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Foreword by the Editor-in-Chief

Firstly, I would like to welcome you to Volume 8, Issue 1 of the North East Law Review. This edition brings together the writings of Newcastle University students from the academic year 2020/21 and spans across a hugely diverse range of topics. In spite of the uncertainty and challenges of the time in which they were written, each article is of the highest of standards and is a testament to the hard work and dedication of the students of Newcastle University. It fills me with pride to present you with this issue and I feel immensely fortunate to have been part of such a display of talent and determination.

I would also like to take the time to thank those who made the creation of this issue possible. Firstly, thank you to our Academic Leads, Ruth Houghton and David Reader, for your excellent leadership and guidance in the two years that I have been a part of this team. Thank you also to the Editorial Team for your hard work and for juggling so skilfully your commitment to the journal alongside your academic studies. I would also like to thank all of our talented writers for their outstanding contributions to this issue and for allowing us to share such profound and powerful works. Finally, thank you to the journal's previous Editor-in-Chief, James Merryweather, and Deputy Editor-in-Chief, Collette Monahan. Your strong leadership in my previous role of editor was a great source of inspiration and I hope that I have done you justice in the continuation of this role.

Lastly, I hope that our readers are as captivated by the works of our writers as I am, and I wish each of you happy reading.

Alice Spencer

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The Editorial Board forms part of the broader project of the North East Law Review (NELR). The North East Law Review also includes the NELR Blog and the NELR podcast team.

This year the NELR blog published work by Eleanor Fox, Reet Kaur, Nicole Stockton, Josh Sheehy and Max Chau, Emnani Subhi, Joshua Butcher, Samantha Johnston, and Nadia Ashbridge.

This year the NELR podcast was hosted by Niamh Kenny and Scarlett Clarke.

Contents Page

A discussion of how the English courts have promoted mediation through costs sanctions for unreasonable refusal to mediate since the advent of the Civil Procedural Rules 1998 and whether judicial decisions in this area are both consistent and appropriately determined

Nadia Ashbridge

1. Introduction

The promotion of alternative dispute resolution (ADR) has been central to civil justice reform, with what has been called a "relentless push" towards mediation.[1] The recent appointment of Sir Geoffrey Vos as the new Master of the Rolls provides the perfect opportunity to evaluate the methods through which mediation has been promoted, and the judicial decisions in this area. Mediation is "expected to be high on his reform agenda",[2] and this article seeks to explore the following areas for consideration: policy considerations, consistency and appropriateness.

ADR promotion was initiated by Lord Woolf in the mid-1990's,[3] a policy later enshrined in the Civil Procedure Rules (CPR).[4] Since, there have been significant judgments concerning mediation, however, this article will mostly focus on those related to the rule in 44.5 CPR and the policy considerations involved. 44.5 CPR "gives discretion to the judges in the allocation of costs" while requiring them to consider the "behaviour of the parties during the process".[5] It will be demonstrated that the caselaw arising from this rule undermines the requirement for certainty through lack of consistency. Furthermore, it will be argued that judicial decisions in this area have been inappropriately determined, with undue (and often inconsistent) weight being attached to concerns around access to justice. It is posited that the 'overriding objective'

[1]Rachel Rothwell, 'ADR offers: the new costs weapon' 2020 The Law Society Gazette <https://www.lawgazette.co.uk/commentary-and-opinion/adr-offers-the-new-costs-weapon/5104503.article> accessed 14 March 2021.
[2] John Bramhall & Francesca Muscutt, 'Access all areas?' 2021, 171 NLJ 7918, 20.
[3] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, Lord Chancellor's Department, 1995) Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, Lord Chancellor's Department, 1996).
[4] Civil Procedure Rules, 1999.
[5] Pablo Cortes, 'The Promotion of Civil and Commercial Mediation in the UK' (University of Leicester School of Law Research Paper N0. 15-23) 2015, 1, at 14.

holds sufficient weight to make the enforcement of costs against unreasonable refusal to mediate proportionate.[6]

2. Policy considerations

The four central principles of commercial law are predictability, flexibility, party autonomy and efficient dispute resolution.[7] Central to this article is the expectation of predictability. This is often in tension with flexibility. It is important that a proportionate response is adopted to accommodate both policies. As regards mediation and cost sanctions, the law must be clear and certain, so that parties can fully foresee *all* the potential burdens of litigation and make commercial decisions from this. Civil law more generally is underpinned by the 'overriding objective' which requires the court to handle cases "justly and at proportionate cost".[8] This includes a need to allot to each case no more than "an appropriate share of the court's resources",[9] as "formal civil justice provision requires rationing".[10] Parties also have an obligation to further this objective,[11] and therefore should engage in ADR "wherever that offers a reasonable prospect of producing a just settlement at proportionate cost".[12]

It is through the lens of these (often conflicting) policy considerations, that the judicial considerations pertaining to cost sanctions for refusal to mediate will be analysed.

3. Consistency

There is an overwhelming consensus that the caselaw around cost sanctions and the related notion of compulsory mediation is "inconsistent, contradictory and confusing".[13] However, this section will draw out those inconsistencies which most undermine certainty, thereby most heavily impacting parties.

[6] Civil Procedure Rules, 1999 at (1.1).
[7] Eric Baskind, Greg Osborne & Lee Roach, *Commercial Law* (3rd Edn OUP, 2019) at 4.
[8] Civil Procedure Rules, 1999 at (1.1.1).
[9] ibid. at (1.1.2.e).
[10] Bryan Clark, 'Where now for ADR?' (The New Law Journal) January 2021, 18.
[11] Civil Procedure Rules, 1999 at (1.3).
[12] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA CIV 1288, [2013] WL 5338250 at [27].
[13] Masood Ahmed & Fatma Nursima Arslan, 'Compelling parties to judicial early neutral evaluation but a missed opportunity for mediation: Lomax v Lomax [2019] EWCA Civ 1467' CJQ 2020, 39(1), 1, at 3.

Following the introduction of the CPR, cost sanctions were imposed against parties who refuse to engage in ADR when suggested by the court under 1.4 CPR.[14] In the relevant case, *Dunnett*, there is no requirement for the refusal to mediate to be unreasonable. However, in *Halsey*,[15] Dyson LJ set out the criteria to be applied when deciding if a party unreasonably refused mediation.[16] Following this, cost sanctions could only be imposed if a refusal to mediate was deemed 'unreasonable'. The points set out in *Halsey* have been heavily criticised. For example, Dyson LJ's submission that some cases are "intrinsically unsuitable for ADR"[17] has been met in recent years with scepticism from the courts.[18] Furthermore, Jackson has responded to each of the *Halsey* criterion, commenting, for example in response to the issue of disproportionately high mediation costs, that mediation costs significantly less than litigation.[19] The significant criticisms of the *Halsey* approach have been impliedly supported by the majority of the caselaw, where the courts have largely found refusals to mediate to be unreasonable. Despite this, *Halsey* remains 'good law'.[20] Ultimately, the consequence is a body of caselaw which undermines the overarching rule. This has led to confusion over whether the threshold for a reasonable refusal of mediation can be met, or whether it is so high that an implied compulsion to mediation exists.[21]

It may be accepted that *Halsey* is 'good law', and that the threshold for a reasonable refusal of mediation *can* be met. However, there are discrepancies within the caselaw of each criterion, most notably, the inconsistency between *Thakkar*[22] and *Gore*[23] as regards the "merits principle".[24] In *Thakkar*, it was held that a refusal to mediate when "the prospects of a successful mediation were good" would be unreasonable.[25] In *Gore*, it was held that a refusal to mediate, on the basis that the questions of law raised were too complex for mediation, could

[14] *Dunnett v Railtrack Plc* [2002] EWCA Civ 3030, [2002] 1 WLR 2434.
[15] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.
[16] ibid [16 – 23].
[17] ibid [17].
[18] Neil Andrews, *The Three Paths to Justice Court Proceedings, Arbitration and Mediation in England* 2nd Edn (2018: Heidelberg, Springer) at 280.
[19] Sir Rupert Jackson, 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (RICS Expert Witness Conference, 8 March 2012) at para 3.8 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf> accessed 16 March 2021.
[20] John Bramhall & Francesca Muscutt, 'Access all areas?' 2021, 171 NLJ 7918, 20.
[21] Masood Ahmed, 'Implied compulsory mediation' CJQ 2012, 31(2), 151.
[22] *Thakkar v Patel* [2017] EWCA Civ 117, [2017] 1 WLUK 447.
[23] *Gore v Naheed* [2017] EWCA Civ 369, [2017] 5 WLUK 565.
[24] Masood Ahmed, 'Mediation: the need for a united, clear and consistent judicial voice: Thakkar v Patel [2017]. EWCA Civ 117; Gore v Naheed [2017] EWCA Civ 369' CJQ 2018, 37 (1), 13 at 14.
[25] *Thakkar v Patel* [2017] EWCA Civ 117, [2017] 1 WLUK 447 at [29].

not be unreasonable.[26] Here, the inconsistency lies in the ability of parties to rely on assumptions about the success of a potential mediation. *Gore* is further contradicted in *DSN*,[27] where the judge held that even a strong defence would "have fallen short of an acceptable level of engagement" with ADR.[28] The existence of these conflicting decisions in such a short time period can only lead to confusion for parties.

It must be noted that the lack of consistency and certainty demonstrated above is not proportionate in favour of parties' flexibility. A less certain area of law can only be justified by affording businesses sufficient party autonomy and allowing flexibility for emerging business customs and practices.[29] The inconsistency here limits party autonomy as parties are not fully informed of the risks of all commercial decisions when it comes to dispute resolution. Consequently, the lack of predictability in judicial decisions is problematic, and must be addressed both in future reforms and through the judiciary taking "a united approach on the extent of the parties' ADR obligations".[30] The nature of that approach will be discussed below.

4. Appropriateness

In establishing whether judicial decisions as regards cost sanctions have been appropriately determined, there must be an analysis of the policy considerations which are in tension: parties' right to access to justice and the CPR's overriding objective. It has been noted that "the right of access to justice…is not restricted to the ability to bring claims which are successful",[31] underlining the fact that anyone has a right to access the courts, regardless of the strength of their claim. In *Halsey,* Dyson LJ suggested in *obiter* that a compulsion of mediation would be "an unacceptable constraint on the right of access to the court",[32] thereby violating article 6, ECHR.[33] Despite this point later being discredited by Dyson LJ,[34] and the finding in *Alassini* that compulsory mediation "does not constitute a disproportionate infringement upon the right

[26] *Gore v Naheed* [2017] EWCA Civ 369, [2017] 5 WLUK 565 at [50].
[27] *DSN v Blackpool FC* [2020]EWHC 670 (QB), [2020] 3 WLUK 296.
[28] ibid[29].
[29] Eric Baskind, Greg Osborne & Lee Roach, *Commercial Law* (3rd Edn OUP, 2019) at 5.
[30] Masood Ahmed, 'Mediation: the need for a united, clear and consistent judicial voice: Thakkar v Patel [2017]. EWCA Civ 117; Gore v Naheed [2017] EWCA Civ 369' CJQ 2018, 37 (1), 13 at 18.
[31] *R (on the application of Unison) v Lord Chancellor* [2017 UKSC 51, [2017] 3 WLR 409, at [29].
[32] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 at [9].
[33] European Convention on Human Rights, 1950 (entered into force 1953).
[34] Lord Dyson, 'A word on Halsey v Milton Keynes', Arbitration 2011, 77(3), 337.

to effective judicial protection",[35] there is significant disagreement on whether mandatory mediation would be appropriate.

To consider this issue further, the current regime applied in England will be compared to potential alternative systems.

4.1 Complete removal of court pressure

For those fiercely protecting the right of access to courts, a more appropriate response may be to remove the pressure to mediate, which has been considered so strong as to be dubbed "implied compulsory mediation".[36] There is no "formal system of centralised regulation of mediators",[37] which undermines the legitimacy of the process. This combined with the lack of fair trial requirements,[38] causes resistance against court encouragement. It is submitted that this lack of trust must be addressed, educating parties and lawyers about the process, in order to increase effective mediation participation. Most cases are settled before trial,[39] demonstrating parties' willingness to engage in negotiation, however the current imposition of cost sanctions and 'court encouragement' is "contrary to the central ethos of the process".[40] A more systemic, educative approach may inspire greater participation.

4.2 Mandatory mediation

The above suggestion, whilst theoretically persuasive, ignores the need to alleviate pressure on the courts. This objective is central to mandatory mediation. This compulsion incites discomfort as,[41] in comparison to the current approach, there is a restriction on access to courts (at least until mediation is attempted). It is submitted that this temporary restriction/delay should be accepted as proportionate on the basis that the 'overriding objective' holds significant

[35] *Alassini v Telecom Italia SpA* (Joined Cases C-317-320/08) [2010] 3 C.M.L.R. 17 ECJ at [57].
[36] Masood Ahmed, 'Implied compulsory mediation' CJQ 2012, 31(2), 151.
[37] Neil Andrews, *The Three Paths to Justice Court Proceedings, Arbitration and Mediation in England* 2nd Edn (2018: Heidelberg, Springer) at 267.
[38] Ronan Feehily, 'Creeping Compulsion to Mediate, the Constitution and the Convention' 2018, 69 NIR Legal Q 127 at 128.
[39] Laura Elfield, 'Mediation and alternative dispute resolution: the future is bright' JPI Law 2020, 2, 141.
[40] Bryan Clark, 'Lomax v Lomax and the future of compulsory mediation' The New law journal, 2019, vol.168, 17.
[41] Bryan Clark, 'Where now for ADR?' (The New Law Journal) January 2021, 18 at 19.

weight. This emphasis[42] can be seen in *Lomax*,[43] and there is no good reason why the same weight should not be applied across all forms of ADR. In adopting an approach whereby mediation becomes part of the court process, mediation would be unavoidable. This would ensure proportionate use of court resources without limiting the parties' access to the courts. Additionally, the current system has led to parties feeling a pressure to settle,[44] which infringes on their right to justice. By placing mediation within the broader litigation process, parties would feel safer pursuing this right, without the unpredictable risk of cost sanctions currently at play.

5. Conclusion

While some of the judicial decisions in this area have been appropriately determined, no consistent line of reasoning can be identified. Differing judicial attitudes as to the weight to be attached to conflicting policy considerations are to blame. It has been submitted that the policies of the overriding objective, combined with a commercial need for certainty, carry sufficient weight to make not only cost sanctions, but also mandatory mediation, proportionate.

[42] Bryan Clark, 'Lomax v Lomax and the future of compulsory mediation' The New law journal, 2019, vol.168, 17.
[43] *Lomax v Lomax* [2019] EWCA Civ 1467, [2019] 1 WLR 6527.
[44] Masood Ahmed, 'Implied compulsory mediation' CJQ 2012, 31(2), 151 at 171.

Cohabitation Rights Bill and the Common Law Marriage Myth

Abigail Rymer Barnes

1. Introduction

Is the Cohabitation Rights Bill 2019-2021 (hereafter, known as the Bill)[1] a continuation of the 2007 report 'Cohabitation: The Financial Consequences of Relationship Breakdown' (hereafter, known as the Report)?[2] Furthermore, would the enactment of the Bill lead to bringing the Common Law Marriage Myth (hereafter, CLMM) into existence? These are the issues of relevance in this article. From the evidence it will be argued that the Bill is in fact a continuation of the Report. The evidence also suggests that the enactment of the Bill is a step closer to brining the CLMM into existence. Enactment of the Bill would be the next in a series of steps moving towards making the CLMM a reality. The CLMM will not be brought into existence by the enactment of the Bill, it is simply one more step in that process.

To begin, the current position in law will be explained. Then, it will be clarified why these issues matter. Following this, it will be explained what is not going to be included in this work. Next, cohabitation will be defined for the purposes of this article. Then, it will be explained why the Bill is a continuation of the Report, not a separate attempt at cohabitation rights. It will then be considered what is exactly meant by the CLMM. Finally, it will be explained why the Bill can be described as moving one step closer to bringing the CLMM into existence if it was enacted but does not actually achieve bringing the CLMM into existence.

The current law is that on the breakdown of a relationship, cohabitants have very few rights. Cohabiting couples are subject to general rules of property and these do not allow for the redistribution of assets after a separation, they can only determine property rights at that point in time.[3] This means that contributions to the home and the family that may have benefited one party or disadvantaged another are not recognised by the law. It may be possible to establish an interest in the family home under certain circumstances as seen in *Stack v Dowden,*[4]

[1] Cohabitation Rights HL Bill (2019-2021) 97.
[2] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).
[3] Rosemary Hunter, 'Contemporary Issues in Family Law in England and Wales' in Shazia Choudhry and Jonathan Herring (eds), *The Cambridge Companion to Comparative Family Law* (Cambridge University Press 2019) 13.
[4] *Stack v Dowden* [2007] UKHL 17, [2007] AC 432.

however, this can be difficult to establish. Further, it gives neither party a right to any other property, pension, or asset that would not have been possible for one of the parties to have without the support of the other.[5] This can lead to unfair outcomes for cohabiting couples, especially for the primary carer of the family who may have suffered serious economic disadvantage following separation.[6] For example, they may have given up work or reduced their hours, leading to reduced future career progression and earning capacity. This may have even enabled their partner to carry on working advancing their career and earning capacity. On separation there is little recourse for the party who may now struggle to support themselves whilst the working partner continues to benefit from the higher earning potential previously enabled by the other party.

The status of cohabitation rights affects a large amount of the population because as of 2018 cohabitants were the fastest growing family type.[7] If the number of cohabitants is increasing, it is important to ask these questions about the law surrounding them so that an ever-increasing amount of the population know what their position in law is. There is a need for a more consistent message about the non-existence of common law marriage as there is general confusion about the legal position of cohabitants.[8] This can be seen from half of cohabitants believing in the CLMM.[9] Therefore, it is important to address these issues to keep track of the position of the law and the status of the CLMM. This will ensure a clear position on where cohabitation rights stand can be articulated for the purpose of progress and advising cohabitants on their rights.

It will be assumed that when referring to marriage and divorce that civil partnerships and the dissolution of civil partnerships are also included in this. This is because, for the purposes of what is relevant to this article, they are the same in everything but name.[10] Cohabitation rights is a broad topic and so it is important to narrow the focus. This means that certain aspects of

[5] (n 2) para 2.16
[6] ibid, para 2.13.
[7] Office of National Statistics, 'Families and Households in the UK: 2018' (ons.gov.uk, 7 August 2019) < https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018 > accessed 15 March 2019.
[8] Ministry of Justice, *The Living Together Campaign - An Investigation of Its Impact on Legally Aware Cohabitants* (Ministry of Justice Research Series 5/07, 2007) 50.
[9] Muslihah Albakri, Suzanne Hill, Nancy Kelley and Nilufer Rahim, 'Relationships and gender identity' in John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: The 36th Report* (The National centre for Social Research 2019) 113.
[10] *Wilkinson v Kitzinger* [2006] EWHC (FAM) 2022, [2006] HRLR 36, [88].

cohabitation rights will not be addressed here. To begin with, matters concerning children will not be discussed in any detail here because of the complex nature of provision for the care of children and the need to stray away from the central focus of this article to explain this. Furthermore, provisions concerning what happens on the death of one of the cohabitants will not be addressed, keeping the focus solely on relationship breakdown. Finally, it should be acknowledged that there are other proposed clauses in the Bill that do not fall under the above exclusions, but these will not be addressed as it is not necessary to do this to answer the questions posed. Finally, it should be noted that this article is not concerned with whether we should be bringing the CLMM into existence, or whether we should be moving towards that end. It is only concerned with what is actually happening regarding the Report, the Bill and the CLMM.

2. Cohabitation

In order to effectively discuss the issues posed here it is important to define exactly what is meant by cohabitation. Currently there is no consistent legal definition of what qualifies as cohabitation.[11] For this research project it seems logical to use the same definition for cohabitation as is used in the Report[12] and the Bill,[13] as this will allow for effective and accurate comparison. This definition is two people that live together as a couple and are neither married or in a civil partnership.

3. Is the Cohabitation Rights Bill a continuation of the 2007 Report?

The Bill is a continuation of the move towards statutory rights for cohabitants started in the Report, rather than a separate attempt. There are some variations between the Report and the Bill, but they do not cause enough of a difference between the two that the Bill could not be seen to be a continuation of the Report. The three most relevant provisions have been picked out for the purpose of this comparison. They have been selected as the most relevant because they are the most pertinent to the issues of concern in this article and in the case of two of them, they display some differences that needs to be addressed. One variation is in the time for which

[11] Anne Barlow, Simon Duncan, Grace James and Alison Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart Publishing 2005) 8.
[12] (n 2) para 3.13
[13] (n 1) cl 2.

a couple is required to be cohabiting to be considered under the proposed statutory scheme. In the case of the Bill this is three years.[14] In the Report it is recommended that this is set at somewhere between two and five years, but no exact time was agreed on and it was left to the Bill stage for this to be decided.[15] This is not considered a difference of any consequence; the Bill picked an exact time that a couple is required to be together that was within the time span given by the Report. It is not deviating from the proposals in the Report.[16] In fact it would be expected that in the journey from the Report to the Bill there would be some small developments when moving to the next stage. This is the nature of creating legislation and the point of the various procedures and review processes involved; this does not mean that the essential nature of any of the recommendations has changed. The Bill then requires that the applicant suffered an economic disadvantage or that the respondent retained a benefit. This has to be because of the anticipation of the cohabitation, because of the cohabitation itself or because of the breakdown of the cohabitation.[17] This is an implementation of what was recommended in Part Four of the Report and there is no material difference between the Bill and the Report here.[18] The Bill sets out that it must be 'just and equitable to make an order'[19] and that a number of discretionary factors are to be considered when deciding this.[20] These factors are set out and worded slightly differently than what was recommended in Part Four of the Report.[21] However, in terms of their content and effect there is no difference between them. There are many other provisions in the Bill that could be picked out as materially the same as what was recommended in the Report but to prevent repetition it is enough to say that there is no material difference between the Bill and the Report. The provisions that have been looked at in detail above are what are deemed to be the most relevant to this article and are intended to give a flavour of the extent of the similarities between the Bill and the Report. In light of this comparison of the main provisions in the Bill and the Report, it seems clear that the Bill is a continuation of the Report. It would be arbitrary to use small differences in wording or the refinement of a rule to argue that the Bill was anything other than a continuation of the Report.

[14] (n 1) cl 2(2)(d).
[15] (n 2) para 2.63(2)
[16] Ibid.
[17] (n 1) cl 8
[18] (n 2) paras 4.33-4.37
[19] (n 1) cl 8(1)(c)
[20] ibid, cl 9.
[21] (n 2) para 4.38.

4. Common law marriage myth

There is currently a lot of confusion surrounding the CLMM. The CLMM in its current form can be traced back to the early 1970s when arguments about the entitlement to means tested benefits of unmarried couples led to the use of phrases such as common law marriage and common law wife in the media; by the end of this decade a myth that the common law wife had the same rights as a legal wife had come into being.[22] The common law marriage myth has not changed much since it first came into being, the rights believed to be held under it may have changed but the basic premise of the myth, 'the mistaken belief that the law recognises cohabitants as "common law spouses" once they have lived together for some period of time'[23] has stayed broadly similar since its inception. The myth is still prevalent in modern society; around half of people believe that common law marriage exists.[24] People tend to think that the law reflects what seems logical and sensible from the point of view of families and many may say that rights for cohabitants is what is logical and sensible.[25] This is not the case with the law on cohabitation and might go some way to explaining the prevalence of the myth.[26] Furthermore, the confusion is likely to be compounded by the mixed messages spread by the government; for some purposes they treat cohabiting couples like married couples and for others they treat them completely differently.[27]

It needs to be determined whether the CLMM sets out that cohabitating couples have the same rights as married couples or that they have similar rights but not the exact same. This difference is highly significant for the conclusion in this article as it could be the difference between stating that the CLMM has been brought into existence or stating that it is simply one step closer to being brought into existence. It is also an important distinction when commenting on how close the Bill would be to bringing the CLMM into existence. It will be found that the CLMM establishes cohabitants have rights that are the same as couples who are married.

[22] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (Second Edition, Palgrave Macmillan 2015) 182.
[23] (n 2) para 1.26
[24] Muslihah Albakri, Suzanne Hill, Nancy Kelley and Nilufer Rahim, 'Relationships and gender identity' in John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: The 36th Report* (The National centre for Social Research 2019) 113.
[25] (n 11) 39
[26] ibid, 39.
[27] John Haskey, 'Cohabitation and births outside marriage after 1970: A rapidly evolving phenomenon' in Rebecca Probert (eds), *Cohabitation and Non-Marital Births in England and Wales, 1600-2010* (Palgrave Macmillan 2014) 179.

Probert expresses the myth in different ways; in one instance Probert sets out that the myth establishes that cohabiting couples have 'the same rights as if they were married'[28] and that there is 'no longer any significant legal difference between cohabitation and marriage'.[29] In another instance, Probert also expresses the rights the CLMM represents cohabitants to have as 'similar to those of married couples'.[30] These two examples may seem inconsistent but they can be seen as a development of understanding of the myth moving from understanding it as 'similar'[31] in an earlier work to the 'same rights'[32] in later work. Combined with the Law Commission approach in the Report, it can be said that the myth gives the impression that the law treats cohabiting couples 'as if they were married'.[33]

5. Is the law one step closer to bringing the common law marriage myth into existence?

This Bill is not bringing the CLMM into existence, but if it was enacted this would bring the law one step closer to this outcome. At the time of writing, it has been over fourteen years since the Report was published. However, while the Bill is a continuation of the Report, this time should not be thought of as a big gap consisting of two steps. It was not a case of going from the Report in 2007 to the Bill in 2019. This Bill is not the first attempt to pass legislation giving rights to cohabitants, there have been other attempts between the Report and the Bill. One Bill was introduced to the House of Lords in 2014[34] and another in 2017.[35] Each attempt can be seen as a step towards gaining rights for cohabitants and therefore a step towards bringing the CLMM into existence. Each step is a progression of the last but not a distinct attempt at creating statutory cohabitant rights. The 2014 Bill[36] is similar to the 2017 Bill.[37] One change that was made was the time people are required to cohabit for before they are considered cohabitants for the purposes of the proposed statutory scheme. Under the 2014 Bill this was two years,[38] but was increased to three years under the 2017 Bill.[39] This increase was in response to criticism

[28] Rebecca Probert, *The Changing Legal Regulation of Cohabitation From Fornicators to Family 1600-2010* (Cambridge University Press 2012) 185.
[29] ibid 214.
[30] Rebecca Probert, 'Common-Law Marriage: Myths and Misunderstandings' (2008) 20 Child & Family Law Quarterly 1, 21.
[31] ibid 21.
[32] (n 28) 185
[33] (n 2) para 2.49
[34] Cohabitation Rights HL Bill (2014-2015) 10.
[35] Cohabitation Rights HL Bill (2017-2019) 34.
[36] Cohabitation Rights HL Bill (2014-2015) 10.
[37] (n 35) 34
[38] (n 34) 10, cl 2(2)(d).
[39] (n 35) 34, cl 2(2)(d).

of the 2014 Bill.[40] Each Bill is a continuation of the last, its own individual step, but connected enough that they cannot be seen to be distinct and unconnected. The 2017 Bill[41] and the Bill which is the focus of this article are identical. The 2017 Bill[42] was unsuccessful due to the proroguing of Parliament in 2019.[43] The Bill can be seen as another step towards statutory cohabitation rights in face of many circumstantial barriers, such as the proroguing of Parliament. There are various explanations for why past Bills on cohabitation rights have failed. Hunter argues that it is because the Bills propose separate rights systems and that as cohabitation becomes more prevalent, there is less justification for separate regimes.[44] Whereas, Probert thinks that the resistance to passing rights for cohabitants is because with the rising number of cohabitants, implementing a system where they could make claims to the court would be costly.[45] Although, it could be argued that with cohabitants bringing claims, trying to have a trust recognised in their favour in order to establish an interest in the family home on the breakdown of a relationship, such as was the case in *Stack v Dowden,*[46] that cohabitants are already costly to the court system. Other reasons for the failure of these past Bills are circumstantial, for instance as already mentioned, the last version of this Bill[47] did not pass because of the proroguing of Parliament in 2019.[48] Furthermore, looking at the big picture of family law as a whole the 'Government are loath to embark on the major overhaul of family law needed for the 21st century'.[49] This speaks as to why there has not yet been a successful establishment of statutory cohabitation rights. It is unclear whether this version of the Bill will be passed into legislation, as its chances as a private member bill are limited,[50] especially in the current climate of Covid-19 and the need for other legislation to take priority. However, either way it is important to track the progression of cohabitation rights and how these interact with the CLMM. Each of these Bills can be seen as a step towards cohabitation rights which in turn can be seen as a step towards bringing the CLMM into existence.

[40] HL Deb 15 March 2019, vol 796, col 1260.
[41] (n 35) 34.
[42] Ibid.
[43] Cohabitation Rights Bill [HL] 2017-19' (*www.parliament.uk)* < https://services.parliament.uk/bills/2017-19/cohabitationrights.html > accessed 12 Feb 2021.
[44] (n 3) 33
[45] (n 28) 257
[46] (n 4)
[47] (n 35) 34
[48] (n 43)
[49] (n 40) col 1263.
[50]John Bolch, 'Cohabitation Rights Bill has first reading' (*Stowe Family Law*, 12 February 2020) < https://www.stowefamilylaw.co.uk/blog/2020/02/12/cohabitation-rights-bill/ > accessed 12 February 2021.

The Bill is not bringing the CLMM into existence. If, as it has been argued, the CLMM does set out a position where cohabitants have the same rights as married couples on breakdown of their relationship after cohabiting for a certain amount of time, this means that the rights contained in the Bill would have to be the same as the rights in the Matrimonial Causes Act.[51] This is not the case. There are some key differences which mean that it could not be said that the Bill gives divorce rights to cohabitants. The first key difference is that in the divorce of a married couple, equal division of assets should be seen as a 'yardstick' and that equality between the parties should only be departed from if there is a valid reason for doing so.[52] In the Bill it is proposed that compensation is provided for any economic disadvantage suffered by the applicant or benefit retained by the respondent as a consequence of a qualifying contribution made by one of the parties.[53] A qualifying contribution 'is any financial or other contribution made by the applicant to the parties' shared lives, or to the welfare of members of their families during the parties' cohabitation or in contemplation of the parties' cohabitation, or likely to be made by the applicant following its breakdown'.[54] The Bill is looking to deal with any specific unfairness that has arisen out of the cohabitation. It does not look to create general equality between the parties. Divorce law, on the other hand, is looking to create general equality between the parties as far as it is possible in the circumstances.[55] The case of *White v White* is a prime example of this.[56] The equality of the contributions to the marriage beyond economic contributions were considered, for example raising of children was considered as a contribution.[57] In the case of the Bill, while looking after children would be a qualifying contribution, unless it led to a retained benefit for the respondent or an economic disadvantage for the applicant who undertook the caring it would not be enough on its own to lead to a financial settlement order for one of the parties.[58] Furthermore, if it was found that there had been equality of contribution in the case of cohabitants, this would not be a reason not to give an award unless one had an advantage or disadvantage over the other. There are similarities between the approach of divorce law and the proposed statutory cohabitation rights contained in the Bill. For example, that non-financial contributions can be considered such as childcare. As long as, in the case of cohabitation, it leads to an economic disadvantage or a

[51] Matrimonial Causes Act 1973.
[52] *White v White* [2001] 1 AC 596, 605.
[53] (n 1) cl 8.
[54] ibid, cl 8(2)(c).
[55] (n 52)
[56] ibid.
[57] ibid, 602.
[58] (n 1) cl 8(1).

retained benefit.[59] This is one reason why it can be said that a step is being taken towards bringing the CLMM into existence. However, they are two distinct concepts. One involves equalising any unfairness between the couple because of the cohabitation and will only concern property related to this unfairness. The other concept looks at generally separating assets equally between two parties – this is an important distinction. In the case of divorce, any property owned by either spouse is available for the court to redistribute if it is required to meet the needs of either party.[60] This is not the case with the Bill; any property that was wholly owned by one of the parties before the cohabitation and had very little to do with the other party while the cohabitation was on going is highly unlikely to be available for any sort of claim under the cohabitation proposals. The Bill does not bring the CLMM into existence; there are enough differences between the Bill and the current law on divorce that it cannot be said that they give couples the same rights on the breakdown of their relationship under any circumstances.

There are similarities between some provisions of divorce law which is governed largely by the Matrimonial Causes Act[61] and the Bill which show why it can be said that a step has been moved closer to bringing the CLMM into existence. These provisions are still distinct enough that it could not be argued that married couples and cohabitants have the same rights on the breakdown of their relationship and that the CLMM has been made a reality. Take for example the discretionary factors set out for consideration of a judge in the Bill.[62] These have some similarities to the factors for consideration when the court is exercising its powers set out in s.25 of the Matrimonial Causes Act.[63] One of the main similarities is that both sets of factors require the consideration of children of the parties under the age of eighteen, and this factor is to be given priority above the others in both situations. However, there is enough of a difference between the factors to mean that there is no chance of an allegation of equivalent rights. For example, the Matrimonial Causes Act requires the consideration of the age of the parties and the duration of the marriage,[64] but there is no equivalent for this in the Bill. The best explanation of what sort of rights the Bill would be giving cohabitants was provided by Baroness Chakrabarti when debating the 2017 Cohabitation Rights Bill.[65] She referred to the rights that

[59] (n 1) cl 8(1)
[60] Jonathan Herring, *Family Law* (9th edition, Pearson) 255.
[61] (n 51)
[62] (n 1) cl 9.
[63] (n 51) s 25.
[64] (n 51) s 25(2)(d).
[65] (n 35) 34.

the Bill would create as 'quasi-marital'.[66] This is a correct assessment of the situation. The provisions in the Bill could be said to be 'quasi-marital'[67], because as already shown there is a certain amount of commonality with provisions in the Matrimonial Causes Act.[68] However, it is the fact that the provisions in the Bill are 'quasi-marital'[69] and not marital that shows the rights that the Bill would be proposing are not creating an equivalence between married couples and cohabitants, but they are moving us one step closer to that equivalence. This is why it cannot be said that the Bill is bringing the CLMM into existence, but that it can be said that enactment of the Bill would be moving one step closer to that situation becoming a reality.

This is only a Bill concerning financial provision, but it is capable of achieving this step towards bringing the myth into existence, if only in terms of the financial arrangements of this kind of relationship. Many of the rights that married couples have that focus on the breakdown of a relationship concern financial arrangements. The CLMM assumes that cohabitants have the same rights as married couples on the breakdown of their relationship and so rights for cohabitants that focus on financial arrangements are capable of moving the law one step closer to the CLMM no longer being a myth.

