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CRITIQUES

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IN COLLABORATION WITH
LAWYERS WITHOUT BORDERS
(EDINBURGH DIVISION)
&
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LGBTQ+ LAW SOCIETY

ABOUT CASE CRITIQUES

Being inspired by the Scottish Feminist Judgments Project, Edinburgh University Women in Law Society launched a research project, Case Critiques, to provoke discussions on the intersectionality of criminal law outside the classroom. To encourage the diversity of thoughts and talents, Case Critiques is in collaboration with Lawyers Without Borders - Edinburgh Division and the University of Edinburgh LGBTQ+ Law Society,

The prompt of the project is: choose a specific case within criminal law and evaluate how the relevant judgment may have changed in this day and age, considering the shifts in societal contexts. How may the cases be dealt with differently nowadays? What prior issues may be resolved now?

We are proud to have involved students from a wide range of intersectional backgrounds - ranging from their academic discipline to gender, race and economic status. As women in law, we believe diverse participation at all levels, including academia, to be vital in promoting inclusivity within the sector.

Lastly, we are thankful for the generous support of the Edinburgh Foundation for Women in Law, the hard work of our Director of Research, Olivia Perna, as well as all the student researchers.

We hope you enjoy our first edition of Case Critiques.

Co-Presidents - Hazel Law and Jessica Motley,
Edinburgh University Women in Law 2021/2022

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The Enduring Crimes Against Women: Honour Killings and the Case of Qandeel Baloch

By Fizza Kazmi

In this essay, I set out to prove that while times have changed, certain behaviour, like a man's confusion by a woman's audacity, remains consistent and will lead him to take any drastic and extremist measure to establish himself as the guardian of female value and flagbearer of masculinity¹.

What are Honour Killings

Honour killings most often refer to the murder of a woman or girl by male family members who justify their actions by claiming that the woman has brought dishonour upon the family name². In patriarchal societies, the man is believed to sit at the hierarchical forefront and is not only the head of the family but in charge of women's sexual purity and morals. In what is sometimes referred to as gynophobia³, people are fearful of women that they cannot understand; so, when young women, particularly, are seen or suspected of transgressing the family's morals (most often, religious teachings), such as indulging in sexual intercourse outside of wedlock, it evokes undesirable gossip that men cannot control. Society taunts the man for not pulling the reins taut enough on his woman. To prove his manliness and jurisdiction, the man abuses the woman in every way before brutally killing her.

¹ Luopajarvi, 2004

² Raghu N. Singh and J. Douglas Daily, 'Honour Killing', (Britannica Encyclopedia, 3 August 2016), <<https://www.britannica.com/topic/honor-killing>> accessed 17 March 2022.

³ Timothy J. Legg and Erica Cirino, "Gynophobia: What You Should Know", (Healthline, 18 September 2018), <<https://www.healthline.com/health/mental-health/gynophobia>> accessed 15 June 2022

History of honour killings

Although stereotypically honour killings are said to belong to South Asian and Middle Eastern cultures, they are significantly rooted in British Colonial Law as will be discussed in the following subsection.

Violence directed at women for their sexual expression is not a recent trend but one that can be dated back to the time of Ancient Babylon (2300 BC) when female infanticides were common and imbedded in culture rather than religion. These practices cascaded into the Ancient Roman empire as well. The *pater familias* (Latin for Father of the family meaning the oldest male in the family) had the legal right to kill an unmarried, sexually active daughter or adulterous wife⁴.

It thus surprises many that the concept and implementation of honour killings, despite being most endorsed in Muslim countries, has no basis in Islam or the Islamic Law. It originated in the West and influenced from there: Middle East from the Ottoman Empire⁵ and South Asia from the British Empire⁶.

Prevalence Around the World

While 2022 statistics show that Pakistan and India top the charts with 1100 and 1000 per annum, respectively, UK, USA, Sweden, Germany, and France are just some of the white

⁴ Saller, 1999

⁵ The Imperial Ottoman Code of 1860 stated in Article 188 that a man that caught his Mahram (a member of one's family from whom concealment of the body with hijab is not obligatory such as daughter, mother, sister) committing an "abominable act", and killed them both, would be pardoned. This was originally taken from the French Penal Code of 1810.

⁶ The British Penal code of 1860 laxed the punishment for a man if he had killed his wife and/or her partner in adultery, by labelling it as "manslaughter" and not "murder". A man could defend himself with the argument that the wife had offended his masculinity and was a callous tactician (Grey, 2017).

majority countries where many honour crimes happen⁷. Globally, there are around 5000 killings, but all numbers are severely underestimated due to the lack of reporting surrounding this topic⁸. This may be due to fear of speaking up for their own lives or due to bribery, so witnesses testify in favour of the perpetrator. Many do not report honour killings because they do not see the murder of a woman as a crime.

Following are some cases that support my argument of honour crimes not being limited by geography⁹.

1) Denmark, 2005: Ghazala Khan and her husband were shot when she admitted to her family that she had had an intimate relationship with her husband before they were married. While the husband survived, Ghazala did not.

2) Great Britain, 2005: Samaira Nazir was cornered and stabbed 18 times in her own home because she wished to marry an Afghan man whom her parents deemed to be of the 'wrong' caste.

3) India, 2007: Manoj and Bibli Banwala belonged to different castes which was detested by their respective families. The newlyweds were dragged off the bus while fleeing and Bibli was made to eat pesticide while Manoj was hanged and then mutilated by members of Bibli's family.

4) Ghana: Witchcraft is a practice that history describes as dark magic and akin to making deals with the devil. Women deemed uncontrollable had been tried and punished by European towns of the mediaeval period, but the witch trials remain ever abundant in Ghana

⁷ Dr A.T. Fildis, *The Historical Roots and Occurrence of Honour Related Violence in Non-Muslim and Muslim Societies*, (2013), JWMEIW, 1-15.

⁸ Veena Meeto and Heidi Safia Mirza, *Honour, Violence, Women, and Islam*, (2010), 25.

⁹ JR Thorpe, 9 High Profile Honour Killings We Should Remember, (Bustle, 18 July 2016), <<https://www.bustle.com/articles/173199-9-high-profile-honor-killings-we-should-all-remember>> accessed 13 May 2022

today.¹⁰

We see from the examples above that the bitter traditions continue to accuse expressive women of not just personal problems but of tribulations like disease and famine.

Critiquing the Case of Qandeel Baloch

The cruel and prolonged practices have resulted in non-serious attitudes towards honour killing cases such as reducing the sentence given to a man who experiences “grave and sudden provocation” caused by a woman in his family¹¹. This section discusses the murder of Pakistani model, Qandeel Baloch and analyses the proceedings of the case in different contexts.

Case Summary

Qandeel was an actress, activist and social media personality who was known to share culturally and religiously controversial photos, videos, and discussions. Her immense popularity put her on several talk shows where she would talk about women’s rights in Pakistan and how she wished to challenge the norms of society¹². In 2016, she became the most Googled topic in the country after she posted racy content with religious cleric, Mufti Abdul Qawi¹³. She also started appearing on Islamic talk shows where she would challenge religious scholars with her Western and ‘sinful’ behaviour like promising her fans that she

¹⁰ Adinkrah, Mensah. *Witchcraft, Witches, and Violence in Ghana*. New York: Berghahn Books, 2015.

¹¹ Idzikowski, 2017

¹² Rafia Zakaria, Look Who’s Talking, *Times Literary Supplement*, (20 September 2019), <<https://www.the-tls.co.uk/articles/qandeel-baloch-pakistan-youtube/>> accessed 16 June 2022

¹³ ____ When Qandeel Baloch Met Mufti Qawi, *Express Tribune*, (22 June 2016), <<https://tribune.com.pk/story/1127984/qandeel-baloch-met-mufti-qawi-guideline-not-learn-islam>> accessed 16 June 2022

would strip if Pakistan won the cricket match against India¹⁴. This is when the planning for her murder began, according to the case judgement. All the hatred, fury and criticism that had been built up from 2013 got hold of Qandeel on 15 July 2016 when between 23:15 and 23:30, her brother, Waseem Azeem, allegedly murdered her in her sleep by asphyxiation¹⁵.

Murder Trial and Verdict

The murder trial and multiple verdicts can be analysed in several contexts, although this essay will aim to focus on three: police involvement, family, and legislation.

