution of international criminal law (Bassiouni 1995; Ferencz 1992). The ICC, the world's first permanent international criminal court, was a legal development and a political decision that profoundly impacted the trajectory of international criminal justice (Chazal 2016; Scharf 1996). Chazal stresses how states constructed the ICC through their political interests and ideas.[1] The book accentuates the intricate web of contemporary international criminal law and its evolving nature. It addresses several themes such as the viability of regional African criminal court, the legitimacy, the challenges in prosecuting international crimes, state sovereignty, domestic jurisdictions, universal jurisdiction and human rights. In addition, the edited volume also considers the historical, cultural and political contexts of global justice. Given that the book conveys the recent developments in international criminal law, it is crucial to acknowledge an alternative perspective that raises doubts about the efficacy and feasibility of international criminal justice. Opponents sometimes contend that international criminal law is prone to notable politicking, wherein influential nations exploit it to advance their interests while overlooking the crimes committed by their allies or themselves.

Moreover, the considerable logistical constraints involved in prosecuting persons in different jurisdictions and political systems raise doubts regarding the practical applicability of international criminal law (Kaleck 2015). Furthermore, universal jurisdiction has been the topic of intense controversy due to concerns regarding its possible infringement on state sovereignty and the potential for prosecutions driven by political motives (Krings 2012). These differing perspectives serve as a reminder of the boundaries of present-day international criminal law, requiring cautious assessment and clarification.

Furthermore, the edited book, which is structured into two sections, focuses on the sustainability of international criminal justice. Part I of the book is devoted to international criminal law in Africa, while Part II delves into matters of convergence that have more extensive ramifications from a global lens. The edited collection provides a comprehensive analysis of eleven chapters, delving into topics including the legitimacy of the

[1] See Chazal, Nerida. (2016) *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity.* London & New York: Routledge: 36-40. The book extensively analysed the role of states and Civil society in the establishment of the ICC.

International Criminal Tribunal for Rwanda, the law of genocide, universal jurisdiction, the preliminary examination process of the ICC in Nigeria, international co-operation in criminal matters, the potential establishment of an African regional Court for international crimes, the development of the investigation and prosecution of Sexual and Gender-Based Violence (SGBV) in the international criminal justice, marginalisation of slavery in international criminal justice and the evolution of guilty pleas. The edited volume offers a roadmap for readers to navigate through the collection.

This book is a must-read for anyone interested in comprehensively understanding international criminal law. The book's in-depth discourse on the prospect of international criminal law is useful for academics, legal researchers, legal practitioners, judges, students and others working in areas related to international criminal law, human rights, and international humanitarian law practitioners. The contributors effectively incorporate theoretical perspectives and real-world scenarios, making this book an invaluable resource for students and professionals. A detailed examination of the most serious crimes affecting the international community provides an intensive understanding of international criminal law's challenges and nuanced nature. The chapters are skillfully integrated and structured in an organised pattern that mirrors the sphere of international criminal justice. Moreover, this volume is an addition to international criminal law and a reference for individuals willing to gain insights into international criminal justice and its effects in practice.

2. Chapter Commentaries

The opening chapter serves as an introductory section of the book, effectively acquainting readers with the main themes and issues in international criminal law that the book aims to elucidate. This chapter sets the stage for assessing the multifaceted challenges of implementing and enforcing international criminal law in today's modern global landscape. While this chapter establishes the context for assessing the criminal justice system's intricacies, its cursory analysis may not be as effective in articulating the critical issues beyond the surface.