6. Conclusion

Two issues were addressed in this article. Firstly, whether the Bill was a continuation from the Report or whether it was a separate attempt at statutory cohabitation rights. Secondly, whether the enactment of the Bill would be moving the law one step closer to bringing the CLMM into existence. The evidence shows that the Bill is a continuation of the Report. It could not be classed as a separate attempt because of the extent of the similarities between them. Furthermore, the Bill does move the law one step closer to bringing the CLMM into existence. The CLMM is the belief that cohabitants have the same rights as married couples. The Bill gives cohabitants 'quasi-marital'[70] rights but it does not give them anything that could be found to be equivalent to marital rights. The CLMM would not be brought into existence through the

[66] (n 40) col 1270.
[67] ibid, col 1270.
[68] (n 51)
[69] (n 40) col 1270
[70] (n 40) col 1270.

enactment of the Bill but the enactment of the Bill would move the law one step closer to this outcome because of the 'quasi-marital'[71] rights it would introduce for cohabitants.

[71] (n 40) col 1270.

Time for the Sun to Set on the British Empire: Addressing the Legacy of Colonial Era Abuse

Samara Majd Sharaf

1. Introduction

The perception and knowledge of the British Empire has greatly changed, as through social movements and truth revival, it is now accepted that many colonial experiences constitute violations of fundamental human rights.[1] Further, through the recognition of colonial violence and the emergence of "the idea that old wrongs require rectification,"[2] the transitional justice movement gained momentum. Thereby aided by the repurposing of torts, litigation for historical abuses became possible through using concepts of "legal accountability" and "reparative justice,"[3] which has resulted in a new category of constitutional claims.

Mari Matsudas' arguments support reparations by presenting a convincing case for the litigation of historical abuses.[4] Despite being considered legacy issues; colonial abuse remains important in the functioning of a modern democratic society. Issues of historical wrongs are still significant; warranting both discussion and action as the inequality created by the Empire remains in place. Descendants of those colonised remain marginalised, whereas many descendants of "white settlers" seem to have benefitted.[5] These long term "continuing harms" should be addressed by forms of reconciliation, through litigation or other means, in order to remedy this imbalance and achieve lasting social change.[6]

Importantly, there were many legislative blocks to addressing these abuses at the time, therefore they remain relevant to the legal system and the current constitutional order, which

[1] Kehinde Andrews, *The New Age of Empire - How Racism and Colonialism Still Rule the World* (2021, Allen Lane) 83, 205-207; Kim A Wagner, 'Calculated to Strike Terror': The Amritsar Massacre and The Spectacle of Colonial Violence' [2016] Vol. 233 Past and Present 185, 219
[2] Mayo Moran, 'The problem of the past: How historic wrongs became legal problems' [2019] Vol 69 No.4 University of Toronto Law Journal 421, 425
[3] Ibid
[4] Mari J Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' [1987] Vol.22 Harvard Civil Rights - Civil Liberties Law Review 323, 377-397
[5] Ibid; Eric K. Yamamoto and Susan K. Serrano, 'Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court' [2012] Vol. 18 Asian Pacific American Law Journal 71, 75
[6] Kehinde Andrews (n 1) 205-207

has arguably seen no systematic change;[7] allowing the damaging effects to continue.[8] The slow development of human rights law significantly delayed the initiation of these claims; as individuals were unable to bring complaints against the State until after the dismantling of the British Empire.[9] This was furthered by the underdevelopment of vicarious liability, which resulted in the UK Government being able to avoid responsibility for actions of Colonial Governments and individual executive actors.[10] Although the Crown Proceedings Act enabled legal action against the Crown,[11] it was limited as public bodies, unlike corporate bodies, did not owe a duty of care.[12] Therefore, the full functionality of the Act, against the Crown and public authorities, was delayed until the development of vicarious liability. Additionally, the 1955 "act of clemency" prevented prosecutions for "any public servants acting in response to the emergency,"[13] which exacerbated substantial and procedural violations. Actions such as restricting the right to petition,[14] and silencing the press also limited the claims being addressed at the time.[15]

The debate over litigating for historical abuse will be explored using two case studies: the Mau Mau Uprising during the Kenyan emergency period and the Amritsar Massacre. Both events are colonial responses to threats of nationalism and anti-colonial movements. As such, they are instrumental in assessing how the UK's constitutional order addresses a threat to its power or supremacy. The cases will provide the basis for the following evaluation: the use of tort law for reparation claims and the barriers associated with such claims including the limitation period, group-based litigation and the relationship between the parties, issues of liability and damages. The next section will cover the truth revival emerging from the Hanslope Discourse and the Hunter Commission, and the subsequent information revealed concerning the UK's constitutional order and its effects on modern-day governance. Finally, an assessment of the

[7] Nathan J. Miller, 'Human Rights Abuses as Tort Harms: Losses in Translation' [2016] Vol. 46 No.361 Seton Hall Law Review 505, 544-546
[8] Mickie Mwanzia Koster, Recasting the Mau Mau Uprising: Reparations, Narration, and Memory in Kithinji M.M., Koster M.M., Rotich J.P. (eds) *Kenya After 50, African Histories and Modernities* (2016, Palgrave Macmillan, New York) 53-54
[9] CRG Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses' [2019] Vol. 30 No.3 King's Law Journal 426, 446-447
[10] Ibid, 439
[11] The Crown Proceedings Act 1947, s.2
[12] Arvind, T.T. "Restraining the State through Tort?: The Crown Proceedings Act in Retrospect." in Ed. T.T. Arvind and Jenny Steele, *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013, Hart Publishing, London) 431
[13] CRG Murray (n 9) 441
[14] Ibid, 413
[15] Ibid, 440

forms of reconciliation available to remedy these historical abuses will take place. The overall purpose of this study is to analysis the legal system, through the litigation of historical abuse claims and the constitutional order, to demonstrate the continuing influence the Empire has over all sectors in the UK. It seeks to assess the methods available in achieving the necessary systemic changes required to rectify these historical wrongs.

2. Outline of the events

2.1 The Mau Mau Uprising

The first event undergoing evaluation is the Mau Mau Uprising and the subsequent cases; *Mutua & Others v The Foreign and Commonwealth Office* and *Kimathi & Others v The Foreign and Commonwealth Office.*[16] Mau Mau resulted from resentment growing against European settlers, who displaced large numbers of the Kikuyu tribe in Kenya. In 1920, when Kenya became a colony of the British Empire, restrictions were introduced concerning land ownership.[17] This furthered tension as the Kikuyu lacked political representation, which increased animosity towards the settlement of the British. In 1952, the secret society Mau Mau, was banned as it started attacking Kikuyus loyal to the Government, European settlers and civil authorities.[18] This led to a declaration of a state of emergency and growing conflict between the two sides, with the UK Armed Forces deployed to reinforce local forces and strengthen security.[19]

The emergency period, lasting 8 years involved: search and destroy missions, the detention of many Mau Mau fighters and supporters, and the resettlement of Kikuyu women and children into enclosed villages.[20] Overall, this resulted in multiple incidents of torture, sexual assault, murder and many other fundamental human right abuses.[21] There is ongoing debate over the

[16] *Mutua and Others v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB); *Mutua and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB); *Kimathi v The Foreign and Commonwealth Office* [2015] EWHC 3432 (QB)
[17] Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (2014, Bodley Head) 324-352
[18] Ibid
[19] *Mutua and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) [21]-[22]; M. Hasian Jr & S.M Muller, 'Post-conflict peace initiatives, British Mau Mau compensation, and the mastering of colonial past [2016] Vol. 11 No. 2 Journal of Multicultural Discourses 164, 165
[20] Caroline Elkins (n 17) 324-352
[21] David M. Anderson, 'Mau Mau in the High Court and the 'Lost' British Empire Archives: Colonial Conspiracy or Bureaucratic Bungle?,' [2011] Vol. 39 No.5 The Journal of Imperial and Commonwealth History 699, 711

official number of deaths resulting from this campaign, ranging from the official number of 11,000 to the Kenyan Human Rights Commission estimating that 90,000 people were executed, tortured or maimed.[22] However, during the 8 year emergency period only 32 white settlers were killed.[23]

Following Kenyan independence in 1963, the UK's actions during their withdrawal were questionable as evidence of the state of emergency was hidden and destroyed. Further, Mau Mau remained banned until 2003. This negatively impacted the right to a fair trial and truth revival of the events; leading to the dismissal of testimonies and significant delays in the opportunity for litigation.[24] Once these documents, describing the extent of abuse were revealed, it "prompt[ed] a considerable re-evaluation of British colonial violence."[25] However, as demonstrated by the settlement reached in *Mutua*, the Government has arguably understated the extent and scope of suffering felt by victims. While the agreement to compensation and the acknowledgment of the abuse in Parliament is certainly a positive in remedying the past harm, its extent is undeniably limited when assessing the actual payments and the number of recipients of the compensation. This "indicates [the UK Governments'] crafty desire to sanitise its role in the horrendous suppression of the rebellion."[26] Additionally, the dismissal of the second attempt at litigation, *Kimathi*, highlights "the private law of tort…cannot adequately address violations of public law."[27] Thus, making apparent the inadequacies of the use of tort law for historical abuse. The law needs to adapt to protect and safeguard fundamental human rights as arguably, it "would…be an even greater immorality to deny [victims] justice."[28] Overall, while *Mutua* is significant, as it sets up a template for historical abuse litigation, it does not go far enough in truly breaking "the cycle of inherited trauma."[29] Thereby it is likely to be a one off, making revisitation of Mau Mau necessary.

[22] Caroline Elkins (n 17) 430

[23] 'Mau Mau uprising: Bloody history of Kenya conflict' (*BBC*, 7 April 2021) <https://www.bbc.co.uk/news/uk-12997138> accessed 6 December 2020

[24] Mickie Mwanzia Koster (n 8) 52; *Mutua and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) [34]-[35]

[25] Caroline Elkins, 'Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice' [2011] Vol 39. No.5 The Journal of Imperial and Commonwealth History 731, 745

[26] Mickie Mwanzia Koster (n 8) 50

[27] Nathan J. Miller (n 7) 547

[28] Zarina Patel, 'Mau Mau: Raw British brutality' [2009] Vol. 487 New African, Social Science Premium Collection 28, 29

[29] Ngugi Mukoma Wa, 'Mau Mau: Ever-present past' [2009] Vol. 487 New African, Social Science Premium Collection 24, 27

2.2 The Amritsar Massacre

An assessment of the Amritsar Massacre and the following response to the event is also necessary. There had been growing tension in Punjab in 1919 due to the continuation of the wartime measures, the Rowlatt Acts, which allowed Indians to be imprisoned without trial and enforced prohibitions on public gatherings.[30] The massacre occurred when approximately 15,000 people gathered in an enclosed space to peacefully protest during the Sikh New Year Festival of Vaisakhi.[31] In response, General Reginald Dyer gave an order to fire into the unarmed crowd, killing an estimate of 379 people.[32] Altogether, 1650 rounds were shot into the crowd.[33] Additionally 1000s of people were injured due to "jump[ing] into the square's wall in order to save themselves,"[34] resulting in people suffocating under the weight of others.

The tragedy of the events in Amritsar highlights the lack of accountability concerning the British Army during the Empire. The Hunter Commission, established to investigate the massacre, concluded that "in continuing to fire for so long as he did it appears that General Dyer committed a grave error."[35] This is arguably a fallacious judgement which blindly accepts the shooting as nothing but a mistake. It fails to acknowledge the calculated motives behind Dyer's commands, as "the Hunter Committee was serving to maintain and further [the] system of rule [of the Empire]."[36] This highlights that the response was inadequate as it was based on a constitutional order which aimed to protect itself and retain colonial power. It is apparent that the "massacre was representative of a basic fact of imperial rule: of necessity, it was…found[ed] on violence."[37] Revisitation of the constitutional order is required as in an aim to retain power, fundamental abuses were committed and further downplayed. Thus, re-evaluation of the imperial framework, is necessary to prevent further future abuse. Additionally, by providing forms of reconciliation and acknowledgement, the State could consequently achieve better relations with former colonies.

[30] HC Deb 9 April 2019, vol 658, col 45WH-47WH
[31] Sathnam Sanghera, *Empireland - How Imperialism Has Shaped Modern Britain* (2021, Viking) 19
[32] HC Deb 9 April 2019, vol 658, col 39WH
[33] Ibid
[34] Archana Venkatesh, 'The Amritsar Massacre' (*Origins: Current Events in Historical Perspective*, April 2019) <https://origins.osu.edu/milestones/april-2019-amritsar-massacre-gandhi-dyer-rowlatt-acts-punjab > accessed 6 December 2020
[35] Disorders Inquiry Committee Report, Calcutta, 1920; HC Deb 9 April 2019, vol 658, col 43WH
[36] Paddy Docherty, 'Apr 13 The Amritsar Massacre of 1919: performative violence and colonial rule' (*Historian of Empire*, 2020) <https://www.paddydocherty.com/blog/2019/4/13/the-amritsar-massacre-performative-violence-and-colonial-rule> accessed 7 December 2020
[37] Ibid

2.3 Modern Day Effects

Both events and the subsequent responses demonstrate that the accountability for governmental abuse, past or current, is inadequate and needs reforming. The current Governments' aim to implement the Overseas Operations Bill demonstrates this.[38] The Bill aims to provide more legal protection for troops serving overseas against civil and criminal claims. It aims to do so by introducing a "presumption against prosecution for allegations - including of torture and inhuman or degrading treatment"[39] after five years. This indicates that the imperial structure, which prioritised retaining its own power over protecting its citizens and those under its jurisprudence, remains active within the UK's constitutional order. Further, parallels can be drawn to the British Empire, as the act would only apply if the victim was not a British citizen.[40] The Bill is also worrisome as the events of the Mau Mau uprising and the subsequent cover up of evidence demonstrates that "allegations can take considerably longer to come to light."[41] Thus, the Bill would largely reduce the ability of victims to bring forward claims. Therefore, the State evidently still aims to protect itself against litigation for human right abuses, particularly regarding operations abroad. This stems from the framework in place during the Empire, making it vital that the above events and the responses to them, are revisited so similar abuses can be prevented.

Additionally, abuses that occurred during the Empire require re-evaluation, as Matsuda argues, descendants of those who lived under the rule of the British Empire continue to face forms of discrimination.[42] Therefore, it is beneficial for the UK to provide reconciliation to those affected as this could lead to social change, in which there is increased equality and less racial bias.[43] While, social change may be initiated by the reparative justice motives of successful reconciliation cases, *Kimathi* and *Keyu v Secretary of State for Foreign and Commonwealth*

[38] Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21)
[39] John Hyde, 'Overseas Operations Bill a 'gross injustice' to veterans, say lawyers' (*The Law Society Gazette*, 23 September 2020) <https://www.lawgazette.co.uk/news/overseas-operations-bill-a-gross-injustice-to-veterans-say-lawyers/5105740.article> accessed 6 December 2020
[40] Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21)
[41] Michael Clarke, 'The UK's Overseas Operations Bill: Good Questions, Wrong Answers' (*The Royal United Services Institute*, 7 October 2020) <https://rusi.org/commentary/uks-overseas-operations-bill-good-questions-wrong-answers> accessed 7 December 2020
[42] Mari J Matsuda (n 4) 377
[43] Ibid

Affairs[44] have made evident the multitude of barriers in place in bringing these claims. Additionally, tort law remedies are not sufficient to adequately address the systematic social change required to right these historical abuses. This end could be achieved through re-evaluating education in relation to the British Empire, as currently the majority of ideas surrounding the Empire are, arguably, "conceptually impoverished [and can] produc[e] a false empathy with the narrative."[45] Secondly, reconciliation could mend relations and the power imbalance between the UK and previous colonies.[46] It is apparent that this marginalisation and imbalance of "superiority" stems from the Empire, as "among Anglo-Indians, the dominant conception of imperial purpose…was a paternalistic one."[47] It therefore requires a rebalancing of power, in modern-day settings. The contemporary parliamentary statements,[48] made in response to both Mau Mau and Amritsar make evident "that successive governments have failed to reckon with the history of empire,"[49] to a sufficient level. Therefore, not only does the abuse that occurred under the British Empire need revisiting; proper acknowledgement and education about the UK's past is also required.

3. The Successes and Limitations of Reparation Claims

3.1 The History and Justifications for Reparation Claims

The opportunity to litigate for reconciliation claims, stemming from past abuse, emerged with greater prominence after WWII and the Nuremberg trials; in which the concept of legal accountability was developed.[50] The use of private tort law become particularly useful as victims could "insist upon being heard."[51] Following this development emerged the work of theorists; offering connections between past wrongs and the current legal system. Through

[44] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355; TM Poole and SA Shah, 'A Very Successful Action? Historical Wrongs at Common Law' [2016] LSE Legal Studies Working Paper No.17/2016, 12-14
[45] Nadena Doharty,'I Felt Dead': Applying a Racial Microaggressions Framework to Black Students' Experiences of Black History Month and Black History' [2019] Vol. 22 No.1 Race Ethnicity and Education 110, 122; Farzana Shain, 'Race matters: confronting the legacy of empire and colonialism,' [2020] Vol. 41 No.2 British Journal of Sociology of Education 272, 279
[46] HC Deb 9 April 2019, vol 658, col 46WH
[47] Derek Sayer, 'British reaction to the Amritsar massacre 1919-1920,' [1991] Vol. 131 No.1 Past and Present 130, 162
[48] HC Deb 6 June 2013 vol 563 col 1693-1694; HC Deb 10 April 2019 vol 658 col 308-309
[49] Sally Tomlinson, *Education and race from Empire to Brexit* (2019, Bristol University Press) 169-199; Farzana Shain (n 45) 275
[50] Mayo Moran (n 2) 424-426
[51] Ibid, 426

conceptualising them in a certain manner, these connections allowed for their litigation. Matsuda plays a significant role here, as her reparation theory provides the basis for the following evaluation of the use of tort law in litigating for legacy issues. The most vital argument, for the purpose of this study, is that descendants of colonisers and settlers have continued to benefit from a privileged status resulting from "the wrongs of the past";[52] at the price of the victims and their descendants experiencing continuing levels of harm and discrimination.[53]

Matsudas' theory is based on the argument that reparations claims establish new connections between victims and perpetuators.[54] This thinking proposes that a horizontal connection exists within the groups; the victims being connected by "the continuing group damage engendered by past wrongs,"[55] as even if different people within the group are situated differently in society, the entirety of the group experiences a level of discrimination.[56] Conversely, "members of the dominant class continue to benefit from the wrongs of the past";[57] providing a connection between descendants of colonisers and potential defendants. Therefore, successive governments bear a responsibility to remedy this inequality, the immediate framework for which is provided by tort law. Further, the claims can be considered timely as the "continuing harm and discrimination,"[58] resulting from past abuse, establishes a close connection between the initial wrong and the harm suffered today.[59] Additionally, although phrased as "historical abuses", in reality these events are not as remote as perceived. These justifications are applicable to Kenya, as it is "a country still struggling with the effect of colonialism,"[60] thereby litigation was both necessary and crucial.

Re-evaluating the reparative justice model, using international law norms and domestic private law principles, has allowed historical wrong claims to become "legally plausible."[61] It is questionable how effective these theories actually are when it comes to the litigation of these legacy issues. As *Mutua*, and other attempted claims have demonstrated there exists a gap

[52] Eric K. Yamamoto and Susan K. Serrano (n 5) 73
[53] Ibid, 75; Mari J Matsuda (n 4) 377
[54] Ibid
[55] Eric K. Yamamoto and Susan K. Serrano (n 5) 74
[56] Mari J Matsuda (n 4) 375- 377
[57] Ibid, 379
[58] Eric K. Yamamoto and Susan K. Serrano (n 5) 75
[59] Ibid
[60] Mickie Mwanzia Koster (n 8) 54
[61] Mayo Moran (n 2) 427

between the reparation theories, which embody fairness and justice, and their application due to "their difficult interface with ordinary legal rules."[62] This is not to suggest that the theories themselves are not merited or based on valued issues, but that tort law is not the best method to achieve such reconciliation and change. The basic bilateral structure of tort law works against the foundations of these theories; primarily the existence of a horizontal connection between individual claimants and other members in society.[63] Therefore, although *Mutua* was successful, it is likely an exception. In coming to this conclusion, analysis of *Mutua* and the hurdles within tort law is required.

3.2 *Mutua*: An Example of the Use of Tort Law

Many of the difficulties associated with the use of tort law for historical abuse and in holding public authorities accountable, generally, are consequences of the slow development of international human rights law.[64] Despite the establishment of human rights norms, enforcement and protection was weak due to the presence and dominance of state supremacy and sovereignty of national laws.[65] Liability in tort, therefore, correlates to the growth of the administrative state as it increased opportunities for claims against the Government where there had been a violation of constitutional rights.[66] This in turn created a "constitutional role of tort as a tool to restrain the state,"[67] by keeping "public authorities within their lawful bounds."[68] The litigation of historical abuse claims contains a strong constitutional element regardless of occurring within the private law framework.

Mutua demonstrates that the use of trespass to the person torts, "promote[s] the rule of law,"[69] by opening a cause of action to survivors of governmental abuse. From McCombe J's judgment, concerning the preliminary decision on whether the case should be fully heard, it is

[62] Ibid, 472
[63] Francois Du Bois, 'Human rights and the tort liability of public authorities' [2011] Vol.127 Law Quarterly Review 589, 600
[64] A. W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2004, Oxford University Press) 12
[65] Ibid; T. Frost and S.D Bachmann, 'Human rights, colonialism and post-colonial conflict resolution: historical justice litigation' [2012] Issue 92 Amicus Curiae 20, 20
[66] Arvind, T.T. (n 12) 414; Geoffrey Samuel, 'Governmental liability in tort and the public and private law division' [1988] Vol. 8 Legal Studies 277, 280
[67] Ibid, 414
[68] CRG Murray (n 9) 428
[69] Elizabeth Adjin-Tettey & Freya Kodar, 'Improving the Potential ofTort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence' [2010] Vol. 42 No. 1 Ottawa Law Review 95, 98

apparent that the law will not allow the most serious kind of violations, those to physical integrity, to go unheard.[70] These poignant abuses engage "judicial emotions,"[71] demonstrated by the emotive language used within the judgements; which importantly "generat[es] the normative leverage require[d] to clear the…procedural hurdles."[72] This is effectively judicial attempts to litigate for these "timeless"[73] injustices. Thus, tying the litigation to the previously mentioned reparation theories, due to its focus on reparative justice.

However, instrumentally, *Mutuas'* circumstances were unique and the particular facts of the case allowed for its success, where other legacy claims would fail.[74] It was significant that living claimants initiated the claim, as Shelton states this makes it easier to establish a causal connection between the two parties.[75] Additionally, the Hanslope disclosure played a crucial role in uncovering new evidence on which the claimants were able to rely to make their case.[76] The significance of this evidence to *Mutuas'* success is highlighted by the dismissal of the second Mau Mau uprising case, *Kimathi*, where the claimants were unable to rely on historians' evidence or documentation such as the parliamentary record.[77] Thereby, making it harder "to establish the position of UK ministers [regarding] the conduct of the Emergency."[78] Stewart J's decision guided the application of the limitation period, which will be later explored. Concluding the litigation for *Kimathi*, Stewart J notes that without vital documents and witnesses a fair trial was not possible,[79] which emphasises the singularity of *Mutua* particularly as both cases materialised from the same event.

Overall, there exists a tension between the "procedural and doctrinal barriers to liability [and the] …substantive rights violation."[80] Therefore, due to the procedural hurdles faced when bringing forward legacy claims *Mutua* was likely an exception, arising from specific

[70] Mayo Moran (n 2) 431
[71] Ibid
[72] Ibid
[73] Mickie Mwanzia Koster (n 8) 53
[74] CRG Murray (n 9) 456-458
[75] Dinah Shelton, *Remedies in International Human Rights Law* (first published 1999, 3rd edn, 2015, Oxford University Press) 464
[76] Caroline Elkins, 'Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice' [2011] Vol. 39 No.5 The Journal of Imperial and Commonwealth History 731, 743-744
[77] *Kimathi and Others v Foreign & Commonwealth Office* [2017] EWHC 3379 (QB), [2018] 4 WLR 48 [20]
[78] CRG Murray (n 9) 454
[79] Ibid; *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 3144 (QB) [312]-[317]
[80] Mayo Moran (n 2) 430

circumstances, rather than setting the precedent for future historical abuse claims. This conclusion can be reached by examination of some of the most prominent barriers.

3.3 The Limitation Period

One of the biggest advantages of tort law is the contextual approach under The Limitation Act 1980. Section 33 allows the court discretion to disallow the limitation defence, in relation to personal injury, where it is fair and equitable to do so.[81] The court undergoes a balancing exercise, taking into consideration the relevant circumstances including; the factual background of the claimants, available resources and the possibility of a fair trial.[82] *Mutua* highlights the clear resulting benefits as the High Court ruled that the limitation period had not expired due to;[83] the ban of the Mau Mau until 2003, "the extreme emotional barriers to claimants acknowledgement of their suffering,"[84] and late revival of key documents. Therefore, the limitation defence "cannot be mechanically applied,"[85] in legacy claims as strong reparative justice motives can shift the judge's focus away from the traditional approach and instead onto remedying historic injustices.[86]

Contrastingly, the *Kimathi* case, makes apparent that this discretion is narrow in scope. The need to maintain a fair trial plays a dominant role in the judge's consideration, as demonstrated by Stewart J's rejection of the claimants' argument; that the limitation period was restarted by the "deliberate concealment by the UK Government of their right of action,"[87] revealed by the Hanslope disclosure. The judges refused to exert their section 33 discretion, using instead a strict interpretation of personal injury which excluded "causing fear," thus dismissing the argument to waive the limitation period.[88] Therefore, *Kimathi* makes apparent the reality of the limited use of judicial discretion.

Whilst theorists like Matsuda have argued for an alternative time-bar to be applied to historical abuses claims; suggesting that the "outer limit should be the ability to identify a victim class

[81] The Limitation Act 1980, s.33 (1)
[82] Ibid, s.33 (3)
[83] *Mutua and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) [158]-[160]
[84] Eric K. Yamamoto and Susan K. Serrano (n 5) 96
[85] Mayo Moran (n 2) 434
[86] Ibid
[87] CRG Murray (n 9) 454
[88] *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 1305 (QB) [37]

that continues to suffer… [due to] the wrongful act in question."[89] The 1980 Act provides enough judicial discretion to allow cases, like *Mutua,* to proceed while respecting the right to a fair trial. Further, it is unlikely that judges will adopt higher levels of activism, such as starting the clock when the abuse becomes discoverable, as arguably it "provides defendants with no protection at all."[90] Furthermore, it requires the court to adopt a discretionary justice model which moves into "subjective decision making,"[91] which is outside judicial comfortability. This encroaches upon a strict view of separation of powers, and arguably, judges lack the democratic legitimacy the decision requires. Additionally, evidentiary issues arise from this approach due to outdated and unavailable evidence. Further, the "defendants' conduct [should be] judged by the prevailing standards at the time of the alleged wrongdoing."[92] Claims brought decades after the abuse can be influenced by hindsight, and social change, which is prejudiced towards the defendant, thus eroding the possibility for a fair trial.

Therefore, it is unlikely that the courts will loosen their approach to the limitation period when addressing the litigation of legacy issues. This could "result in uncertainty and uneven results,"[93] especially as there would be no guarantee that the claim would be successfully heard, which could further harm the possibility of remedying these past wrongs. This position is strengthened by the weighty argument that "inheritance cannot be an open-ended and indefinite process, it has to stop somewhere."[94] This is particularly applicable to colonial abuse claims, as the number of descendants who potentially have a connection to previous abuse is far too large as to be feasible under tort law. However, the calls to change the application of limitation periods, in order "to protect former military personnel from tort action,"[95] are severely undermined by the strict approach taken by the courts, and the Law Commission advocating no changes.[96] Overall, it is apparent that the time bar is not an easy hurdle for claimants to overcome, as it requires judges to be more open to utilising section 33 in relation to historical abuse, which they appear largely unwilling to commit to.

[89] Mari J Matsuda (n 4) 385
[90] Monica Chowdry and Charles Mitchell, 'Responding to Historic Wrongs: Practical and Theoretical Problems' [2007] Vol. 27 No. 2 Oxford Journal of Legal Studies 339, 353
[91] Geoffrey Samuel, (n 66) 297
[92] Elizabeth Adjin-Tettey, 'Righting Past Wrongs through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses' (2007) Vol.25 Windsor Yearbook of Access to Justice 95, 100
[93] Ibid, 121
[94] Gerry Johnstone and Joel Quirk, 'Repairing Historical Wrongs' [2012] Vol.21 No.2 Social & Legal Studies 155, 159
[95] CRG Murray (n 9) 456
[96] Law Commission, *Administrative Redress: Public Bodies and The Citizen* (Law Com No 187, 2008) para 4.206

3.4 Group Based Litigation and The Relationship Between the Parties

Matsuda advances arguments for the victims to be approached and remedied as a group, "because they are treated and survive as a group,"[97] and therefore face a collective harm. The reality of the situation transpires differently under tort law, as the supposed benefits may not be attainable due to the difficulties of group-based litigation.[98] Part of the struggle arises from the complexities in defining group membership, particularly regarding the British Empire where the sheer number of potential victims results in no easy solution. In attempting to set the boundaries, there is a risk of it being too wide and inclusive of victims with weak connections to the harm or too narrow and discriminatory to victims who may genuinely be suffering. *Kimathis'* dismissal highlights the evidentiary issue in bringing group claims; as the claim involved more wide-ranging allegations, which lead to there being issues with the available evidence and whether it displayed a connection to the claimants.[99]

Furthermore, there have been concerns that the litigation of legacy claims will result in "copycat" cases. This presents a number of issues; firstly, the majority of these claims are likely to fail simply because of the inherent expenses and numerous procedural barriers that not all claimants will be able to cross.[100] Secondly, due to the classic corrective justice tort model which requires individual merit consideration; many cases will fail to produce strong enough connections to meet the threshold and thus be dismissed.[101] Lastly, there is also the worry that claims may be pursued for misguided monetary or political motives which defeats the reparative justice purpose of these claims and is detrimental to the claimants.[102] While, considering legacy claims in a similar manner to "statutory and administrative compensation schemes"[103] may counteract these issues; it could result in limited opportunities for arbitration which may be in opposition to what the claimants require.[104] Further, "many historical wrongs are highly personalised…[therefore] responsiveness to reparative justice may [require] more individualised remedies."[105] Analysis of other alternative methods are later explored.

[97] Mari J Matsuda (n 4) 376
[98] Gerry Johnstone and Joel Quirk (n 94) 159
[99] CRG Murray (n 9) 454
[100] Carol Harlow, *State Liability: Tort Law and Beyond* (2004, Oxford University Press) 46-47
[101] Ibid
[102] Ibid; CRG Murray (n 9) 452-453; Mayo Moran (n 2) 452-453
[103] Carol Harlow (n 100) 48
[104] Ibid
[105] Mayo Moran (n 2) 467

The difficulty of using tort law for group claims stems from Locke's observation that "the essence of the relationship between government and citizen is not reciprocal."[106] Tort law "[fails] to address horizontal inequality,"[107] between parties by ignoring differentiators such as wealth, status and the power gap between the state and individuals. Instead, private law treats the parties as equals, within a closed universe. However, it is the precise fact that the Government can exert a degree of lawful authority over its citizens and possess rights "such as the monopoly over the use of force,"[108] that renders these cases crucial. The State owes a duty to its citizens to act lawfully when discharging its authority, therefore, where there have been abuses of power, the difference in status is relevant to both the wrongdoing and the harm suffered.[109] Furthermore, issues arise as the individualised aspects of tort law dismisses the importance of distributive justice in favour of corrective justice.[110] This disregards the harm done to "similarly situated" members of society by focusing only on the individual claimant, thus "fail[ing] society as a whole."[111] Further, "by failing to situate the…[abusive] behaviour in the broader social system,"[112] the overarching source and cause of the unlawful policy cannot be remedied. While individual claimants may benefit, the group damage that most descendants suffer will not be adequately addressed, failing the reparative justice aims of legacy claims.

In combatting these issues tort law could adopt a more concrete concept of constitutional torts, which allows consideration of the differing relationship and rights of the state, under horizontal equality.[113] This model would offer "constitutional protection…when the state's acts impinge on a value of constitutional dimension,"[114] which can be interpreted as a right that cannot simply be overwritten by popular vote.[115] In order to accurately protect parliamentary sovereignty within the UK's constitutional order this could follow the structure of constitutional statutes, thus a constitutional right would require express repeal. However, as

[106] John Alder, 'Restitution in public law: bearing the cost of unlawful state action' [2002] Vol. 22 No.2 Legal Studies 165, 172; John Locke, *Two Treaties of Government,* ed. Thomas Hollis (1764, London, A. Millar et al.) 127-128

[107] Nathan J. Miller (n 7) 542

[108] Ibid

[109] Francois Du Bois (n 63) 592-597

[110] Ibid; Richard Mullender, 'Tort, Human Rights, and Common Law Culture' [2003] Vol. 23 No. 2 Oxford Journal of Legal Studies 301, 307

[111] Nathan J. Miller (n 7) 543

[112] Ibid

[113] Michael Wells, 'Constitutional Torts, Common Law Torts, and Due Process of Law' [1997] Vol. 72 No.3 Chicago-Kent Law Review 617, 617-619

[114] Ibid, 650

[115] Ibid

Raz observes, "values are incommensurable,"[116] resulting in no "rational solution," as ranking certain rights above others is problematic and will cause further discrimination such as excluding claimants like those in *Kimathi* who suffered from the villagisation policy.[117]

3.5 Issues of Liability

Mutua accurately demonstrates the issues of contention regarding liability for legacy claims and how the courts navigate through these debates. The UK Government denied both legal responsibility and involvement, regarding the torture that occurred during the uprising.[118] Instead it was argued that liability for the violation passed to the new Kenyan State upon independence, as they suggested that the conduct was part of the operation of the Colonial Government of Kenya and not acts of the UK Government.[119] Faced with this contention, McCombe J narrowly construed the *Quark* rule, finding that "the Secretary of State acted as one of her Majesty's Ministers in the right of the United Kingdom,"[120] thus "remov[ing] the threshold shield to British Government accountability."[121] This conclusion, and the evidence provided by the Hanslope disclosure, made apparent that the conduct in question was "of a joint exercise by the UK Government and the Colonial Administration."[122] Particularly as the responsibility for the decision to use force rested with General Erskine; who reported directly to the War Office, thus, ensuring governmental awareness of such decisions.[123]

Vicarious liability emerged as a principal basis in claiming against the UK Government,[124] as the court construed the conduct "as organisational participation in a common design to commit torture."[125] In establishing vicarious liability, the legal relationship between the parties had to be examined to establish a close connection linking the Government to the tortious act.[126] The

[116] John Alder, 'Restitution in public law: bearing the cost of unlawful state action' [2002] Vol 22 No.2 Legal Studies 165, 170; J Raz, *The Moraliry of Freedom* (1988, Oxford University Press) 322-366
[117] *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 1169 (QB) [167] (Stewart J)
[118] *Mutua and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) [27]-[28]
[119] *Mutua and Others v The Foreign and Commonwealth Office* [2011] EWHC 1913, [5]
[120] Ibid, [110]-[111]; *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2005] UKHL 57 [2006] 1 A.C. 529
[121] Eric K. Yamamoto and Susan K. Serrano (n 5) 95
[122] Mayo Moran (n 2) 436
[123] Huw Bennett, 'Soldiers in the Court Room: The British Army's Part in the Kenya Emergency under the Legal Spotlight' [2011] Vol. 39 No.5 The Journal of Imperial and Commonwealth History 717, 720
[124] *Mutua and Others v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB); Mayo Moran (n 2) 435
[125] Eric K. Yamamoto and Susan K. Serrano (n 5) 94
[126] *Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 [19] (Lord Phillips)

evidence including; that "Governor Baring and Secretary of State…were directly engaged in defining these actions,"[127] and had shared the decision making responsibilities, established that the relationship in question resembled a connection as to "sustain" vicarious liability.[128] Particularly, as McCombe J questioned, "if the British were not responsible for events in Kenya….then who was,"[129] as the Government refused to take effective preventative measures.