Qandeel lived under abuse during her marriage, but even when free from it, was constantly under denunciation and received death threats for her “western” lifestyle and defiant beliefs against Islam. Throughout her short-lived life, Qandeel was subject to the worst forms of mockery, threats, and superficial treatment. Despite all her public troubles, Qandeel received no protection from the police. During the trial of the case, there were many people who were believed to be indirect aides to her death, namely, Mufti Abdul Qawi. He was known to have been furious that after the controversial pictures had been leaked, he was removed from talk shows while Qandeel was brought onto them. He even stated during the trial that mere selfies with the deceased did not connect him to the crime¹⁶. This raises suspicion that if his jealousy was so apparent to the point that it could be a motive for abetment, was Qandeel ever warned of the potential danger?

¹⁴ Dawood Rehman, ‘Qandeel Baloch to do Strip Dance’, *Daily Pakistan*, 14 March 2016, <<https://en.dailypakistan.com.pk/14-Mar-2016/video-qandeel-baloch-to-do-strip-dance-if-pakistan-beat-india-in-world-t20>> accessed 16 June 2022.

¹⁵ She was drugged and her nose and mouth were pinned shut.

¹⁶ ___ Viewpoint: Qandeel Baloch was Killed for Making Lives Difficult, *BBC*, (30 September 2019), <<https://www.bbc.com/news/world-asia-49874994>> accessed 20 May 2022.

Another big role the police department played in Qandeel's life was regarding the accused, Waseem Azeem, who on the 17th of July 2016, confessed to killing his sister, Qandeel Baloch. At the time of his confession to the police, Azeem's statement was not recorded. This raises a problem surrounding the lax approach the police had and it can be further inferred that even at her death, the victim was not taken seriously. It was believed that she had dug her own grave - perhaps signifying that her fate was inevitable. However, Azeem did appear in front of the Judicial Magistrate where he clearly stated that he had killed his sister; "The reason is the way she was coming on Facebook", referring to the fact that she would often post scandalous videos of herself that would garner a lot of attention. He stated three years later that this confession was made after police coercion and torture but there was no evidence of abuse found. Additionally, there was plentiful scientific and direct evidence found that the accused was the convict. Here, the problem arises that he only made this statement three years after being in trial as an accused; what took so long? Additionally, his confession came a day after he had murdered Baloch and would not have been enough time for the involved police unit to influence or coerce him into confessing. This further leads to the conundrum; how large a part did bribery and corruption play? The kind of neglect Baloch experienced is horrifying when her scenario is extrapolated to the rest of the world.

Police involvement has been problematic in other cases of abuse against women. In fact, a study by *Ruxton v Lang*¹⁷ showed that a woman who was escaping an abusive boyfriend was stopped by the police and charged for a DUI. Interestingly, where the average response time of the police regarding domestic abuse is 30 minutes, the police had reached the woman significantly earlier as her boyfriend had called them accusing her of driving while drunk, reflecting their priority towards a drunk driver over a victim of domestic abuse. Despite her defence for necessity, she was fined and charged.

¹⁷ 1998 S.C.C.R. 1

Another structure that played a crucial role in the unfolding of the case was the family of Qandeel Baloch. Her father, Muhammed Azeem, was the complainant in this case and had given the names of his sons to the police when asked whom he suspected was behind the heinous crime. The accused, Waseem Azeem, had argued that his parents were blaming him due to emotions and deemed them to be hostile witnesses. In August of 2019, after the verdict of the trial was announced (Waseem Azeem was to be convicted while all suspected accomplices were to be acquitted), the parents of the deceased stated that they now forgave their son and through legal means pleaded the court to set him free¹⁸. They did so “in the name of Allah Almighty” and that they were “happy to have him released despite bearing the loss of their daughter”. It can be inferred that their faith was strong; but seemed to waiver when condemning their son for the great sin he had committed. Accused, Waseem Azeem, could be acquitted on legal grounds rather than cultural. They based their mind on the claim that the police had pressurized them into giving the names of their sons, but it is odd to know that they only pleaded the court after the verdict had been made. It is also ethically questionable why they would not want the suspected murderer of their daughter to be punished. However, to answer that question, there is an aspect of sociology and psychology. In terms of the former, the background from which the Azeem family came, gave importance and responsibility of running the finances of the house to the son. It is customary for the son to take his parents in and look after them, so it can be understood that the Azeem parents wanted a sense of security for their future. In terms of the latter, research shows that third-party figures such as the society in this case, are more likely to see the crime as a greater offence and think there are more benefits if the offender is not forgiven. They do not see any benefit in forgiveness and due to this clash of opinions, react aggressively.¹⁹ The parents may not have

¹⁸ Taser Subhani, ‘Qandeel Baloch’s Parents Announce Pardon for Sons’, *Dawn*, 21 August 2019, <<https://www.dawn.com/news/1500816>> accessed 16 June 2022.

¹⁹ Eaton, Judy, Jenniffer Olenewa, and Cole Norton. “Judging Extreme Forgivers: How Victims Are Perceived When They Forgive the Unforgivable.” *International review of victimology* 28.1 (2022): 33–51. Web.

wanted to become enemies of the son as they expected him to have many already. As it is, the suspected murderer of 26-year-old starlet, Qandeel Baloch, roams free.

The crumbling, outdated, and severely flawed legislation did not do justice to Qandeel either. In 2019, Waseem Azeem, was sentenced to a lifetime of imprisonment under section 311 of the Pakistan Penal Code (PPC)²⁰ but felt no remorse for his actions; in fact, he stated “She made our lives very difficult, and I had no other solution”²¹. However, as the PPC is rooted in culture, it allowed the complainants to forgive the perpetrator. An issue with changing the PPC is that because its basis is in the Islamic Law, Pakistanis are reluctant to remove or alter it. They believe that to adopt an updated one would mean abandoning Islamic values and moving away from the way of God. However, the truth is that the current legal system has not practically supported God’s teachings of tolerance either, as is evident from Baloch’s case. Relevantly, there is a common law principle that states that a series of acts committed by person A that instigate a reasonable person B to lose control suddenly and temporarily, and kill person A, can be labelled as culpable homicide rather than murder²². This law exists not only in Pakistan, but in the UK as well. This is evident in the case by *Drury v HM Advocate*²³ where a man was not convicted of murder because there was reasonable evidence that he had been provoked by his cheating girlfriend.

Ironically, Qandeel’s entire family had been using her fame and money to improve their lives and indulge in their own endeavours. After her death, her family went back to living an

²⁰ Ta'zir after waiver or compounding of right of qisas in qatl-i-amd:

Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.

²¹ Viewpoint: Qandeel Baloch was killed for making lives 'difficult', 2022

²² ___ ‘Murder or Culpable Homicide Offences’, (Patterson Bell Solicitors), <<https://www.patersonbell.co.uk/criminal-defence-solicitors/murder-or-culpable-homicide-offences/#:-:text=Murder%20is%20committed%20when%20the,or%20no%20'wicked%20recklessness'.>> accessed 16 June 2022.

²³ 2001 S.C.C.R 583

impoverished life, except this time, no daughter nor son, would be able to change that.

Changes

Qandeel's death sparked a conversation that divided the population. While the legal system refined the penal code – now ensuring that convicts would face life imprisonment even if the family of the victim forgave them under section 300 of the Pakistan Penal Code – the increasing support for the accused encouraged men to misbehave with women as they knew they would not be held accountable. Although the case made headlines, and campaigns were established, it eventually became a topic of gossip because for many people, it was not the murder of a girl, but the riddance of a sinful drama queen. Social values became a topic to enforce onto young adults again, but no one taught the inhumanity of murder. Many people on television broadcasts referred to the religious aspect, the religion of majority of Pakistan's population being Islam²⁴. This raises the question that if people believed so profoundly in their religion and Creator who was to have the unquestionable right to be judge, jury and executioner, why did they support the transgression of their allotted rights by taking a life?

Such views on honour and respect were not new to the country; there had always been supporters of out-of-context and extremist approaches. When Waseem Azeem was released from hold in February of 2022 on the appeal of his parents, the anger with justice violation was transmitted to the public as it criticised the parents and demanded justice the way it should have been. It was made clear that neither the police nor the law would protect women or give them an equal or fair opportunity to present their case.

²⁴ <https://www.findeasy.in/population-of-pakistan/>

It is the prevalence of rapists, rape apologists and victim shamers, and the laws that protect them, that honour killings are still committed today around the world. There needs to be a change in the district judges that are assigned by the High Court to deal with cases because they possess discretionary power to decide the verdict. The women of the country need to know that they will be protected by the legislation, especially when the perpetrator confesses to the crime.