Chapter two offers a compelling sift probe into the ICC's pursuit of justice for the atrocities committed by Boko Haram in Nigeria. Arthur Traldi contextualises the Boko Haram faction and their infamous abduction of female students in Chibok, which drew international attention through the BringBackOurGirls movement. The chapter subsequently explores the ICC's preliminary examination process in Nigeria, analysing both the framework and implementation of this process. The author also examines the broad range of international crimes committed by Boko Haram, including acts of violence against civilians, the kidnapping and

imprisonment of civilians, attacks on educational institutions and students, the recruitment and deployment of child soldiers, gender-based crimes, attacks on religious buildings, and violence on humanitarian personnel. According to Traldi, Office of the Prosecutor (OTP) has identified seven potential cases of allegations against members of Boko Haram. These cases encompass diverse patterns of criminal conduct. The initial case pertains to attacks on non-combatants and the killing of civilians. The second scenario pertains to the forcible removal of numerous citizens and their confinement in camps and cities under the authority of Boko Haram. The third scenario pertains to assaults on educational facilities, educators, and pupils. The fourth case relates to the enlistment and deployment of child soldiers, while the fifth case concerns acts of violence targeting females, particularly women and girls. The sixth case pertains to the intentional targeting of religious buildings. The seventh case involves attacks on humanitarian personnel or objects and the act of taking hostages. Set against this background, Traldi evaluates each case, accentuating the gravity and complementarity principle and, emphasising the severity and interdependence of the crimes. The chapter concludes with an analysis of the subsequent developments in the ICC investigation and its potential significance for future situations, especially its consequences for ICC and African relations. Traldi underscores the relevance of prompt actions, their impact on the preliminary investigation, and the synergy between Africa and the ICC. Succinctly, chapter two demonstrates the inherent challenges associated with pursuing accountability for the Atrocity Crimes committed by this extremist group. The conclusion provided in chapter two is forward-looking and briefly outlines the ongoing challenges and potential solutions for achieving justice in Nigeria. However, it is suggested that the author should have expanded on the conclusion and put more effort into reiterating the points stated earlier.

The ICC has played an integral part in addressing and ensuring accountability for atrocities committed in several African countries. Nonetheless, African leaders and scholars have consistently voiced their concerns about the perceived bias and power imbalance within the ICC (Ross 2018). These criticisms have prompted demands for the creation of an alternative court, specifically the African Regional Court (ARC), to handle cases of international crimes committed in Africa. The idea of establishing an African Regional Court as a substitute for ICC is based on the understanding that the current international criminal justice system is often perceived as being controlled by Western powers and does not effectively address the specific issues and complexities of the African situation (Ba 2023). As outlined in the Malabo Protocol of 2014, the ARC offers a possible alternative to the ICC (Ba 2023). The African Regional Court and its potential as an alternative to the ICC are the primary focus of Chapter three, which explores the concept of regionalisation of criminal court. Notably, the relationship between the ICC and the

African States has been complicated.[2] Ikpat proposes four alternative approaches to regionalisation: the establishment of a regional criminal court, the introduction of regional sessions of the ICC, the implementation of the universality principle at a regional level, and the use of specialist domestic courts with regional judges. One of the chapter's strengths is its comprehensive assessment of the ARC and the specific mandates outlined in the Malabol Protocol. Ikpat emphasises that the Protocol encompasses several kinds of international crimes (fourteen), including genocide, crimes against humanity, war crimes, and crimes of aggression. It also incorporates aspects from other international criminal tribunals and conventions. This demonstrates the ARC's commitment to established international norms and practices. The chapter recognises the potential for overlap and conflicts between the two institutions: the ICC and the ARC. It emphasises both the progressive provisions and drawbacks of the court. The court's mandate is perceived as overstretched, which may impact its effectiveness. Moreover, the court's jurisdiction is excessively broad, raising concerns about its capacity to adjudicate on a non-exhaustive list of crimes efficiently. Critics argue that granting immunity to high-ranking state officials violates international law and restricts the court's jurisdiction. Overall, the chapter's sentence structure expresses apprehensions over the court's capacity to achieve its objectives and effectively administer global criminal justice.

Furthermore, the chapter would have sufficiently addressed the political context and consequences surrounding establishing the ARC. The author briefly acknowledges the scholarly criticism, concerns, and the impression that the court may be seen as a "Rebel Court" to shield African states from the ICC investigation. Nevertheless, a more robust comprehensive analysis of these concerns, encompassing the possible impact on state collaboration, regional harmonisation, and the court's credibility, is still pending. For instance, the author could delve into the possible impact of establishing the African Regional Court on the willingness of African states to cooperate with the ICC and whether it could lead to a fragmentation of international criminal justice. The author could have also considered incorporating and legitimising the ARC's mandate and operations with extant regional and global frameworks. Finally, an in-depth appraisal of the court's legitimacy within Africa and globally would be essential for determining its feasibility as a viable substitute for the ICC.