Kimathi demonstrates the difficulty of establishing liability, due to a lack of available documentation, and the likelihood that the Government will deny the allegations.[130] The courts may provide for this by adopting Higgins argument that as "the prevention of harm is an absolute duty… it is the violation of international law [itself] that engages responsibility."[131] Arguably, this would more closely resemble the private law concept of strict liability.[132] However, the interaction of human right norms and the collective responsibility of a democratic government to remedy past wrongs for future generations, supports a lower threshold of liability.[133]

The fairness of a strict liability approach regarding the defendant is questionable as it involves stretching tort "to encompass scenarios that no private person is likely to find [themselves in]."[134] This requires the judiciary to take into account a range of different considerations, due to the public character of the defendant. The corrective justice model of tort law does not facilitate this; as it does not "consider the defendants' public context and the impact of [its] functions,"[135] instead treating the parties as "normative equals."[136] This results in relevant considerations such as the duty owed to the public and the bounds of lawful conduct being dismissed. Further, the litigation of these legacy issues requires a focus on distributive justice, in order to have a social impact. Therefore, due to torts' bilateral framework, it is "ill suited" to litigate for historical abuses.[137] Furthermore, it is likely that threats of liability will only

[127] David M. Anderson (n 21) 711
[128] CRG Murray (n 9) 452
[129] David M. Anderson (n 21) 701
[130] *Kimathi and Others v Foreign & Commonwealth Office* [2017] EWHC 3379 (QB), [2018] 4 WLR 48 [20]; *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 3144 (QB) [174]
[131] Carol Harlow (n 100) 52
[132] Ibid; Francois Du Bois (n 63) 590-592
[133] Francois Du Bois (n 63); John Alder (n 106) 172
[134] Francois Du Bois (n 63) 592
[135] Ibid, 598
[136] Ibid, 599
[137] Ibid, 600

increase "bureaucratic inertia,"[138] as the Government may seek to increase the difficulty of bringing such claims, which relates to the later analysis of the Overseas Operation Bill.

Importantly, there was no finding of liability in *Mutua,* as the claim was settled out of court. The issue was instead concluded in the House of Commons with a statement by the Foreign Secretary, which worked to largely reduce the significance of the case. The swift apology did not serve to reveal further information as would have occurred during a full trial nor did it address the problematic issues present within the case. Rather, the statement gave way to the Governments' priority of maintaining relations with Kenya, without being obligated to admit wrongdoing or give full acknowledgement to the violations, which worked to conceal governmental embarrassment, an issue which will be further explored in later sections of this article.

3.6 Damages

The award of damages for historical abuse presents significant tension between "deontological moral impulse" and "consequentialist ones."[139] There is a desire to award damages to repair the harm caused by the violation, although it should be proportional to the actual loss suffered. However, this must also be balanced against the risk of imposing high costs which may potentially bankrupt governments.[140] This contention may result in the use of out of court settlements, as with *Mutua*, which was criticised for protecting the wrongdoer from accountability. This resulted in significantly lower amounts, £2,658 for each survivor, than the potential amount awarded by the court.[141] It has been noted that "the payment was not sufficient to cover minimal healthcare needs…in Kenya,"[142] so its ability to adequately remedy abuses such as torture and life altering injuries, is questionable.

The use of tort is beneficial, concerning damages, in combatting identification issues as the court may award the "next best class."[143] This allows for the continuing harm of the violation to be remedied even where actual victims may be deceased. Although, an endpoint is required

[138] Carol Harlow (n 100) 26
[139] Richard Mullender (n 110) 308
[140] Mari J Matsuda (n 4) 385
[141] Carol Harlow (n 100) 26; Mayo Moran (n 2) 468
[142] Mayo Moran (n 2) 646
[143] Mari J Matsuda (n 4) 386

due to the sheer number of victims and their descendants.[144] Further, tort law provides "a reasoned and…coherent body of precedent,"[145] which can guide judicial decisions in awarding damages for human rights abuses. As in *Ashley v Chief Constable of Sussex Police*, where Lord Scott determined that the available remedies under tort law could be in the form of damages and/or a declaration that the conduct was unlawful.[146] Adoption of this in relation to historical injustices may be an effective method of providing the proper acknowledgment and accountability to the victim, as it sufficiently resembles constitutional rights cases.[147] However, as argued by Lord Carswell the court does not exist to conduct public inquires,[148] thus if there is no award of damages it is contentious as whether actions under trespass are an efficient method of achieving a declaration of wrongdoing. Political methods that can achieve the same result will be later explored.

Where damages are awarded, it may have negative distributive justice consequences by producing inequalities[149] between members of the same victim group, if some receive compensation while others do not. This further undermines arguments of collective group damage. Compensation may also cause discrimination between different victim groups, as if the State only provides redress to some groups, this could exacerbate the harm suffered by those who do not receive remedies.[150] Additionally, damages may be detrimental to the effectiveness of public services as it involves the allocation of public resources. This raises separation of powers concerns as within the UK's constitutional order "the allocation of public expenditure…is…a matter for democratic decision."[151] The repurposing of tort to sue for violations of human rights, creates "a new head of public expenditure,"[152] requiring judges to determine the allocation of resources, and what is in the public's interest.[153] In doing so, they must not create a heavy burden which results in a strain of resources. The judiciary, therefore, exerts caution when issuing judgments involving the allocation of state money; with some

[144] Gerry Johnstone and Joel Quirk (n 94) 159
[145] Jason N.E. Varuhas, 'A Tort-Based Approach to Damages under the Human Rights Act 1998' [2009] Vol. 72 No. 5 The Modern Law Review 750, 765
[146] Jenny Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' [2008] Vol. 67 No. 3 The Cambridge Law Journal 606, 627; *Ashley v. Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 2 W.L.R. 975 [23]
[147] Ibid
[148] *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 2 W.L.R. 975 [81]
[149] Monica Chowdry and Charles Mitchell (n 90) 342
[150] Mari J Matsuda (n 4) 397
[151] Lord Hoffman, 'The COMBAR Lecture 2001: Separation of Powers' [2002] 7 Judicial Review 137, 141
[152] Ibid, 143
[153] Ibid, 139-140

judges using this principle as basis to not deploy tort law as a remedy for historical abuse. Arguably those who are democratically elected are better placed to decide how best to rectify these past wrongs, allowing the courts to remain within the constraints of their constitutional role.

3.7 Overall Inadequacy of the Law

While the focus has mainly been on tort law, there are further inadequacies in remedying historical abuses coming from human rights law. As despite the enactment of legislation such as the ECHR and the Human Rights Act,[154] claimants cannot rely on these provisions as they largely came into force after many of the incidents occurred, and the UK had a tendency to derogate regardless.[155] Further, where the ECHR could have been applicable, it was not until 1966 that the UK allowed individual petitions,[156] and as interstate complaints were unlikely to be an issue due to the conduct being common practice within imperial Europe,[157] the UK was insulated from human rights action.

However, *Cestaro v Italy,*[158] suggests a way in which human rights law can aid the litigation of past wrongs. The case involved "various radical groups [being] amongst peaceful anti-globalisation protesters."[159] The police in responding to violent conduct of these groups stormed a school where Mr. Cestaro and others were lodging, peacefully and legally. During this, Cestaro was "brutally ill-treated"[160] which the court held amounted to torture.[161] This is applicable to abusive colonial conduct, as it too involves abusive actions by authorities in response to opposition. Strasbourg found that Italy had violated their procedural obligations

[154] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); Human Rights Act 1998
[155] CRG Murray (n 9) 446-447
[156] Ibid
[157] A. W Brian Simpson (n 64) 4
[158] *Cestaro* v. *Italy Application No.*6684/11 (ECtHR 7 April 2015); P Pustorino, 'A New Case on Torture in Europe'(*Blog of the European Journal of International Law*, 13 May 2015) <https://www.ejiltalk.org/a-new-case-on-torture-in-europe-cestaro-v-italy/> accessed 24 January 2021; James Gallen, 'Historical Abuse and the Statute of Limitations' [2018] Vol. 39 No. 2 Statute Law Review 103, 116
[159] *Cestaro* v. *Italy Application No.*6684/11 (ECtHR 7 April 2015) [12]; Christina Kosin, 'The Cestaro v Italy Case and the "Prohibited Purpose" Requirement of Torture' (*Strasbourg Observers*, 20 April 2015) <https://strasbourgobservers.com/2015/04/20/the-cestaro-v-italy-case-and-the-prohibited-purpose-requirement-of-torture/> accessed 5 April 2021
[160] Ibid, [182]
[161] Ibid, [178]

under Article 3;[162] as the limitation regime restricted the ability to prosecute. The actions of the state were incompatible with the convention due to the limitation period being "inadequate to meet the need to punish acts of torture."[163] Thereby, implying that statutes of limitations in relation to torture should be eliminated. The adoption of a similar framework regarding historical abuse; where it can be demonstrated that the state has a "contemporary obligation to prevent the relevant form of abuse,"[164] would provide relief for those who suffered during the British Empire. Eliminating a statute of limitations for torture would further align domestic law with broader international law principles, which prohibits limitation periods for serious human rights violations that amount to crimes under international law.[165] Overall, when concerning the most infringing abuses under the Empire, those which eroded fundamental rights, a strict approach to limitation periods seems dubious.

This proposal is limited by *Keyu*,[166] which held that there was no duty to hold an inquiry into the events that occurred during the Malayan Insurgency as the ECHR was enacted after the violations, and so the claimant was unable to rely on the statute.[167] Additionally, due to the lapse in time there was no longer "a genuine connection [with] the death,"[168] resulting in the claim failing. However, even under the Human Rights Act, the courts have been reluctant to award damages for "claims arising out of overseas military deployments."[169] Further limitations emerge from the use of judicial review, as it "is indifferent both to corrective and distributive justice,"[170] as it only looks at how a decision is made but does not "impose restrictions…on what…cannot be done."[171]

As such, Diceys' approach of using tort to restrain the state appears to be the best option for claimants seeking to redress past wrongs.[172] The use of "private law constitutionalism"[173]

[162] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 3
[163] James Gallen (n 158) 116
[164] Ibid
[165] *Rantsev* v. *Russia and Cyprus* (Application No. 25965/04), Judgment of 7 January 2010; Jean Allain, '*Rantsev v Cyprus and Russia:* The European Court of Human Rights and Tracking as Slavery' [2010] Vol.10 No.3 Human Rights Law Review 546, 546–57
[166] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [255]
[167] TM Poole and SA Shah (n 44) 9-12
[168] Ibid; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [88]-[89]
[169] CRG Murray (n 9) 448
[170] John Alder (n 106) 173-174
[171] Arvind, T.T. (n 12) 432
[172] CRG Murray (n 9) 428; Francois Du Bois (n 63) 597
[173] Arvind, T.T. (n 12) 414

provides, "the best mechanism of accountability,"[174] allowing the rule of law to prevail.[175] This is not without significant challenges, therefore "this popular yet problematic model [needs to be] successful challenged."[176] Particularly as aside from the difficulties for claimants to advance their case, the use of private law does not adequately remedy the wrong in question. Since torts' bilateral structure does not allow for the systematic change of the system that allowed for such abuse to occur; "the harm to the social contract cannot be remedied expect by changing the offensive…practice."[177] Thus, what is required is an uproot of the constitutional order which offers protection to a state exerting abusive practices as to retain its power. Evaluation of this point will follow next.

Throughout, it is evident that under the corrective justice model, "judges may struggle to respond to the imperative to protect human rights";[178] suggesting that *Mutua* was "just a lucky outcome,"[179] as it is unlikely that the majority of these legacy claims will succeed. This is not to suggest that it is not desirable to "give practical shape to our collective impulse to undo the consequences of past wrongdoing."[180] It may, however, be more appropriate to do so on social and political, rather than legal, basis. Regardless, "the question of when it is appropriate to leave someone aggravated by the state with no recourse at all,"[181] is still relevant and requires addressing.

4. The British Empire and Modern-Day Consequences

The above section detailed the limitations of success for historical abuse claims. This poses questions of what can be gained from these claims, and whether they are still important in modern-day society. *Mutua* proved vital in the mission of truth revival.[182] Therefore, although the efficiency of litigation as a mode of reconciliation is questionable, the information revealed is crucial in reconceptualising the Empire and its continuing influence in governmental practices today; particularly when considering the framework adopted in conflicts like Iraq and Afghanistan.

[174] Elizabeth Adjin-Tettey (n 92) 108-109
[175] Ibid, 98
[176] Gerry Johnstone and Joel Quirk (n 94) 160
[177] Nathan J. Miller (n 7) 544
[178] Richard Mullender (n 110) 306
[179] M. Hasian Jr & S.M Muller (n 19) 177
[180] Monica Chowdry and Charles Mitchell (n 90) 340
[181] Arvind, T.T. (n 12) 433
[182] Caroline Elkins (n 76) 742

4.1 Truth Revival: The Hanslope Disclosure and The Hunter Commission

The Hanslope Disclosure, aside from providing the evidential basis in *Mutua,* was crucial in confirming what many historians had already suspected about the counter insurgency methods used in Kenya.[183] The documentation described the "systematic torture,"[184] of the detainees as well as the knowledge of these abuses by UK Government officials, evident by correspondence between the UK Government and the Colonial Administration.[185] Furthermore, concerning the Home Guard, the documents revealed that the British Army were willing to "turn a blind eye [to their actions as] they were vital to the counter insurgency strategy"[186]; the Army trained and operated alongside them while pushing for their extension.[187] This demonstrates the conscious decision made by British public and military officials to not "stop the mistreatment of civilians."[188] Thus, leading to the "re-evaluation of British colonial violence,"[189] and the inclusion of cover-ups in responding to imperial resistance.[190]

Furthermore, analysis of the Hunter Commission highlights the fundamental use of systematic violence, in responding to the threat of nationalist movements within the colonial system.[191] Violence was performative and often deployed as collective punishment.[192] The Commission found that the time period of the shooting was an error and that General Dyer had exceeded his authority as there was no evidence of a conspiracy, to overthrow British Rule, as feared by military officials.[193] Dyer did not face any sanctions post inquiry,[194] demonstrating that internal inquiries are often limited in terms of recourse; a problem still prevalent in modern day conflicts, as will be later explored. Instead, the Hunter Commission attempted to isolate the events of the Amritsar Massacre,[195] however, through analysing colonial affairs it is apparent that it was part of "broader [imperial] failings,"[196] rather than a singular incident. Therefore,

[183] M. Hasian Jr & S.M Muller (n 19) 175
[184] Caroline Elkins (n 76) 744
[185] David M. Anderson (n 21) 710-712
[186] Huw Bennett (n 123) 723
[187] Ibid
[188] Ibid
[189] Caroline Elkins (n 76) 745
[190] Ibid
[191] Kim A Wagner (n 1) 192
[192] Ibid, 218; Derek Sayer (n 47) 143
[193] Disorders Inquiry Committee Report, Calcutta, 1920; HC Deb 9 April 2019, vol 658, col 39WH
[194] Kim A Wagner (n 1) 215
[195] Ibid, 190
[196] Derek Sayer (n 47)133

Dyer was likely used as a scapegoat,[197] in this instance, allowing for the British to maintain face while concealing the political motives of the conduct.[198] Thus, events like Amritsar are vital in understanding the legal and political framework of the Empire.

4.2 The Inner Workings of the British Empire

The evidence revealed in the Hanslope Disclosure and the Hunter Commission aids in understanding the inner workings of the British Empire and its relevance to governmental legislative action today.

Certain measures such as; the concealment of information and the use of irrational justifications, were principles upon which the British Empire was based.[199] Many of these methods continue to be deployed in the UK's approach to overseas conflict and counter terrorism measures.[200] In addressing Kenya, the focus was on the suppression of rebellions, aiming to dismantle the Empire, instead of the military abuses.[201] This allowed for the Government to, firstly, vilify the Mau Mau leading to "contempt for Kenyans."[202] Secondly, by presenting the opposition as the enemy through removing their humanity, the Government was able to rationalise their activities.[203] Additionally, in both India and Kenya, a paternalistic model was adopted, which saw the locals as "children of humanity"[204]; unable to govern themselves and so needed British guidance.[205] This thinking embodies 'orientalism' which Said summaries as a "western style for dominating, restructuring and having authority over [the East]."[206] Society in the East was seen as being inferior to the political and cultural supremacy of the West.[207] In turn this justified the dominance and expansion of colonial power as it was believed that Western powers knew better and could thereby civilise the East.[208]

[197] Ibid
[198] Ibid, 137
[199] Caroline Elkins (n 76) 742
[200] Ibid, 735; Huw Bennett (n 123) 727
[201] Ibid; CRG Murray (n 9) 457
[202] Ibid
[203] Ibid, 433
[204] Nazli Pinar Kaymaz, 'From Imperialism to Internationalism: British Idealism and Human Rights,' [2019] Vol. 41 No.6 The International History Review 1235, 1250
[205] David Boucher, 'Sane' and 'insane' imperialism: British idealism, new liberalism and liberal imperialism' [2018] Vol. 44 No. 8 History of European Ideas 1189, 1195; Dylan Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' [2018] Vol.81 No.5 The Modern Law Review 739, 759
[206] Edward W. Said, *Orientalism* (1979, Vintage) 3
[207] Ibid, 40-41
[208] Ibid, 35

Resultant was the justification of violence as "uncivilised peoples…needed to be ruled by despotism,"[209] thereby violence was the only available answer in responding to opposition, and allowing for the maintenance of British Rule.[210] Formulating this "social distance between rulers and ruled,"[211] allowed the actions of the Indians to be perceived as far removed from the "fundamentals of British life."[212] Therefore, while Dyer was cast as a bad apple,[213] simultaneous movements existed to exonerate and justify Dyer's actions by framing his conduct as moral acts, teaching the Indians the ways of civilisation.[214] By presenting the circumstances as an "obligation to civilise,"[215] Dyer's actions could be justified, through maintaining the racial hierarchy.[216] These separate approaches each served their own imperial purposes, demonstrating the "rottenness" of the entire colonial system.[217]

Additionally, it was imperative to protect British officers from prosecution through avoiding legal consequences.[218] At the time, this took form in removing information, prior to Kenyan independence, by holding that they were "relevant to UK policy and that [the documents] were none of Kenya's business."[219] In modern-day settings, prior to *Mutua*, historians that uncovered such information were discredited by claims that "they had sullied the name of the British Empire."[220] This is undeniably a mode of colonialism, as files from across the Empire were withheld,[221] and there remains an "ease [in] which departments of government can still withhold historical records."[222] Difficulties continue to exist in trying to retrieve information, despite the enactment of the Freedom of Information Act.[223]

[209] Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire,' [2016] Vol.36 No.4 Oxford Journal of Legal Studies 751, 778
[210] Kim A Wagner (n 1) 205
[211] Derek Sayer (n 47)143
[212] Ibid, 139
[213] CRG Murray (n 9) 444; Huw Bennett (n 123) 720
[214] Camilla Boisen, 'The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise' [2013] Vol. 39 No.3 History of European Ideas 335, 339
[215] Ibid, 350
[216] Kim A Wagner (n 1) 219
[217] CRG Murray (n 9) 436; Huw Bennett (n 123) 720
[218] David M. Anderson (n 21) 710
[219] Ibid, 708
[220] M. Hasian Jr & S.M Muller (n 19) 172
[221] Caroline Elkins (n 76) 744
[222] David M. Anderson (n 21) 713
[223] Ibid; The Freedom of Information Act 2000

Evaluation of public and military officials' thinking, paints a startling picture of the UK's constitutional order. The work of key constitutional authorities, in particular Dicey, were influenced by the surrounding context of the Empire. From this, an idea of Liberal Imperialism emerged, which used the rule of law and parliamentary sovereignty together to justify the actions of the Empire.[224] As while there was an "emphasis on the rule of law…, [this was accompanied by]… the discretionary authority of the central executive."[225] Dicey manipulated the rule of law to accommodate vast executive discretion by framing the Empire, and consequent abusive actions, as an attempt to civilise.[226] The notion of civilisation as a "hierarchical concept"[227] allowed for the British to formulate the spreading of ideals such as; liberty and freedom as a moral duty,[228] which "in Dicey's view, [was] one of the chief justifications for the British Empire."[229]

In order to sustain both this "education" and the Empire, it was accepted that some instances "could necessitate oppressive departures from the rule of law."[230] The State was willing to abandon the foundations of the rule of law in order to further and maintain their imperial aims. However, under this thinking, this did not equate to lawlessness as it was necessary to ensure the "stability of the Empire."[231] Parliamentary sovereignty enhanced this rationale by holding that as the "acts were to ensure the safety of the colonial regime, [they were] part of the legal sovereignty of the state."[232]

Parliamentary sovereignty led to problematic "unrestrained power [by leaving] … room for centralised maladministration."[233] It did so by providing wide scope for discriminatory and abusive practices, under the pretence of securing the Empire. Resulting from this were "rules that hierarchise, bureaucratise, mediate and channel power."[234] The basis of this power was left unchecked, but arguably, it was constructed upon insupportable reasonings to both the modern-

[224] Dylan Lino (n 205) 743-745
[225] Nasser Hussain, 'Towards a Jurisprudence of Emergency: Colonialism and the Rule of Law' [1999] Vol.10 Law and Critique 93, 100
[226] Ibid; Gary Peatling, 'Race and Empire in Nineteenth-Century British Intellectual Life: James Fitzjames Stephen, James Anthony Froude, Ireland, and India' [2007] Vol. 42 No.1&2 Éire-Ireland 157, 168-169; Nazli Pinar Kaymaz (n 204) 1241-1242
[227] Dylan Lino (n 205) 746
[228] A. W Brian Simpson (n 64) 22
[229] Dylan Lino (n 205) 748-749
[230] Ibid, 743
[231] Nasser Hussain (n 225) 115
[232] Ibid, 101
[233] Dylan Lino (n 209) 772
[234] Nasser Hussain (n 225) 102

day reader and New Liberals. Hobson, for example, argued that India's civilisation was "equally as sophisticated…as those in the West,"[235] as such the pursuance of a universal concept of governance, to be imposed on colonies, was a "delusional fallacy."[236] Overall, there was no real imperative for the British to govern, particularly, as the aim to "promote greater cosmopolitanism, when translated into practice was merely a pretext, for aggressive imperialism."[237] Possession of colonies were often sought after due to the considerable power it granted to the state,[238] rather than the "public welfare…of the colonised."[239]

4.3 Contemporary Consequences

Key features of colonial modes of constitutionalism have continued into governmental conduct and the UK's constitutional order today. This results from continuities such as parliamentary sovereignty, being grounded in a colonial context. The most concerning features can be seen in the UK's involvement in Iraq and Afghanistan and the subsequent Overseas Operation Bill.

In response to the 9/11 attacks, US and UK coalition forces invaded Afghanistan and began a bombing campaign against Taliban forces as to defeat the Al-Qaeda, whose members were trained in Afghanistan prior to 9/11. Additionally, the Taliban continued to protect Bin Laden by refusing to hand him over.[240] Further, the UK joined the US-led invasion of Iraq in 2003, to overthrow the "dictatorial rule of Saddam Hussein"[241] and "destroy Iraqi weapons of mass destruction."[242] Consequently, the UK Armed Forces have faced allegations claiming that soldiers; "killed and tortured unarmed civilians,"[243] and used outlawed interrogation techniques, which amounted to abuse.[244] Responding to these claims, the Government set up

[235] David Boucher (n 205) 1202; J. A. Hobson, 'Socialistic Imperialism'[1901] Vol. 12 No. 1 International Journal of Ethics XII, 44, 53
[236] Ibid
[237] David Boucher (n 205) 1196
[238] Mohamud Abdul, 'Teaching the British Empire' [2016] Vol. 164 Teaching History 4, 5
[239] A. W Brian Simpson (n 64) 22
[240] 'Why is there a war in Afghanistan? The short, medium and long story' (*BBC*, 29 February 2020) <https://www.bbc.co.uk/news/world-asia-49192495> accessed 3 April 2021
[241] 'The Iraq War' (*Council on Foreign Relations*, 2021) <https://www.cfr.org/timeline/iraq-war> accessed 3 April 2021
[242] Ibid; Lord Steyn, 'Our Government and the international rule of law since 9/11' [2007] European Human Rights Law Review 1, 1
[243] Richard Norton-Taylor, 'British troops must be held accountable for abuses in Iraq and Afghanistan' (*Middle East Eye*, 21 November 2019) <https://www.middleeasteye.net/opinion/british-troops-must-be-held-accountable-abuses-iraq-and-afghanistan> accessed 3 April 2021
[244] Ibid; Lord Steyn (n 242) 3-5

the Iraq Historic Allegations Team which aimed to review and investigate the allegations. However, this was discontinued under the pretence of "money grabbing lawyers"[245] who were "launching ill-founded cases,"[246] amounting to harassment of the Army. While this contained an element of truth, as not all cases were grounded in factual evidence, the State arguably overcompensated by introducing the Overseas Operation Bill, which paints an inaccurate picture that these claims are unfounded and undeserving of litigation. This furthers the self-persevering aims of the Government and allows for the continuation of these counter insurgency methods. Therefore, evaluation is required due to the close resemblance to the imperial framework.

Firstly, the existence of "theories [that give] weight to…conduct grounded on rationally self-interested choices,"[247] makes apparent a system functioning off self-protection motives. This is noticeable in the UK's actions abroad and the continuing desire to protect military personnel from prosecution, through the Overseas Operation Bill. The Bill seeks to shield the Ministry of Defence, by allowing the State to conceal abuses, to avoid embarrassment or legal repercussions.[248] Suggesting the practices deployed in Kenya continue to shape the operation of the UK Armed Forces.[249] However, the undeniable difficulties that historical claims face, largely undermines the argument for greater protection for military personnel, particularly as "there's no evidence to suggest [that judicial procedural safeguards are being applied inappropriately]."[250] Furthermore, the restriction of oversight under judicial deference in response to these "contentious issues,"[251] allows the Executive increased discretion concerning overseas operations. National security is considered to lie "outside the competence of the

[245] Nicholas Mercer, 'The truth about British army abuses in Iraq must come out' (*The Guardian*, 3 October 2016) <https://www.theguardian.com/commentisfree/2016/oct/03/british-army-abuses-iraq-compensation> accessed 3 April 2021
[246] Ibid
[247] Freyer TA, "Comment on Chapter 1: David Dyzenhaus, 'The 'Organic Law' of Ex Parte Milligan'" in Austin Sarat (ed), *Sovereignty, Emergency, Legality* (2010, Cambridge University Press) 68
[248] John Hyde, 'Overseas Operations Bill a 'gross injustice' to veterans, say lawyers' (*The Law Society Gazette*, 23 September 2020) <https://www.lawgazette.co.uk/news/overseas-operations-bill-a-gross-injustice-to-veterans-say-lawyers/5105740.article> accessed 5 February 2021
[249] CRG Murray (n 9) 457
[250] 'Overseas Operations (Service Personnel and Veterans) Bill' (*The Law Society*, 21 January 2021) <https://www.lawsociety.org.uk/en/topics/human-rights/overseas-operations-service-personnel-and-veterans-bill> accessed 5 February 2021
[251] Andrew Williams, 'The Iraq abuse allegations and the limits of UK law,' [2018] Public Law 461, 470; Colin R.G. Murray, 'Shifting Emergencies from the Political to the Legal Sphere: Placing the United Kingdom's Derogations from the ECHR in Historical Context' in Matthew Saul, Andreas Follesdal, and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (2016, Cambridge University Press) 201

judicial branch,"[252] this approach, however, raises questions in relation to the judicial role of conducting checks and balances on the Executive.

Currently, the Executive is able to utilise the minimally constrained "Diceyan vision of parliamentary sovereignty."[253] This arguably results in an accountability gap as the supremacy of Parliament, allows laws to be altered, to reduce litigation by "restrict[ing the] application of human rights standards in relation to the conduct of the military overseas."[254] This ability is a consequence of the imperial constitution;[255] and results in a continuing risk of the misuse of power and discriminatory practices. While, this centralised power allows for flexibility, it also permits the weakening of human rights protection as to achieve self-preserving motives.[256] The Overseas Operation Bill suggests a "veil of ignorance,"[257] exists within Parliament. Since, the focus continues to remain on self-preservation, rather than responding to constructive criticism aiming to make the UK more just and rights compliant, particularly in relation to overseas operations.[258]

Secondly, during the Empire "a different set of rules,"[259] applied to "civilised" and "uncivilised" countries. In practice this distinguished European and Non-European countries.[260] The remnants of this continues in "the government's approach to the rule of law and accountability for alleged military abuses,"[261] and the Overseas Operation Bills' application to foreign claimants only. While this restricts the Bills' implementation to the

[252] Andrew Williams (n 251) 470
[253] Ibid
[254] Ibid, 472
[255] Hakeen O Yusuf and Tanzil Chowdhury, 'The persistence of colonial constitutionalism in British Overseas Territories,' [2019] Vol. 8 No. 1 Global Constitutionalism 157, 170
[256] Dylan Lino (n 209) 767-770
[257] Colin R.G. Murray (n 251) 217
[258] Aurel Sari, 'The U.K. Overseas Operations Bill: An Own Goal in the Making?' *(Just Security*, 27 October 2020) <https://www.justsecurity.org/73009/the-overseas-operations-bill-an-own-goal-in-the-making/> accessed 5 February 2021
[259] Casper Sylvest, 'Our passion for legality': international law and imperialism in late nineteenth-century Britain' [2008] Vol. 34 Review of International Studies 403, 407
[260] Ibid, 406
[261] Carla Freshman and Thomas Obel Hasen, 'The Overseas Operations (Service Personnel and Veterans) Bill 2019-2021: A Pragmatic Response to Over-Zealous Claims Against the Military or a Vehicle for Impunity? Introduction to the Symposium on the Overseas Operations (Service Personnel and Veterans) Bill' *(Blog of the European Journal of International Law*, 17 September 2020) <https://www.ejiltalk.org/the-overseas-operations-service-personnel-and-veterans-bill-2019-2021-a-pragmatic-response-to-over-zealous-claims-against-the-military-or-a-vehicle-for-impunity-introduction-to-the-symposium-on-th/> accessed 5 February 2021

conflict in Northern Ireland,[262] the Government intends for a separate legislative regime to "address legacy issues in Northern Ireland";[263] further preventing the pursuit of justice against state abuse. This exclusion links to "the message [that conduct] abroad is bloody,"[264] but at home Britain is the "champion of human rights."[265] Ideas such as these are sustained by the "humanitarian argument,"[266] that countries such as Iraq need "rescuing" which "authoris[es]…invas[ions]."[267] However, in practice, this "different world" concept leads to lower human rights standards and practices. Furthermore, the Overseas Operation Bill includes a "duty to consider derogating,"[268] which could consequently lead to increased abuse. The use of derogations confers "a generous margin of appreciation in emergency situations,"[269] allowing the Executive to use more draconian and discriminatory measures. Furthermore, the Bill fails to address "the weakness of initial… investigations,"[270] and judicial review. Therefore, the Government perhaps should "overhaul and better fund investigations,"[271] as this would both increase justice and lower the number of court claims.

This lack of accountability is exacerbated by "theories associated with public choices,"[272] which supports portraying the opposition in a negative light, to justify the Executive exerting copious amounts of power and influence, while still acting legally. Essentially, turning "systematic human rights violations… [into] political rather than legal,"[273] questions. This accompanied by the lower standard of human rights, significantly waters down the protection of civil liberties. Further, the troubling message the Overseas Operation Bill sends concerning "the health of the rules-based international order,"[274] increases the risk of the UK appearing illegitimate,[275] which may negatively impact counter terrorism strategies.

[262] Michael Clarke, 'The UK's Overseas Operations Bill: Good Questions, Wrong Answers' (*The Royal United Services Institute*, 7 October 2020) <https://rusi.org/commentary/uks-overseas-operations-bill-good-questions-wrong-answers> accessed 5 February 2021
[263] Claire Mills and Joanna Dawson, 'Overseas Operations (Service Personnel and Veterans) Bill 2019-21' [2020] House of Commons Library Briefing, No. 8983, 6
[264] A. W Brian Simpson (n 64) 24
[265] Ibid, 46
[266] Casper Sylvest (n 259) 422
[267] Ibid
[268] Overseas Operations (Service Personnel and Veterans) HC Bill (2019-21)
[269] Colin R.G. Murray (n 251) 216
[270] Carla Freshman and Thomas Obel Hasen (n 261)
[271] Malcolm Rifkind, 'The Guardian view on accusations against the military: playing politics with personnel' (*The Guardian*, 27 September 2020) <https://www.theguardian.com/commentisfree/2020/sep/27/the-guardian-view-on-accusations-against-the-military-playing-politics-with-personnel> accessed 5 February 2021
[272] Freyer TA (n 247) 68
[273] Andrew Williams (n 251) 475
[274] Michael Clarke (n 262)
[275] Colin R.G. Murray (n 251) 198

In the latter moments of this study, the Bill was altered following "the Government [coming] under fire…for how the legislation [was] shaping up."[276] To neutralise criticism that the Bill essentially decriminalised torture, the Government conceded to some of the Lords' amendments.[277] As such the presumption against prosecution after five years for torture, genocide and crimes against humanity was removed.[278] While, this is a clear improvement, it arguably is merely "damage limitation,"[279] as war crimes were not excluded from the Bills' legal safeguards.[280] There was further rejection of amendments, concerning civil claims against the Ministry of Defence, suggesting the Government is willing to trade off administrating justice, in favour of protecting the State.[281] The Bill cannot be deemed a complete win. Concessions seem to be motivated by preventing delays rather than the recognition of the dangerous precedent set concerning the "UK's standing internationally,"[282] and its adherence to the rule of law. Further, "ministers have not shown any appetite for conceding"[283] on the Bill, instead maintaining that although a high threshold is implemented it is not a blanket bar.[284] Thus, dismissing the longstanding difficulties present in litigating for overseas operations.