This is not to say that western ideologies need to be adopted by every country, but rather, open-mindedness regarding people's different lifestyles needs to be de-stigmatized.

Conclusion

By adopting and strengthening archaic European concepts and laws, the world shuns every victim of violence, and strengthens the misogynistic and patriarchal foundations of the global society, as I have sought out to prove in this essay. The evidence provided further suggests that the abuse of women is a global pandemic, and its racist assumptions must be re-aligned through movements like 'Time's Up' and 'MeToo', which are demonstrated every year with the infamous *Aurat March* (woman march).

Women who wish to live unbounded by the constraints of long-running traditions are seen as rebellious and feisty, and bullied with every tribulation and grief. Thus, I aim to educate about the women that have been murdered and displaced from their homes in the false name of so-called religion and society.

A Critique of the Gender Recognition Reform (Scotland) Bill

by Hannah Udall

Terminology

In this critique, the term ‘transgender person/people’ is used to mean a person whose gender is not the same as the gender they were assigned at birth. The term ‘non-binary’ references gender identities which are neither male nor female, and the term ‘genderfluid’ refers to a person who does not define themselves as having a fixed gender identity. The term ‘acquired gender’ is used to describe the gender identity a person has which is different to that of their gender assigned at birth.

The Critique

The Scottish Parliament is reforming the Gender Recognition Act 2004 (hereby referred to as the 2004 Act) with the introduction of the Gender Recognition Reform Bill (Scotland) (hereinafter The Reform Bill). The Reform Bill aims to ‘improve the current process for trans people... and the lives of trans and non-binary people more generally’.²⁵ This analysis acknowledges the positive changes the Reform Bill introduces in its overturning of the Gender Recognition Act 2004, whilst highlighting the sections which fail to achieve the Scottish Parliament’s aim, quoted above. The Reform Bill improves the legal gender recognition process for transgender people, however fails to improve the process for the whole LGBTQ+ community through its omission of a non-binary legal identity and an exclusion of genderfluid people. The Bill does not respond to the needs and reality of society as it fails to discard the

²⁵ The Scottish Government, Gender Recognition Reform (Scotland) Bill: A consultation, Overview. 17th December 2019 <<https://consult.gov.scot/family-law/gender-recognition-reform-scotland-bill/>> accessed 26th April 2022

false theory of the gender binary and .²⁶ This critique communicates that whilst some important changes have been made, the Reform Bill still has the capacity to criminalise and marginalise LGBTQ+ people.²⁷ At the heart of the issue is the failure to acknowledge non-binary gender identities in the UK legal system.

The Reform Bill shortens the time it is mandatory to live as the acquired gender from two years to 3 months, plus a 3 month reflection period.²⁸ This allows a transgender person to live as their legally acquired gender legally sooner, and respects the transgender person's voice, improving the previous Bill, whose two year application period stagnated the process and failed to treat the applicants voice with validity. The 2004 Act required the applicant to live as their acquired gender for two years. The reduction to three months is positive as the previous lengthy time period has caused problems for some individuals regarding identity documents, the Act being unclear as to what the status of 'applicant' entails. Whilst the reduction in time to three months is positive, the Reform Bill is still unclear as to what the status regarding the legal gender identity of the applicant is during this time. For example, *Fair Play for Women Ltd v Registrar General for Scotland* accepted as lawful the fact that transgender people are not obligated to record in the 2022 census that their sex is as stated on their birth certificate or gender recognition certificate. Furthermore, the Reform Bill is unclear as to the legal gender identity status of the applicant during the three month 'reflection period' and how this differs from the 3 month period living as the acquired gender before applying for the gender recognition certificate. Transgender people are legally allowed to change the gender specified on identity documents such as passports and driving licenses,²⁹ thus the two year applicant

²⁶ Hanssen, S., 2017. Beyond male or female: Using nonbinary gender identity to confront outdated notions of sex and gender in the law. *Or. L. Rev.*, 96, p.283.

²⁷ Boukli, A. and Copson, L., 2019. Cultural harm: 'trans fraud', 'gender deception' and zero-sum games. *Justice, Power and Resistance*, 3(2), pp.26-48.

²⁸ The Gender Recognition Reform (Scotland) Bill s 8 A(5)

²⁹ Minister for Equalities and Older People and Cabinet Secretary for Social Justice, Housing and Local Government, *LGBTI and gender recognition* (Equality and Rights Policy, The Scottish Government)

period placed transgender people in a position which made them vulnerable to discrimination and violated Article 8 of the European Convention for Human Rights (ECHR) (Respect to Right for private and family life) because it forces transgender people to reveal their personal history.³⁰

Under the new Bill the application to have the acquired gender legally recognized is made to the General Registrar of Scotland who also makes the final decision, amending the bill to treat the applicants voice with validity and de-medicalizing the process.³¹ This Bill removes the Gender Recognition Panel (hereinafter GRP) from the process, which under the 2004 Act is a body of medical and legal members who made the final decision in the previous system.³² This change is positive on two accounts; a hearing from the GRP takes about 14 weeks so the change has the potential to streamline the application process for a Gender Recognition Certificate (hereinafter GRC),³³ and it is also an important step in de-stigmatising gender dysmorphia; the removal of the need to consult medical professionals declassifies it as a mental illness, and the mandatory consultation of legal members was invasive and criminalising.³⁴ The removal of the Gender Recognition Panel from the GRC process is an important step to treating transgender people with dignity and respect; the applicant keeps the position of authority on their own identity, rather than a third-party panel of medical and legal

<https://www.gov.scot/policies/lgbti/gender-recognition/> accessed 26th April 2022

³⁰ There is still a cause for concern regarding the new Reform Bill, as with cases such as *YY v The Registrar General for England and Wales*, whereby a transgender man applied to be stated as ‘father’ on the birth certificate of his child, whom he gave birth to. The case stated under point 79 that ‘ a person who gives birth to a child, irrespective of their legal gender, has to be registered as that child's "mother"’. This is extremely problematic as it showcases the person’s history which they have a right to keep private. Point 88 states the complication of this case, and discusses the possibility of naming parents as ‘parent 1’ and ‘parent 2’, yet there is no definitive answer how parents would feel about this. The case supposes the possibility of a reform of this legislation and states that it is for parliament, not the court. Another case dealing with this issue is *R. (on the application of JK) v Registrar General for England and Wales*.

³¹ The Gender Recognition Reform Bill s 2(2)

³² Gender Recognition Act 2004 s 1(4)

³³ Gender Identity Research & Education Society, 25/8/2014

³⁴ Scheim, A.I., Perez-Brumer, A.G. and Bauer, G.R., 2020. Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study. *The Lancet Public Health*, 5(4), pp.e196-e203.

professionals.

The Reform Bill removes the obligatory medical diagnosis requirement from the GRC process. The 2004 Act requires a gender dysmorphia diagnosis from two medical professionals, or one medical professional and one psychologist. This is a lengthy process the false perception that gender dysmorphia is a mental illness.³⁵ This is disrespectful to the trans person and invites the harmful notion that gender dysmorphia needs to be ‘cured’ to suit the gender binary societal convention, a convention which has shown to be erroneous and not reflect reality.³⁶ Despite the positive effect of this alteration for transgender people, The Reform Bill still fails to completely de-medicalise gender dysphoria, as the bill fails to recognise non-binary and genderfluid identities, stating non legally ratified guidelines as to what people who identify as such are meant to do and not giving them legal acknowledgement.

The removal of any kind of medical diagnosis is overwhelmingly positive and making ‘self-diagnosis’ sufficient reason to apply for a GRC is affirmed by the British Medical Association (hereinafter BMA). This reform follows in the steps of 20 other countries through negating the requirement of a medical statement.³⁷ However in the BMA’s statement welcoming the validity of self-diagnosis as a precedent for application for a GRC, they state it will help reduce ‘pressure on an already overstretched NHS’.³⁸ Whilst I strongly believe the importance of de-medicalising gender dysphoria is imperative and that the dismissal of the requirement for medical evidence is essential to further this, this statement is concerning as it

³⁵ Playdon, Z., 2016. Unequal treatment of transgender people. *BMJ*, 353

³⁶Hyde, J.S., Bigler, R.S., Joel, D., Tate, C.C. and van Anders, S.M., 2019. The future of sex and gender in psychology: Five challenges to the gender binary. *American Psychologist*, 74(2), p.171.