In chapter four, boost delineates two notable legitimacy challenges the ICTR encounters. The initial impediments pertain to the case of Jean-Bosco Barayagwiza, a key figure in the Rwandan genocide, whose case management prompted inquiries into the ICTR's legitimacy. The controversies and subsequent acquittal of Barayagwiza evoked indignation

[2] South Africa's refusal to arrest the former Sudanese President Omar al-Bashir during his visit to South Africa in 2015.

and scepticism, which impacted the ICTR's reputation and credibility for fairness and objectivity. The second constraint pertains to the dismissal of Carla Del Ponte, the chief prosecutor of the ICTR. She was reportedly dismissed in response to pressure from the Rwandan government, which had suspended co-operation with the ICTR in the wake of the Barayagwiza case. Such a situation raised apprehensions regarding the autonomy of the ICTR's independence and its capacity to operate unfettered from political influence.

The points above highlight distinct legitimacy concerns regarding the ICTR. These concerns include the ICTR's geographical location, its focus on prosecuting individuals from the Hutu ethnic group, its recruitment of former génocidaires, and the acquittals and early releases of those deemed most responsible for the 1994 genocide. Boost recommends that efforts aimed at legitimisation-developing a positive image, transparent communication, and adherence to established standards and norms-are stressed as essential for managing legitimacy. One interesting point about chapter four is that it emphasised specific cases and broader institutional concerns that jeopardised the ICTR's reputation and capacity to administer justice efficiently. It is inferred that the legitimacy of the ICTR is a combination of internal and external factors. Although, they are not mutually exclusive, the absence of legitimacy might put into question the normative and structural content underlying the sustainability of ICTR. By analogy, international criminal tribunals and courts' legitimacy is indispensable to their effectiveness and ability to attain their mandate. The language is unambiguous and easily understandable, catering to a broad spectrum of readers.

Furthermore, chapter five analyses genocide and the atrocities committed against the Namibian Herero and Nama atrocities in the twentieth century, following a discussion of the historical background of genocide, including the Holocaust and the Armenian Genocide. Dermont Groome then focuses on the Herero/Nama genocides as the first genocides of the twentieth century. In addition, the chapter highlights Germany's recent recognition of its crimes against the Herero and Namaqua tribes as genocide. It assesses the implications of this recognition, including the government's commitment to create a fund and return stolen parts as a form of reparations. A noteworthy feature of the chapter is its extensive analysis of the legal elements of genocide. This chapter addresses the necessary mental state (mens rea) and physical acts (actus reus) requirements for genocide. It outlines the prohibited acts acknowledged in Article II of the Genocide Convention. It integrates historical evidence, such as direct quotes from primary sources and narratives of the atrocities committed against the Herero and Nama peoples.

Interestingly, this approach adds depth and emotional dimension while contextualising the legal concepts and exemplifies the real-world

application of the law of genocide. It thoroughly analyses the topic by skillfully merging legal analysis with historical evidence. Nevertheless, the chapter's organisation might be enhanced. Although the general progression is coherent, the transitions between the historical context, the discussion of the Herero and Nama Genocides, and the legal analysis could be more seamless. Moreover, certain sections of the chapter could be improved by adopting a more concise and efficient writing style to sustain the reader's interest. Overall, this chapter provides a substantial addition to the comprehension of the Herero and Nama Genocides and the legal aspects of genocide. Groome's adeptness in seamlessly integrating legal analysis with historical evidence is a notable asset, rendering this work a helpful reference for scholars, policymakers, and everyone interested in the intricate and significant subject of genocide.