Overall, the blind spot in Dicey's constitutional order; defined by unchecked executive power ensures an ability to exert abusive influence over "domestic and external affairs."[285] This has, arguably, "erod[ed] rather than strengthened the political and legal order that is fundamental for achieving liberal ends."[286] This is evident in the perusal of the Overseas Operation Bill which demonstrates a continuation of colonial modes of constitutionalism in UK Government thinking. The Bill trades off human right safeguards for increased state protection in continuing counter terrorism objectives. Therefore, maintaining imperial thinking by suppressing legal

[276] John Hyde, 'Minister departs as Overseas Operations Bill nears critical point' (*The Law Society Gazette*, 21 April 2021) <https://www.lawgazette.co.uk/news/minister-departs-as-overseas-operations-bill-nears-critical-point/5108207.article> accessed 21 April 2021
[277] Overseas Operations (Service Personnel and Veterans) Bill 285, 2019-21 (Lords Amendments to the Bill) 19 April 2021
[278] HC Deb 21 April 2021 vol 629 col 1026
[279] John Hyde (n 276)
[280] HC Deb 21 April 2021 vol 629 col 1026; Charlotte Banks, 'MPs Reject Several Lords Amendments on Overseas Operations Bill' (*Forces Network*, 21 April 2021) <https://www.forces.net/news/veterans/mps-reject-several-lords-amendments-overseas-operations-bill> accessed 22 April 2021
[281] Ibid, col 1035
[282] John Hyde (n 276); Dan Sabbagh, 'Peers vote to halt plans to limit UK soldiers' accountability for war crimes' (*The Guardian*, 13 April 2021) <https://www.theguardian.com/uk-news/2021/apr/13/peers-seek-to-block-limit-on-uk-soldiers-accountability-for-war-crimes> accessed 21 April 2021
[283] Dan Sabbagh (n 282)
[284] HC Deb 21 April 2021 vol 629 col 1016
[285] Hakeen O Yusuf and Tanzil Chowdhury (n 255) 171
[286] Casper Sylvest (n 259) 423

action against the State and allowing for concentrated power in the Executive. This promotes the need to re-evaluate the constitutional order and the weight given to parliamentary sovereignty, in order to ensure a fairer justice system and the proper execution of the rule of law. The next section of this article will address the societal effect of the Empire and how the State can address these issues.

5. Continuing Harms and Possible Reforms

The previous section demonstrated the ongoing influence imperialism has within the constitutional order and state actions. The following aims to make apparent the ongoing systematic social injustices resultant from the Empire and evaluate the types of reconciliation that can initiate positive changes. Many of the following issues are social in nature, therefore, while the law can assist the process, it alone cannot resolve the issues caused by imperialism. The most appropriate measures are political and involve positive governmental action in providing reconciliation to those affected.

5.1 Addressing inter-generational harms

Reparations can take many different forms, the most effective of which result in structural societal change. A consequence of reconciliation may be improved relations;[287] both between the descendants of colonisers and those who were colonised, and the UK and former colonies.

The need to improve equality and relations between descendants stems from the discrimination and racism that unequivocally still "underpins society" [288] in the UK. Arguably, many of these issues arise from the Empire and are a continuation of the colonial attitudes, set out in the previous section. After the dismantling of the Empire, whether intentionally or accidentally, "the particular forms of racist ideologies that were constructed to rationalise,"[289] imperial actions transferred into "anti-black racist ideologies";[290] within the UK's welfare and

[287] HC Deb 9 April 2019 vol 658 col 45 WH
[288] Kehinde Andrews (n 1) 162-164
[289] Errol Lawrence, 'Just Plain Common Sense: The 'Roots' of Racism' in Centre for Contemporary Cultural Studies, *The Empire Strikes Back - Race and racism in 70s Britain* (2005, Taylor & Francis) 57
[290] Ibid, 55

immigration systems.[291] The "black experience of council housing,"[292] best highlights this race discrimination as, White people refused to be subjected to living with people of colour.[293] Regarding housing a form of hierarchal separation existed, so while the UK never implemented legal racial segregation, "argu[ably] it has operated informally for decades."[294] The injustices have continued as evident by the Grenfell Tower fire, which resulted in 72 BAME residents' deaths due to "cost-cutting by the local council, [for which] "there has been no accountability or justice."[295] The allocation of resources should be reassessed, to ensure that access to safe and affordable housing is a basic human right.

The State also has a role to play in the creation of a "hostile environment," which accumulated in the Windrush Scandal.[296] Post WWII, there was mass immigration from former colonies, largely the Caribbean,[297] with many of those immigrating taking up jobs in "sectors affected by Britain's post-war labour shortage."[298] The Immigration Act 1971, granted Commonwealth citizens living in the UK indefinite right to remain.[299] However, the 2012 Coalition Government implemented a Hostile Environment policy which aimed to make "life unbearably difficult…for those who cannot show the right paperwork."[300] This included enforcing ID checks, subsequent refusal of services, and immigration officials checking data used by public sector organisations.[301] The policy is clearly abhorrent as the inability of those affected to prove their right to remain, was largely exacerbated by the Home Office destroying thousands of documentations, resulting in many being falsely labelled "illegal."[302] The people affected by these policies had their lives radically changed, as they lost access to welfare services, faced immigration detention and potential deportation.[303] This unjust treatment demonstrates the

[291] Sidney Jacobs, 'Race, empire and the welfare state: council housing and racism' [1985] Vol.5 No.13 Critical Social Policy 6, 11
[292] Ibid, 7
[293] Ibid; Sathnam Sanghera (n 31) 26
[294] Sathnam Sanghera (n 31) 27
[295] Farzana Shain (n 45) 273
[296] 'The Hostile Environment explained' (*The Joint Council for The Welfare of Immigrants*, 2020) <https://www.jcwi.org.uk/the-hostile-environment-explained> accessed 29 March 2021
[297] Kehinde Andrews (n 1) 190
[298] 'Windrush scandal explained' (*The Joint Council for The Welfare of Immigrants*, 2020) <https://www.jcwi.org.uk/windrush-scandal-explained> accessed 29 March 2021
[299] Immigration Act 1971, s.1 (2)
[300] 'The Hostile Environment explained' (n 296)
[301] Ibid; 'Windrush and the hostile environment: all you need to know' (*Freedom From Torture*, 14 February 2020) <https://www.freedomfromtorture.org/news/windrush-and-the-hostile-environment-all-you-need-to-know> accessed 29 March 2021
[302] 'The Hostile Environment explained' (n 296)
[303] 'Windrush and the hostile environment: all you need to know' (n 301); 'The Hostile Environment explained' (n 296)

intentionally discriminatory actions of the UK Government, concerning individuals within BAME groups. The handling of the scandal further illustrates governmental concealment of abuse, as compensation has not yet been received by all those affected, and the original policies remain in force indicating a "clear determination to maintain the status quo."[304]

Further, Thatcher's anti-immigration rhetoric was dismissive of society as a whole, and instead prompted the idea of British citizens "fending for themselves against the hordes of foreigners swamping the country."[305] This perception of immigration has parallels to the Brexit Campaign, which embodied a longing for the "good old days," in reference to the Empire.[306] While, there is a stark difference in treatment between White and BAME migrants, within the UK, there is a prevalent idea that "it is not so much a matter of where you were born as it is a matter of the culture into which you were born."[307] This gives rise to the idea of "otherness" between descendants of colonisers and those who were colonised, which more widely can be defined as cultural racism.[308] This undoubtedly requires positive action in terms of changing the narrative; such as that under the Governments' counter terrorism "prevent" strategy,[309] as to address racial societal inequality, with the long-term aim being modern multiculturalism.[310]

Furthermore, the position of many former colonies within the international order is a consequence of the Empire. Although, "some former British colonies are among the richest countries in the world,"[311] not all are similarly situated. It is important to address the issues, particularly of underdevelopment caused by colonialism,[312] to help strengthen relations. Additionally, there is irony in the Government seeking to condemn abuses perpetrated by other states without facing or addressing many of their own previous violations.[313] Re-evaluation of foreign policy is required as to be more principled within the international legal order.

[304] 'Windrush scandal explained' (n 298)
[305] Kehinde Andrews (n 1) 196
[306] Ibid, 197; Farzana Shain, 'Race matters: confronting the legacy of empire and colonialism,' [2020] Vol 41 No.2 British Journal of Sociology of Education 272, 273
[307] Errol Lawrence (n 289) 82-83
[308] Farzana Shain (n 45) 272-273
[309] Ibid, 272
[310] Sathnam Sanghera (n 31) 29
[311] Matthew Lange, James Mahoney and Matthias vom Hau, 'Colonialism and Development: 'A Comparative Analysis of Spanish and British Colonies' [2006] Vol. 111 No. 5 American Journal of Sociology 1412, 1442
[312] Christian Walker, 'Guilt and Predation: Europe's Relations with the Former Colonial World' (*E-International Relations*, 2010) <https://www.e-ir.info/2010/11/14/guilt-and-predation-europes-relations-with-the-former-colonial-world/> accessed 11 March 2021
[313] Aline Sierp, 'EU Memory Politics and Europe's Forgotten Colonial Past, Interventions' [2020] Vol. 22 No.6 International Journal of Postcolonial Studies 686, 687-688

India highlights the underdevelopment caused by colonialism, as it went from constituting 25% of global trade, to only 3% at the end of the Empire.[314] This disproves arguments that inferiority is a "natural state of affairs."[315] While today, India has one of the fastest growing economies, it is mistaken to suggest that negative imperial effects have been counteracted. Poverty is still apparent in India, where the standard of living for some is "unimaginable in the West."[316] Additionally, "wealth is not equally distributed across the country,"[317] resulting in a wealth gap which resembles the separation of those classed as elite and those not during the Empire.[318] This is only one aspect that mirrors imperialism, as "Indian labour is being exploited…in exactly the same relationship as under colonialism,"[319] with large Western companies making capital out of the cheap labour available, due to low standards of living.[320]

It is important that the UK acknowledges and remedies this disparity by treating former colonies "more [equitably in] international trade";[321] as without instilling these changes "the current [unequal] framework which is…biased in favour of the West,"[322] will continue. The relations between India and the UK are vital, thus, the Government should be committed to "ensur[ing] a continuity of links."[323] However, the relationship needs restructuring as to eliminate paternalism, which continues in "maintain[ing] the hierarchical position of the former imperial parent,"[324] rather than two equal partners.

5.2 Apologies and Compensation

Responding to the previously mentioned case studies, statements in Parliament were made.[325] However, it is important to not accept these at face value, but instead critique the extent that these statements truly address the past abuse. This is not to say that the acknowledgement is

[314] Kehinde Andrews (n 1) 97
[315] Errol Lawrence (n 289) 63
[316] Kehinde Andrews (n 1) 102
[317] Ibid
[318] Matthew Lange, James Mahoney and Matthias vom Hau (n 311) 1442-1443
[319] Kehinde Andrews (n 1) 103
[320] Ibid
[321] Rhoda E. Howard-Hassmann, *Reparations to Africa* (2008, University of Pennsylvania Press) 149
[322] Ibid, 149-150
[323] James Barber, 'Britain and India: A Continuing Relationship' [1986] Vol. 42 No. 8/9 Royal Institute of International Affairs, 133, 136
[324]Alison Brysk, Craig Parsons and Wayne Sandholtz, 'After Empire: National Identity and Post Colonial Families of Nations' [2002] Vol.8 No.2 European Journal of International Relations 267, 274
[325] HC Deb 6 June 2013 vol 563 col 1693-1694; HC Deb 10 April 2019 vol 658 col 308-309

not valued, and by all means is a step in the right direction, although they perhaps do not go far enough. Hasian and Muller argue that Hague's statement in Parliament, regarding the Mau Mau Uprising "reveals the realpolitik nature of…'pseudo' apologies."[326] Arguably the same can be said for May's comments regarding the Amritsar Massacre in 2019.[327] Pseudo apologies are "generic [and] are performed in public to avoid…more substantive legal or moral redress."[328] This, supplements the Governments' avoidance of admitting legal responsibility, and needing to provide substantial compensation. Further, it contributes to efforts to conceal past abuses, and not truly remedy the ongoing political and social harms that stem from the Empire.[329]

In order to truly confront the past, "we need to exam, understand and respond,"[330] to these issues, genuine apologies therefore provide a good starting point. By demonstrating that the State comprehends the wrongdoing and "send[ing] a signal",[331] that these actions "do not represent modern British values,"[332] which have since evolved. This would be particularly valuable in ensuring non-repetition,[333] which plays an importance in the context of Iraq and Afghanistan, as previously mentioned. This is not to dismiss the very valid concern that not everything can be apologised for,[334] as arguably, this would result in a loss of genuine remorse by diluting the value of an apology.

A more preferable approach would be to focus on the broader society by adopting victim-centred transitional justice measures.[335] This carries the benefits of "empowerment…[and] decreasing…marginalisation,"[336] of past victims. Thereby, as to not be merely "hypocritical gestures,"[337] material compensation directed by those affected, should accompany apologies, as this will result in the largest systemic change. Attention should be paid to "common

[326] M. Hasian Jr & S.M Muller (n 19) 164-165
[327] HC Deb 10 April 2019 vol 658 col 308-309
[328] M. Hasian Jr & S.M Muller (n 19) 166
[329] Ibid
[330] Mayo Moran (n 2) 426
[331] HC Deb 9 April 2019 vol 658 col 49WH
[332] Ibid, col 52 WH
[333] Ibid, col 49WH; Brandon Hamber & Patricia Lundy, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse,' [2020] Vol.15 No.6 Victims & Offenders 744, 761
[334] Ibid
[335] Brandon Hamber & Patricia Lundy (n 333) 747
[336] Ibid
[337] Rhoda E. Howard-Hassmann (n 321) 151

request[s] for funds for education…healthcare services…[and] infrastructure."[338] Compensation may be more useful and transformative if directed to the country in which the abuse occurred, rather than individual claimants. Such policies would better address the "broader reality,"[339] of the consequences of the Empire. This would prevent "monetary reparations to one victim group…result[ing] in a new group slipping to the bottom."[340]

To be valuable, re-evaluation of reparations themselves and how compensation schemes are utilised is needed. Particularly as, the law firms involved in *Mutua* received a disproportionate amount, £6.6 million, compared to the actual victims.[341] Further, the Chagos Island Scheme makes apparent the paucity of official thinking concerning compensation, as "less than £12,000 of a £40m fund,"[342] has been exhausted. The "disingenuously"[343] of the fund, highlights that its purpose was to protect the State from criticisms regarding the human rights abuses associated with the Chagos Islands. The allocated money has largely been non-meaningful, spent on "heritage trips" to the Chagos Island rather than towards Chagossain families struggling to pay for food.[344] Implying that the money was assigned for propaganda reasons, as a way for the UK to be seen as legitimate and addressing the issues, rather than to truly remedy the harm. Overall, if the UK is going to commit to compensation schemes, it requires a change in thinking as the Government need to prioritise providing relief for those harmed, rather than protecting themselves from criticism.[345] Additionally, if compensation is initiated by the State, it reduces the risk of subsequent legal action.[346]

It should be noted that the provision of money will "never …overturn the steep global inequalities,"[347] present in former colonies, and more practically "the wealth necessary to repair the damage would destroy the entire Western economic system."[348] A balance needs to be

[338] Ibid, 149
[339] A Century of Dithering - The Politics of Apologising for Amritsar (*The Economist*, 4 April 2019) <https://www-economist-com.libproxy.ncl.ac.uk/britain/2019/04/04/the-politics-of-apologising-for-amritsar> accessed 13 December 2020
[340] Mari J Matsuda (n 4) 397
[341] Mayo Moran (n 2) 468
[342] Katie Armour, 'Just £12,000 of £40m fund for displaced Chagos islanders has been spent' (*The Guardian*, 31 January 2021) <https://www.theguardian.com/world/2021/jan/31/just-12000-of-40m-fund-for-displaced-chagos-islanders-has-been-spent> accessed 29 March 2021
[343] Ibid
[344] Ibid
[345] Aurel (n 258)
[346] Rhoda E. Howard-Hassmann (n 321) 152-153
[347] Kehinde Andrews (n 1) 179
[348] Ibid, 123

struck between not economically damaging the West but going further to improve conditions in former colonies, particularly as the UK only has this disproportionate wealth due to poverty elsewhere.[349]

5.3 Education

Changing the narrative is an effective way to provide reconciliation; it has the practical benefit of leading to societal change by addressing the discrimination and inequality in the UK. The "legacy of Empire has cast a…shadow over British foreign policy and the national psyche,"[350] making the "historical analysis"[351] of colonialism highly relevant. Arguably, there is a white-washed version of the Empire, currently in place with many continuing to venerate the UK's imperial period,[352] but it is not farfetched to presume that many do not know the full extent of what this entails.[353] This becomes particularly evident when gauging the attitudes of Britons, with 30% believing that "former colonies were better off as part of the British Empire."[354] This may stem from how interlinked the Empire and Britishness is, as being critical of the Empire has equated to meaning Anti-British,[355] but by no means are these two synonymous.

The full extent of "imperial amnesia,"[356] is apparent in the UK's education system. There has been large debate and discussion over the inclusion of the Empire at school level education,[357] as arguably, "Britain would be a different country,"[358] if more students covered colonial history. However, a specific focus of education for the purpose of this study is the teaching of Law at University. Key aspects of EU and Public law are often glossed over, such as many member states, including the UK, possessing colonies at the time of joining the EU.[359] Further, the reasoning behind countries like the UK "distanc[ing] themselves from the project of establishing a strong, legally binding human rights regime,"[360] remains concealed. Since, it was

[349] Ibid, 179
[350] Mohamud Abdul (n 238) 4
[351] Fabian Klose, *Human Rights in the Shadow of Colonial Violence*, (2013, University of Pennsylvania Press) 231
[352] Sally Tomlinson (n 49) 7
[353] Sathnam Sanghera (n 31) 186-189
[354] Ibid, 186
[355] Ibid, 187-189; M. Hasian Jr & S.M Muller (n 19) 172
[356] Sathnam Sanghera (n 31) 191
[357] Women and Equalities Committee, O*ral evidence: Black history and cultural diversity in the curriculum* (2021, HC 893)
[358] Sathnam Sanghera (n 31) 192
[359] Aline Sierp (n 313) 687
[360] Fabian Klose (n 351) 232-233

more important to "protect themselves from any intervention,"[361] while carrying out counter insurgency operations; the UK delayed operationalising Human Right Conventions until after the dismantling of the Empire. It is debatable how measures under the ECHR, which aims to govern and protect fundamental human rights, widely ignored the large-scale abuses that occurred within imperialism, and allowed the possession of colonies in the first place.[362] This system makes evident how parliamentary sovereignty and state supremacy prevents international human right models from being truly effective.

The colonial context of constitutional thinkers should be explored, as their ideas continue to be a live issue in today's constitutional order. Arguably, this should be addressed as principles founded during imperialism still shape our thinking today, and are an "ingress into British constitutional theory."[363] The influence of the Empire cannot be ignored, as it is required to properly critique and understand the large scale effects of "the interaction between British constitutional law and imperial law."[364] It should be understood that Dicey's strict orthodox view of parliamentary sovereignty was intended to allow the UK to manage and control the Empire.[365] Problems now arise as the UK is no longer an imperial state, but there remains a large concentration of power in Parliament and subsequently the Executive. Therefore, there is wide scope for abuse, as the Overseas Operation Bill makes apparent, under the model of an "elected dictatorship."[366] Reassessment is required, to consider the appropriateness of parliamentary sovereignty in light of the substantive rule of law. As the fact that laws can be implemented simply because they pass through the correct procedure is problematic. Especially, when concerning legislation that, despite violating fundamental human rights, will likely be voted in by large party majorities, due to the apparent advantages it confers to the State. As these "bodies of work lie at the foundation of the current unjust social order,"[367] it is important to question the subsequent concepts and their effectiveness in todays' constitutional order; where there is an apparent need to protect against violations from the state, as previously demonstrated.

[361] Ibid
[362] Aline Sierp (n 313) 691
[363] Donal K Coffey, 'Constitutional law and empire in interwar Britain: universities, liberty, nationality and parliamentary supremacy' [2020] Vol. 71 No. 2 Northern Ireland Legal Quarterly 193, 209
[364] Ibid
[365] Dylan Lino (n 205) 742-743
[366] Lord Hailsham, *The Dilemma of Democracy, Diagnosis and Prescription* (1978, Collins) 129
[367] Kehinde Andrews (n 1) 2

Responding to the rise of the Black Lives Matter movement, the Commission on Race and Ethnic Disparities was established to review racial disparities in the UK. The subsequent report found that the continuing existence of racism and racial attitudes, could largely be explained by a multitude of socio-economic factors, rather than "the existence of racism."[368] Unable to stifle claims of racism and discrimination, governmental response was necessary, however, in doing so a multitude of issues arose. Firstly, evidential issues resulted due to selective quoting and mistaken information,[369] which largely ignored "the lived realities of people of…ethnic minorities in the UK;"[370] demonstrating a lack of understanding of institutional racism.[371] The reliability of the report was further diluted by, the involvement of Downing Street in "blending the report to fit a more palpable narrative for the Government."[372] This indicates continuing concealment of criticism, as the report denies the role public institutions and authorities play in remedying these issues.[373] The focus, contrastingly, is on "individuals…[helping] themselves through their own agency."[374] Lastly, the dismissal of the continuing influence of the Empire, attempts to "sanitise the history"[375] of colonial abuse, as noted by the UN Working Group. It rejects the role the State plays in "the social construction of race,"[376] which has for decades allowed white settlers and their descendants to benefit socially and politically.[377] Overall, the report has missed the opportunity to acknowledge the ongoing effects of the

[368] Commission on Race and Ethnic Disparities, *The Report of the Commission on Race and Ethnic Disparities* (31 March 2021) 8
[369] Aditya Chakrabortty, 'The UK government's race report is so shoddy, it falls to pieces under scrutiny' (*The Guardian*, 16 April 2021) <https://www.theguardian.com/commentisfree/2021/apr/16/government-race-report-evidence> accessed 22 April 2021
[370] Rights experts condemn UK racism report attempting to 'normalize white supremacy' (*UN News*, 19 April 2021) <https://news.un.org/en/story/2021/04/1090032> accessed 21 April 2021; Dominique Day, Ahmed Reid, Sabelo Gumedze, Michal Balcerzak and Ricardo A. Sunga III, 'UN Experts Condemn UK Commission on Race and Ethnic Disparities Report (*United Nations Human Rights - Office of the High Commissioner*, 19 April 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27004&LangID=E> accessed 22 April 2021
[371] Nosheen Iqbal, 'Downing Street rewrote 'independent' report on race, experts claim' (*The Guardian*, 11 April 2021) <https://www.theguardian.com/uk-news/2021/apr/11/downing-street-rewrote-independent-report-on-race-experts-claim> accessed 22 April 2021
[372] Aditya Chakrabortty (n 369)
[373] Aamna Mohdin, Peter Walker and Nazia Parveen, 'No 10's race report widely condemned as 'divisive' (*The Guardian*, 31 March 2021)
[374] Commission on Race and Ethnic Disparities (n 368) 7
[375] Dominique Day, Ahmed Reid, Sabelo Gumedze, Michal Balcerzak and Ricardo A. Sunga III (n 370); 'Race report: UN experts say conclusions could 'fuel racism' (*BBC*, 20 April 2021) <https://www.bbc.co.uk/news/uk-politics-56800763> accessed 21 April 2021
[376] Ibid; 'Rights experts condemn UK racism report attempting to normalize white supremacy' (*UN News*, 19 April 2021) <https://news.un.org/en/story/2021/04/1090032> accessed 21 April 2021
[377] Ibid

Empire concerning race discrimination in the UK,[378] and instead endorses the politically motivated portrayal of Britain "as a beacon of good race relations."[379]

Overall, it is not feasible to issue an apology for every colonial violation, nor will it result in the necessary systemic changes, particularly in relation to the issues of racism, western supremacy, and the falsehoods of the Empire narrative. However, action to address the Empire as a mode of the constitutional order is necessary; particularly, as the last two sections of this article have demonstrated, the effects of colonialism are still at play. Whilst the courts may not be the most appropriate way to remedy the issues, this does not render the situation hopeless. The continuing social effects of the Empire can, alternatively, be addressed by non-legal methods. There is a pressing need to improve relations, in order to increase equality and to remove the current marginalisation and discrimination descendants from former colonies face, in many aspects of life. Additionally, a change in education could lead to required structural change, as it will provide more room to understand and reassess the continuing effects of imperialism, within the constitutional order, which may increase safeguards against abuse by the State.

6. Conclusion

In conclusion, the theories providing justifications for reparation claims are sound. Through *Mutua*, it is apparent that in some instances judges may attempt to remedy historical abuse. They do so by utilising these theories and legislative tools, such as trespass to the person torts and the discretion under section 33, to allow these claims to be heard.[380] The overall process is limited by the accompanying procedural hurdles with the use of private law; particularly, that it does not provide for the group damage, nor "the harm to the social contract"[381] materialising from legacy issues. Further, the struggle of litigating of historical abuses is exacerbated by the limitation of the ECHR, which often cannot be utilised as it supervenes or excludes many incidents of imperial abuse.[382]

[378] Ibid
[379] Aamna Mohdin, Peter Walker and Nazia Parveen (n 373)
[380] Mayo Moran (n 2) 430-435; The Limitation Act 1980, s. 33
[381] Nathan J. Miller, Human Rights Abuses as Tort Harms: Losses in Translation [2016] Vol. 46 No.361 Seton Hall Law Review 505, 544
[382] CRG Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses [2019] Vol. 30 No.3 King's Law Journal 426, 447-449

While, successful litigation for colonial abuse is arguably limited to *Mutua*, the increase in cases concerning legacy issues have been particularly beneficial, in bringing the methods and modes of thinking within Imperial Britain, "to public view."[383] This examination reveals the irrational basis of the Empire; the idea of a hierarchy of civilisation, and the belief that colonialism could be justified by the spreading of "British ideals."[384] Further, the modes of colonial constitutionalism; in which parliamentary sovereignty, and a concentration of power conferred to the Executive especially during an emergency, takes precedent over strict adherence to the rule law, arguably remains in place.[385] This structure, which presents "real opportunities for misrule,"[386] remains largely unquestioned, and is often utilised regarding the Governments' approach to overseas military operations, as the Overseas Operation Bill demonstrates. The Bill is a clear violation of international law, and acceptable human rights norms,[387] but has been pursued due to the benefits of the concealment it provides, to a Government that prioritises self-preservation. Overall, largely undermining the idea that "a just society must… right the wrongs of its own past injustices."[388]

Further, the stagnant perpetuation of the imperial constitution has had broad societal effects, in which the influence of the Empire remains apparent in many aspects of life. As the past abuse is "connect[ed] to present day suffering."[389] This is stark in relations between the UK and former colonies, and descendants of settlers and those were colonised. Within these relationships exists a "racial hierarch[y],"[390] due to discrimination and an imbalance of power; evident in welfare services, housing, and immigration policies.[391] In order to combat this inequality, genuine compensation and apologies are beneficial as they acknowledge the wrongdoing, and when directed at the affected country itself can be used to rectify the remnant

[383] Ibid, 457; AM Linden, 'Tort Law as Ombudsman' [1973] Vol.51 Canadian Bar Review 155, 168
[384] Camilla Boisen, The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise [2013] Vol. 39 No.3 History of European Ideas 335, 350; Gary Peatling, 'Race and Empire in Nineteenth-Century British Intellectual Life: James Fitzjames Stephen, James Anthony Froude, Ireland, and India' [2007] Vol.42 No.1&2 Éire-Ireland 157, 168-169
[385] Colin R.G. Murray (n 251) 216; Dylan Lino (n 209)
[386] Dylan Lino (n 209) 767
[387] Miranda Zeffman, 'The UK's Overseas Operations Bill: licence to kill?' (*Oxford Human Rights Hub*, 13 November 2020) <https://ohrh.law.ox.ac.uk/the-uks-overseas-operations-bill-licence-to-kill/> accessed 5 February 2021
[388] Mickie Mwanzia Koster (n 8) 60; Thomas McCarthy, 'Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery.' [2004] Vol. 32 No. 6 Political Theory 750, 753
[389] Mickie Mwanzia Koster (n 8) 52
[390] Kim A Wagner (n 1) 219
[391] Sidney Jacobs, 'Race, empire and the welfare state: council housing and racism' [1985] Vol.5 No.13 Critical Social Policy, 6; Kehinde Andrews (n 1) 196- 197

problems.[392] To properly uproot the system advancing these violations, changes in education and reevaluation of the constitutional framework provides a preferred approach. This facilitates the critiquing of the constitutional order in which these discrepancies have resulted from. Thus, having the potential to systemically change the continuing modes and influence of the Empire, which is required to prevent further state abuse. However, the Sewell report made apparent that attempts to address racial disparity will be faced with considerable pushback from the State, highlighting the continual presence of concealed racial attitudes within the Executive.[393] Throughout, it is apparent that public attitudes and the priority of self-preservation within Government has the unfortunate effect of limiting the opportunity to reckon with colonialisms' continuing influence.

[392] Rhoda E. Howard-Hassmann, 'Remedies: Acknowledgment and Apologies' in *Reparations to Africa* (2008, University of Pennsylvania Press) 149-151
[393] Commission on Race and Ethnic Disparities (n 368); HC Deb 20 April 2021 vol 693 col 867-885
Kehinde Andrews (n 1) 205-207

Community Renewable Energy: From Remission to Resurgence

Sophie Elizabeth Dillon

1. Introduction

This article aims to propose some key policy changes that can be made by the UK in order to re-invigorate the clean renewable energy (CRE) sector in line with the clean energy package (CEP). This is done by outlining provisions for CRE in the CEP, before identifying the key barriers facing the CRE sector through an analysis of reports and research on the sector and proposing recommendations on how the UK could tackle clean energy, while being mindful of changes in political state of affairs such as Brexit.

The latest Nationally Determined Contribution submitted by the UK under the Paris Agreement,[1] includes a new ambitious target to reduce the UK's emissions by at least 68% by 2030 compared to 1990 levels.[2] The UK Government has further committed to achieving net-zero carbon emissions by 2050.[3] This will require extensive decarbonisation of energy generation through the deployment of renewable energy systems (RESs). In order to engender participation and democracy in this transition, energy generation needs to become more flexible, distributed and decentralised,[4] – a difficult feat considering the UK's historical policy 'lock-in' on centralised energy production.[5] Nevertheless, in spite of an unfavourable regulatory environment, renewable energy communities have, in this sense, become the unwitting 'protagonists' of the energy transition.[6] These grassroots energy projects break the paradigm of power being concentrated in a small group of monopoly-structured energy utilities which see the citizen as a passive consumer,[7] and align with the increasing decentralisation and

[1] UNFCCC, *Decision 1/CP.21 Adoption of the Paris Agreement* (29 January 2016).
[2] GOV.UK, 'Press Release: 'UK sets ambitious new climate target ahead of UN Summit" 2020) <https://www.gov.uk/government/news/uk-sets-ambitious-new-climate-target-ahead-of-un-summit> accessed 01/05/21.
[3] The Climate Change Act 2008 (2050 Target Amendment) Order 2019/1056.
[4] Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus' (2019) 11 Sustainability 3493.
[5] Ksenia Chmutina and Chris I. Goodier, 'Alternative Future Energy Pathways: Assessment of the Potential of Innovative Decentralised Energy Systems in the UK' (2014) 66 Energy Pol'y 62.
[6] Annalisa Savaresi, 'The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy' (2019) 31 JEL 487.
[7] J Roberts, F Bodman and R Rybski, *Community Power: Model Legal Frameworks for Citizen-Owned Renewable Energy* (Client Earth, 2014).

distribution of energy generation.[8] By definition, these community organisations are bottom-up initiatives which involve communities coming together to collectively participate in the generation of renewable energy through various RESs (such as solar, wind and biomass). Since the 1970s, the number of renewable and sustainable community-led energy initiatives internationally has flourished.[9] In the UK, after a slow growth in the sector over the past two decades, there are now around 300 active renewable energy communities.[10] Ensuring that the UK incentivises the development of community renewable energy (CRE) is therefore a useful policy tool for increasing shares in renewable energy in the UK, and for achieving the UK Government's ambitions to become a 'world leader' in green energy.[11]

Outside of simply increasing renewable energy generation and decentralising energy production, CRE has a number of social benefits. Individual prosumership (both the consuming and producing) of renewable energy has existed as a salient policy tool for increasing shares in renewable energy in the UK for some time.[12] However, as discussed by Moroni et al, community energy generation has some benefits over solely individual or household microgeneration.[13] Firstly, the capital investment, debt, and operation and maintenance costs of a development can be distributed over the community rather than exclusively the individual or household.[14] Therefore, not only can CRE more easily mobilise individual capital in renewables, contributing to closing the gap in climate mitigation financing,[15] CRE can additionally be more inclusive of lower-income households.[16] With renewable energy becoming increasingly cheaper than traditional fossil fuels, CRE has the potential to positively contribute to tackling energy poverty in the UK.

[8] Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus'.
[9] Gill Seyfang, Jung Jin Park and Adrian Smith, 'A Thousand Flowers Blooming? An Examination of Community Energy in the UK' (2013) 61 Energy Pol'y 977.
[10] Sandy Robinson and Dominic Stephen, *Community Energy: State of the Sector 2020* (Community Energy England, 2020).
[11] GOV.UK, 'Press Release: New plans to make UK world leader in green energy' 2020) <https://www.gov.uk/government/news/new-plans-to-make-uk-world-leader-in-green-energy> accessed 01/05/21.
[12] DECC, *Microgeneration Strategy* (Crown Copyright 2011).
[13] Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus'.
[14] ibid.
[15] Jens Lowitzsch, 'Investing in a Renewable Future – Renewable Energy Communities, Consumer (Co-)Ownership and Energy Sharing in the Clean Energy Package' (2019) 9 RELP 14.
[16] Kirsten E. H. Jenkins, 'Energy Justice, Energy Democracy, and Sustainability: Normative Approaches to the Consumer Ownership of Renewables', *Energy Transition* (Springer International Publishing 2019), 83, Lowitzsch, 'Investing in a Renewable Future – Renewable Energy Communities, Consumer (Co-)Ownership and Energy Sharing in the Clean Energy Package'.

Further, not only can the costs of a community installation be distributed amongst the community, the benefits of CRE generation can be distributed amongst the community also. In the non-financial sense, CRE development can contribute to building the social capital of local communities through stronger community ties,[17] increasing the autonomy of communities,[18] and increasing the democratic participation of its citizens in energy production.[19] With this inevitably comes an increase in awareness and active participation of citizens in the energy transition[20], Ryhaug considers public participation in low-carbon technologies to create an 'energy citizenship'.[21] The financial benefits - namely any profits arising from the sale of surplus energy generated back to the grid - are typically reinvested into the community, either through providing a return on investment for community members, or through a fund or foundation which can be used to develop the local community depending on the ownership model employed.[22] Further, in a quantitative study, Bauwens and Devine-Wright show that members of energy co-operatives have more positive attitudes to renewable energy installations in comparison to non-members.[23] An earlier study by Devine-Wright also indicates how CRE can move attitudes towards renewable energy 'from NIMBYism to participation'.[24] Therefore, due to the reduced local opposition to developments,[25] CRE can help towards achieving increased UK shares in renewable energy through the increased likelihood of CRE projects being permitted by local planning authorities.[26]

[17] Dan van der Horst, 'Social Enterprise and Renewable Energy: Emerging Initiatives and Communities of Practice' (2008) 4 Social Enterprise Journal 171, Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus'.
[18] Elizabeth Bomberg and Nicola McEwen, 'Mobilizing Community Energy' (2012) 51 Energy Pol'y 435, Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus'.
[19] Jenkins, 'Energy Justice, Energy Democracy, and Sustainability: Normative Approaches to the Consumer Ownership of Renewables'; Marianne Ryghaug, Tomas Moe Skjølsvold and Sara Heidenreich, 'Creating Energy Citizenship Through Material Participation' (2018) 48 Social Studies of Science 283.
[20] Chiara Armeni, 'Participation in Environmental Decision-Making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28(3) JEL 415 Lynghaug, Skjølsvold and Heidenreich, 'Creating Energy Citizenship Through Material Participation'.
[21] Ryghaug, Skjølsvold and Heidenreich, 'Creating Energy Citizenship Through Material Participation'.
[22] Claire Haggett and Mhairi Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment' (2015) 2(3) Current Sustainable/Renewable Energy Reports 98.
[23] Thomas Bauwens and Patrick Devine-Wright, 'Positive Energies? An Empirical Study of Community Energy Participation and Attitudes to Renewable Energy' (2018) 118 Energy Pol'y 612
[24] Patrick Devine-Wright, *Renewable Energy and the Public : from NIMBY to Participation* (Routledge 2014).
[25] Haggett and Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment'.
[26] Devine-Wright, *Renewable Energy and the Public : from NIMBY to Participation*Patrick Devine-Wright, 'Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy' (2005) 8 Wind Energy 125.