³⁷ Minister for Women and Equalities, Reform of the Gender Recognition Act - Government consultation, July 2018, p.26.

³⁸ British Medical Association (BMA) Media team, ‘BMA welcomes the recommendations of the Reform of the Gender Recognition Act report’ (BMA media centre, 24 December 2021) <www.bma.org.uk/bma-media-centre/bma-welcomes-the-recommendations-of-the-reform-of-the-gender-recognition-act> accessed 26th April 2022

brings the question if transgender people are going to be neglected by the medical community if medical diagnosis is no longer required legally. There is substantive evidence that gender affirmative psychotherapy can substantially improve a transgender person's life.³⁹ Some transgender people develop mental health problems after being forced to condition themselves to a society which still treats gender as a binary.⁴⁰ It is imperative transgender people are treated equably by health professionals, and the option to 'self-diagnose' should not deprioritise this.⁶ I would suggest that the Bill further expresses the medical professionals' in the person's life duty to appraise them of all their options regarding transitioning specific health care without bias.

Moreover, The Reform Bill changes the process an applicant goes through if they have had their gender legally acknowledged overseas. The Reform Bill treats all applicants equally, and does not give different countries different levels of authority which is the current process under the 2004 Act⁴¹. This change allows the applicant to keep autonomy regarding their own gender, and reaffirms gender identity as a personal matter and not a political one. This creates the problem of what should be done when a person is legally non-binary, as non-binary genders are not currently a legal identity in the UK, but is legally acknowledged in other countries around the world.⁴² The Bill fails to be fully comprehensive and cover all individual's needs, and whilst the legal recognition of 'non-binary' genders should not be applied by the

³⁹ D'Angelo, R., Syrulnik, E., Ayad, S. *et al.* One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria. *Arch Sex Behav* 50, 7–16 (2021). <https://doi.org/10.1007/s10508-020-01844-2>

⁴⁰ Pyne, J., 2014. Gender independent kids: A paradigm shift in approaches to gender non-conforming children. *The Canadian Journal of Human Sexuality*, 23(1), pp.1-8.

⁴¹ Gender Recognition Act 2004 s.1. Under the Gender Recognition Act 2004 an applicant can apply for a gender recognition certificate if their acquired gender has been legally accepted in one of the approved countries or territories. This list affirms 39 countries as having the legal precedent of acknowledging a person's gender that aligns with the United Kingdom's bearing. The Gender Recognition Reform Bill positively removes the requirement for the acquired gender to be legally accepted in an approved territory, instead issuing a full gender recognition certificate if gender recognition has been obtained overseas.

⁴² Countries that have legally recognised non-binary genders: Canada, Argentina, Greenland, Iceland, South Africa, Denmark, Pakistan, India, Australia, New Zealand

UK solely for this reason, the failure to detail a coherent system for people of all genders fails to acknowledge different gender identities and creates a bill which does not reflect social and medical reality.⁴³

Failure to include the mention of non-binary genders in the Bill creates space for the criminalisation and marginalisation of LGBTQ+ individuals. Under the Reform Bill, the applicant is still required to make a statutory declaration. This declaration states that they intend to live permanently as the acquired gender. This section of the Bill has been slightly amended from the 2004 Act, which stated the applicant must intend to live as their acquired gender until death. The alteration suggests partial acceptance of the possibility of detransition, however since it fails to define what 'permanent' means and instead of giving 'detransition' a legal reality creates the potential for applicants who detransition to be exploited. A Statutory Declaration is a legally binding statement; it must be true to the applicant's knowledge, and a false statutory declaration is a punishable crime.⁴⁴ The inclusion of the Statutory Declaration in the Reform Bill is problematic as it fails to address a protocol for people who wish to detransition.⁴⁵ Furthermore, the inability of the Reform Bill to legally acknowledge non-binary and genderfluid people leaves them open to criminalisation; the Reform Bill does not provide these people with acknowledgement, and any statutory declaration they give will not be permanently true.

The rejection of non-binary genders legally in the UK entices the issue of whether a statutory declaration has a place in this Bill. The literature has shown that false statutory

⁴³ Richards, C., Bouman, W.P. and Barker, M., 2017. Non-binary genders. *London: Palgrave Macmillan*.

⁴⁴ The penalties for a false statutory declaration in the Reform Bill are imprisonment not exceeding 12 months, a fine (or both) for a summary conviction and imprisonment of maximum two years or a fine (or both) for conviction on indictment. (and how this differs to GRA and 14 22A (3) Reform Bill)

⁴⁵ Turban, J.L., Loo, S.S., Almazan, A.N. and Keuroghlian, A.S., 2021. Factors leading to "detransition" among transgender and gender diverse people in the United States: A mixed-methods analysis. *LGBT health*, 8(4), pp.273-280.

declaration of gender identity is rare,⁴⁶ which presupposes that the criminalisation of the false statutory declaration will disproportionately affect individuals who are wrongfully convicted due to the legal precedent not reflecting the real societal needs of genderfluid and non-binary people. The legislation also fails to discuss the reality of people who detransition.⁴⁷ It has been presupposed that the lack of acceptance of non-binary genders could be a reason people detransition; therefore the Reform Bill stigmatises non-binary people twice, firstly through the denial of their gender and secondly through the criminalisation of detransitioning people and the failure of the law to accommodate their lived reality.⁴⁸

Returning to the dismissal of ‘non-binary’ and genderfluid people in this Bill, I believe a significant problem is the omission of a legal acceptance of ‘non-binary’ genders. Legalising non-binary genders in the United Kingdom is overdue, and the law is failing to meet people’s needs. The issue has been a subject of debate in cases such as *Regina (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; however, the appeal for non-binary gender to be present on a passport was dismissed on the grounds that article 8 of the European Convention for Human Rights (ECHR) did not obligate the government to allow this. Further British cases calling for non-binary terms to be added to other legal documents (such as *Alfred McConnell v The Registrar General For England and Wales*) have been similarly dismissed under the pre-text that it is required to state Mr McConnell as ‘mother’ for the continuity of law, as there are many inter-linked pieces of legislation which would be affected if ‘mother’ was not used to describe a person who gives birth to a child, and a term such as ‘gestational parent’

⁴⁶ Cabinet Secretary for Social Justice, Housing and Local Government, *Gender Recognition Reform (Scotland) Bill: more information* (The Scottish Government: Equality and Rights Factsheet, 23 March 2022) <<https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-more-information/>> accessed 26 April 2022

⁴⁷ Butler, C. and Hutchinson, A., 2020. Debate: The pressing need for research and services for gender desisters/detransitioners. *Child and Adolescent Mental Health*, 25(1), pp.45-47.

⁴⁸ Turban, J.L., Loo, S.S., Almazan, A.N. and Keuroghlian, A.S., 2021. Factors leading to “detransition” among transgender and gender diverse people in the United States: A mixed-methods analysis. *LGBT health*, 8(4),

This further highlights the exclusion of non-binary and gender nonconforming people from legal legislation, and could lead to people being vulnerable when interacting with the law. The law is not matching social reality and this can have negative impacts on individuals who are at discordance with the law.

Despite the Reform Bill consultation stating ‘that the reforms cannot be considered a success, inclusive of the whole trans community or a victory for equality, unless they cover non-binary people’⁴⁹ the Bill failed to address this. Rather than this problem lying with the Reform Bill specifically, the crux of the issue is the failure for the Scottish Government to legally acknowledge the ‘non-binary’ gender, and include sections that allow genderfluid people legal recognition. Whilst the Reform Bill has been improved massively, and present case verdicts such as the Taylor v Jaguar Land Rover⁵⁰ case are helping to change legal opinion regarding the gender spectrum and the problematic legal ‘permanence’ given to gender, the omission of ‘non-binary’ genders, detransitioning person and genderfluid identities creates an insurmountable barrier to the respect for all LGBTQ+ people.

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⁴⁹ Gender Recognition Reform (Scotland) Bill: consultation analysis, 2/9/21
<https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-analysis-responses-public-consultation-exercise/>

⁵⁰ This case ruled that Taylor, who is genderfluid, was protected by the Equality Act 2010 after suffering abuse and harassment at work which the management failed to prevent and deal with appropriately. This was a landmark ruling at the Birmingham Employment Tribunal, as previously it has been accepted that gender reassignment was permanent for it to be a protected characteristic (under Section 7 of the Equality Act 2010)

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Wicked, deceitful, malicious, vindictive liars: The treatment of complainers in sexual offences cases in the Scottish courts

by Margaret Driscoll

Sexual offences is an area of the criminal law where the courts have struggled to equitably balance the right to a fair trial and the dignity of the complainer when reaching a verdict. As discussed in the cases below, the environment shapes the hostile and unwelcoming experience of female complainers when giving their evidence. This environment impacts both on the complainers themselves and on the broader perceptions in society of sexual offences trials. Changes and improvements in this area are being brought in, but care must be taken to ensure that the impact felt is both positive and sufficiently substantial.