The sixth chapter discusses international criminal co-operation, focusing on Africa's relationship with the ICC. Kemp investigates the various interactions between African states and the ICC, such as the drafting of the Rome Statute, the referral of African cases to the ICC, and the drawbacks caused by the failure to arrest Sudanese President Omar Al-Bashir. The chapter also discusses Pan-Africanism as a paradigm for international criminal justice in Africa. It addresses modalities of co-operation, such as mutual legal assistance and extradition. It also examines the Malabo Protocol as a manifestation of African solutions to African shortcomings and the implications for mutual legal assistance and co-operation in combating transnational crime. It accentuates the complexities of immunities, particularly those affecting heads of state, and probes South Africa's failure to arrest President Al-Bashir despite ICC arrest warrants. This chapter does an excellent task of assessing the subject matter from every angle, covering African international criminal justice's horizontal and vertical dimensions. Kemp analyses many levels of co-operation, including national, sub-regional, regional, and international, to illustrate the intricacies and boundaries of international criminal justice in Africa.

Furthermore, chapter seven explains the concept of universal jurisdiction and how it operates in international law. It emphasises the debates and controversies regarding universal jurisdiction, particularly among African states. James Nyawo inquires into the historical background of universal jurisdiction, which has its roots in the punishment of pirates. Nyawo additionally examines the principles of criminal jurisdiction under international law, such as territoriality and active personality jurisdiction. Examples and case studies are among the chapter's strengths, as they elucidate the application of universal jurisdiction. The discussion of the Eichmann Trial and the indictments against Rwandan and Congolese government leaders deepens the analysis. However, the chapter could benefit from a more balanced discourse on the rationale for and against universal jurisdiction. While the Nyawo acknowledges the hurdles and

opposition surrounding its enforcement, it tends to portray African States as the principal opponents of universal jurisdiction. Including a broader range of thoughts and viewpoints from scholars and practitioners from different regions would have been beneficial. Furthermore, the chapter could have delved more into universal jurisdiction's practical challenges and limitations, particularly jurisdictional conflicts, diplomatic tensions, and the balance between international justice and state sovereignty. Therefore, providing a deeper examination of these issues would have enhanced the chapter.

Moreover, the invisibility and marginalisation of female experiences of conflict concerning International Humanitarian Law (IHL) and International Criminal Law (ICL) is covered in chapter eight. Priya Gopalan advocates for a more nuanced understanding of gender in conflict-related crimes and underscores the necessity of addressing accountability gaps for specific kinds of crimes, victims, and perpetrators. The chapter commences by addressing the historical neglect and impunity surrounding sexual violence against women in armed conflicts. It also highlights the accomplishments achieved through prosecutions by ad hoc tribunals and the ICC in bringing to light Conflict-Related Sexual Violence (CRSV). This recognises the significance of gender analysis in this process but urges the need for an elaborate and futuristic understanding of gender as an analytical framework. Chapter eight argues against the conflation of gender with women, which constrains gender analysis to a binary approach of male vs female. Gopalan contends that this narrow perception of gender disregards the experiences of males in conflict, specifically with sexual violence. She underlines the fact that instances of sexual violence against males are frequently underreported, under-documented, and under-acknowledged, resulting in accountability gaps for male victims.

Gopalan additionally stresses the scarcity of gender analysis about crimes against men and sexual violence perpetrated by women. Besides that, chapter eight explores the emphasis on sexual violence as the primary violation against women, which hinders the analysis of non-sexual gender-based violations experienced by women. Goplan advocates for a better understanding of the effects of gender on non-sexual violations and emphasises the importance of acknowledging the diverse range of sexual violence, its victims, and perpetrators. Gopalan additionally points out the significance of including LGBTQI+ individuals within the analysis of gender-based violence in conflicts, specifically addressing sexual orientation and gender identity. Furthermore, the chapter discusses the challenges associated with classifying and documenting multiple kinds of sexual violence, as well as the underlying motivations and victims. It critiques the inclination to focus on penetrative rape as the paradigmatic articulation of sexual violence against men. Instead, it advocates for a broader comprehension of diverse kinds of sexual violence and trauma experienced by men. The chapter also delves into the participation of

female perpetrators in international crimes and the stereotypes and narratives associated with their cases. To summarise, chapter eight presents various thought-provoking arguments regarding the constraints of existing gender analyses in comprehending and addressing conflict-related crimes. The arguments stress the significance of recognising the intricate nature and diverse motivations driving sexual violence, as well as the necessity to shift away from gender stereotypes and binary understandings.