Despite these benefits, CRE has seemingly fallen off the radar for UK policy makers. Prior research has evaluated the development of CRE over time in the UK. Walker et al explain that the potential benefits of distributed renewable energy generation which involves local people and communities entered policy discourse around the 1990s.[27] The UK Energy Research Centre suggest that is generally held to have begun with the creation of the Baywind Cooperative in the late 1990s.[28] This built the foundation for a fertile policy environment for community energy in the 2000s.[29] Anna L. Berka links this to prevailing energy policy governance rather than a 'paradigm shift', in that the Labour Government 'enabled political consensus over the need of both a domestic renewable energy industry and a more hands-on role for government in achieving policy objectives'.[30] This can be exemplified by the Community Energy Strategy published by the UK in 2014 - "[w]ith community energy we win as a nation" as stated by Rt Hon Edward Davey MP in the Community Energy Strategy Update published by the former Department of Energy and Climate Change in 2015.[31]

Paradoxically, this statement came during the year that the Feed-in-Tariff (FiT) guarantee for community energy was removed by the UK government,[32] resulting in a decline in CRE initiatives.[33] The Community Energy Strategy itself was never implemented. The removal of pre-accreditation and pre-registration for the FiT, along with a major reduction in the FIT generation rate in 2015,[34] were not the only examples of the abrasion of financial support for CRE,[35] CRE projects were excluded from the Enterprise Investment Tax Relief Scheme in 2015,[36] the Renewables Obligation for onshore wind was removed in 2015,[37] and the

[27] Gordon Walker and others, 'Harnessing Community Energies: Explaining and Evaluating Community-Based Localism in Renewable Energy Policy in the UK' (2007) 7 Global Environmental Politics 64, 68.
[28] Tim Braunholtz-Speight and others, *UK Energy Research Centre: The Evolution of Community Energy in the UK*, (2018), 3.
[29] Walker and others, 'Harnessing Community Energies: Explaining and Evaluating Community-Based Localism in Renewable Energy Policy in the UK', 72.
[30] Anna L. Berka, 'Community Energy in the UK: A Short History' in L. Holstenkamp and J Radtke (eds), *Handbuch Energiewende und Partizipation* (Springer 2017), 1022.
[31] DECC, *Community Energy Strategy Update* (Crown Copyright 2015), 5.
[32] Ofgem, 'Changes to the FIT Scheme' <https://www.ofgem.gov.uk/environmental-programmes/fit/about-fit-scheme/changes-fit-scheme> accessed 14/01/21.
[33] Robinson and Stephen, *Community Energy: State of the Sector 2020*.
[34] Ofgem, 'Changes to the FIT Scheme'.
[35] Pegah Mirzania and others, 'The Impact of Policy Changes: The Opportunities of Community Renewable Energy Projects in the UK and the Barriers They Face' (2019) 129 Energy Pol'y 1282.
[36] HM Revenue and Customs, 'Income Tax and Capital Gains Tax: changes to Venture Capital Schemes for companies and community organisations benefiting from energy subsidies' 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/385147/Venture_Capital_Schemes.pdf> accessed 02/05/21.
[37] DECC, 'Changes to Renewable Subsidies' 2015) <https://www.gov.uk/government/news/changes-to-renewables-subsidies> accessed 02/05/21.

Government's stake in its Green Investment Bank has now been sold,[38] This has led one sector report to suggest that, in its current business model, CRE is now essentially unviable.[39] These 'abrupt policy reforms' which followed the election of the Conservative Government in 2015, in the words of Anna L Berka, have left the future of CRE 'uncertain'.[40]

This is evidenced through the quantitative web-based research undertaken by Seyfang et al.[41] In analysing the strengths and weaknesses of the CRE sector, and the challenges it faces, they conclude that the policy shift engendered by this change in Government - from grant-funded projects to a revenue generating business model – 'will have serious implications for projects in the sector, not all of whom will be able to adapt to the new policy regime'.[42] Certain academics have linked the lack of support for CRE and microgeneration of renewables to a 'path-dependent' mode of policy making favouring large scale commercial deployment of renewables.[43] This can certainly be seen in the UK's Ten Point Plan on achieving net-zero,[44] – its renewable energy focus is entirely consumed with large-scale offshore wind energy deployment with no recognition of community or individual household ownership in renewables.[45] The UK Energy Research Report suggests that given the highly centralised nature of the UK energy system, which is dominated by large players, CRE will likely remain a 'niche'.[46]

Nevertheless, one can see, particularly in the European legal sphere, CRE as a policy tool for tackling the low-carbon transition is regaining political traction, with the new Clean Energy Package (CEP),[47] adopted by the European Union (EU). The CEP provides a regulatory

[38] GOV.UK, 'Speech in Parliament: Sale of Green Investment Bank' 2017) <https://www.gov.uk/government/speeches/sale-of-green-investment-bank> accessed 02/05/21.
[39] Robinson and Stephen, *Community Energy: State of the Sector 2020*.
[40] Berka, 'Community Energy in the UK: A Short History', 1026.
[41] Seyfang, Park and Smith, 'A Thousand Flowers Blooming? An Examination of Community Energy in the UK'
[42] ibid [988].
[43] Colin Nolden, 'Governing Community Energy—Feed-in tariffs and the Development of Community Wind Energy Schemes in the United Kingdom and Germany' (2013) 63 Energy Pol'y 543.
[44] BEIS, 'The Ten Point Plan for a Green Industrial Revolution' 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936567/10_POINT_PLAN_BOOKLET.pdf> accessed 02/05/21.
[45] CEE, 'Boris Forgets to Invest in People and Communities Contributing to Net-Zero in his 10 Point Plan' 2020) <https://communityenergyengland.org/news/boris-forgets-to-invest-in-people-and-communities-contributing-to-net-zero-in-his-10-point-plan> accessed 28/03/21.
[46] Braunholtz-Speight and others, *UK Energy Research Centre: The Evolution of Community Energy in the UK*, 4.
[47] EU, *Clean Energy for all Europeans* (Publications Office of the European Union 2019).

framework to both 'level the playing field'[48] for CRE, and 'promote and facilitate the development of' CRE.[49] The explicit mention of CRE is the first of its kind in EU regulation and could therefore herald a new era for the sector. Due to be implemented by Member States in June 2021, the new provisions emphasise the role of citizens in the low-carbon energy transition. The CEP aims to facilitate the transition towards a carbon-neutral economy,[50] and contains explicit provisions for the regulation of renewable energy communities within two legislative acts; the recast Renewable Energy Directive (RED II),[51] and the Internal Electricity Market Directive (IEMD)[52] and Regulations (IEMR).[53] Therefore, the increasing European saliency of CRE engenders questions around if and how the UK plans to regulate and incentivise CRE after its withdrawal from the European Union. This forms a gap in the research which this article will attempt to address.

1.2 Aims and Objectives

In order to address this gap in the research, this article will outline the provisions for CRE in the CEP (Part 2), identify the key barriers facing the CRE sector through an analysis of reports and research on the sector (Part 3), and propose some key policy changes that can be made by the UK in order to re-invigorate the CRE sector in line with the CEP (Chapter 4). This is a necessary endeavour given that the UK is still 'languishing' at the bottom of the EU renewables league tables.[54] Without falling victim to the 'naïve tendency'[55] that community energy is entirely unproblematic,[56] CRE will be postulated in this article as a socially beneficial form of increasing the deployment of renewable energy in the UK, as evidenced by research pertaining

[48] Directive (EU) 2019/944 of the European Parliament and of the Council on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU, (43) and (46).
[49] Directive 2018/2001 (EU) Of the European Parliament and of the Council on the Promotion of the Use of Energy From Renewable Sources (recast) art 22:4.
[50] EU, *Clean Energy for all Europeans*, 1.
[51] RED II.
[52] IEMD.
[53] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the Internal Market for Electricity.
[54] Rebecca Willis and Neil Simcock, 'Consumer (Co-)Ownership of Renewables in England and Wales (UK)', *Energy Transition* (Springer International Publishing 2019), 1.
[55] Stefano Moroni and others, 'Energy Communities in the Transition to a Low-Carbon Future: A Taxonomical Approach and Some Policy Dilemmas' (2019) 236 Journal of Environmental Management 45.
[56] Gerald Taylor Aiken and others, 'Researching Climate Change and Community in Neoliberal Contexts: an Emerging Critical Approach' (2017) 8 Wiley Interdisciplinary Reviews 463.

to its ability to build social capital,[57], autonomy,[58] and democratic participation in the energy transition.[59] The EU recognises that "[t]o ensure that such initiatives can freely develop … [it] requires Member States to put in place appropriate legal frameworks to enable their activities".[60] Indeed, consistent policy support is essential to ensure the 'flourishing' of the CRE sector.[61] Taking these assumptions, six research questions will frame the parameters of this inquiry, to enable discussion of regulations and policies which could incentivise the growth of CRE in the UK post-Brexit:

1.2.1 Research Questions

What is community renewable energy?
What is the Clean Energy Package and what does it provide for CRE?
What are the legal barriers which hinder the development of CRE?
What impact will Brexit have on the delivery of the CEP?
What reforms or new measures are necessary to effectively promote community energy initiatives in the UK post-Brexit?

1.2.2 Methodology

The research in this article is doctrinal in nature. It is based on studying policy papers, government publications, academic literature, planning policy guidance and other soft-law mechanisms and instruments both EU and UK based.

[57] van der Horst, 'Social Enterprise and Renewable Energy: Emerging Initiatives and Communities of Practice' ; Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus' ; Anna L. Berka and others, 'A Comparative Analysis of the Costs of Onshore Wind Energy: Is There a Case for Community-Specific Policy Support?' (2017) 106 Energy Pol'y 394.
[58] Bomberg and McEwen, 'Mobilizing Community Energy' Niki Frantzeskaki, Flor Avelino and Derk Loorbach, 'Outliers or Frontrunners? Exploring the (Self-) Governance of Community- Owned Sustainable Energy in Scotland and the Netherlands' in E Michalena and Jeremy Maxwell Hills (eds), *Renewable Energy Governance* (Springer London 2013).
[59] Jenkins, 'Energy Justice, Energy Democracy, and Sustainability: Normative Approaches to the Consumer Ownership of Renewables' ; Ryghaug, Skjølsvold and Heidenreich, 'Creating Energy Citizenship Through Material Participation'.
[60] European Commission, *COM (2016) 861 Final/2. Proposal for a Regulation of the European Parliament and of the Council on the Internal Market for Electricity (Recast)* (2016), p4 ; Moroni S, Antoniucci V and Bisello A, 'Local Energy Communities and Distributed Generation: Contrasting. Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus', 3495
[61] Seyfang, Park and Smith, 'A Thousand Flowers Blooming? An Examination of Community Energy in the UK'.

2. The Clean Energy Package and CRE

2.1 What is a renewable energy community?

Renewable energy communities globally can take very different forms and there exist 'a panoply of interpretations',[62] of what defines a renewable energy community. In the abstract, renewable energy communities are citizen-led renewable energy projects or developments which are owned and controlled to some extent by the community and exist predominantly to benefit the community. They are bottom-up initiatives which involve communities coming together to collectively participate in the generation of renewable energy, through various RES such as solar, wind and biomass.

In the literature there are two substantial theories on how renewable energy communities can be defined. Walker and Devine Wright,[63] propose that community energy can be defined in two dimensions, visually represented in a Cartesian co-ordinate system.[64] These two dimensions are the process dimension (who is running the community?) and the outcome dimension (who benefits from the community?). It is suggested that the 'ideal' form of RE community is one which has a high degree of ownership and involvement in the community (process), as well as a high degree of community benefit in the outcome dimension.[65] This differentiates from RE initiatives which have a large extent of third-party control and ownership, and those where the beneficial outcomes of the community are mostly exported outside of the community. The literature also offers a distinction between communities of interest and communities of place.[66] A community of place is tied together through its geographical proximity, and a community of interest is tied together through its interest in the community activity. Examples of renewable energy communities of interest would encompass situations where investors who have a financial interest in the community are not based in close

[62] Gordon Walker and Patrick Devine-Wright, 'Community Renewable Energy: What Should it Mean?' (2008) 36 Energy Pol'y 497, 498.
[63] ibid.
[64] Moroni and others, 'Energy Communities in the Transition to a Low-Carbon Future: A Taxonomical Approach and Some Policy Dilemmas'.
[65] Walker and Devine-Wright, 'Community Renewable Energy: What Should it Mean?'.
[66] Savaresi, 'The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy', Mark Brennan, Jeffrey Birdger and Theodore R Alter, *Theory, Practice, and Community Development* (Routledge 2013) 41.

proximity to the development.[67] Therefore, we can say that communities of place more closely correlate with the 'ideal' form of RE community postulated by Walker and Devine-Wright.

2.1.1 Renewable Energy Communities in the Clean Energy Package

These ideas are also reflected in the regulations within the CEP. RED II defines a 'renewable energy community' as a 'legal entity':

a) Which in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity;
b) The shareholders or members of which are natural persons, SMEs or local authorities, including municipalities;
c) The primary purpose of which is to provide environmental, economic or social community benefits for its shareholders.[68]

Here we can see a clear influence from the definitional literature. There is a clear focus on communities of place rather than communities of interest.[69] Interestingly, the IEMD/R offers a differing definition of 'citizen energy communities' (CECs), which whilst retaining some similarities such as purposive requirements of community benefit,[70] voluntary and open participation,[71] and effective control limitations,[72] also contains some key differences.[73] For renewable energy communities (RECs) in the RED II there is a requirement that they 'are located in the proximity of the renewable energy projects that are owned and developed by that community';[74] a geographical proximity requirement which is non-existent for CECs in the IEMD/R. This could be explained due the purpose of each directive, given that the IEMD is focused on facilitating the internal market in electricity whereas the RED II is focused on

[67] Savaresi, 'The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy', 12.
[68] RED II art 2:16.
[69] Savaresi, 'The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy'.
[70] RED II art 2:16 c), IEMD 2:11 b).
[71] RED II art 2:16 a), IEMD art 2:11 a).
[72] RED II art 2:16 a), IEMD art 2:11 a).
[73] Joshua Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition' (2020) 29(2) RECIEL 232, 237.
[74] RED II art 2:16 a).

facilitating renewables (including those generating other forms of energy). Therefore, RECs can be seen as a subset of CECs.[75]

It has been noted in the literature that this may restrict innovation in community energy in the EU, given that to benefit from the provisions in the RED II aiming to 'promote and facilitate the development' of CRE,[76] communities need to form themselves within the narrower definition of a REC in the RED II. This may discriminate against RE communities which exist as communities of interest rather than communities of place.[77] However, 'proximity' is not defined within these regulations which therefore gives Member States the freedom with which to closer harmonise CECs and RECs through a wider interpretation of proximity here. Reconciling these differences at the national level, as noted by Joshua Roberts, increases the coherence of the EU regulatory framework for CRE.[78]

Whilst it is necessary to 'cast a wide net' in the regulatory definitions of CRE so as to facilitate a variety of CRE initiatives flourishing, it is also important not to lose sight of the purpose for incentivising CRE. That is (amongst others) increasing grid decentralisation and community empowerment. Therefore, preventing large energy companies or utilities from benefiting from these regulations is paramount. The UK has a clear opportunity to avoid incoherence resulting from the differences between a REC and a CEC and to forge a path promoting CRE which corresponds to regulatory issues experienced by the sector in the UK.

2.2 The Clean Energy Package Provisions for CRE

As well as focusing on the definitions of energy communities in the CEP, it is also necessary to cast an eye to the rights and obligations provided for CRE in its provisions, to allow for an analysis of how similar policy goals can be achieved in the UK. The CEP, which is due to be implemented by Member States in June 2021, comprises eight new legislative acts including the aforementioned IEMD and RED II. The CEP – the Clean Energy for all Europeans Package – also known as the 'Winter Package', builds upon Energy Competences established by the

[75] Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition', 236.
[76] RED II art 22:4.
[77] Savaresi, 'The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy'.
[78] Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition', 238.

Lisbon Treaty in 2009 to 'shape the legal framework for a European Energy Union'.[79] This Energy Union aims to facilitate the position of the EU as a global leader of the clean energy transition, partially through empowering citizens to take an active role in the energy transition, through self-consumership and/or prosumership.[80] The CEP takes a three-pronged approach to achieve this; 1) putting efficiency first, 2) achieving global leadership in renewable energies and 3) providing a fair deal for consumers.[81] It sets ambitious new targets in order to achieve the goals set out in the Paris Agreement (of which the EU is a signatory), namely a reduction in CO^2 emissions by 40% and increasing the share of renewable energy sources by 32% by 2030 EU-wide. With an eye to achieving these ambitious goals, the EU has placed the citizen at the heart of the energy transition.[82] This arguably makes a marked difference from the approach the UK has taken in terms of rolling out RESs seen through its emphasis on large commercially owned installations, rather than citizen or community owned RESs (see Part 3.1.3). The emphasis on stimulating the active involvement of citizens in the field of renewable energy by the EU Von Der Leyen Commission,[83] created the political saliency for the adoption of regulation for CRE in the CEP.

2.2.1 The IEMD/R

As previously mentioned, the IEMD/R in the CEP contains provisions aimed at 'levelling the playing field' for CRE.[84] This directive is mainly concerned with the horizontal dimension of CRE which provides rights and obligations for communities towards public authorities, consumers, and electricity enterprises,[85] in the internal electricity market. The enabling framework for CRE under Article 16 ensures that CECs are inter alia subject to 'non-discriminatory, fair, proportionate, and transparent procedures',[86] 'are able to access all

[79] Grit Ludwig, 'A Step Further Towards a European Energy Transition: The "Clean Energy Package" from a Legal Point of View', *The European Dimension of Germany's Energy Transition* (Springer International Publishing 2019), 1.
[80] L. Horstink and others, 'Collective Renewable Energy Prosumers and the Promises of the Energy Union: Taking Stock' (2020) 13 Energies 421.
[81] EU, *Commission Presents Clean Energy Package* (Sweet & Maxwell 2017).
[82] Michael Krug and Maria Rosaria Di Nucci, 'Citizens at the Heart of the Energy Transition in Europe?' (2020) 9(4) RELP 9.
[83] Mikolaj Jasiak, 'Energy Communities - a New Market Actor in the Electricity Sector under the Clean Energy Package' (2020) 3 IELR 38, 38.
[84] IEMD, (43) (46).
[85] Lowitzsch, 'Investing in a Renewable Future – Renewable Energy Communities, Consumer (Co-)Ownership and Energy Sharing in the Clean Energy Package', 22.
[86] IEMD, art 16:1(e).

electricity markets, either directly or through aggregation in a non-discriminatory manner',[87] and 'are treated in a non-discriminatory and proportionate manner with regard to their activities, rights, and obligations as final customers'.[88] The emphasis on non-discriminatory and proportionate procedures and access to the market for CRE in the IEMD/R offers a novel opportunity for energy communities to effectively compete against larger and incumbent generators in the electricity market. These provisions would likely be very effective for CRE in the UK given its historically centralised energy system, which is still mostly controlled by a handful of incumbent suppliers.[89]

2.2.2 The RED II

Whereas the focus in the IEMD/R is on the horizontal, the focus in the RED II is on the vertical; that is, the rights and obligations of CRE against the state. It creates additional incentives for CRE with the explicit aim to 'promote and facilitate the development of [CRE]',[90] a legal novelty in the EU and for many Member States. Foundationally, it includes a right for energy communities to 'produce, consume, store and sell renewable energy'.[91] Further, it explicitly requires Member States to provide an 'enabling framework',[92] in order to facilitate the development of CRE. This enabling framework comprises inter alia a duty to remove 'unjustified regulatory and administrative barriers to renewable energy communities',[93] a duty to provide 'tools to facilitate access to finance and information',[94] and to provide 'regulatory and capacity-building support'.[95]

Significantly, Article 22 also provides that 'Member States shall take into account specificities of renewable energy communities when designing support schemes in order to allow them to compete for support on an equal footing with other market participants'.[96] Therefore, despite

[87] ibid art 16:3(a).
[88] ibid art 16:3(b).
[89] Rebecca Willis and Nick Eyre, *Demanding Less: Why We Need a New Politics of Energy* (Green Alliance 2011).
[90] RED II art 22:4 ; J. Lowitzsch, C. E. Hoicka and F. J. van Tulder, 'Renewable Energy Communities Under the 2019 European Clean Energy Package – Governance Model for the Energy Clusters of the Future?' (2020) 122 Renewable & Sustainable Energy Reviews 109489, 2.
[91] RED II art 22:2(a).
[92] ibid 4.
[93] ibid 4(a).
[94] ibid 4(g).
[95] ibid 4(h).
[96] RED II art 7.

not prescribing a set support scheme for CRE in its provisions, the RED II does realise the idea that the development of CRE requires a close eye on its specific needs and hence these should be 'taken into account' by Member States. This respects the principle of subsidiarity whilst still providing for the promotion and development of CRE. The RED II also includes rights to information, awareness raising, guidance and training, as well as access to markets both individually and through aggregation.[97] Therefore, it has been said that 'the CEP creates a strong legal basis to ensure that energy communities can develop at the national level and participate on a level playing field with larger commercial market actors.[98]

3. A Fertile Regulatory Environment

3.1 Challenges Faced by the CRE Sector

Regulations which support the development of CRE are essential due to the specific existential challenges that communities face, a factor recognised by the EU in its CEP in its focus on the specificities of CRE. So, in order to formulate policy or regulatory proposals to promote CRE in the UK following the approach taken by the EU, the specific challenges faced by the sector in the UK need to be assessed. In the UK, these challenges are manifold for smaller generators given the centralised nature of the UK energy system.[99] Not only do communities face significant financial hurdles due, for example, to an unstable regulatory environment in the case of subsidies (such as the FiT scheme), but also organisational issues such as acquiring the expertise needed to operate a community installation. The sector as a whole faces similar barrier, as explored by Vasco Brummer, who uses a comparative analysis of CRE in the UK, Germany and the USA.[100] He recognises six thematic barrier categories in line with Weber's,[101] features of a barrier model,[102] which will be adopted here. These create a holistic view of the

[97] ibid art 18:6.
[98] Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition', 236.
[99] Peter Pearson and Jim Watson, *UK Energy Policy 1980-2010: A History and Lessons to be Learnt* (The Parliamentary Group for Energy Studies, 2012).
[100] Vasco Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces' (2018) 94 Renewable & Sustainable Energy Reviews 187.
[101] Lukas Weber, 'Some Reflections on Barriers to the Efficient Use of Energy' (1997) 25 Energy Pol'y 833.
[102] Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces', 191.

challenges faced by CRE, rather than solely the economic and institutional barriers which, although important, have been overly focused on in much of the extant literature.

1. Organisational Issues / Legal Framework / Planning Requirements
2. Discrimination
3. Lack of Institutional and Political Support
4. Scepticism against RE / NIMBY opposition
5. Lack of Resources
6. The 'Saturation Effect'

3.1.1 Organisational Issues / Legal Framework / Planning Requirements

Communities tend to be on the back-foot when it comes to organisational issues in comparison to larger commercial actors. Given the typically grassroots character of energy communities, they rely heavily on volunteers,[103] and thus tend to suffer from a lack of expertise,[104] whether that be technical, legal, or business related. The lack of these resources for CRE was emphasised in the UK's Community Energy Strategy 2014, in which it was recognised that '[c]community energy projects are more likely to succeed where there is access to the right information, advice and expertise, and where members of the group have the necessary time, dedication and skills'.[105] This Strategy report noted that the advice and information relating to community energy in the UK ('where there is no central body to support community energy'), is 'fragmented' and 'complex'.[106] This strategy had as its purpose to remedy some of these issues with the aim of supporting the growth of the CRE sector; this 'marked a high point for community energy'.[107] Nevertheless, this Strategy never came to fruition – it was shelved

[103] Simon Roberts, *Community Energy Finance Roundtable: Final Report and Recommendations to the Secretary of State for Energy and Climate Change and the Minister for Civil Society* (July 2014).
[104] Krug and Rosaria Di Nucci, 'Citizens at the Heart of the Energy Transition in Europe?', 12 ; Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces', 193 ; Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition', 234 ; Haggett and Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment', 100.
[105] DECC, *Community Energy Strategy: Full Report* (2014), 40.
[106] DECC, *Community Energy Strategy: Full Report* (2014), 40.
[107] Braunholtz-Speight and others, *UK Energy Research Centre: The Evolution of Community Energy in the UK*, 4.

following the election of a new government in 2015.[108] Thus, the lack of expertise and informational challenges for CRE are yet to be addressed adequately at the governmental level. Many CRE groups, as a consequence, rely on other energy communities or larger co-operative energy communities for information, advice and support, such as Community Energy England, Community Energy Scotland and Community Energy Wales.[109] This lack of institutional support for CRE has created a larger space in the market for intermediary companies and third sector organisations supporting communities to develop, such as Energy4All, Sharenergy, and Mongoose.[110] These intermediary companies aim to empower initiatives through support and partnership 'while sharing their values much more closely'.[111] This is one example of innovative action by the community energy sector in spite of an unfavourable regulatory environment.[112] Incentivising peer-to-peer support and information sharing was a prominent approach in the Community Energy Strategy,[113] which highlights the importance of intra-sector support for CRE. Nevertheless, academic papers and governmental reports have stressed the importance of institutional and public support in terms of the provision of information and expertise.[114] This is addressed in the RED II which creates a duty for MS to 'provide tools to facilitate access to finance and information',[115] and provides rights to information, awareness raising, guidance and training.[116]

Similarly, Brummer noted that planning requirements in the UK are particularly stringent in comparison to the USA and Germany,[117] and as a consequence, proposed CRE installations in the UK may find it more difficult to get off the ground. His research found that navigating the various forms and permissions required is a 'daunting prospect'.[118] This conclusion was also

[108] Chaitanya Kumar, *Community Energy 2.0: The Future Role of Energy Ownership in the UK* (Green Alliance, 2019), 4.
[109] Braunholtz-Speight and others, *UK Energy Research Centre: The Evolution of Community Energy in the UK*, 26.
[110] ibid.
[111] ibid.
[112] CEER, *Regulatory Aspects of Self-Consumption and Energy Communities*, (Council of European Energy Regulators, 2019), 35.
[113] DECC, *Community Energy Strategy: Full Report*, 40.
[114] Maciej M. Sokołowski, 'Renewable and Citizen Energy Communities in the European Union: How (Not) to Regulate Community Energy in National Laws and Policies' (2020) 38(3) JERL 289, 294 ; Berka and others, 'A Comparative Analysis of the Costs of Onshore Wind Energy: Is There a Case for Community-Specific Policy Support?', 401 ; Ofgem, *Community Energy Grid Connections* (Working Group Report to the Secretary of State 2014), 9.
[115] RED II art 22:4(g).
[116] Ibid art 18:6.
[117] Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces', 192.
[118] ibid.

reached in the Community Energy Strategy[119]. This raises the cost of finance for communities, given the already risky nature of investment at the pre-planning stage (the most expensive stage in CRE development).[120]

3.1.1.1 The Planning System and CRE

One way for communities to circumvent the convoluted planning system is to fit their development into an existing permitted development right (PDR). Under Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015,[121] RE microgeneration installations can bypass the usual planning procedure,[122] – they are generally permitted. There are fifteen distinct categories of PDRs related to RES microgeneration installation depending on the category of RES (wind, solar PV, heating system etc), and depend upon whether installed on 'domestic' or 'non-domestic' premises. Each has distinct thresholds, above which the usual planning process must be used. The first of these thresholds is generational capacity – in order to be defined as 'microgeneration' it must generate <50kW.[123] Each further threshold is distinct to each category of PDR; they are strict and fairly impracticable. For example, a Class A PDR for RE installation concerning solar equipment on domestic premises will not be permitted if 'the solar PV or solar thermal equipment would protrude more than 0.2 metres beyond the plane of the wall …'.[124] It must be noted here that for wind turbine installations, the conditions for a PDR are much stricter. For example, development will not be permitted inter alia for more than one turbine,[125] if the highest point of the wind turbine (including blades) would either protrude more than 3 metres above the highest part of the roof or exceed more than 16 metres in height,[126] and if the blades of the turbine are made from reflective materials.[127] Outside of these conditions, the usual planning procedure must be used - wind turbine installation must then be subject to an Environmental

[119] DECC, *Community Energy Strategy: Full Report*, 62.
[120] Haggett and Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment', 100.
[121] The Town and Country Planning (General Permitted Development) (England) Order 2015/596.
[122] ibid schedule 2, part 14.
[123] Energy Act 2004, s82:8(a).
[124] The Town and Country Planning (General Permitted Development) (England) Order 2015/596 part 14: Class A: A.1(a).
[125] ibid part 14: Class H: H.2 (a).
[126] The Town and Country Planning (General Permitted Development) (England) Order 2015/596 part 14: Class H: H.2(d).
[127] ibid part 14: Class H: H.3(a).

Impact Assessment,[128] and a consultation requirement.[129] This necessitates that receiving permission for community installation of onshore wind energy technology is virtually impossible.

A somewhat wider extension of permitted development rights are Local Development Orders (LDOs): Neighbourhood Development Orders (NDOs) and Community Right to Build Orders (CRtBOs). These grant planning permission for 'specific development(s) in a specific area' and can be used for 'community energy schemes'.[130] These neighbourhood plans 'can be an opportunity for communities to start a conversation about energy use and generation in their area'.[131] However, procedurally, CRtBOs and NDOs require consultation (both with the public and local authorities) and a local referendum.[132] Despite community energy projects being less likely to encounter opposition (see section 3.1.4), consultations and local referenda ultimately take time, which can add to the financial burden of community energy developments.

In terms of the usual planning process, local authorities need to take account of material considerations in their decision-making. The National Planning Policy Framework (NPPF) constitutes one of these material considerations,[133] and includes specific reference to CRE – it states that '[l]local planning authorities should support community-led initiatives for renewable and low-carbon energy'.[134] Likewise, the Sustainable Communities Act 2007 alongside the Localism Act 2011 provide local authorities the power with which to "do anything which they consider is likely to achieve" economic, social and environmental well-being.[135] Local authorities, under this framework may have regard to 'measures to conserve energy and increase the quantity of energy supplied which are produced from sustainable sources within a 30-mile radius of the region in which they are consumed'.[136] Previous to the Deregulation Act

[128] The Town and Country Planning (Environment Impact Assessment) Regulations 2017/571, schedule 2, 3(i).
[129] The Town and Country Planning (Development Management Procedure) (England) Order 2015/595, s3(1).
[130] NeighbourhoodPlanning, 'Neighbourhood Development Orders (including Community Right to Build Orders): A Toolkit for Neighbourhood Planners'. <https://neighbourhoodplanning.org/wp-content/uploads/NDO-READY-FOR-MHCLG-FS-JS-complete.pdf> accessed 29/03/21, p4.
[131] DECC, *Community Energy Strategy: Full Report*, 32.
[132] The Neighbourhood Planning (General) Regulations 2012, part 6.
[133] 2019, *National Planning Policy Framework* (Ministry of Housing, Communities & Local Government) [2].
[134] ibid [152].
[135] Ronan Bolton and Timothy J. Foxon, 'Infrastructure Transformation as a Socio-Technical Process — Implications for the Governance of Energy Distribution Networks in the UK' (2015) 90 Technological Forecasting & Social Change 538, 545.
[136] Sustainable Communities Act 2007, sch 1: 1(f).

2015, local authorities had a duty to have regard to the measures within the Sustainable Communities Act 2007, but these provisions now exist only as material considerations.[137]

Reflecting critically on this system, none of these procedures have reduced the complexity of the planning system for communities. In fact, it could be said that they have added to the complexity of the planning system. Trying to determine which, if any, PDRs apply to a proposed CRE development seemingly requires a PhD in planning law. The likelihood is, for CRE, that none of them will apply given that a community will likely require more than 50kW of installed energy. Local Development Orders, despite having the potential to attract participation and democracy in local planning, have an attached procedure which is laborious and lengthy. For a community with a lack of external support and available resources, navigating the planning system alone is a 'mammoth task',[138] let alone having to navigate circumventing the planning system through the LDO procedures.

3.1.2 Discrimination

Discrimination vis-à-vis larger market participants is another challenge that CRE faces. This discrimination is compounded through the lack of informational support discussed above, resulting in informational asymmetry relative to commercial actors. As Anna L. Berka et al discuss, the lack of 'in-house skills or knowledge' results in higher transaction costs, for example through paying margins to intermediary companies, hiring external expertise, and search costs when taken in comparison to large commercial actors in the energy market.[139] For example, one study found that pre-planning costs for onshore wind are on average 70% higher for communities than for a commercial wind developer.[140] Similarly, large commercial actors are often well placed to diversify risks involved in development unlike communities.[141]

[137] Stuart Bell, *Environmental Law* (9th edn / Stuart Bell, Donald McGillivray, Ole Pedersen, Emma Lees, and Elen Stokes.. edn, Oxford : Oxford University Press 2017), 415.
[138] Sioned Haf and others, 'Distributing Power? Community Energy Projects' Experiences of Planning, Policy and Incumbents in the Devolved Nations of Scotland and Wales' (2019) 62 Journal of Environmental Planning and Management 921, 933.
[139] Berka and others, 'A Comparative Analysis of the Costs of Onshore Wind Energy: Is There a Case for Community-Specific Policy Support?', 401.
[140] Haggett and Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment'.
[141] Roberts, *Community Energy Finance Roundtable: Final Report and Recommendations to the Secretary of State for Energy and Climate Change and the Minister for Civil Society*, 10.