Background

Attitudes towards and treatment of complainers in sexual offences cases have undergone significant changes since the 1800s. The ‘unchaste and immoral’⁵¹ character of the complainer is no longer a sufficient ground for attacks on credibility. The new ‘rape shield’ provisions of the Criminal Prosecutions (Scotland) Act 1995 (CP(S)) provide protection against the admission of irrelevant, overly generic evidence of the complainer’s sexual history, previous actions, and bad character.

Despite these developments, complainers can still face discourteous and hostile treatment in the courtroom. It is common for the credibility of a witness to be called into question, in order to challenge their honesty in the eyes of the jury. However, the attacks to which the characters of female complainers are subjected to in sexual offences cases take a distinctive nature. The

⁵¹ *Dickie v HMA* (1897) 24 R (J) 82

attacks often take centre stage in the cross-examination, and take on a personal direction, often of a deeply insulting nature. These attacks can tend to shift the focus of the trials onto the complainer's honesty and away from the facts at issue. The complainer is not herself on trial, but based on such attacks, accusations and broader treatment in court it does not always appear as such to an outsider, much less a complainer.

When even practising lawyers would think twice before seeking legal remedies due to the inadequacies of the system,⁵² it is hard to imagine how complainers can be expected to report their rapes and co-operate with prosecution.

Both cases discussed were rape cases heard in the last 8 years that resulted in guilty convictions. They were appealed unsuccessfully to the High Court of the Justiciary at which point, the poor treatment of the complainers when giving their evidence was highlighted. The failures of both the judges at first instance and the Crown Prosecution were addressed against the backdrop of a system that is clearly in need of reform.

Dreghorn v. HMA

The 2015 case of *Dreghorn*⁵³ was appealed on the grounds that one of the complainers' testimonies was so incredible to as to render the 'guilty' verdict at first instance one that no rational jury would have reached⁵⁴. There were two complainers, SM and VH, who had been raped, sexually assaulted, and, subjected to domestic abuse. The offences occurred (mostly) in private so the *Moorov* doctrine⁵⁵ was applied. Thus, if either of the witnesses' evidence fell, so

⁵² Kennedy, 138.

⁵³ *Dreghorn v. HMA* [2015] HCJAC 69

⁵⁴ under s. 106(3)(b) of Criminal Prosecution (Scotland) Act 1995

⁵⁵ Where the charges libelled are 'private sphere offences' and have no witnesses aside from the complainer, if evidence from two complainers about offences which share sufficient similarities is credible, then such evidence

would the case as a whole. Attacking the credibility of a witness in this situation becomes a straightforward approach for the defence to raise a reasonable doubt. SM's testimony was unchallenged - it was found to be credible and reliable. On the other hand, VH, who was described by the appeal court as a 'woman with clear vulnerabilities' (who also suggested this may have been due to the offences in question),⁵⁶ was subjected to days of stressful, demeaning questioning, that appeared to have been carried out to break the witness.

Intimidation was at the heart of the appellant's strategy in discrediting the witness. Both the length of questioning, three days amounting to almost 600 pages in print, and the nature of the cross-examination to which the complainer was subjected were heavily criticised on appeal. The appeal court described it as a 'substantial ordeal for the complainer'.⁵⁷ The right under domestic law to test the evidence of a witness through directed and focussed cross-examination is necessary to ensure that justice is properly administered. However, it is not without its limits. Under the common law, the insulting or intimidation of witnesses is not permitted⁵⁸ – in this case, these rules were flouted by the defence. The question at the beginning of the cross-examination on whether the complainer was a 'wicked, deceitful, malicious, vindictive liar'⁵⁹ was intended to destabilise the complainer as were the repeated accusations of 'making things up'.⁶⁰ Following one of these such attacks she said she no longer cared and had given up on 'yous lot' - *yous* presumably referring to the whole system from which she was seeking justice.⁶¹ This is a deeply concerning sentiment to hear from a complainer.

The hostile reputation of the courts towards complainers in sexual offences is vividly shown in

may be mutually corroborative. Originating from *Moorov (Samuel) v HM Advocate* 1930 S.L.T. 596

⁵⁶ *Dreghorn* at [14]

⁵⁷ *Dreghorn* at [38]

⁵⁸ *Falconer v Brown* (1893) 21 R (J) 1, at [4]

⁵⁹ *Dreghorn* at 15

⁶⁰ *Ibid* at 17

⁶¹ *Ibid*

Dreghorn. The combination of the language used, length of time and the grating, incessant accusations of lying would naturally have an impact on a witness who was reliving a traumatic event. VH's cross-examination caused such damage as to make her appear physically ill and stopped questioning early on one day.

The repeated questioning of the complainers' tendencies to lie perpetuates the myth often found in the media and literature that women frequently falsify rapes for their own gain, for example the accusations of sexual assault in *To Kill a Mockingbird* are used as a means to cover up the woman's sexual promiscuity.⁶² There is a widely held belief that false allegations of rape are prevalent in Scotland.⁶³ The argument that forceful questioning is required to protect against false allegations resulting in unsound convictions becomes very weak when the statistics are considered. A 2005 study of rape allegations in Scotland concluded that only 3% of allegations made to the police were false.⁶⁴ There is no need for 'combative' questioning⁶⁵ of this kind only serves to intimidate and embarrass the complainer rather than protect the innocent accuseds from false convictions.

During the defence's speech, no objection was raised when counsel said that the 'truth doesn't change' and where there are discrepancies in testimony, the explanation is that it is not the truth.⁶⁶ This is exactly contrary to what psychologists tell us about the functioning of memory when an individual is recalling traumatic events.⁶⁷ It is surprising that neither the judge nor the Crown made any objection to any of the questioning or comments made during the trial, especially when the appeal court identified so many areas of concern. It is unclear if the lack of

⁶²Eva Wiseman, *Truth About Women Crying Rape*, (The Guardian, 31 March 2013, <https://www.theguardian.com/lifeandstyle/2013/mar/31/truth-about-women-crying-rape>).

⁶³ Rape Crisis Scotland, Briefing paper on False Rape Allegations (September 2013).

⁶⁴ L Kelly et al, *A Gap or a Chasm? Attrition in reported rape cases*. (Home Office Research Study 293, 2005).

⁶⁵ *Dreghorn* at [19]

⁶⁶ *Ibid*.

⁶⁷ Brown et al, *Memory, trauma treatment, and the law*. (1998, W. W. Norton & Company).

objection was due to a lack of appreciation for the inappropriate nature and substantial impact of the questioning or being aware of the impact and inappropriate nature, nevertheless, though it to be to be acceptable. Either is worrying.

Donegan v. HMA

Like *Dreghorn*, the 2019 case of *Donegan v. HMA*⁶⁸ also created a very hostile environment for the complainers. *Donegan* dealt with two complainers: one who immediately reported rape and the other who first made partial disclosures and formally reported at a later date. The delay in the allegations of the latter complainer led to a demeaning and unnecessary attack on her credibility and character during the cross-examination. Not only did the defence conduct a ‘lengthy, unjustified and [...] insulting’⁶⁹ cross-examination, but the trial judge also engaged in cross-examination-like questioning. Judicial cross-examination is prohibited⁷⁰ and can open a case up to appeals on the basis of actual or apparent partiality⁷¹.

One of many areas which raised concern in the appeal court was the embarrassing nature of sections of the cross-examination. The length of time between romantic partners was, in this case, entirely irrelevant yet the complainer was questioned on this. Cross-examination of this nature - as a means to ‘humiliate’ a witness – has been criticised by European Court of Human Rights.⁷² In theory, the guidance should be in addition to the common law protections offered, but here neither were adhered to.

⁶⁸ *Donegan v. HMA* [2019] HCJAC 10

⁶⁹ *Ibid* at [54]

⁷⁰ *Tallis v. HMA* 1982 SCCR 91

⁷¹ GW Gordon, ‘Keeping Up Appearances: Judicial partiality, Natural Justice and Article 6(1) in Scots Law’, 2006 JR 241

⁷² *Y v Slovenia* [2016] 62 EHRR 3

The complainer was then told that she should be capable of ‘telling someone to get out of her bedroom’ and was then asked if she had tried ‘screaming at the top of [her] voice?’.