Chapter nine, written by Natasha Bracq discusses the ICC's Approach to Sexual and Gender-Based Violence (SGBV) by analysing the Rome Statute's legal framework for addressing SGBV. Bracq recognises the progress made in international criminal law, however, chapter draws attention to acknowledging these crimes and implementing specific legal procedures, evidence, organisational structure, and staffing requirements to guarantee fair and effective justice for the victims. Bracq's assessment of the ICC's relevant policies, such as the Policy Paper on Sexual and Gender-Based Crimes, underscores the court's commitment to addressing these issues. Nevertheless, the chapter does not hesitate to pinpoint notable weaknesses in the ICC's approach. It rightly criticises the absence of sexual violence charges in high-profile cases such as Lubanga and Al Madhi despite compelling evidence. Bracq criticises the ICC's selective charging of SGBV, arguing it undermines substantive and procedural justice, and fails to hold SGBV perpetrators accountable fully. Also the chapter underscores the complexities of investigating and prosecuting SGBV, highlighting evidentiary issues, insufficient resources, and procedural shortcomings, and calls for effective prioritisation of the investigation and prosecution of SGBV by the new ICC Prosecutor. The court is admonished for perpetuating a historical tendency to overlook sexual violence and failing to uncover relevant evidence during investigations.

One of the strengths of chapter nine is its thorough review of the historical development of SGBV crimes in international criminal law, starting from the Nuremberg and Tokyo trials to the establishment of ad hoc tribunals, and it effectively demonstrates how the ICC built upon the legacy of these tribunals in recognising and prosecuting SGBV as international crimes. In summary, it accentuates the role of the new ICC Prosecutor in continuing to investigate and prosecute SGBV crimes effectively.

Having analysed the chapter commentaries, the strength of the edited volume lies in its comprehensive analysis of contemporary international criminal law issues and its relevance to Africa and the international community. The book provides a critical analysis of various topics, including the role of African States in promoting international criminal justice, spotlighting the imperative of justice and accountability in the African context, emerging trends in the jurisprudence of international criminal law, the role of politics and power play, as well as the enforcement

of international criminal law, universal jurisdiction and complementarity and their implications for the future. One of the outstanding flaws of international criminal law is gaps in enforcement. The gaps in enforcement question the system's effectiveness and raise concerns about whether the future of international criminal law is truly domestic.

It conclusion, it is worthy of mention that the themes of this edited volume emphasises the urgent requirement for justice and accountability in Africa, calling for immediate attention to this situation, which underscores the significance of fostering meaningful dialogues to develop effective strategies, spotlighting the necessity for collaboration and participation from governments, civil society organisations, and the global community to tackle these issues and drive positive change.

3. References

Ba, Oumar. 2023. "Constructing an international legal order under the shadow of colonial domination". *Journal of Human Rights*, pp. 6-10. Link (last visited September 06, 2024)

Bassiouni, Cheriff. 1995. "Establishing an International Criminal Court: Historical Survey". *Military Law Review.* 149, 49-52.

Chazal, Nerida. 2016. *"The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity"*. London & New York: Routledge.

Ferencz, Ben. 1992. "An International Criminal Code and Court: Where They Stand and Where They're Going," *Columbia Journal of Transnational Law*. 30, 375-399.

Kaleck, Wolfgang. 2015. *Double Standards: International Criminal Law and the West* Torkel Opsahl Academic E-Publisher.

Britta, Krings. 2012. "The Principles of Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?," *Goettingen Journal of International* Law. 4(3), 739-740.

Ross, Christopher. 2018. "Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court," *Human Rights Quarterly.* 40(2), 369-375.

Scharf, Michael. 1996. "The Politics of Establishing an International Criminal Court: An Appraisal." *Cornell International Law Journal.* 29, 665.

Yacoubian, George. 2023 "The Artsakh Conflict as a Violation of the Genocide Convention: Toward a Referral to the International Criminal Court": *Advances in Applied Sociology.* 13(1), 171-173.