In a regulatory sense, institutional discrimination against small generators exists in the UK energy markets given its highly centralised nature. This has resulted in a regulatory environment 'geared towards very large commercial companies' in terms of energy generation, supply and trading.[142] One clear example of this is the increasing liberalisation of the energy markets, which has had an adverse effect on small-scale generation[143] such as energy communities. After the adoption of the EU Guidelines on State Aid for Environmental Protection and Energy (EEAG) 2014,[144] state-aid subsidies such as FiTs have been dialled down to a minimum across Europe and are being replaced with competitive tendering in auctions. This auctioning process has had an adverse impact on small-scale generation. This is due to the inability of small-scale generators to compete with larger actors in the auctioning process,[145] as well as the consequent abrogation of much needed government support/subsidisation.

Discrimination for small-scale generation can further be seen in terms of access to the grid system (applicable to electricity generation such as wind and solar PV). Due to the high costs of connection and limited market size, the grid system has historically operated as a monopoly.[146] Despite the liberalisation of the energy markets, the distribution network still exists as a natural monopoly and is currently owned and controlled by six Distribution Network Operator (DNO) groups in the UK.[147] As a consequence, gaining access to the grid can more easily be attained by commercial actors with deeper pockets and access to resources given the high costs of connection and lack of capacity. This lack of infrastructure and capacity can be attributed to the traditionally centralised nature of the grid system in the UK, which is geared towards transmission of traditional energy supplies such as fossil fuels.[148]

3.1.3 Lack of Institutional and Political Support

[142] Willis and Simcock, 'Consumer (Co-)Ownership of Renewables in England and Wales (UK)', 389.
[143] Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition', 235.
[144] Commission, *Guidelines on State Aid for Environmental Protection and Energy 2014-2020* (2014).
[145] Krug and Rosaria Di Nucci, 'Citizens at the Heart of the Energy Transition in Europe?', 10.
[146] Roberts, Bodman and Rybski, *Community Power: Model Legal Frameworks for Citizen-Owned Renewable Energy*, 66.
[147] Ofgem, 'The GB Electricity Distribution Network' 2021) <https://www.ofgem.gov.uk/electricity/distribution-networks/gb-electricity-distribution-network> accessed 31/02/21.
[148] Roberts, Bodman and Rybski, *Community Power: Model Legal Frameworks for Citizen-Owned Renewable Energy*, 66.

Brummer surmises that there is a 'missing link between the needs of [CRE] and energy policy in the UK',[149] and this can indeed be evidenced through the lack of direct acknowledgement and support for the sector in the UK since the Community Energy Strategy. Despite the increased political saliency of CRE since the adoption of the CEP, indeed evidenced by the increasing academic attention in this sector, there has been no explicit political paradigm for promoting the development of CRE in the UK since 2015. This presents a significant challenge for CRE, given that between 2016-2018, the formation of new community energy organisations dropped by 81% in the UK.[150] This can be understood as an indirect consequence of a removal of specific institutional and political support for CRE, such as the reduction in FiTs[151] and the lack of implementation of CRE promotion strategies.[152] This, it has been argued, can be attributed to a recent policy culture shift toward neoliberal 'cost reduction and minimal state interference' in the UK.[153]

Discrimination towards small-scale renewables due to a lack of political support has been seen as an 'ingrained' feature of the UK political landscape for renewables.[154] Thus, it has been argued that there is a kind of 'path-dependency' in the UK favouring large energy corporations.[155] This can be illustrated through the focus by the UK Government on supporting large-scale, commercial RES deployment rather than small-scale generation. The Government's Ten-Point Plan in the new Energy White Paper[156] has been criticised by the CRE community for failing to include the people.[157] Instead, the plan focuses on investing in 'big-cheque, corporate solutions, many of which look dangerously like 'unicorns', which may not scale in time'.[158] Whether this statement can be substantiated is debatable. However, it is true that the Government's Ten Point Plan focuses solely on large-scale offshore wind deployment

[149] Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces', 193.
[150] Robinson and Stephen, *Community Energy: State of the Sector 2020*, 17.
[151] ibid.
[152] DECC, *Community Energy Strategy: Full Report* ; Ofgem, *Community Energy Grid Connections*.
[153] Neil Simcock, Rebecca Willis and P Capener, *Cultures of Community Energy: International Case Studies* (The British Academy, 2016), 31.
[154] Haf and others, 'Distributing Power? Community Energy Projects' Experiences of Planning, Policy and Incumbents in the Devolved Nations of Scotland and Wales'.
[155] Richard Cowell and others, 'Energy Transitions, Sub-National Government and Regime Flexibility: How has Devolution in the United Kingdom Affected Renewable Energy Development?' (2017) 23 Energy Research & Social Science 169, 175.
[156] BEIS, 'Energy White Paper: Powering our Net Zero Future' 2020) <https://www.gov.uk/government/publications/energy-white-paper-powering-our-net-zero-future> accessed 28/03/2021.
[157] CEE, 'Boris Forgets to Invest in People and Communities Contributing to Net-Zero in his 10 Point Plan'.
[158] CEE, 'Boris Forgets to Invest in People and Communities Contributing to Net-Zero in his 10 Point Plan'

in terms of its RE policy.[159] This potentially negates the social benefits of incentivising community-owned renewables.

In comparison, the Scottish Government have issued a Local Energy Policy Statement outlining 'key principles' and 'associated outcomes' for community RES generation.[160] Further, the success of the Scottish CRE sector,[161] has been attributed to the target set by the Scottish Government to achieve 500mW of community and locally-owned renewables by 2020 which was later exceeded and thus increased to 2GW by 2030.[162] The Welsh Government has similarly implemented a target of 1GW of locally-owned renewable energy and heat by 2030.[163] So, through the devolution of energy competences, devolved administrations, innovating in this policy area, have effectively continued to incentivise growth in the CRE sector through continuing political support. This potentially highlights the failure of the UK government to effectively steer harmonised policy-making in this area.

3.1.4 Scepticism against RE / NIMBY opposition

Brummer notes that in the UK there is some 'general scepticism about the idea of [CRE] and the people involved with it'.[164] His research further noted psychological barriers within the general public, often stemming from 'landscape and nature protectionism',[165] and therefore acquiring planning permission for community developments is often obstructed. However, the extent to which this is a practical barrier for CRE is debatable. For example, it has been argued that the concept of NIMBY-ism is highly 'reductionist' and is an 'ill-defined concept for

[159] BEIS, 'The Ten Point Plan for a Green Industrial Revolution'.
[160] ECCD, 'Local Energy Policy Statement' 2021) <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2021/01/local-energy-policy-statement/documents/local-energy-policy-statement/local-energy-policy-statement/govscot%3Adocument/local-energy-policy-statement.pdf?forceDownload=true> accessed 31/03/21.
[161] Bill Slee and Jelte Harnmeijer, 'Community Renewables: Balancing Optimism with Reality' in Geoffrey Wood and Keith Baker (eds), *A Critical Review of Scottish Renewable and Low Carbon Energy Policy* (Springer International Publishing 2017).
[162] A Grillanda and P Khanal, 'Community and Locally Owned Renewable Energy in Scotland at June 2019: A Report by the Energy Saving Trust for the Scottish Government' 2020) <https://energysavingtrust.org.uk/sites/default/files/Community%20and%20locally%20owned%20renewable%20energy%20in%20Scotland.%202019%20Report.pdf> accessed 30/03/21.
[163] Llywodraeth Cymru, 'Policy Statement: Local Ownership of Energy Generation in Wales - Benefitting Wales Today and for Future Generations' (*Welsh Government,* 2020) <https://gov.wales/sites/default/files/publications/2020-02/policy-statement-local-ownership-of-energy-generation-in-wales.pdf> accessed 10/04/21.
[164] Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces', 193.
[165] ibid

understanding the way publics make sense of the siting of renewable energy facilities',[166] In fact, a number of studies have concluded that economic participation in RE installation dramatically increases positive public perception of RE developments.[167] Therefore, it is postulated that public opposition to RE developments stems from a system of 'top-down, centralised planning without local participation and lack of clear local benefits' rather than the idea of the installation itself or any notion of nature protectionism.[168] Following this reasoning, it is probable that CRE developments with a high degree of community participation and involvement with local municipalities will not face insurmountable local opposition. This is - in of itself - one significant benefit of incentivising CRE when considering the UK's RE deployment targets.

3.1.5 Lack of Resources

The lack of expertise is exacerbated by the wider lack of relevant resources for CRE. Nevertheless, the 'most existential question',[169] concerning CRE is the lack of financial resources. Despite many CRE projects operating as co-operatives or trusts/foundations raising funds through share offering, this often does not generate sufficient capital at the initial project stages.[170] At the developmental level, access to initial project capital is very limited given the existing inequalities between smaller and larger market players.[171] To take one practical example, given a lack of technical knowledge, communities may find applications for planning permission and for finance more difficult to navigate.[172] Not only does the UK have a highly complex and lengthy planning system for renewable energy siting,[173] but these costs are also

[166] Ryghaug, Skjølsvold and Heidenreich, 'Creating Energy Citizenship Through Material Participation', 285
[167] Devine-Wright, *Renewable Energy and the Public : from NIMBY to Participation* ; Devine-Wright, 'Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy' ; Bauwens and Devine-Wright, 'Positive Energies? An Empirical Study of Community Energy Participation and Attitudes to Renewable Energy'
[168] Ryghaug, Skjølsvold and Heidenreich, 'Creating Energy Citizenship Through Material Participation', 285.
[169] Savaresi, 'The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy', 14.
[170] Nolden, 'Governing Community Energy—Feed-in tariffs and the Development of Community Wind Energy Schemes in the United Kingdom and Germany', 547.
[171] Haggett and Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment', 100.
[172] Roberts, *Community Energy Finance Roundtable: Final Report and Recommendations to the Secretary of State for Energy and Climate Change and the Minister for Civil Society*, 4
[173] Georgina Crowhurst and Simone Davidson, 'Planning: A Roadblock to Renewable Energy in the UK' (2008) 10 Env L Rev 181.

born equally whether small-scale and community-owned, or large-scale, commercial, and privately-owned.[174]

Access to initial capital has further been weakened through the lack of regulatory stability around subsidisation which has deterred traditional investors from entering the market.[175] Indeed, the high-risk nature of the pre-planning stage has been seen in the literature as one of the highest hurdles that faces the CRE sector,[176] and was considered during the Community Energy Finance Roundtable of 2014.[177] The roundtable contended that access to project finance is 'stymied' by the high-risk nature of pre-planning and feasibility costs. As such, community projects are heavily reliant on governmental or third sector loans or grant schemes, as opposed to traditional forms of financing such as bank loans.[178]

Regulatory instability has mostly been experienced by communities through the changes in the Feed-in Tariff Scheme, which provided payment for renewable energy generated and exported to the grid.[179] As well as presenting a hurdle to initial development (through de-incentivising investment), this has weakened the long-term viability of energy communities. Previously, guaranteed FiT payments have ensured the rapid development of the CRE sector, due to the ability of communities to use FiT payments to cover initial project debt and by providing investor security.[180] However, the removal of FiTs has resulted in a significant decline in CRE developments,[181] by severely compromising the traditional community energy renewable power model. Community Energy England and Wales have reported that 'the closure of the Feed-in Tariff (FiT) scheme had a dramatic impact on community energy project development'

[174] Nolden, 'Governing Community Energy—Feed-in tariffs and the Development of Community Wind Energy Schemes in the United Kingdom and Germany'.
[175] Robinson and Stephen, *Community Energy: State of the Sector 2020.*
[176] Haggett and Aitken, 'Grassroots Energy Innovations: the Role of Community Ownership and Investment', 100 ; Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition' ; Nolden, 'Governing Community Energy—Feed-in tariffs and the Development of Community Wind Energy Schemes in the United Kingdom and Germany'.
[177] Roberts, *Community Energy Finance Roundtable: Final Report and Recommendations to the Secretary of State for Energy and Climate Change and the Minister for Civil Society*.
[178] ibid.
[179] Ofgem, 'About the FIT Scheme' 2021) <https://www.ofgem.gov.uk/environmental-programmes/fit/about-fit-scheme> accessed 29/03/21.
[180] Lowitzsch, 'Investing in a Renewable Future – Renewable Energy Communities, Consumer (Co-)Ownership and Energy Sharing in the Clean Energy Package', 20.
[181] UKERC, 'Financing Community Energy in a Brave New World' 2020) <https://ukerc.ac.uk/news/financing-community-energy-in-brave-new-world/> accessed 04/05/21.

in 2020.[182] This has made 'the most prominent existing business model [of CRE] *unviable*' [emphasis added].[183]

These financial challenges are further exacerbated by the emphasis on large commercial RES installations in 'green' investment. Despite the existence of several funding schemes in the UK which can be accessed by potential CRE developments, (such as the Rural Community Energy Fund, the Scottish Government's Community and Renewable Energy Scheme and the Ynni'r Fro Renewable Energy Support Scheme in Wales), the previous UK Green Investment Bank (sold in 2017) predominantly funded large commercial renewable energy installations. As of 2016, of its £3.8bn fund, £2bn was spent on large commercial installations,[184] which can be contrasted with the German public development bank KfW which has consistently supported small-scale projects(<€25m).[185] This support for small-scale renewables through financial institutions in Germany has been heralded as one key factor of its CRE sector success.[186] This has led to calls for more financial support for CRE in the financial sector, to address the finance gap for communities.[187] Speaking hypothetically, this investment could come through the new Green Investment Bank 2.0 proposed by the UK energy minister Kwasi Kwarteng in 2020.[188]

As explored by the UK Energy Research Centre, due to these financial challenges, community energy is slowly diversifying in nature.[189] There has been a significant shift away from supply-side management activities (such as energy generation through solar PV/wind installations) towards demand-side management activities (including energy efficiency initiatives and communal switching organisations).[190] Therefore, rather than inhibiting the growth of community energy activities, the lack of subsidisation is causing the sector to evolve into other (more viable) areas. The neoliberal logic of the recent cultural shift towards a market orientated approach contends that RE installations which cannot function outside of government

[182] Robinson and Stephen, *Community Energy: State of the Sector 2020*, 3.
[183] ibid.
[184] Stephen Hall, Timothy J. Foxon and Ronan Bolton, 'Financing the Civic Energy Sector: How Financial Institutions Affect Ownership Models in Germany and the United Kingdom' (2016) 12 Energy Research & Social Science 5, 9.
[185] ibid, 12.
[186] ibid.
[187] ibid.
[188] Jillian Ambrose, 'UK government planning new green investment bank' 2020) <https://www.theguardian.com/environment/2020/jul/15/uk-government-planning-new-green-investment-bank> accessed 31/03/21.
[189] Braunholtz-Speight and others, *UK Energy Research Centre: The Evolution of Community Energy in the UK*
[190] ibid.

subsidisation serve only to hamper the markets.[191] In this way, it could be said that the innovative and evolutionary capacity of the sector is being encouraged by reducing its reliance on government subsidies.

Even so, this negates the beneficial societal outcomes of supporting CRE in all its various forms as discussed in Part 1, including traditional supply-side activities through RES installation. These benefits are implied within the CEP, given the duty it places on Member States to ensure 'unjustified regulatory and administrative barriers to renewable energy communities are removed'.[192] Thus, when designing support schemes, 'Member States shall take into account the specificities of renewable energy communities';[193] 'support schemes' are defined in article 2(5) as including inter alia investment aid, tax exemptions or reductions, renewable energy obligations, and direct support schemes including feed-in tariffs.[194]

3.1.6 The 'Saturation' Effect

Finally, Brummer notes a 'saturation effect' in Germany, whereby many of the "good spots" for Solar PV installation are already taken, and many groups who like to be engaged in CRE are already.[195] Therefore the 'recruitment of new activists' is more difficult.[196] This 'saturation effect' has no real consequence for CRE in the UK, given that the UK CRE sector is far less developed than our European friends.[197]

4. From Remission to Resurgence?

4.1 A Word on Brexit

In bringing the discussion back to the wider European framework for CRE in the CEP, a discussion on the impacts of Brexit on this sector is necessary. Although a few of the legislative instruments in the CEP have been implemented, there are no plans for the UK Government to

[191] Sirja-Leena Penttinen, 'The Gradual Hardening of Soft Law: the Renewable Energy Support Schemes and the Renewable Energy Directive Under Revision ' (2018) 22(2) Util LR 61, 62.
[192] RED II art 22:4(a).
[193] ibid art 22:7.
[194] ibid art 2:5.
[195] Brummer, 'Community Energy – Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces', 194.
[196] ibid.
[197] Simcock, Willis and Capener, *Cultures of Community Energy: International Case Studies*, 1.

implement the RED II nor the IEMD.[198] These directives are due to be implemented by EU Member States in June 2021, falling outside of the UK implementation period (1st January 2020 - 31st December 2020). The provisions for CRE in the CEP are therefore outside 'retained' EU law and are lost for UK energy communities. Nevertheless, the more optimistic academics like to look to the opportunities that Brexit can bring to the UK in terms of creating a specialised national response.[199] For CRE, this creates the potential to build upon the framework European regulation for CRE in the CEP and create regulation that can address specific hurdles that communities face in the UK. In any case, the provisions in the CEP for CRE are sufficiently wide as to ensure different national regulatory environments post implementation for Member States. Therefore, Brexit or not, there would require some analysis of the CRE sector in the UK in order to determine sound policies for its incentivisation.

It is a reasonable concern that CRE will entirely fall off the radar for the UK legislature given that the RED II and IEMD will not be implemented, which is an existential concern for the CRE sector in the UK. Policy stability is not a 'given' in parliamentary government – necessarily the next government can choose to lay a previous policy path by the wayside[200]. Indeed, energy communities have been a victim of this (see 3.1.3). Previously, EU legislation has acted as a necessary buttress against 'short-term political vicissitudes',[201] – and without this the CRE sector is more susceptible to policy instability in the UK.[202] Be that as it may, in order to achieve the UK's ambitious carbon emission targets, the UK government should not be placing all of its eggs in the baskets of large, commercial RE developers. Rather, the energy transition requires awareness, participation and democracy by the people in order to be ultimately successful. Incentivising energy communities is seen by the EU as a method of achieving this, so too by Scotland. So, in taking account of the increasing academic attention given to CRE, the explicit provisions for CRE in the CEP, and the legislative steps taken by the UK devolved government in Scotland, one could reasonably assume that CRE is coming out of its 'remission' (as coined by Anna L. Berka) and into its resurgence. In this part, using

[198] Energy DG, *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of the Internal Energy Market (REV2)* (EU 2021).
[199] Richard Cowell and others, 'Integrating Planning and Environmental Protection: An Analysis of post-Brexit Regulatory Styles and Practitioner Attitudes in the UK' (2020) 21 Planning Theory & Practice 570, 571.
[200] Katharina Rietig and Timothy Laing, 'Policy Stability in Climate Governance: The Case of the United Kingdom' (2017) 27 Environmental Policy and Governance 575.
[201] Cowell and others, 'Integrating Planning and Environmental Protection: An Analysis of post-Brexit Regulatory Styles and Practitioner Attitudes in the UK', 575.
[202] Séverine Saintier, 'Community Energy Companies in the UK: A Potential Model for Sustainable Development in "Local" Energy?' (2017) 9 Sustainability (Basel, Switzerland) 1325, 1338.

the framework of the provisions in the RED II and IEMD, solutions to the regulatory hurdles discussed in Part 3 will be expanded upon.

4.2 Proposals

The following proposals are not designed to be exhaustive, nor do they remedy all the issues faced by the sector. For example, it is clear that in the UK, unlike Denmark or Germany, there is a lack of historical and cultural tradition of using the co-operative model for energy ownership.[203] Similarly, moving energy communities from a 'niche' to a 'mainstream' energy generation/ownership model in the UK would require a 'seismic',[204] shift within the energy system.[205] This has led many academics to be disillusioned as to the potential growth that can realistically be achieved in the sector.[206] Even so, this does not negate the potential gain of incentivising its growth in the UK in terms of increased RES deployment through reduced opposition to RE development, engendering citizen participation in the energy transition, and the social and economic benefits to communities that it derives.

4.2.1 Allocate more resources to Local Energy Hubs

The aim of the IEMD is to 'level the playing field' for CRE by removing discriminatory hurdles. Even though its focus is on the horizontal level, discrimination against smaller market players needs to be remedied at the institutional level. First and foremost, communities need support in terms of information, guidance, and expertise in order to effectively compete against large market players (3.1.1). In providing this support, the risk associated with community developments is reduced. Therefore, as Anna L. Berka has suggested, community energy needs a 'one-stop shop' that 'serves[s] to disseminate essential technical, financial, legal and project

[203] Simcock, Willis and Capener, *Cultures of Community Energy: International Case Studies*.
[204] Haf and others, 'Distributing Power? Community Energy Projects' Experiences of Planning, Policy and Incumbents in the Devolved Nations of Scotland and Wales', 933.
[205] Cowell and others, 'Energy Transitions, Sub-National Government and Regime Flexibility: How has Devolution in the United Kingdom Affected Renewable Energy Development?' ; Bolton and Foxon, 'Infrastructure Transformation as a Socio-Technical Process — Implications for the Governance of Energy Distribution Networks in the UK'.
[206] Haf and others, 'Distributing Power? Community Energy Projects' Experiences of Planning, Policy and Incumbents in the Devolved Nations of Scotland and Wales' ; Cowell and others, 'Energy Transitions, Sub-National Government and Regime Flexibility: How has Devolution in the United Kingdom Affected Renewable Energy Development?'.

management information'.[207] This policy mechanism was also suggested in the Community Energy Strategy 2014.[208] It envisaged a one-stop shop for information 'including an open database of community energy specialists and resources such as guides, shared templates and protocols'.[209] Further, the Strategy aimed to establish a 'dedicated Community Energy Unit' within the former Department of Energy and Climate Change (now, the Department for Business, Energy and Industrial Strategy (BEIS)).[210]

Interestingly, this policy mechanism was employed in 2019 in the UK. The BEIS introduced Local Energy Hubs co-ordinated within a Local Energy Team,[211] which exists to 'scale up investment in local energy schemes, provide impartial and technical advice and encourage collaborations'.[212] So, the dissemination of essential expertise and information for CRE has found a root in government. Despite the introduction of these Hubs, lack of expert support and knowledge sharing were still among the highest hurdles for community energy in 2019.[213] Therefore, one proposal in levelling the playing field for CRE, in light of the IEMD, is to increase the resources funnelled to Local Energy Hubs. This would ensure the Hubs can develop an efficient and accessible platform. Increasing the resources of Hubs would increase their reach in terms of being able to provide for a growing number of communities. This is especially relevant if the UK can achieve a significant growth in the number of energy communities. This could prove transformational for CRE by further providing information and expertise to ensure communities can adequately compete against commercial developers, and align with the duty in the RED II to provide 'tools to facilitate access to finance and information',[214] and to provide 'regulatory and capacity-building support'.[215]

4.2.2 Re-introduce Subsidy Support

[207] Berka and others, 'A Comparative Analysis of the Costs of Onshore Wind Energy: Is There a Case for Community-Specific Policy Support?', 401.
[208] DECC, *Community Energy Strategy: Full Report*, 40.
[209] ibid.
[210] ibid.
[211] BEIS, 'BEIS Local Energy Team' 2019). <https://www.apse.org.uk/apse/index.cfm/local-authority-energy-collaboration/beis-local-energy-team/> accessed 08/04/21.
[212] Robinson and Stephen, *Community Energy: State of the Sector 2020*, 8.
[213] ibid, 28.
[214] RED II 4(g).
[215] ibid 4(h).

Financial support for CRE is foundational to level the playing field, given that large organisations are more able to secure investment or have otherwise the resources to fund installations (3.1.5). In terms of financial support, the specialities of communities have often been neglected at EU level. The EEAG 2014,[216] introduced limitations on how Member States could subsidise renewable energy, and it 'largely neglected the particularities of energy communities'.[217] This sparked a European movement away from traditional subsidisation of renewables through FiTs and towards market-based mechanisms, such as auctioning (3.1.2). With the adoption of the CEP, this position has been remedied in the EU. The RED II provides that support schemes for renewable energy should be 'as non-distortive as possible for the functioning of electricity markets',[218] however, 'small-scale installations can be of great benefit to increase public acceptance and to ensure the rollout of renewable energy projects, *in particular at the local level',*[219] [emphasis added]. Small-scale installations are exempted from solely market-based support in the RED II,[220] and it explicitly states that 'specific conditions, such as feed-in tariffs, might … be necessary to ensure a positive cost-benefit ratio'.[221] It is clear then that CRE subsidisation is envisaged at the EU level despite the overall policy paradigm of creating a market free from distortion. One could imagine, therefore, that the social benefits of incentivising community energy outweigh potential adverse effects on the market from the perspective of the EU.

In light of these provisions (including the need to 'take into account the specificities of renewable energy communities',[222] when designing support schemes in the IEMD) it is proposed here that the UK re-introduces a FiT scheme or an adequate alternative for CRE (relevant tax incentive schemes for example). The lack of subsidy support remains the highest hurdle faced by energy communities in the UK,[223] and there is an overarching justification for re-introducing subsidies for community energy given its social benefits and the need to reduce fossil fuel consumption. Re-introducing adequate subsidy support would therefore remove this 'unjustified regulatory … barrier to renewable energy communities',[224] as required in the RED

[216] Commission, *Guidelines on State Aid for Environmental Protection and Energy 2014-2020*.
[217] Roberts, 'Power to the people? Implications of the Clean Energy Package for the role of community ownership in Europe's energy transition'.
[218] RED II (16).
[219] ibid (17).
[220] ibid art 4:3.
[221] ibid.
[222] ibid art 22:7.
[223] Robinson and Stephen, *Community Energy: State of the Sector 2020*, 28.
[224] RED II art 22:4a.

II. It is important that in improving subsidy support, the UK would need to ensure that commercial parties were exempt. This would prevent a re-occurrence of previous patterns in RE subsidisation where commercial parties had largely benefitted from market support.[225] This could be achieved through a requirement for a threshold of community ownership or proposed community ownership in the installation in order to be approved for the subsidisation/market support scheme.

4.2.3 Increase Investment in CRE

The CRE sector managed to raise £3.7 million in funding in 2019, including funding from the Rural Community Energy Fund, which was re-introduced through the Local Energy Hubs, and from the Welsh Government Energy Service, to name two.[226] There are a large array of various grant funding and grant-to-loan funding options available for communities in the early stage of their development.[227] However, the Rural Community Energy Fund, the main UK-wide government funding resource for communities, only provided for a fraction of the funding granted.[228]. The variety of grant and loan options available to communities, whilst beneficial, can complicate the process of acquiring finance. Similarly, the CRE community has found that more support is required in terms of funding staff costs,[229] in addition to early development costs, given that the two are mutually inclusive. One proposal is therefore to increase funding available through the current Rural Community Energy Fund, as well as to reinstate the Urban Community Energy Fund. Amalgamating the Rural Community Energy Fund and Urban Community Energy Fund under the same ‘roof’ as a UK-wide Community Energy Fund provides a more inclusive and accessible funding option.

Further, it is clear that more investment is needed in small-scale renewables institutionally. Large developers secure investment more easily given the scale and therefore potential return on investment involved in the development. Interestingly, the Climate Change and Sustainable Energy Act 2006 states that ‘[i]t shall be the duty of the Secretary of State to take such steps as

[225] Peter A. Strachan and others, 'Promoting Community Renewable Energy in a Corporate Energy World' (2015) 23(2) Sustainable Development 96.
[226] Robinson and Stephen, *Community Energy: State of the Sector 2020.*
[227] CEE, 'Community Energy England: Funding Opportunities' <https://communityenergyengland.org/pages/funding-opportunities-2> accessed 08/04/21.
[228] Robinson and Stephen, *Community Energy: State of the Sector 2020*.
[229] ibid, 27.

he considers appropriate to promote community energy projects.'[230]The Secretary of State 'shall have regard to the desirability of promoting … investment by others in such schemes and community energy projects'.[231] Therefore, under this provision, the UK government should seek to promote investment in community renewables within the proposed Green Investment Bank 2.0,[232] and otherwise. Significant private investment in RE generation more widely is unlikely, as argued by Ian Wright, unless issues of equal market access and revenue support are addressed.[233] Therefore, promoting and incentivising investment is inextricably reliant on holistically redressing the institutional hurdles facing CRE. Thus, investment could further be incentivised through implementing the other proposals in this section.

4.2.4 Implement the Ofgem Grid Connections Working Group Recommendations for CRE

Addressing the infrastructural deficits in the grid system is a highly expensive but necessary transformation needed in order for increased decentralisation of energy generation, small-scale or large scale (3.1.2). This necessarily requires investment and construction over a large time period, so is unlikely to comprise an immediate solution for removing the hurdle of connecting to the grid for energy communities.[234] However, for CRE in particular, there have been smaller-scale solutions proposed in order to level the playing field for communities connecting to the grid in a working group report by Ofgem in 2014.[235] These include, inter alia, socialising connection costs, introducing delayed payments (or instalments) for connection costs and requiring DNOs to invest ahead of need and reserve capacity.[236] None of these recommendations have been implemented.[237] It is interesting to note that the report itself emphasised that enabling these solutions 'would require a clear public policy steer from government on the case for distinct treatment of community energy projects'.[238] Even so, implementing these recommendations would facilitate access to the grid system for

[230] Climate Change and Sustainable Energy Act 2006, s19(1).
[231] ibid, s19(2)b.
[232] Ambrose, 'UK government planning new green investment bank'.
[233] Iain Wright, 'Regulation and Market Reform: The Essential Foundations for a Renewable Future' in Geoffrey Wood and Keith Baker (eds), *Palgrave Handbook of Managing Fossil Fuels and Energy Transitions* (Springer International Publishing 2019).
[234] Bolton and Foxon, 'Infrastructure Transformation as a Socio-Technical Process — Implications for the Governance of Energy Distribution Networks in the UK'.
[235] Ofgem, *Community Energy Grid Connections*
[236] Ofgem, Community Energy Grid Connections.
[237] Willis and Simcock, 'Consumer (Co-)Ownership of Renewables in England and Wales (UK)'.
[238] Ofgem, *Community Energy Grid Connections*, 2.

communities by reducing connection costs and increasing grid capacity available to small-scale generators such as energy communities. This would, in turn, ensure that renewable energy communities are subject to 'non-discriminatory, fair, proportionate, and transparent procedures',[239] 'are able to access all electricity markets, either directly or through aggregation in a non-discriminatory manner',[240] as required in the IEMD.

4.2.5 Planning System Reform

The RED II seeks to promote and facilitate the development of CRE through removing 'any unjustified regulatory and administrative barriers to community energy'. As M Sokolowki explains, merely legislating for the removal of these barriers in general terms is not enough (i.e. a provision stating that 'all unjustified regulatory barriers should be removed') – this general solution can cause 'practical problems'.[241] Rather, these unjustified barriers need to be identified and remedied directly. One of these unjustified barriers is the planning system (3.1.1). In order to promote and facilitate the development of CRE the current planning process needs reform to alleviate the bureaucratic burden on communities.

The NPPF and the Sustainable Communities Act 2007, as described in section 3.1.1, provide that community energy projects need to be considered by planning authorities. As a result, 'supporting'[242] CRE projects is one material consideration that needs to be balanced against other considerations by local planning authorities in making planning decisions.[243] The balancing of these considerations is at the discretion of local planning authorities.[244] Some academics have suggested that to incentivise CRE, the social benefits of a development should be included in material considerations during decision-making by local authorities[245]. This would include a consideration of the increase in social capital, the economic benefits to the community, and the increase in awareness and participation of the community in the energy transition created by CRE. Thus, a 'net gain' rather than 'no net loss' approach would be taken

[239] IEMD, art 16:1(e).
[240] ibid art 16:3(a) .
[241] Sokołowski, 'Renewable and Citizen Energy Communities in the European Union: How (Not) to Regulate Community Energy in National Laws and Policies', 292.
[242] 2019, *National Planning Policy Framework* [152].
[243] Town and Country Planning Act 1990, s70(2)
[244] ibid.
[245] Jelte Harnmeijer, Mathew Parsons and Caroline Julian, *The Community Renewables Economy: Starting Up, Scaling Up and Spinning Out* (ResPublica, 2013).

in terms of town and country planning – a specific goal of the Planning for the Future white paper.[246]

However, for CRE to be functionally incentivised at the planning level, it needs to be elevated in status within the decision-making matrix of local authorities. Even if social benefits were included as material considerations in the planning process, they would still exist as one set of material considerations amongst many. Further, given the inherently political nature of the planning decision making process, it is unlikely that social benefits are not already considered at some level by authorities. One proposal is to include a presumption in favour of development for CRE in order to elevate consideration of community energy developments. The NPPF contains a presumption in favour of sustainable development.[247] Whilst this does not necessary exclude CRE, the definition of 'sustainable development' is contentious,[248] and therefore seems unlikely to add significant weight in favour of CRE in the planning process. Elevating the status of energy communities could be achieved through a similar presumption in favour of development explicitly for community renewable energy in the NPPF, or in the form of a Statutory Instrument. In this way, more weight would be given in favour of permitting CRE development during decision-making.

Alternatively, this elevation could theoretically be achieved through the creation of a Permitted Development Right specifically for energy communities. Modelling in line with the renewable energy PDRs for microgeneration,[249] the installation, alteration or replacement of specified categories of renewable energy systems (e.g. solar PV, ground source heat, biomass heating systems) for energy communities could be generally permitted under the General Permitted Development Order.[250] These microgeneration PDRs could be scaled up for CRE by specifying that the maximum generational capacity of the installation shall be no more than 50kW multiplied by the number of properties that the energy community is proposing to service. Further, to guarantee that these rights provide a level playing field, they could be conditional upon proof that 51% of ownership belongs to the community. In this way, commercial

[246] UK, *Planning for the Future: White Paper August 2020* (Ministry of Housing, Communities & Local Government).
[247] 2019, *National Planning Policy Framework,* [11].
[248] Hans Christian Bugge, Christina Voigt and forskningsråd Norges, *Sustainable Development in International and National Law: What Did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Groningen : Europa Law Publishing 2008).
[249] The Town and Country Planning (General Permitted Development) (England) Order 2015/596 sch 2 Part 14.
[250] ibid.

developers would be prevented from taking advantage of these PDRs. In order to define ownership here, the community could be required to organise as a legal entity, in line with the definitional provisions for CRE in the CEP.[251] They would be thus able to prove either a minimum of a 51% share ownership by the community, or a community beneficial ownership of at least 51% in a trust. In terms of protecting the public interest, certain PDRs contain the requirement to consult the local planning authority before carrying out development.[252] This could be a relevant safeguard to protect against adverse visual or environmental impacts of developments. In this sense, the government would be actively promoting the development of CRE by facilitating an easy and accessible route to achieving development permission in hard law terms, (rather than as one material consideration amongst many in the usual planning process). These PDRs would be wide enough to ensure a variety of RES systems are included and narrow enough to ensure that the public interest is safeguarded. CRE needs to be more visible within planning policy and a specific PDR for CRE would achieve this.

4.2.6 Introduce A Nationally Binding Target for CRE generation

An overarching requirement for the promotion and development of community energy in the UK is a clear policy steer from the government. This, in and of itself, would secure more investment in the sector, and create a more stable policy environment for CRE. Introducing an ambitious and UK-wide target for community renewable installation is one method of achieving this, following the actions of devolved governments in the UK (Scotland and Wales) (3.1.3).