The inferences of ‘victim blaming’ from these lines of questioning are concerning. The questions imply that the complainer didn’t do enough to prevent herself from being raped. It suggests that had the complainers been more confident and assertive the situation would not have arisen. In turn, in the eyes of the jury, this shifts the culpability of the accused to the complainer and thus minimises the severity of the crime. Victim blaming only serves to suggest that the complainer ‘deserved it’. However, the complainer should not need to justify every single decision made after the event – she is not on trial, and she is not to blame.

What is most striking about these propositions is that they show how much the courtroom fails to acknowledge the social context and psychological knowledge surrounding rape and sexual offences. Sexual offences are different from other crimes for a number of reasons – the often private and intimate nature, the motivations, the physical and emotional impact on the survivor - and, in the interests of justice, should be treated as different where required.

Firstly, there is a failure to acknowledge the inherent role of power and dominance in sexual offending. Many scholars argue that power and control are the main motivation for rapists.⁷³ The questioning did not consider the powerlessness felt by a woman who had already experienced other forms of violence and humiliation by the perpetrator and had invited him into her home. ‘Screaming for help’ could very likely put the victim in further danger of abuse. Sexual offending is not a situation of two persons with equal physical or social power. The insinuation that prevention was within the capabilities of the victim is insensitive and redundant.

⁷³ D Bryden, & M Grier, ‘The Search for Rapists’ ‘Real’ Motives’, (2011). 101(1), *The Journal of Criminal Law and Criminology*, 171.

Another area which the defence and judge failed to understand was the emotional impact of the rape. Feelings of shame and humiliation were both accepted as reasons for the delayed reporting of the incident (the jury were given instruction following s. 288DA CP(S) that such a delay was not in itself a reason to doubt the complainer's credibility). However, this apparently doesn't extend to the expectations of the court on the actions of the victim directly after the fact. Questioning this repeatedly was out of touch with the circumstances. The Crown, again as in *Dreghorn*, made no objection to the questioning by the judge.

Vulnerable adult witnesses, which under CP(S) include victims of domestic abuse and sexual offences, are offered protection by application when in court,⁷⁴ including the addition of a screen obscuring the accused from the view of the complainer or giving evidence via video link. Nonetheless, there is no protection from malicious nor excessively long cross-examination. The common law protections for general witness examination in theory are sufficient. From both the *Dreghorn* and *Donegan* cases, however, it is clear these are not even properly implemented. This situation leaves victims vulnerable and exposed.

The Need for a Trauma-Informed Approach

There is no lack in psychiatric research of the effects of rape and sexual abuse on the complainer. It has been argued that justice systems pose a great danger of the 'revictimization' of the complainer due their structures,⁷⁵ with complainers describing the experience as 'further abuse'.⁷⁶

⁷⁴ ss. 271 – 271M CP(S) 1995

⁷⁵ J. Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention', *International society for Traumatic Stress Studies*, 2005

⁷⁶ Helena Kennedy, *Eve Was Framed*, (Chatto & Windus, 1992), 128.

For those who have never been a victim of sexual assault the psychological impacts of it are obscure hidden. Unless it is presumed that all legal persons and the jury the court room have had a first hand experience with sexual assault, the consideration of the psychological impacts of sexual assault should as part of the common knowledge of the court will prejudice the complainer. Where required, sufficient information must be given to the jury to allow them to fully appreciate the psychological impacts of rape. Similarly, training, or substantial advice must be given to the defence to prevent the exacerbation of those psychological impacts, especially in the cross-examination process. Clear and enforced limits to what lines of questioning are likely to cause significant distress to the complainer should also be introduced.

The jury are not left without any guidance on sexual offences and evidence giving. For example, guidance is given that due to traumatic event discrepancies in the testimony of the complainer may arise, but this does not automatically reduce her reliability. The courts, under s. 288DA of the CP(S), must now inform the jury that a delay in reporting does not dismiss the credibility of the complainer's evidence. In theory, in addressing this, the court has mitigated any doubts as to credibility and reliability due to lack of understanding of the social and mostly psychiatric impact of sexual assault. As questioning and arguments from the defence in this area are not subject to any formal restriction, the jury may still be encouraged by the defence to conclude that a delay reduces credibility. Importantly, the complainer may still have to defend her delay in reporting. The delay is often due to shame or a feeling of compliance or guilt in the situation. There is then a further embarrassment when the complainer must explain their shame and justify their delay to the court. It is no wonder that in 2019 only half of people seeking support from Rape Crisis Scotland had reported to the police.⁷⁷

Where the facts of the case require it, the jury should be informed of the impact that 'rape

⁷⁷ https://www.rapecrisisscotland.org.uk/resources-stats-key-info/#rlslider_3 Accessed 5 April 2021

trauma syndrome' can have on the demeanour of the complainer when giving evidence.⁷⁸

Survivors can appear unfeeling or distant from the event and not emotive enough when recounting their evidence. This is a coping mechanism – a direct result from the assault - that the courts should be able to give guidance on.

The courts should also be reminded of the common law protections complainers are afforded from improper questioning. The court and the Crown both must regulate the nature and length of cross-examination to reduce the scope for the embarrassing, abrasive or inappropriate questioning like that endured by the complainers in the above cases. Here, a balance must be struck between accused's right to a fair trial,⁷⁹ and the dignity of the complainer. The solution may be statutory, as in s. 274 CP(S), or perhaps may need a more flexible approach to ensure that where the questioning is relevant and not insulting or intimidating (as prohibited at common law) it is permitted while still excluding any questioning that does not pass the common law test.

Until both additional guidance on the psychiatric impacts of sexual assault is given to the jury, and restrictions placed on the types of questions that can be lead, there will continue to be a great risk that the court room is a place of 'further abuse' for the complainers.

Steps in the right direction?

The Scottish Government have and continue to take steps to reduce the hostile treatment of complainers in these cases.

⁷⁸ H Lauderdale, 'The Admissibility of Expert Testimony on Rape Trauma Syndrome', (1984) 75(4), *The Journal of Criminal Law and Criminology*, 1366

⁷⁹ Article 6 European Convention on Human Rights

The ‘rape-shield’ provisions, found in s.274 of the CP(S), attempt to preclude certain classes of evidence that were historically permitted under the common law that tended towards gratuitous attacks on the character of the complainer or admission of irrelevant sexual history evidence used to embarrass and demean her. This evidence can be admitted if there is a successful s. 275 application.

Research is currently being undertaken by HM Inspectorate of Prosecution in Scotland which is looking at COPFS practices in relation to s. 274 and 275.⁸⁰ Drawing on the empirical research of Dr Sharon Cowan which shows that in 90% of the s.275 applications the Crown made no objection and that 83% of applications were accepted,⁸¹ the report will hopefully make recommendations as to how to better give effect to protection from embarrassing, often calculated, admission of evidence. As the data used in Dr Cowan’s research does not have any details as to the contents of the applications, not much can be said with certainty at present. Either the current system for challenging applications either is highly effective in allowing only relevant and permissible evidence being admitted or is widely ineffective at preventing inadmissible evidence being led. The forthcoming report will hopefully give guidance on which is the reality.

There have been a number of suggestions from the 2021 report of Lady Dorrian on Case Management in Sexual Offences Cases⁸² as to how to improve the experience for complainers. Some are to be welcomed: training to ensure that judges and sheriffs take a trauma-informed approach when dealing with sexual offences cases will provide more sensitivity and consideration in the court room. The changes required for a fully trauma-informed approach, are substantial – some aspects that must be borne into consideration are discussed above.

⁸⁰ <https://www.gov.scot/publications/inspection-copfs-practice-relation-sections-274-275-criminal-procedure-scotland-act-1995-terms-reference/> Accessed 5 April 2021

⁸¹ Professor Sharon Cowan, *The use of sexual history and bad character evidence in Scottish sexual offences trials*, Equality and Human Rights Commission Scotland Report, (2020)

⁸² Scottish Courts and Tribunals Service, *Improving Case Management in Sexual Offences Cases*, March 2021

However, some recommendations will require special attention to ensure the environment in court is not exacerbated or the changes ineffectual.