4.3 Conclusion: Creating an Action Plan

This article takes the assumption, based on prior research, that a thriving CRE sector can help to increase deployment of renewables in the UK in a socially beneficial manner. It is therefore posited in this article as one potential policy tool to facilitate the low-carbon energy transition. This concerns the UK given its desire to become a ‘world-leader in Green Energy’ and given its ambitious carbon emission targets in its National Determined Contribution under the Paris Agreement. As the increased academic literature on this sector has suggested, a thriving CRE

[251] RED II art 2:16.
[252] The Town and Country Planning (General Permitted Development) (England) Order 2015/596, sch 2 Part 19 Class E.

sector can contribute to closing the financial gap for the energy transition, tackle issues of energy poverty by including low-income households, and reduce opposition to renewable installations in the UK. So, this article had as its aim to identify the regulatory hurdles facing community energy in the UK and to propose a number of solutions to address the specific hurdles faced by the UK CRE sector, using the framework provisions within the CEP that need to be tackled.

In order to move community renewable energy out of its remission and into its resurgence, this article concludes that, firstly, more resources need to be allocated to Local Energy Hubs; with enough funding, these hubs have the potential to become "one-stop shops" for advice, expertise and guidance for a growing community energy sector. This could level the playing field for CRE to compete against large market players. Secondly, subsidy support for CRE needs to be re-introduced, and investment in small-scale renewables needs to be promoted, perhaps through the introduction of a UK-wide Community Energy Fund. This would ensure financial viability of the sector, including supply-side as well as demand-side management activities. Thirdly, grid connection needs to become more accessible to communities through socialisation of grid costs, introducing delayed payments and requiring DNOs to reserve capacity. This set of regulations would provide horizontal rights for CRE against monopoly structured DNOs and remove excessive and disproportionate costs of connection to the grid. Fourthly, the planning system needs to be reformed through creating a presumption in favour of CRE developments and/or generally permitting CRE development under certain conditions.

Finally, a nationally binding target for CRE generation needs to be set to signal the intention of the UK Government to support community energy; this would incentivise investment by creating policy stability. The UK also has an opportunity, in implementing these proposals, to avoid the coherence with the CEP pertaining to the definition of CRE (Part 2) by actively seeking to define CRE as to be inclusive of communities of interest as well as communities of place in its policies and regulations. These reforms would contribute to creating a fertile regulatory environment so that community action in the UK energy sector can thrive. Building upon the Community Energy Strategy published in 2014, these proposals need to be included in a revitalised, renewed and relaunched UK action plan for community renewable energy. This new action plan would be the centre for CRE policy going forward and provide the foundations for the flourishing of community energy projects in the UK.

‘Yes! All is vanity, all falsehood, except that infinite sky’: jurisprudential insights from Leo Tolstoy’s thought and fiction

Joshua Merad

1. Introduction

Leo Tolstoy’s fiction and thought are shown to be useful for the law student, in poetically demonstrating aspects of jurisprudence and legal philosophy in an engaging form capable of facilitating a deeper understanding. This article begins by drawing on Mikhail Bakhtin’s thought, demonstrating its applicability to law and literature, and then attempting to prove the existence of a measured dialogism in Tolstoy’s work. Examples to substantiate this thesis are primarily drawn from his final novel, *Resurrection*. Bakhtin’s theory of dialogism can show how subjectivity, intuition, and competing discourses influence the law’s application, as well as indicate the ways in which the novel can give readers a sense of the ‘other’.

Next, the judicial opinion as a literary genre and its ingredients, as recognised by Robert A. Ferguson, are analogised with elements of Tolstoy’s poetics, his critique of historiography in *War and Peace*, the rhetorical techniques used by those who preside over the trial with which *Resurrection* begins, and the omniscient narrator that judges them. Robert Cover and Kieran Dolin’s writings on jurisprudence also feature in this section.

Interpretation is then explored as an explicit theme in *Resurrection*. A framework is derived from György Lukács’s article, ‘Tolstoy and the Attempts to Go Beyond the Social Forms of Life’, upon which the following discussion of jurisprudence is built upon. Lukács recognises that nature and culture are forces with symbolic resonance in Tolstoy’s fiction. These disparate elements are analogised with the novel’s critique of state institutions, in particular the law. Nature is argued to represent a natural law approach, and culture to represent formalistic legal interpretation. I aspire to prove that ultimately a middle ground between these two extremes is espoused in the novel, as embodied by its protagonist, Nekhlyudov. This can be read as following the pragmatic, ethical interpretative approach thoughtful of a case’s wider circumstances, championed by Oliver Wendell Holmes. The chapter’s analysis of *Resurrection* begins with an analysis of its opening paragraph, which contains the contrast between the natural and man-made that reoccurs throughout. Then, the interpretative position of various

characters Nekhlyudov encounters in the novel who represent both extremes, culture and nature, are shown and examined. The influence they have on *Resurrection's* protagonist, and how he listens and assimilates the views of all, is shown. This is used to substantiate the claim that he occupies a middle ground between both, representative of a pragmatic, ethical and realistic interpretative approach. Finally, an epiphany Nekhlyudov experiences towards the novel's conclusion, precipitated by observing nature's elements and the structures of men interacting, is shown to reinforce this assertion.

Part 1: Tolstoy's dialogism

To begin, the relevance of Bakhtin's theory of the novel to law and literature is shown. Then, its application to Tolstoy's *Resurrection* is explored, with it being argued that this novel possesses a measured degree of dialogism—a middle ground between the 'monologism' Bakhtin posits as characteristic of Tolstoy's work, and the pure 'polyphony' argued by Bakhtin to be present in Dostoevsky's masterpieces.[1] This investigation will begin by attempting to prove the un-articulable feelings experienced by Tolstoy's characters, precipitated by their observation of the world around them, contribute to his novels' heteroglossia. An analogy is made between this, and the intuition involved in the act of judgment. A specific instance of this Tolstoyan motif is then explored. This forms the basis of the forwarded argument that Tolstoy's artistic technique in describing physical environments in *Resurrection* increases the impenetrability of his characters' consciousnesses in their totality, and thus their autonomy. The subjectivity of the reading experience is shown to facilitate this, enhancing a sense of an authorial perspective which is not authoritarian, but, on the contrary, egalitarian. Finally, the threads of the preceding sections are tied together in a discussion of the Tolstoyan epiphany. These are argued to significantly contribute to his novels' dialogism, constituting polyphonic revelations. This is a result of, inter alia, the significant role they play in character development. The discussion concludes by showing how these moments contribute to his novels' ability to facilitate empathy in readers, and law students, for those who are *other*. The entire chapter shows how Tolstoy's fiction and Bakhtin's thought can change the law student's perception of their own world by illuminating various aspects of jurisprudence.

[1] Leo Tolstoy, *Resurrection* (Richard F Gustafson ed, Louise Maude tr, Reissue edition, OUP 2009).

Bakhtin set out his theory of dialogism in *Problem of Dostoevsky's Poetics* (*PDP*) and *The Dialogic Imagination.*[2] In Bakhtin's later works Tolstoy and Dostoevsky 'emerge as two rallying points, two poles for opposing tendencies in literature and language'.[3] Bakhtin writes in *PDP* that Tolstoy's characters are inscribed into a *'monolithically* monologic whole … that finalises them all'.[4] For Dostoevsky, they ostensibly have such dominance 'he felt compelled to coin the special term "polyphony" to describe it'.[5] Scholars have contested Bakhtin's portrayal of this diametric opposition, and argued that he understated the level of dialogism in Tolstoy. The stance held by these critics is followed here.

1.1 Dialogism and jurisprudence

In showing the relevance of dialogism to the interdisciplinary field of law and literature beginning with Bakhtin's definition of dialogicity is logical:

> No living word relates to its object in a singular way: between the word and its object, between the word and the speaking subject, there exists an elastic environment of other, alien words about the same object … any concrete discourse [utterance] finds the object at which it was directed already as it were overlain with qualifications, open to dispute, charged with value, already enveloped in an obscuring mist […][6]

The dialogic novel is replete with the contradictions and complexities of reality. Its heteroglossia is the convergence in speech or language of 'specific points of view on the world, forms for conceptualising the world in words, specific world views, each characterised by its own objects, meaning and values'.[7] Furthermore, it contains a 'plurality of relations, not just a cacophony of different voices'.[8] The multiplicity of perspectives which the dialogic novel encompasses can highlight how our judgements are inextricably shaped by subjectivity. This, correspondingly, signals to the law student the importance of intuition. David Keily draws on dialogism in discussing the changed legal system of post-reform Russia:

[2] Mikhail Bakhtin, *Problems of Dostoevsky's Poetics* (Caryl Emerson ed, Caryl Emerson tr, University of Minnesota Press 1984); Mikhail Bakhtin, *The Dialogic Imagination: Four Essays: 1* (Michael Holquist ed, Caryl Emerson tr, New Ed edition, University of Texas Press 1982).
[3] Caryl Emerson, 'The Tolstoy Connection in Bakhtin' (1985) 100 PMLA 68, 68.
[4] Bakhtin, *Problems of Dostoevsky's Poetics* (n 2) 72.
[5] Michael Holquist, *Dialogism: Bakhtin and His World* (2nd edition, Routledge 2002) 32.
[6] Bakhtin, *The Dialogic Imagination* (n 2) 276.
[7] ibid 291–292.
[8] Holquist (n 5) 86.

> The Judicial Reform of 1864 effected a radical transformation of the jurisprudential discursive formation … legal discourse … decisively entered into dialogic relations with other discursive formations, borrowing authority from some and lending its narrative paradigms and interpretative devices to others.[9]

This is comparable to the competing concerns that influence the law's application in today's world—such as policy, common law precedent, and statutory authority. The competing discourses in dialogic relations with other discursive formations which the dialogic novel contains shows the impossibility of reducing life, and legal systems, to principles.[10] This poetically illustrates the dangers of a formalistic jurisprudential approach. As Oliver Wendell Holmes Jr. in *The Common Law* posited, 'the life of law has not been logic: it has been experience'.[11] Tolstoy would seem to agree, writing in *War and Peace*: 'If we admit that human life can be ruled by reason, the possibility of life is destroyed.'[12]

Bakhtin's thought also illustrates how the novel can bring attention to and amplify the voices of those who are 'other'. A character portrayed with an objectified, predetermined perspective by an author writing in the monological mode that makes the reader meld completely into the former's consciousness, cannot be consummated into one who has the sense of a fully rounded human being; you 'cease to enrich the event of his life by providing a new, creative standpoint, a standpoint inaccessible [to] himself'.[13] By contrast, the dialogic novel 'manifest[s] the self's discovery of the other'.[14] This results from the possibility of the 'hero' being capable of observation 'beyond the horizon of his own consciousness'.[15] Thus, 'for Bakhtin the soul is not merely revealed by the novel … but *created* by it'.[16] The dialogic novel can therefore facilitate

[9] David Keily, '"The Brothers Karamazov" and the Fate of Russian Truth: Shifts in the Construction and Interpretation of Narrative after the Judicial Reform of 1864' [1996] Diss. Harvard University 75.
[10] Desmond Manderson, 'Mikhail Bakhtin and the Field of Law and Literature' (2016) 12 Law, Culture and the Humanities 221, 233-234.
[11] Oliver Wendell Holmes, *The Common Law* (New edition, Dover Publications Inc 1991) 1.
[12] Leo Tolstoy, *War and Peace* (Amy Mandelker ed, Louise and Aylmer Maude tr, Revised ed edition, OUP 2010) 1217.
[13] Mikhail Bakhtin, *Art and Answerability: Early Philosophical Essays (University of Texas Press Slavic Series): 0009* (Michael Holquist ed, Vadim Liapunov and Kenneth Brostrom trs, 1st edition, University of Texas Press 1990) 71.
[14] Michael Holquist, *Dialogism: Bakhtin and His World* (2nd edition, Routledge 2002) 72.
[15] Manderson (n 10) 228.
[16] ibid.

empathy in the law student, providing insight into how their actions do not exist in a vacuum, but create a ripple effect that impacts upon others.

1.2 The un-articulable word

Bakhtin's emphasis on language capable of articulation, the spoken word, was essential in his characterisation of Tolstoy as an arch-monologist; here, it is argued that *un*-articulable language in the novel can contribute to a novel's heteroglossia, with this assertion substantiating the claim that *Resurrection* possesses a measured dialogism. While Bakhtin accepts the possibility of internally dialogised discourse, he asserts that the 'double-voicedness' in the 'rich soil of novelistic prose … draws its energy' not from 'individual dissonances, misunderstandings or contradictions', but only in 'socio-linguistic speech diversity and multi-language-ness'.[17] Put more simply, at issue is the fact ostensibly 'the human being in the novel is first, foremost and always a speaking human being'.[18] If this is absent, 'we will recognise the naively self-confident or obtusely stubborn unity of a smooth, pure single-voiced language', rendering it a 'closet drama'.[19] Caryl Emerson notes that Bakhtin's framework 'does not really allow for any investigation of the Tolstoyan sense of self', which focuses 'for a while only and at considerable mental effort, on a select sequence of events'.[20] These events are crucial for their development and the sense elicited in the reader of Tolstoy's novels being populated by 'human being[s]'.[21]

However, Bakhtin's rejection of non-verbal communication's contribution to dialogism has been argued as attributable to the social milieu of the authoritarian Soviet state in which he wrote.[22] Free speech was limited. His literary theories not only outlined his ideal novel but were also a philosophical treatise outlining his ideal world; he was 'talking ultimately about the survivability of intellectual discourse'.[23] Ideology, therefore, motivated his emphasis on the utterance and language capable of articulation over the more ethereal unspoken word, which surely indicates that the latter should be reappraised as significantly contributing to a novel's

[17] Bakhtin, *The Dialogic Imagination* (n 2) 325–326.
[18] ibid 332.
[19] ibid 327.
[20] Emerson (n 3) 77.
[21] ibid.
[22] David Sloane, 'Rehabilitating Bakhtin's Tolstoy: The Politics of the Utterance' (2001) 13 Tolstoy Studies Journal 59, 64–68.
[23] ibid 64.

heteroglossia. Tolstoy's characters 'find fulfilment when they abandon ideologies, arguments and syllogistic reasoning. They grasp truth when they experience it sensually'.[24] This sensual experience of truth is a component of the interactions between the environment and Tolstoy's characters' sense of self that is explored in the following sections. Furthermore, turning to jurisprudence explicitly, parallels can be drawn between the Tolstoyan consciousness, how it comes into being, and the intuition sometimes required in applying the law. The latter cannot be put into words but, as Holmes recognised, still affects judgment:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than *syllogism* in determining the rules by which men should be governed'.[25] (emphasis own)

Intuition is one of the many competing legal discourses in dialogic relations with others; similarly, in the novel, it should also be recognised as contributing to its heteroglossia. By reading Tolstoy, the law student can get a sense of this intangible concept, adding depth to their understanding of jurisprudence.

1.3 Perception and subjectivity

Michel Aucouturier asserted the 'gift of concrete evocation' was the 'secret of [Tolstoy's] art'; the visceral feeling it conduces, while coming vividly to the readers' mind, does not flow from 'his ability to "describe" the object, but to create the "sensation" of the object'.[26] This technique is shown to enhance the subjectivity of his characters' experience as they are felt by the reader. Subjectivity can contribute to heteroglossia based upon Bakhtin's 'surplus of seeing'. [27] The latter concerns the 'limitedness of one's positioned vision and uniqueness and irreplaceability of that person in the state of being'.[28] An event becomes aesthetic, dialogical, when the 'different viewpoints [of characters] do not coalesce into one encompassing point of view'.[29]

[24] ibid.
[25] Oliver Wendell Holmes, *The Common Law* (New edition, Dover Publications Inc 1991) 1.
[26] Richard Pevear, 'Introduction' in Larissa Volokhonsky and Richard Pevear (trs), *The Death of Ivan Ilyich and Other Stories* (Vintage Classics 2010) x.
[27] Bakhtin, *Problems of Dostoevsky's Poetics* (n 2) 49.
[28] ibid.
[29] Deniz Kocaoğlu, 'A Bakhtinian Analysis of Dostoevsky's Polyphonic Novel' [2020] Sofia Philosophical Review 77, 84.

If this requirement is unfulfilled, their word and truth is relegated to an inferior plane than the author's.[30] In the dialogic novel ultimately 'the author must recognise the hero's unique point of view in the event'.[31] A specific example to support the assertion of this criterion being fulfilled is drawn from the experience of *Resurrection's* protagonist. As a result of these and similar moments there is no domineering and objective authorial perspective; the character's consciousness is alive and whole. Nekhlyudov visits the peasant town where he grew up and experiences his surroundings, with it then going on to elicit a memory from his youth:

> 'Tra-pa-trop, tra-pa-trop', came a sound from the river, as the women who were washing clothes there beat them in regular measure with their wooden bats. The sound spread over the glittering surface of the mill-pond, the rhythm of the falling water came from the mill, and a frightened fly suddenly flew past his ear, buzzing loudly. And all at once Nekhlyudov remembered how, long ago, when he was young and innocent, he had heard, above the rhythmical sound from the mill, the women's wooden bats beating the wet clothes, how in the same way the spring breeze had blown the hair about on his wet forehead and disturbed the papers on the window-sill which was all cut about with a knife, and how, just in the same way, a fly had buzzed loudly past his ear.[32]

This scene, and its contribution to the character being un-finalised, a sense of an interior life that author or reader cannot penetrate, is given additional significance by it being connected to Nekhlyudov's childhood memories, which form the core of who we are. His thoughts, his feelings, as he strives to formulate and then embody a moral life, are unknowable in their entirety to all except himself. David Sloane's writings, drawing on Filipp Fortunatov, are helpful in evidencing this effect and illustrating how it is achieved.[33] The latter 'points out that the sequence of details in passages like these indicate movement through the scene and further embeds us in the mind of the witnessing subject'.[34] This technique brings the reader into 'the perceived reality of a character and makes us feel this raw subjective experience as the character's own, not the author's objective description of it'.[35] Its significance for an appraisal of *Resurrection's* dialogicity is evidenced by Tolstoy calling *Resurrection* 'a joint letter to

[30] Bakhtin, *Problems of Dostoevsky's Poetics* (n 2) 49.
[31] Kocaoğlu (n 29) 85.
[32] Tolstoy (n 1) 226–227.
[33] Sloane (n 22) 63.
[34] ibid.
[35] ibid.

many', with 'joint' referring to the role the reader plays; they are a 'reader-creator'.[36] Comparing the novel's early drafts to the final product supports this, as Tolstoy condensed 'originally lengthy and openly emotional descriptions into a few terse details, out of which the reader himself must construct scene and mood'.[37]

Tolstoy's usage of repetition in his fiction reinforces this effect. Marian Schwartz, in her translator's note to *Anna Karenina*, notes that the novel is 'replete with repetitions of words and phrases'.[38] Tolstoy deliberately limited his vocabulary, avoiding the '"elegant variation" that conventional literary language advocates'.[39] This technique is evident in the previously quoted passage from *Resurrection*. Natasha Sankovitch's citation of Tolstoy discussing his ideal reader is illuminating on this point:

> Without trying to understand the sense of each phrase, you continue to read, and from some words intelligible to you, a completely different sense comes into your head; true it is unclear, vague, and inexpressible in words, but therefore all the more beautiful and poetic.[40]

Sankovitch goes on to posit that Tolstoy was aware from his own reading experiences that 'the images that take shape in the imagination during reading are coloured by memories or associations called up by words on the page', and that 'repetition is one of the devices Tolstoy uses to awaken in readers their own memory-images and imaginative constructions'.[41] This contributes to the latter's described experience of the physical world producing a multitude of differing sensory sensations to each that reads them, strengthening the subjectivity of the reading experience, and adding gravity to Nekhlyudov's independent point-of-view. His is a consciousness impenetrable in its entirety, with a 'reserve of subjectivity' that increases the richness of *Resurrection*'s heteroglossia.[42] Cardazo noted that subjectivity affects the judicial decision, or 'resultant', which is a product of 'an outlook on life, a conception of social needs, a sense of … "the total push and pressure of the cosmos", which, when reasons are finally

[36] Donna Orwin, 'The Riddle of Prince Nexljudov' (1986) 30 The Slavic and East European Journal 473, 482–483.
[37] ibid 483.
[38] Marian Schwarz, 'Translator's Note' in Gary Saul Morson (ed), *Anna Karenina* (Yale UP 2015) xxiv.
[39] ibid.
[40] Natasha Sankovitch, 'Readers' Experience of Repetition In Tolstoy' 3 Tolstoy Studies Journal 49, 55.
[41] ibid.
[42] Holquist (n 5) 32.

balanced, must determine where choice shall fall'.[43] The dialogic novel can poetically emphasise the importance of this subjectivity in life, capable of transferral to an appreciation of its importance in jurisprudence to the law student.

1.4 Polyphonic revelation and the other

Additional resonance is given to Tolstoy's technique in describing the environment, and their corresponding contribution to his characters' reserve of subjectivity, as Nekhlyudov's observations of the natural world's sublime beauty are central to his development as *Resurrection's* narrative progresses. These are examples of the 'Joycean epiphanies' Holquist has identified in Tolstoy's masterpieces.[44] Famously, in *War and Peace* Prince Andrei lies wounded and dazed on the battle-field of Austerlitz, staring at the blue expanse above: 'How was it I did not see that lofty sky before? And how happy I am to have found it at last! Yes! All is vanity, all falsehood, except that infinite sky.'[45] The protagonists' lives are changed as they perceive the world around them, correspondingly changing readers' perception of the reality they themselves live in. They facilitate a transcendent experience that the reader shares with one who is other.[46] A specific example of such an epiphany in *Resurrection*, and its implications for the novel's application to jurisprudence, is explored later. Richard Gustafson notes the formula of these repeated events as the narrative's momentum, and Nekhlyudov's progression towards recognition, grows:

> An encounter, perhaps by chance, with a figure he either has not known or not recently seen, awakens him from a former blindness, and this allows him to see some truth about them which then reveals a truth about himself; armed with these truths he resolves to reorder his life, often finding confirmation of this moment in an expanse of nature which represents the absolute truth embodied in the revelatory opening frame.[47]

These events constitute *Tolstoyan* epiphanies. The effects they have on the reader and their perception of Nekhlyudov, and his autonomy, are compounded by Tolstoy's method in

[43] Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale UP 1921) 12.
[44] Michael Holquist, 'Resurrection and Remembering: The Metaphor of Literacy in Late Tolstoi' (1978) 12 Canadian-American Slavic Studies 549, 552.
[45] Tolstoy (n 12) 299.
[46] Manderson (n 10) 228.
[47] Richard F Gustafson, 'Introduction', *Resurrection* (Reissue edition, OUP Oxford 2009) xvi.

describing the physical world of his fictional creations, discussed previously. Moreover, Bakhtin asserts that the internally dialogic consciousness is 'open to inspiration from outside itself'—if this inspiration is derived from the physical world, not just through their dialogue with others, it can contribute to a novel's heteroglossia.[48] Occurrences of similar metaphysical power are described as 'ecstatic epiphanies' in Dostoevsky by Bilal Siddiqi. They constitute a 'type of "threshold moment"', where his characters are, in Bakhtin's words, 'on the threshold of a final decision, at a moment of *crisis*, at an un-finalisable—and *unpredeterminable*—turning point for his soul'.[49] These events allow 'latent aspects of human nature to reveal themselves … thus, there is room for polyphonic revelation'.[50] If at issue is the sense of these characters being alive and un-objectified, it is difficult to see why Tolstoyan epiphanies, which reach the same heights of insight and are comparable 'primordial encounter[s]' with 'fundamental aspect[s] of human nature', are neglected by Bakhtin.[51] Tolstoy's characters are fluid, they pulse and writhe with un-finalisable life. Nekhlyudov's truth is brought to the same level as Tolstoy's during the epiphanies he experiences, creating a sense of a complete consciousness, a shiver in the reader's spine precipitated by a brush with the other as they create his soul. This can enhance the law student's ability to empathise.

1.5 Summary of Part 1

Tolstoy's artistic technique which increases the subjectivity of the reading experience in *Resurrection,* and its significance to the epiphanies in which Nekhlyudov learns and grows, contribute to the sense of an alive and un-objectified character. The emphasis on the un-articulable word and intuition in Tolstoy enhance this effect, which can be analogised with the intuition required in applying statutes and precedent to a given factual situation. These artistic elements combine to substantiate the claim that his fiction, and *Resurrec*tion in particular, possesses a measured dialogism. Readers of Tolstoy are therefore given an opportunity to escape the self and appreciate the other. The dialogic novel acts like a prism; it demonstrates how the blinding light of reality refracts into a wide spectrum of colours which signify everyone's subjective perception of the world, demonstrating the multiplicity of perspectives and aspects to an event. Its heteroglossia can allegorically suggest the breadth of competing

[48] Bakhtin, *Problems of Dostoevsky's Poetics* (n 2) 32.
[49] Bilal Siddiqi, 'Existentialism, Epiphany, and Polyphony in Dostoevsky's Post-Siberian Novels' (2019) 10 Religions 59, 61; Bakhtin, *Problems of Dostoevsky's Poetics* (n 2) 116–117.
[50] Siddiqi (n 49) 62; Bakhtin, *Problems of Dostoevsky's Poetics* (n 2) 123.
[51] Siddiqi (n 49) 68.

legal discourses which affect the law's application. The thickness of a novel's heteroglossia is comparable to the refractive index of the material through which a ray of light is incident.

Part 2: Tolstoy and the judicial opinion

This part will begin by outlining Robert A. Ferguson's notion of the judicial opinion as literary genre. Upon this framework, a law as literature analysis focused upon the narrational techniques used by Tolstoy to establish the authenticity of his own observations and opinions, used throughout the works written during his maturity, will be undertaken. Tolstoy's arguments in which these devices are utilised, and the strategies used by the historiographers who were such a subject of Tolstoy's polemics, will be analogised with respect to those used by judges in the formation of judicial opinions. Finally, the same issues will be explored explicitly in the behaviour of judicial actors in *Resurrection,* through an investigation of the application to jurisprudential thought of the novel's opening trial scene. The omniscient third-person narrator in *Resurrection* and the strategies it uses to critique these presiding officials will also feature in the following analysis. The works of Robert Cover will be discussed in relation to this aspect of the section's discussion. Keily notes the influence of the Russian legal reforms on contemporary authors *vis-à-vis* interpretation:

> The judicial reform of 1864, which offered new narrative models and new hermeneutic strategies, made an impact on the way Russians constructed and interpreted narrative in the last third of the nineteenth century.[52]

This part's discussion will, quoting Ferguson, aid law students attain a greater understanding of the 'contending voices in the language of judgment', which will facilitate the entertaining of 'competing questions in a more seriously dialogical mode'.[53] The central theme in *Resurrection* is the nature of power, and words can be used as another instrument of state control, in 'secur[ing] shared explanations and identifications'.[54] The judicial opinion should be read with a more sceptical eye, and Tolstoy's poetics and thought can contribute to attaining such an understanding.

[52] Keily (n 9) 78–79.
[53] Robert A Ferguson, 'The Judicial Opinion as Literary Genre Symposium: Language, Law, and Compulsion: Rhetorics of the Judicial Opinion' (1990) 2 Yale Journal of Law & the Humanities 201, 219.
[54] ibid.

2.1 Tolstoy's poetics

Ferguson divides the elements of the judicial opinion which render it a literary genre into three 'driving impulses' which convey this type of writings' 'tonal, methodological, and rhetorical life'.[55] These are the monologic voice, interrogative mode, and declarative tone, which all 'build together in what might be called a rhetoric of inevitability'.[56] These will each in turn be examined and compared to the devices that constitute Tolstoy's poetic method.

Firstly, we will address the 'monologic voice' of the judicial opinion, where Ferguson explicitly draws on Bakhtin's theory of dialogism. Tolstoy's depiction as a monologist in *PDP* was a result of, inter alia, his usage of 'authoritative discourse',[57] or as Morson calls it in his study of *War and Peace*, 'absolute language'.[58] Authoritative discourse is 'located in a distanced zone, organically connected with a past that is felt to be hierarchically higher. It is, so to speak, the word for the fathers. Its authority was already acknowledged in the past.'[59] Bakhtin himself, when evidencing that 'the authoritative text always remains, in the novel, a dead quotation', cites the 'evangelical texts in Tolstoy at the end of *Resurrection*'.[60] These are accepted to have a monological quality, similar to the statutes relied upon by jurists, due to their 'sharply demarcated, compact, and inert' quality.[61] However, the picture is less clear for Tolstoy's usage of absolute language generally. Morson posits such statements in his works are not spoken by a novelistic narrator at all, and that these almost 'jarring' assertions of fact interweaved throughout his narratives are governed by nonfictive speech genres—not the set of conventions that govern the rest of the novel.[62] Therefore, Tolstoy's usage of this language is ostensibly un-dialogized and non-novelistic: 'they claim literal, not literary, truth'.[63] This strategy fails, Morson argues, because of the 'self-contradiction' stemming from its usage being 'implicitly framed by an assertion of their non-conditionality, and yet this very assertion

[55] ibid 204.
[56] ibid.
[57] Bakhtin, *The Dialogic Imagination* (n 2) 340.
[58] Gary Saul Morson, *Hidden in Plain View: Narrative and Creative Potentials in 'War and Peace'* (Stanford UP 1987) 9.
[59] Bakhtin, *The Dialogic Imagination* (n 2) 342.
[60] ibid 344.
[61] Keily (n 9) 70–71; Bakhtin, *The Dialogic Imagination* (n 2) 343.
[62] Morson (n 58) 19.
[63] ibid.

is conditional and conscious of its audience'.[64] 'In short,' writes Morson, 'the very refusal to enter into dialogue is itself both dialogic and dialogising.'[65]

Tolstoy's failure to utter such un-dialogised truths using absolute language can be analogised with the strategies used by judicial actors in present-day courts when giving judgment. The aspects of the judicial opinion that contribute to it possessing a monological quality, which applies specifically to the 'speaking judge in the act of judgment' and its 'ideological thrust', are outlined by Ferguson: [66]

> The judicial voice works to appropriate all other voices into its own monologue. The goal of judgment is to subsume difference in an act of explanation and a moment of decision … alternative views are raised but entirely within the controlling voice of the judicial speaker … It must appear as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand.[67]

These rhetorical devices are used to achieve the 'judicial self-fashioning' that Ferguson recognises, whereby 'the monologic voice … seeks its own embodiment by projecting an actual judicial persona into the frame of an opinion'.[68] The jurist uses this language to establish authority in a form which is limited and may not always be able to deliver actual 'justice' in the instant case, due to the inherent subjectivity involved in applying the law. While the judicial opinion may—like Tolstoy's absolute language—seem purely monological at face value, it is always in a tacit dialogue, and therefore dialogised, due to a self-consciousness regarding judges' unelected status in a liberal democratic society.[69] This is an example of the influence exerted by what Morson terms the 'irony of origins'.[70] These attempts by adjudicators in the judicial opinion to lend authenticity to their statements are comparable to Tolstoy's own efforts to increase the sense of his authoritative statements constituting empirically verifiable truths separate to his own character, or as Morson calls it, 'his aspiration to be a prophet'.[71]

[64] ibid 19–20.
[65] ibid 20.
[66] Ferguson (n 53) 205.
[67] ibid 207.
[68] Morson (n 58) 206.
[69] Ferguson (n 53) 207.
[70] Morson (n 58) 23.
[71] ibid.

The judicial opinions' 'interrogative mode' is closely interlinked to the former aspect, as in creating the 'dynamic of power, the interrogative mode joins the monologic voice'.[72] Here, the 'questioning gives the questioner … a retrospective omniscience', as 'all questions in the deciding opinion of a court are rhetorical in scope because they are asked with an answer already firmly in mind'.[73] This will be shown as relevant to Tolstoy's poetics in the following section discussing the opening trial of *Resurrection*.

The 'declarative tone' of the judicial opinion constitutes an 'insistence upon an answer now … [it] resists mystery, complexity, revelation, and even exploration … the selling of an affirmation, namely judgment, forces a language of certainties upon the whole genre'.[74] In Tolstoy this strategy can be seen in his proclivity towards presenting 'his assertions as cited or derived from a nonhistorical source[,] and to define his own role as a simple transmitter of timeless truths'.[75] His usage of technical vernacular is an example, giving his statements an almost mathematical quality. Morson cites the afterword to *The Kreutzer Sonata* as constituting such a treatise, where 'Tolstoy presents each of his increasingly outrageous conclusions as a "deduction which, it seems to me, one must naturally draw" and which no reasonable or disinterested person could doubt'[76]. His repetition of certain phrases therefore creates 'its own rhetorical kind of inevitability'.[77] This, again, is directly comparable to Ferguson positing that each component of the judicial opinion as literary genre combines to create its own sense of an inevitable verdict.

2.2 Historiography

There are also parallels between Ferguson's envisioning of the judicial opinion as literary genre and Tolstoy's critique of historians in *War and Peace*.[78] 'The human mind cannot grasp the cause of events in their completeness,' decrees *War and Peace's* narrator, 'but the desire to find those causes is implanted in the human soul'.[79] Sarah Hudspith has applied Tolstoy's

[72] Ferguson (n 53) 209.
[73] ibid 208.
[74] ibid 210.
[75] Morson (n 58) 24.
[76] ibid 25.
[77] ibid.
[78] Ferguson (n 53) 210; ibid 208.
[79] Tolstoy (n 12) 1062.

theory of historiography to the criminal justice system as it is portrayed in *Resurrection's* opening murder trial, in the respect that you can never truly recreate the infinitesimal series of moments that make up a crime.[80] The declarative tone as it is defined by Ferguson bears setting out in greater depth:

> The courtroom … takes the complexity of events … and transfers complexity into a narrative, the written form of which is a literal transcript of what has been said in court … judicial opinion then appropriates, moulds, and condenses that transcript in a far more cohesive narrative of judgment, one that gives the possibility of final interpretation by turning [the] original event into a legal incident for judgment … every step of the process [of transference] requires an unavoidable series of simplifications.[81]

Similarly, you can never truly subsume every legal question and each side's counsels' arguments, and the respective uncertainties and ambiguities therein that accumulate, with complete faithfulness in the judicial opinion, or else its meaning would be indecipherable and ultimately fail to convince. Furthermore, 'according to Tolstoy,' Morson writes, 'historians attempt to mask their failure to discover a real explanation for events by resorting to phrases like "fate," "genius," and "power".'[82] Parallels can be drawn with the declarative tone, where judges mask their personal qualities, and thus the choices they make in coming to their decision, by citing legal authority such as statutes or precedent. Kieran Dolin, when discussing the 'passive voice' in judicial opinions, cites a helpful real-life example: 'that the appellant was properly convicted of murder according to law there can be no doubt'.[83] This language 'locates the source of judgment away from the particular Mr Justice Devlin, or the jury, and on the impersonal force of the law'.[84] The usage of such a rhetorical tool sidesteps an appraisal of how closely this legislative provision or case actually aligns with the circumstances at hand, and the arguments which have been raised by both parties, disguising the inherent discretion vested in the judge.