The recommendations that complainers should have access to Independent Legal Representation (ILR) to challenge a s. 275 applications⁸³ will require a delicate application. The ability to be informed of⁸⁴ and challenge the admission of evidence that attacks the character of the complainer or includes irrelevant, embarrassing disclosures will be welcomed by complainers. In addition to practicability questions to be solved first (e.g. who is to inform the complainer?), there are two other potential risks that may arise. Firstly, if the Crown's role in protecting the complainer's dignity and privacy in this area is reduced further (as it will no longer be the responsibility of the Crown to challenge s.275 applications), then there is the risk that the general standard will fall. Perhaps leading to more instances of *Dreghorn*-like cross-examination without a challenge. Secondly, if the complainer has their own ILR, the perception of the complainer also being on trial may be aggravated. This is to be avoided as far as possible for the proper administration of justice. If the complainer is seen by wider society, or feels herself, to be on trial, the perception will only be further entrenched leading to reduced reporting and reversal of positive changes in society's attitude to complainers e.g. in the MeToo movement.

Another major recommendation as to how the process can be improved relates to when the evidence for use in court is taken. The report recommends that initial police interviews will be recorded and used as the evidence in chief of the complainer. This is to be supplemented by evidence given on commission i.e. pre-recorded at an earlier time during the proceedings,

⁸³ A developed proposal also put forward by E. Keane and Tony Convery, *Proposal for Independent Legal Representation of Complainers where an Application is Made to Lead Evidence of their Sexual History or Character* (2020).

⁸⁴ Issues in the past relating to the complainer's right to private and family life as protected by Article 8 ECHR have arisen in this area especially in relation to medical records – *WF v Scottish Ministers* [2016] SLT 359; *JC, Petitioner* [2018] HCA/2018/000013/XM

where required or the initial police interview is not usable. Removing the need to go to court and the stresses related to this as well as the key change in reducing the length of time the complainant is involved in the proceeding are the main reasons for the introduction of this. Unfortunately, it will likely prejudice complainants who don't make full disclosures initially as the police interview – which is a common enough occurrence for it to be legislated on (s. 288DA). The initial evidence given will have to be supplemented by evidence on commission which may differ hugely from each other. The gaps will be more apparent than under the current system leading to further challenges to credibility. The situation, as in *Donegan*, where the complainant made incremental disclosure would be worst affected. The new recorded evidence approach will require additional judicial guidance to supplement s.288DA on delayed reporting and flexibility to allow for situations which are prejudiced by the new method.

Conclusion

As shown by *Donegan* and *Dreghorn*, the environments created for complainants in the giving of their evidence in court can be highly hostile and combative. The gratuitous attacks on character, credibility and victim-blaming are deeply inappropriate. They serve to further harmful rape myths and are contrary to the common law protections from such questioning. With the ongoing unfair approach, the chronic underreporting of rape will not be rectified nor will the further harm that can occur in the courtroom be reduced. To solve these issues, I suggest the courts take a trauma-informed approach and take on – not unreservedly - the recommendations that are currently being forwarded. This will require substantial care and attention to the delicate balancing required to protect both the accused's right to a fair trial and the complainant's dignity, both of which are essential to the proper, effective administration of justice.

A critique of the Scots Law partial defence of provocation by sexual infidelity through examining *Gilmour*

by Meera Kaiser

The Scots Law partial defence of provocation to murder due to sexual infidelity is outdated and problematic. It draws on stereotypes and expectations that are out of place in a modern criminal justice system and should be left in the past, such as the proprietary right of men over their partners. The case of *HM Advocate v Gilmour*⁸⁵ came before the development of the modern partial defence, but it is useful as an exploratory tool to demonstrate how archaic values have been preserved in the Scots legal system. There are three prominent concerns that the partial defence brings up in relation to its suitability to the modern legal landscape. Firstly, the assumption of the ‘ordinary person’ standard as a characterisation of an ordinary Scottish person being one who is quick to kill being one that promotes the idea of everyday violence, which serves to normalise male violence against women. Secondly, the condoning of individuals taking on the role of executioner in response to noncriminal actions, which exposes an acceptance of anachronistic honour killings, and moves the normalisation of male violence towards a justification for it. Finally, the defence brings up a myriad of concerns surrounding its gendered application, as it is primarily used to defend men who kill as a reaction to the infidelity of their female partners. On the basis of these issues, there is large room to argue for reform in this area of law - something which several other jurisdictions, such as France and England and Wales, have already taken the steps to do. Specifically, I will be suggesting a reform that moves away from the reaction that comes from anger towards one from fear, based on the proposal by the English and Welsh Law Commission.

⁸⁵ 1938 J.C.1; 1938 S.L.T 72

The partial defence of provocation deals with cases where one is less responsible for their actions due to their emotional response to triggering acts. In *Drury v HM Advocate* it was held that the two circumstances that this partial defence could apply to were deaths resulting from a reaction to an assault or sexual infidelity⁸⁶ - a successful plea of either results in the accused being charged for the lesser offence of culpable homicide, rather than murder. This essay focuses on the latter, which is based on the notion that the 'ordinary person' would react in the same way in reaction to such provocation⁸⁷. There is no requirement that the act of infidelity is discovered itself, but an indication that it has or is about to happen will suffice⁸⁸, and the test has been applied to the discovery of previous partners' current sexual activities⁸⁹.

The case of *Gilmour*

The case of *HM Advocate v Gilmour*⁹⁰ concerns the accused finding his wife in their home with another man. The circumstances of the discovery were such that heavily implied the two were having an affair, though there was no conclusive discovery of the act taking place. The accused, Gilmour, proceeded to assault both his wife and her partner to severe injury and the man died from his wounds. Despite the charge being for both assault and murder, the conviction was limited to assault, following the representation to the jury from Lord Justice-Clerk Aitchison that they were entitled to decide the case in such a way. This essay will deal with the way this case would be decided in a modern Scottish court. If held in a modern court, the conviction would likely be one of voluntary culpable homicide, through the partial defence to murder of provocation due to sexual infidelity, as there has been an immediate reaction to a discovery of

⁸⁶ 2001 SLT 1013 at [25]

⁸⁷ Ibid. at [29]

⁸⁸ *HM Advocate v Hill* 1941 JC p.59

⁸⁹ *Drury v HM Advocate* 2001 SLT 1013

⁹⁰ 1938 J.C.1; 1938 S.L.T 72

evidence suggesting that his partner has been unfaithful, following the case of *HM Advocate v Hill*⁹¹.

The ‘ordinary’ murderer

The partial defence makes use of the ‘ordinary person’ test. It is derived from the ‘reasonable person’ equivalent previously found in English criminal law, intending to reflect that a reasonable person would not act in such a way⁹², altering how a court would assess a given set of circumstances. The reduction to ‘ordinary’ seems to widen the availability of this defence, with the bar for the standard of behaviour being lower - the accused need not show that they were acting with any reason, nor that the action was morally right, simply that an ordinary person would have acted in such a way when presented with the same circumstances. The development of precedent has allowed the dated principles of male entitlement in such circumstances to fall within the wide application of this defence, even where a modern society would not consider it suitable.

The characterisation of the ‘ordinary’ Scottish person being one that reacts to their partner’s infidelity by killing is an understandably controversial notion. Most people never kill at all, so how can such a response ever be ‘ordinary’? With murder being such a serious offence, this seems a dubious justification to reduce it to a lesser conviction and sentence. The characterisation of the accused in this partial defence brings archaic values of male honour before modern courts, such as a proprietary interest in one’s female partner⁹³. This serves to

⁹¹ 1941 JC p.59

⁹² Claire McDiarmid, ‘Don’t Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law’ in James Chalmers, Fiona Leverick and Lindsay Farmer, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) p.199

⁹³ Celia Wells, ‘Provocation: The Case for Abolition’ in Andrew Ashworth and Barry Mitchell, *Rethinking English Homicide Law* (Oxford University Press 2000) p.88

cement the place of violence in everyday life and reasoning. The defence is additionally worrying, as it can be successfully claimed in the case of former relationships⁹⁴, confirming an acceptance of the societal attitude of ownership even when the female victim does not consent to being in a relationship at all. Despite the accused's reaction being far from 'ordinary' under modern standards it is very likely that *Gilmour* would have succeeded in this defence today, as it fits into the requisite test to lower the accused's conviction to culpable homicide. Moreover, statistically, the 'ordinary man' is far more likely to murder their partner than the 'ordinary woman'⁹⁵, meaning that access to this defence is likely to be unequal across genders, as will be further discussed later in the essay. It is clear that the characterisation of the 'ordinary person' is not only inaccurate for the Scottish population, but damaging, opening up a wider defence to people who react with violence where such protections are not warranted.