[80] Sarah Hudspith, 'Narrative and Miscarriages of Justice in Tolstoy's Resurrection' (2002) 14 Tolstoy Studies Journal 15.
[81] Ferguson (n 53) 211.
[82] Morson (n 58) 106.
[83] Kieran Dolin, *A Critical Introduction to Law and Literature* (Reissue edition, CUP 2011) 34.
[84] ibid.

Morson has written extensively about the 'falsity of narrative' which he posits as central to Tolstoy's polemic against historiography. [85] It has relevance in analysing the methodology behind the judicial opinion. The nature of narrative necessitates limitations in order to 'tell a coherent and readable story', therefore historians, to Tolstoy, 'select just one or a small number of reasons'.[86]' 'In short,' Morson asserts, 'they engage in an essentially literary pursuit that they misrepresent as a science.'[87] In the same way, vis-à-vis the judicial opinion's interrogative mode, the central questions which form the basis of the decision are consciously selected to create a coherent narrative, and the questions they address in spinning this web to ensnare their audience are those which add to their verdicts' persuasiveness.[88]

2.3 The trial in *Resurrection*

After discussing how Tolstoy's poetics and his critique of historiography can be compared to the techniques used in crafting the judicial opinion, how these same issues are explicitly explored in the opening court-room scene of *Resurrection* is shown. This encompasses the behaviour of judicial actors as well as the strategies employed by Tolstoy's narrator. Keily describes the relevance of jurisprudence as we know it today to the post-reform Imperial Russia legal system:

> The right to legal discourse was distributed to legal professionals. The authoritative word no longer spoke for itself or was sufficient to itself. Its authority now became a function of the authority vested in those charges with its interpretation. The new code of criminal procedure explicitly licensed this new interpretative authority.[89]

Language in the monological mode is utilised by the court's president at the conclusion of the trial which begins *Resurrection*, used to justify its decision, with this being quoted verbatim and not paraphrased by Tolstoy. This is significant, with Keily noting that Tolstoy's 'Olympian' omniscient narrator 'freely indulges in interpretation, generalisation, and judgement' in the novel.[90] It quotes 'little, if any, of their [the litigators] closing arguments',

[85] Morson (n 58) 102.
[86] ibid 102–103.
[87] ibid 100.
[88] Ferguson (n 53) 208.
[89] Keily (n 9) 62.
[90] ibid 169; ibid 170.

instead preferring to provide his own explanations and neglecting to quote them verbatim.[91] The fact this passage *is* transcribed word for word therefore indicates the intentionality behind its inclusion:

> 'By His Imperial Majesty's ukase, the M—— Criminal Court, on the strength of the decision of the jury, in accordance with Section 3 of Article 771, and Section 3 of Articles 776 and 777, decrees that … the meshchanka, Katerina Maslova, 28 years of age, shall be deprived of all property rights and be sent to penal servitude in Siberia … for four years, with the consequences stated in Article 25 of the code.'[92]

The president relies upon the authority of his 'imperial majesty' for the decision and cites articles of the law in a droning fashion which suggests their ultimate inconsequentiality. In fact, he has little confidence in the decision. After receiving the jury's decision on 'paper … [he] looked at it, and, spreading out his hands in astonishment, turned to consult his companions'.[93] This shock is due to a procedural error in the jury's decision; he goes on to suggest it 'is a case for putting Article 817 into practice', which 'states that if the Court considers the decision of the jury unjust it may set it aside'.[94]

Article 817 is not invoked, with the same serious member positing: 'As it is, the papers accuse the juries of acquitting prisoners. What will they say if the judges do it? I shall not agree to that on any account.'[95] The reliance upon the authority of black-letter law and 'His Imperial Majesty's ukase' is used to distract attention from the contextual realities of jurisprudence, in the same manner as when the declarative tone is utilised. Furthermore, this can be analysed with reference to Cover's notion of the 'jurispathic' court, in which 'interpretation always takes place in the shadow of coercion'.[96] 'In the face of challenge,' Cover writes, 'the judge—armed with no inherently superior interpretative insight, no necessarily better law—must separate the exercise of violence from his own person.'[97] The president in *Resurrection* citing the sovereign achieves the same end, with this reliance on jurisdictional principle 'obscur[ing] the nature of

[91] Keily (n 9) 170.
[92] Tolstoy (n 1) 93–94.
[93] ibid 91.
[94] ibid.
[95] ibid 92.
[96] Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4, 40.
[97] ibid 54.

the commitment entailed in adjudication'.[98] This theme is reinforced by the president's reply when Nekhlyudov finds him to assert there has been a mistake after the verdict has been delivered: 'The court passed sentence in accordance with the answers you yourselves [the jury] gave'.[99]

The omniscient narrator's all-seeing eye looms over the opening trial. Here, elements of the 'monologic voice' and 'interrogative mode' are combined—the former due to the absolute language it uses, the latter as questions and aspects of the courtroom proceedings are focused upon to support the narrative it weaves (in this case highly negative). Hudspith notes how Tolstoy pre-emptively undermines the characters of judicial actors. [100] They all behave in a manner which is moulded by their personal circumstances. This conduces the reader's perspective of their statements to be refracted through an ironizing lens. Examples she cites include the court's president who has an 'affair with the Swiss governess, with whom he has an assignation straight after court that he is anxious to keep'. [101] This makes clear 'his own agenda will shape both the narratives he relates and his impression of those he receives'.[102] The previously discussed devices used by this same president to increase his statements' authoritativeness are therefore counteracted in the reader's perspective. Moreover, Keily asserts Tolstoy's 'generalisation, and judgment, [is] exemplified in his explanation for the verdict':[103]

> The resolution was taken not because everyone agreed upon it, but because the president … omitted to say what he always said on such occasions … and chiefly because, being tired, and wanting to get away as soon as possible, all were ready to agree to the decision which would soonest bring matters to an end.[104]

Keily goes on to posit that passages such as these in *Resurrection* indicate that Tolstoy's narrator is a 'cynical legal realist', who 'tells the narratee about every factor, both judicial and extrajudicial, that operates to produce an unjust verdict. Therefore, he depicts the important

[98] ibid 55.
[99] Tolstoy (n 1) 95.
[100] Hudspith (n 80) 16.
[101] ibid.
[102] ibid.
[103] Keily (n 9) 169.
[104] Tolstoy (n 1) 91.

legal formalities, but he also exposes how they have become an end in themselves.'[105] Tolstoy utters this criticism in the monologic tone. His usage of the same device as the President of the court announcing the guilty verdict facilitates a satiric critique of the formalistic interpretative ideology which they subscribe to. The authority the latter holds automatically over citizens with its own absolute language, the law, is subverted by Tolstoy's usage of this same device to condemn the actors that are cogs in its pulverising machine. His own moral law is therefore put in place to compete with that of the state.

Ostranenie, or 'making strange', is also relevant in exploring Cover's ideas regarding the judicial opinion. It is used by Tolstoy to describe the court to the reader during the opening trial, where he 'adopts the conceptual point of view of someone who is visiting a courtroom for the first time'.[106] The Russian formalist critic Viktor Shklovsky first recognised the device.[107] By describing phenomena as if seen through the eyes of a child, Tolstoy peels back the layers of societal indoctrination which render opaque the grim truths that lie before us, so that 'the event … appears in all its naked awkwardness'.[108] D. S. Mirsky describes it as 'never calling complex things by their accepted name, but always disintegrating a complex action or object into its indivisible components; in describing, not naming it'.[109] This technique can be seen when its members take their seats before presiding over the trial:

> The figures of the president and the members, in their uniform with gold-embroidered collars, looked very imposing. They seemed to feel this themselves, and, as if overpowered by their own grandeur, they hurriedly sat down on the high-backed chairs behind the table with the green cloth, on which were a triangular article with an eagle on the top, two glass vases—something like those in which sweetmeats are kept in refreshment-rooms—an inkstand, pens, clean paper, and newly cut pencils of different kinds.[110]

[105] Keily (n 9) 169.
[106] Alexandre Christoyannopoulos, 'The Subversive Potential of Leo Tolstoy's "Defamiliarisation": A Case Study in Drawing on the Imagination to Denounce Violence' (2019) 22 Critical Review of International Social and Political Philosophy; Keily (n 9) 170.
[107] Christoyannopoulos (n 106) 2.
[108] Liza Knapp, 'The Development of Style and Theme in Tolstoy' in Donna Tussing Orwin (ed), *The Cambridge Companion to Tolstoy* (CUP 2002) 164.
[109] DS Mirsky, *A History of Russian Literature from Its Beginnings to 1900* (Francis J Whitfield ed, Northwestern UP 1999) 263.
[110] Tolstoy (n 1) 29.

We see the emphasis on documents and papers, an artificial process, a theatre and show, the pencils 'newly cut', the paper 'clean': a pristine surface disguising nothing within. The emblems of the bureaucracy meant to elicit awe in the audience, establishing their unimpeachable authority, are described by their component parts—a 'triangular article with an eagle on top', vases which are described with a simile comparing them to 'those in which sweetmeats are kept in refreshment-rooms'. The latter description recalls in the reader memories of anxiously eyeing treats as a child. Christyannopoulous, drawing on Shklovsy, asserts that art can be used to dislodge 'the automatism of perception' which results from the '"unconsciously automatic" interpretations of what we observe'.[111] Cover argues that the civilised and proceduralised nature of the judicial process distracts from a law that 'licenses in blood certain transformations while authorising others only by unanimous consent'.[112] Judges can 'trigger agnetic behaviour' in persons who constitute institutions when they interpret the law, which can be contrasted to 'autonomous' states in which conscience has a greater influence on behaviour.[113] Tolstoy's *ostranenie* creates a rent in this shimmering, concealing mist, helping the law student to *see*. It therefore elucidates Cover's ideas.

2.4 Summary of Part 2

Elements of Tolstoy's poetics have been comparatively analysed with the judicial opinion, specifically the literary devices used in the latter to persuade listeners of its authority. The clear parallels have been shown. *War and Peace*'s critique of historiography has been illustrated as applicable to elements of the judicial opinion. Those presiding over the opening trial scene in *Resurrection*, and Tolstoy's omniscient third-person narrator, also utilise these devices, providing additional evidence of the novel's relevance to jurisprudence. This has been achieved through an investigation built upon Ferguson, Dolan and Cover's writings on jurisprudence. This examination entire has aspired to add clarity to the law student's perception of how legal judgments are written.

Part 3: Culture, Nature and Jurisprudence

[111] Christoyannopoulos (n 106) 4; Viktor Shklovsky, 'Art as Technique' in David H Richter (ed), *The Critical Tradition: Classic Texts And Contemporary Trends* (3rd edition, Bedford/st Martins 2006) 779.
[112] Robert Cover, 'Violence and the Word' (1986) 95 The Yale Law Journal 1601, 1613–1615; Cover (n 96) 9.
[113] Cover (n 112) 1614–1615.

Conflict between differing jurisprudential philosophies is shown in this part to be an explicit theme in *Resurrection*. This analysis includes elements that concern the novel's characters, how they interpret texts and the physical world. Nekhlyudov will be the principal subject of the following discussion. He is argued to be orbited by a range of characters who occupy differing positions on the same interpretative continuum; the different poles being represented by natural law and legal formalism. The influence of natural law in Tolstoy is built upon Christ's Sermon on the Mount; the formalists in *Resurrection* are represented by the officials who turn the wheels of the state's bureaucracy and the people who suffer at their hands. A central position between these two extremes is argued to be occupied by Nekhlyudov as he learns and grows over the course of the novel: a legal pragmatism mindful of ethical principle which appreciates the broader social circumstance of a case's outcome. This investigation begins by outlining Lukács's theory of the social forms of life, its application to *Resurrection* and, correspondingly, jurisprudence. Then, the opening paragraph of the novel in which the symbols of nature and culture are first seen by the reader is analysed. It is shown to suggest a new, unnatural, perspective in Tolstoy's art. Next, Nekhlyudov's encounters with individuals from both sides of the previously noted jurisprudential continuum and how he is influenced by them, as well as his reading of texts, is analysed. Finally, the chapter concludes by examining the Tolstoyan epiphany he experiences towards the end of the novel that confirms and solidifies his views on interpretation and the world. Its pedagogic potential for law students is shown. The entire chapter follows *Resurrection*'s story in a roughly chronological order.

Parallels can be drawn between Holmes's jurisprudential approach, as outlined in *The Path of the Law*, and that of Nekhlyudov by *Resurrection*'s conclusion. In the former, respect for positive law and the influence of natural law is brought together in its final section:[114]

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[115]

[114] William Fisher, 'Oliver Wendell Holmes' in David Kennedy and William W Fisher III (eds), *The Canon of American Legal Thought* (Illustrated edition, Princeton UP 2006) 23.
[115] Oliver Wendell Holmes, 'The Path of the Law' in David Kennedy and William W Fisher III (eds), *The Canon of American Legal Thought* (Illustrated edition, Princeton UP 2006) 43.

There are also elements of utilitarian thought in this alloy, as Holmes notes 'judges themselves have failed adequately to recognise their duty of weighing considerations of social advantage'.[116] This duty requires looking at the case and its surrounding circumstances, reminiscent of the later legal realists.

This comparison between Tolstoy and Holmes is supported by Berlin's classification of thinkers as foxes, 'for whom the diversity of the world cannot be explained through one single system', and hedgehogs, 'who are moved by a central idea that can, thus, explain the world in terms of a single system.'[117] Berlin sees 'Tolstoy as a fox by nature, but a hedgehog by conviction', and this contradiction goes towards explaining the tension between the natural world and culture in *Resurrection*.[118] Tolstoy has the conviction that there should be a universal system of justice based upon Christ's teachings, but as a fox he understands, at least on a subconscious level, that this idealistic vision for the world is a mirage. Thus, we must modulate our expectations, and have a pragmatic, ethical, perspective that remains observant of the surrounding social and economic circumstances of a case, while remaining committed to legal principle.

3.1 Social forms of life

Throughout *Resurrection*, the man-made world, or culture, is contrasted in typically Tolstoyan fashion to the natural.[119] This allegorical technique can be used as a framework to investigate the novel's discourse on interpretation generally and specifically with respect to the legal: formalistic approaches are represented by the former, and an approach reminiscent of natural law by the latter. Lukács argued that Tolstoy failed to reconcile these two contradictory elements' existence in his fiction; this, and its implication for this part's argument, will now be explored. [120]

[116] ibid 35.
[117] André Karam Trindade, 'Requiem for Ivan Ilyich: The Problem of Judicial Interpretation in Tolstoy's Literature' (2019) 13 Pólemos 191, 194–195; ibid 199; Isaiah Berlin and Michael Ignatieff, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History, Second Edition: An Essay on Tolstoy's View of History - Second Edition* (Henry Hardy ed, Second edition with a New foreword by Michael Ignatieff, Princeton UP 2013).
[118] Trindade (n 117) 191.
[119] Gustafson (n 47) xii.
[120] György Lukács, 'Tolstoy and the Attempts to Go Beyond the Social Forms of Life' in Harold Bloom (ed), Anna Rostock (tr), *Leo Tolstoy* (Chelsea House Pub 2000).

Tolstoy, Lukács posits, 'created a form of novel which overlaps to the maximum extent into the epic'.[121] He goes on to write that his mentality 'aspires to a life based on a community of feeling among simple human beings closely bound to nature … and excludes all structures which are not natural, which are petty and disruptive, causing disintegration and stagnation'.[122] Tolstoy's usage of Homeric epithets is just one ingredient of his works' epic reality; another essential aspect of this is the natural world of these epics themselves, which was 'a culture whose organic character was its specific quality'.[123] Lukács asserts this was insolubly contradicted by how Tolstoy's envisioned ideal existent world was, 'in its innermost essence, meant to be nature (and is, therefore, opposed, as such, to culture)'.[124] The creation of an epic reality is only possible by including elements of the man-made world—culture—which Tolstoy rejected; this had the consequence of his works containing 'two layers of reality which are completely heterogenous from one another both as regards the value attached to them and the quality of their being', as although nature 'cannot become an immanently complete totality, [it] is objectively existent'.[125] This transmutation of disparate and contradictory elements leads to his characters being 'dissatisfied with whatever the surrounding world of culture can offer them and seeking and finding of the second, more essential reality of nature … [which] does not have the plentitude and perfection that would make it … a home in which characters might arrive at and come to rest'.[126] Tolstoy's failure to reconcile the epic's form and his artistic vision can be analogised with his failure to prove that a system of legality can be based purely on morality, represented by nature in *Resurrection*. However, there is still a battle waged against the purely mechanical, man-made system of laws that represent culture. A continuing endeavour to ameliorate formalistic jurisprudence with notions of morality, a system which emphasises the importance of observation and seeing, is supported by the 'unnatural' world of *Resurrection*.

3.2 Observing the environment

[121] ibid para. 1.
[122] ibid.
[123] George Steiner, 'Tolstoy and Homer' in Harold Bloom (ed), *Leo Tolstoy* (Chelsea House Pub 2000); Lukács (n 120) para 2.
[124] Lukács (n 120) para 2.
[125] ibid para 3.
[126] ibid.

Nature is a powerful symbolic force in the novel, 'invested with moral meaning'.[127] The tone is set for the following story by the novel's opening paragraph, which sets up the dichotomy between the natural world and that of men, or culture:

> Though hundreds of thousands had done their very best to disfigure the small piece of land on which they were crowded together: paving the ground with stones, scraping away every vestige of vegetation, cutting down the trees, turning away birds and beasts, filling the air with the smoke of naphtha and coal—still spring was spring, even in the town …
>
> All were glad: the plants, the birds, and insects, and the children. But men, grown-up men and women, did not leave off cheating and tormenting themselves and each other. It was not this spring morning men thought sacred and worthy of consideration, not the beauty of God's world, given for a joy to all creatures—this beauty which inclines the heart to peace, to harmony, and to love—but only their own devices for enslaving one another.[128]

We see the juxtaposition of culture's ills—destruction of the environment and animals' habitats, tarnishing the atmosphere's purity with pollutants in pursuit of earthly wealth—and nature's sublime beauty.[129] The two flowing streams of these contradictory elements in Tolstoy's earlier fiction was sub-textual and not addressed directly. In later life, his focus shifted to condemning the unnatural, as opposed to championing the virtues of the natural.[130] This was an expression of disillusionment with his earlier romanticism. 'If nature and the natural rhythm were an essential presence in Tolstoy's earlier art', Ani Kobobobo writes, 'in *Resurrection* one is confronted with quite a different perspective.'[131] In an unjust world, 'glimpses of nature occasionally manage to pierce through Tolstoy's estranged vision of an unnatural society'. [132] This is a result of the conflicted artist attempting to combine the natural and culture in a coherent worldview where the camera does not pan away from hard reality. Moralistic and formalistic dogmatism should, therefore, be resisted. Tolstoy no longer shies away from elements of the world which are incompatible with his idealistic philosophy, which

[127] Gustafson (n 47) xii.
[128] Tolstoy (n 1) 5.
[129] Ani Kokobobo, 'Estranged and Degraded Worlds: The Grotesque Aesthetics of Tolstoy's Resurrection' (2012) 24 Tolstoy Studies Journal 1, 3.
[130] ibid.
[131] ibid 4.
[132] ibid 5.

is comparable to the importance in Holmes's jurisprudential ideology of looking at the surrounding circumstances of a legal scenario, and the broader social context of a rules real-world application—in *Resurrection*'s case, a moral law.

3.3 Texts, character, and interpretation

Nekhlyudov undertakes a Dantesque journey into the diseased heart of tsarist Russia's post-reform legal system. This expedition is precipitated by a woman, Maslova, whom he loved and ruined in his youth, being wrongly convicted of murder and sent to Siberia, with him by coincidence acting as a juror at her trial. The moral dilemmas relevant to the legal that are orchestrated and resolved in *Resurrection* can be derived not just from environmental phenomena, but texts themselves and how they are interpreted. Holquist posits that the books Nekhlyudov reads, such as those concerning the law written by Lombroso and Ferry, are all 'associated with a new stage in Nekhlyudov's understanding of the world'.[133] All the while, he attempts to square these texts with the society around him: replete with bureaucracy, ubiquitous institutional corruption, incompetence, cruelty, and amorality. 'Even though it is the law that comes to be seen by Nekhlyudov as the ultimate crime,' Holquist writes, 'it cannot simply be ignored by a Faustian shrug of contempt, a primal act of will.'[134] The relevance of Lukács's theory of social life in Tolstoy to this aspect of *Resurrection* is supported by this, as Holquist goes on to note in the novel the 'self alone [nature] is not enough: any identity that would be adequate to the rigours of his quest for it must take society, despite its evils and because of its power, into account'.[135] It is the 'exploration of the possibilities for authenticity that exist between these two extremes', and this 'between' is argued to be represented by a Holmesian ethical legal pragmatism.[136] Characters who occupy discrete positions on this continuum form the basis of the following discussion.

As Nekhlyudov ventures into the depths of Russia's administrative machine, he encounters people in authority who employ a heavily formalistic interpretative approach, aligned with the same position on the continuum as culture, the world of men. Judges and individuals associated with the mammoth structure of the post-reform Imperial Russian state think that the law is right

[133] Holquist (n 44) 553.
[134] ibid 554.
[135] ibid.
[136] ibid.

because it was made in the right way, and apply it strictly, without thought or an appreciation of reality's complexity. As discussed previously, Maslova's trial at the beginning of *Resurrection* is the first encounter with such figures in the novel, namely, the members of the court. The quality of this mechanical behaviour is most obviously, and satirically, evident in the third jurist who, as Kobobobo notes, 'counts steps and mechanically decides life questions based on the results of these counting processes'.[137] Furthermore, after the jurymen are seated, the court's president gives instructions which have the quality of automation. He distractedly '[puts] the papers straight, now handling his pencil, now the paper-knife' as he informs the jury of their 'rights, obligations, and responsibilities'.[138] Hudspith posits that this is done by Tolstoy 'to show that the president's mind, and hence his moral sense, is disengaged from the truth'.[139] *Resurrection*'s narrator relates his giving of instructions to the jury:

> He told them that they have the right … to use papers and pencils, and to examine the articles put in as evidence. Their duty was to judge not falsely but justly. Their responsibility meant that if the secrecy of their discussion were violated or communications were established with outsiders they would be liable to be punished. Everyone listened with an expression of respectful attention.[140]

As discussed previously, the focus is upon the written word, 'papers and pencils'. While the court may fulfil its responsibilities by complying with the demands of procedure, in the process they accomplish the exact opposite of their ultimate duty. In an ironic inversion of Tolstoy's comment, they judge not justly but falsely, demonstrated by Maslova's conviction and the plight of those erroneously sentenced to penal servitude in *Resurrection*. 'There is a thing called government service', Tolstoy writes, 'which allow men to treat other men like they were things.'[141] State authority's mechanical application is reflected by the automated body of the prisoners themselves, as they travel in a convoy from the prison to the train station on the way to Siberia.[142] 'They no longer seemed like men,' observes Nekhlyudov of this procession, 'but some sort of peculiar and terrible creatures.'[143] However, he is still able to 'recognise individual faces and humanity in the dehumanised procession in front of him', and this demonstrates his

[137] Kokobobo (n 129) 11; Tolstoy (n 1) 29.
[138] Tolstoy (n 1) 33.
[139] Hudspith (n 80) 16.
[140] Tolstoy (n 1) 33.
[141] ibid 383.
[142] Kokobobo (n 129) 10.
[143] Tolstoy (n 1) 358.

capacity to ethically observe, to see, and this is essential to a Holmesian jurisprudential approach.[144]

The institutions of man, of culture, depriving humanity of its ability to justly treat their fellows, is also a prominent theme in *War and Peace.* After the French soldiers storm and seize Moscow, Pierre is taken prisoner on suspicion of arson. The unthoughtful application of laws and its ability to lead to inhumane, incorrect outcomes, and the importance of looking at the person before you and his circumstances, is depicted when he is taken to be tried by a military commander:

> Davout looked up and gazed intently at him. For some seconds they looked at one another, and that look saved Pierre. Apart from conditions of war and law, that look established human relations between the two men. At that moment an immense number of things passed dimly through both their minds, and they realized that they were both children of humanity and were brothers.
>
> At the first glance, when Davout had only raised his head from the paper where human affairs and lives were indicated by numbers, Pierre was merely a circumstance and Davout could have shot him without burdening his conscience with an evil deed, but now he saw in him a human being.[145]

Just as before Davout opens his eyes and looks at the person before him, his perception of his duty and how his actions affect 'human affairs and life were indicated by numbers' and 'circumstance', dictated by the written word, so when the jurist opens his eyes to the individuals involved in a case and the detrimental impact which would result from a formalistic application of rules, he understands that an appreciation of the circumstances which surround a case are essential.

With respect to a character who falls on the extreme of nature in *Resurrection*, the archetypal example is the old man on the Siberian ferry boat whom Nekhlyudov meets towards the end of the novel. Holquist persuasively argues that he embodies an extremist stance which is 'in almost binary opposition' to those in *Resurrection* who represent de-individualisation in their

[144] Kokobobo (n 129) 10.
[145] Tolstoy (n 12) 1036.

mechanistic application of rules.[146] As the 'vibrating sounds of a big brass bell reached them from across the town' as they cross the river, all on the ferry raise their caps and cross themselves—except Nekhlyudov and the old man, signalling the symbolic relationship between each character.[147] The latter enters into conversation with his fellow itinerants:

> As they persecute Christ so they persecute me … They say "what is your name?" Thinking I shall name myself. But I do not give myself a name. I have given up everything; I have no name, no place, no country, no anything … "Who are your parents?" "I have no parents except God and Mother Earth. God is my father."[148]

The old man, like Tolstoy, rejects a Christianity subsumed into the state, a tool of the man-made world that oppresses the individual. He rejects all labels of culture's invention, while emphasising his single-minded devotion to entities beyond our perception, such as God and Mother Earth. Moreover, Holquist asserts that he is also 'literally illiterate', with his speech being more 'marked than that of almost any other character in the book as being sub-standard, most unlike received Russian'.[149] This bluntly communicates that he cannot interpret texts at all, and therefore for our purposes the law, as he does not even possess the capacity to read them. Later, Nekhlyudov goes on a tour with an Englishman in a prison where the old man has, coincidentally, been incarcerated for having no passport. The Englishman 'spoke very bad French', but had a 'command of his own language [which] was very good and oratorically impressive'.[150] While on the tour, the Englishman takes 'several bound Testaments out of a hand-bag' to give to the prisoners.[151] The narrator notes his robotic, unthinking behaviour: 'having given away the appointed number of Testaments [he] stopped giving any more'.[152] They encounter the old man, whom the Englishman poses a question which Nekhlyudov translates: 'Ask how he thinks one should treat those who do not keep the laws.'[153] The old man replies:

[146] Holquist (n 44) 556.
[147] Tolstoy (n 1) 455.
[148] ibid 456–457.
[149] Holquist (n 44) 559.
[150] Tolstoy (n 1) 466.
[151] ibid 474.
[152] ibid 475.
[153] ibid 476.

> ‘The laws?’ He repeated with contempt. ‘First *he* robbed everybody, took all the earth, and all rights away from men—took them all for himself—killed all those who were against him, and then he wrote laws forbidding to rob and to kill. He should have written those laws sooner.’ Nekhlyudov translated. The Englishman smiled.[154]

Nekhlyudov serving as the medium through which this conversation is conducted is significant. Both men are engaged in a dialogue where they cannot understand each other, in terms of their language as well as their ideas about justice. Nekhlyudov can understand each of them, and in the same way throughout the novel he listens to and interprets opposing positions, attempting to reconcile them, assimilating the truth that each position holds in a pragmatic, Holmesian manner.

Hudspith has argued the old man on the ferry being a ‘baldly emblematic, fixed and flat character’ is ostensibly a reflection of Tolstoy’s efforts to ‘express the kernel of his non-violent beliefs and feeling that a mouthpiece in the novel was necessary’.[155] She goes on to write that this strategy has the unintended side effect of compromising ‘the message he is intended to express’.[156] On the contrary, his inclusion was not an oversight from Tolstoy that had the consequence of undermining his own argument. This was the product of an author in conflict with his own beliefs. The old man is not an example to aspire to, but a portrayal of his own worst qualities. Hudspith herself notes in *Resurrection* we ‘find ourselves … in a position where the narrator has fallen behind the hero [Nekhlyudov]’ in its ability to fulfil the criteria of New Testament forgiveness and non-judgment.[157] Further, she recognises that a ‘fallible third person omniscient narrator in Tolstoy is unusual’.[158] The novel in all its contradictions is an expression of the internal battle being waged in Tolstoy’s own soul about the correct way to navigate the world in all its intricacies, how to live. The glints of malevolent outrage at the injustice of institutions which perforate the narration, like the glints of grass which still ‘sprang up’ between the ‘paving-stones’ in the novel’s opening frame, reflect Tolstoy’s own inability to follow a philosophy based upon the unemotional natural, ascended from the world of men.[159] This indicates there is no easy path except a process of listening, learning, and growing with

[154] ibid.
[155] Sarah Hudspith, ‘Narrative, Conscience and Judgment in Tolstoy’s Resurrection’ (2005) 27 Tolstoy Studies Journal 20, 29.
[156] ibid 30.
[157] ibid 28.
[158] ibid.
[159] Tolstoy (n 1) 5.

the world around you with a realistic, but moral, mind-set. In jurisprudence this perspective is crucial to a Holmesian interpretative approach. Holquist also recognises that the old man 'may serve as a pointer to Nekhlyudov on his road to selfhood' and appears to conclude the protagonist does not follow his example, asserting that he must be rejected.[160]

3.4 Epiphany

Holquist asserts that *Resurrection* can be distinguished from Tolstoy's preceding works as Nekhlyudov's development, as opposed to being precipitated by observing nature, is realised through reading 'actual books' and comparing their content with his experience.[161] However, there are points where revelations are elicited in Nekhlyudov through the natural world, as noted previously. The novel's central dilemma of reconciling this plane of existence with culture is tentatively resolved by a Tolstoyan epiphany as Nekhlyudov contemplates the injustice he has witnessed on his journey thus far. This occurs in the story's closing section, while he follows Maslova on a train to Siberia:

> All these people were evidently invulnerable by and impermeable to the simplest feelings of compassion only because they held offices. 'As officials they are as impermeable to the feelings of humanity as this paved earth is impermeable to the rain', thought Nekhlyudov, as he looked at the sides of the cutting paved with stones of different colours, down which the water was running in streams instead of soaking into the earth. '*Perhaps it is necessary to pave slopes with stones*, but it is sad to look at earth deprived of vegetation, when it might be yielding corn, grass, bushes, or trees like those on the top of this cutting.
>
> 'And it is the same thing with men', thought Nekhlyudov. '*Perhaps these governors, inspectors, policemen are needed*; but it is terrible to see men deprived of the chief human attribute: love and sympathy for one another. The thing is' he continued, 'that these people acknowledge as law what is not law, and do not acknowledge as law at all, the eternal, immutable law written by God in the hearts of men.[162] (emphasis own)

[160] Holquist (n 44) 556.
[161] ibid 553.
[162] Tolstoy (n 1) 382.

We see the reluctant reconciliation of idealism and pragmatism after reflecting deeply upon the morally deteriorating effects authority has on officials, brought about by watching the elements and how they interact. Disparate elements of culture and nature are represented by the rivulets of water that run over the concrete paving that lines the cutting's sides, which do not and cannot 'soak into the earth'. His equivocation when considering the solution to this problem, as he accepts the necessity of paving slopes with stones, as well as of 'governors, inspectors [and] policeman', despite their detrimental effect on the earth and 'love and sympathy for one another' respectively, poetically demonstrate an acceptance that no single ideology or perspective provides a key to navigating the world. Immediately preceding this scene, 'in the east—not very high above the horizon—appeared a bright rainbow broken only at one end, the violet tint being very distinct'.[163] The theme of the lines between the natural and the man-made being blurred is therefore further reinforced as the cutting is 'paved with stones of different colours'.[164]

Translating this revelation to the law, Tolstoy as embodied by Nekhlyudov argues that, even though the formalistic application of rules may lead to manifest injustice in certain cases, a complete obliteration of any code, and then relying upon a set of principles like natural law, while in theory attractive, is impractical. A coherent body of rules governing society is necessary for it to function. Both elements symbolically combine in this epiphany, advocating for an observant, intuitive approach to the application of a coherent body of rules in a non-dogmatic way. Tolstoyan epiphanies subconsciously teach law students the importance of the Holmesian attention that should be paid to the implications for wider society of a judicial outcome, of remaining observant. The novel's closing sentence signals the beginning of another journey: 'How this new period of his life will end, time alone will prove'.[165] The reader himself, fittingly, must interpret the character's actions and behaviours in the preceding narrative to deduce their own judgment on his ethical trajectory in the subsequent unwritten pages of his life.

3.5 Summary of Part 3

[163] ibid 381.
[164] ibid.
[165] ibid 483.

The two parallel streams of nature and culture which are a theme throughout Tolstoy's work as recognised by Lukács, his earlier inability to create a convincing reality without each element, and their subsequent reconciliation in his final novel *Resurrection,* can be analogised with developing the mind-set required to interpret the law pragmatically and realistically, while remaining mindful of a 'universal law'. There are similarities between this and the jurisprudential approach espoused by Holmes in the *Path of the Law.* Nekhlyudov occupies this position by the end of the novel after encountering characters representing extremist perspectives on the world and on how it can secure justice, learning lessons from all. This process of observation and reflection is also carried out in the realms of observing the natural phenomena around him, as well as reading texts themselves. A Tolstoyan epiphany has been shown as contributing to this understanding being secured.

4. Conclusion

Throughout this article the potential for further research into Tolstoy's thought and fiction, and the insights that can be gleaned for the law student of today, has been shown. By analysing abstract legal philosophy in the context of the novel, with its capacity to emotionally engage the reader, difficult concepts can be more easily understood.

Bakhtin's theory of dialogism, and its applicability to Tolstoy's works in a measured form, changes the way readers perceive the novel and the wider world. It facilitates a recognition of the impossibility of reducing the world to isolated principles; this has been demonstrated in the context of *Resurrection*. These observations are transferrable to the art of jurisprudence, highlighting the importance of subjectivity, intuition and feeling in applying the law.

The components of the legal opinion as literary genre have been outlined, based upon Ferguson's writings. A more profound understanding of this framework has been made possible by analysing its parallels with Tolstoy's poetics, his critique of historiography in *War and Peace,* the behaviour of judicial actors in *Resurrection*, and the latter novel's omniscient narrator. Cover's critique of jurisprudence has been intertwined with this examination, focusing upon Tolstoy's usage of *ostranenie* and the techniques used by judges to locate decisions away from themselves.

Interpretation has been proven as an explicit theme in *Resurrection*, with the symbols of nature and culture being central to its exploration. These elements and their influence are fundamental to the growth of Nekhlyudov, precipitated by his willingness and ability to observe the world around him, read texts thoughtfully, and listen to the views of others who hold differing jurisprudential stances. These attitudes are all comparable to the state of mind required in applying law pragmatically, ethically, and realistically—an approach with similarities to that posited by Holmes in *The Path of the Law*. This part's entire discussion has been built upon Lukács theory of the social forms of life in Tolstoy.


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