The citizen executioner

Unlike the alternative branch for the partial defence to murder – assault – sexual infidelity is not a crime. In contemporary times, it would not be dealt with in a court, nor would there be any legal repercussions. Nonetheless, the partial defence of provocation as a result of sexual infidelity effectively entitles the accused to take the law into their own hands in dealing out punishment. Lord Justice-Clerk Aitchison in *Gilmour* represents to the jury that they may conclude that the accused's actions were wrong, but that, if he “acted in... passion” and did not “appreciate to the full extent what he was doing”, then they were entitled to fully acquit him of the charge of murder⁹⁶. The severe implication of this is, despite the court preferring that an individual would not act in such a way, infidelity is a valid excuse, if not justification,

⁹⁴ *Drury v HM Advocate* 2001 SLT 1013

⁹⁵ Claire McDiarmid, 'Drury v HM Advocate 2001 SLT 1013' in Sharon Cowan, Chloë Kennedy and Vanessa E Munro, *Scottish Feminist Judgements (Re)Creating Law from the Outside In* (Hart Publishing 2019) p.120

⁹⁶ *HM Advocate v Gilmour* 1938 J.C.1; 1938 S.L.T

for murder. Such an attitude entitles jealous partners to act as an executioner in punishing conduct which is not a crime. If this case was tried in a modern court, the partial defence would likely apply, as the courts are still allowing outdated excuses for partner-on-partner violence.

The approach serves as a justification of honour-based killing to protect the reputation of emasculated men⁹⁷. Honour-killings take place where a person, usually a woman, is murdered as a way to repair injuries against male or familial honour⁹⁸, and it is clear that cases that fall within the partial defence usually fall within this definition. The male ego, bruised by a partner's infidelity, is entitled to react with violence to soothe the bruise. Again, this serves to further entrench the view of women as property and uphold the overbearing requirements of fidelity. The narrative followed seems to be victim-blaming, placing the responsibility for the death of the partner partly outside the hands of the accused, and into the hands of their dead or injured partner. The cases that the partial defence applies to are only the tip of the iceberg of domestic abuse utilised to keep women in their place, with the vast majority of the violence being unseen by the public⁹⁹, and the acceptance of such high scale reactions serve to justify smaller damaging acts.

A gendered defence

The issues highlighted from this partial defence are clearly not un-gendered, as has been outlined briefly above. The nature of the expectations of fidelity - and the consequences for infidelity - experienced by women are different from those placed on men. The societal ideals

⁹⁷ Rupa Reddy, 'Gender, Culture and the Law: Approaches to 'Honour Crimes' in the UK' (2008) Vol. 15, Iss. 3 Feminist Legal Studies p.305

⁹⁸ Ibid. p.306

⁹⁹ Jill Radford and Elizabeth A. Stanko, 'Violence against Women and Children' in Marianne Hester, Liz Kelly and Jill Radford, *Women, Violence and Male Power* (Open University Press 1996) p.68

of feminine value being found within a woman's loyalty, in which a man essentially makes an investment¹⁰⁰ are encompassed within the defence - endorsing the sense of "sexual ownership"¹⁰¹ which Claire McDiarmid identifies in the case of *Drury v HM Advocate*. The male partner in a heterosexual relationship typically holds, or is seen to hold, a higher power role within the relationship, and resultantly sexual infidelity by their partner represents a loss of control, status and dominance¹⁰². On top of this, men are more prone to reactive jealousy against their partners than women¹⁰³ with sexually motivated murders being primarily men murdering women¹⁰⁴. The Scottish homicide statistics for 2020-21 show that while 62% of female victims were killed by a partner or ex-partner, that same category was 22% for male victims, and 92% of those accused of homicide were male¹⁰⁵. As a result, the crimes which this defence partially excuses are primarily male on female crimes, which allows for a subjugation of women and an acceptance in men's proprietary interest in their partners. Lord Aitchison in *Gilmour* characterised the accused's wife's infidelity as the "most terrible provocation"¹⁰⁶, which accurately encapsulates the idea of ownership of women as it relies on a view of sexual infidelity as theft. The language used highlights that this is considered the worst offence a woman can commit - denying a man his right to exclusive use over his property. That a judge is referencing this in his representation to the jury further shows that this idea has been entrenched in the Scots legal system throughout the development of the laws surrounding

¹⁰⁰ Luci Paul and Jianna Galloway, 'Sexual Jealousy: Gender Differences in Response to Partner and Rival' (1994) Vol. 20 Iss. 3 Aggressive Behaviour p.203

¹⁰¹ Claire McDiarmid, 'Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law' in James Chalmers, Fiona Leverick and Lindsay Farmer, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) p.209

¹⁰² Margit I. Berman and Patricia A. Frazier, 'Relationship Power and Betrayal Experience as Predictors of Reactions to Infidelity' (2005) Vol. 31 Iss. 12 Personality and Social Psychology Bulletin p.1617

¹⁰³ Luci Paul and Jianna Galloway, 'Sexual Jealousy: Gender Differences in Response to Partner and Rival' (1994) Vol. 20 Iss. 3 Aggressive Behaviour p.203

¹⁰⁴ Karen Ingala Smith, 'Femicide' in Nancy Lombard, *The Routledge Handbook of Gender and Violence* (Routledge 2018) p.167

¹⁰⁵ Scottish Government, 'Homicide in Scotland 2020-2021: statistics' (gov.scot, 26 Oct 2021)

<<https://www.gov.scot/publications/homicide-scotland-2020-2021/pages/4/>> accessed 5 April 2022

¹⁰⁶ *HM Advocate v Gilmour* 1938 J.C.1; 1938 S.L.T

these issues. Despite the common law not explicitly providing standards for men and women within the context of domestic murders, it does still uphold stereotypes of male superiority and female subjugation.

Moving forward

The highlighted concerns make it clear that reform is needed in this area. Different jurisdictions with similar approaches have begun to alter their own versions of the provocation partial defence. France has completely removed sexual infidelity defenses, and simultaneously abolished minimum penalties for murder, leaving the sentencing up to the court¹⁰⁷.

Considering the Scots partial defence was originally imported from English law to avoid the use of capital punishment¹⁰⁸, abolishing the defence would not be unreasonable if guidelines were in place to ensure reasonable sentencing in differing cases. Without appropriate guidelines, there would be a risk of the defence of provocation by sexual infidelity resurfacing under a different name¹⁰⁹, and the risk would remain without frequent evaluations of the effectiveness and fairness of the system. England and Wales have also veered away from the traditional defence by fully abolishing the common law rules¹¹⁰, and replacing them with the partial defence of 'loss of control'¹¹¹ due to a 'qualifying trigger'¹¹². This notably excludes the use of sexual infidelity as a valid provocation, which seems at surface level to solve some of the issues. However, it has been argued that the 'loss of control' approach still maintains a defence

¹⁰⁷ Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan 2014) p.103

¹⁰⁸ Ibid. p.25

¹⁰⁹ Kate Fitz-Gibbon, 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) Vol 40 No. 2 Journal of Law and Society p.296

¹¹⁰ Coroners and Justice Act 2009, s. 56

¹¹¹ Ibid., s. 54

¹¹² Ibid., s. 55

that is centred around a typical male reaction, and therefore the law continues to justify male violence against women disproportionately¹¹³. This replacement did not follow the English and Welsh Law Commission's recommendations, which advised against 'loss of control', and instead centred on a defence for reactions based on a fear of serious violence. This is a preferable approach as it moves away from self-righteous, anger based acts¹¹⁴ that result in violent revenge, instead protecting those that have been acting as they have been forced to due to the circumstances. While the new reformed partial defence certainly does improve the issue, it still results in gender-based discrimination.

Conclusion

This analysis, with the assistance of the example of *HM Advocate v Gilmour*¹¹⁵, demonstrates that the partial defence of provocation from sexual infidelity is unfit for use in Scotland's modern legal landscape. It is inappropriate to characterise the 'ordinary' Scottish person as one who would murder their partner on finding them unfaithful, as it holds onto archaic ideals that should no longer be upheld as modern norms. Furthermore, it justifies honour-killing, allowing individuals to take the law into their own hands even where the provoking act is not a crime. This serves to create a victim-blaming narrative allowing violent partners to feel righteous in their actions, which is unacceptable in a modern legal system. Throughout, there is an inherent bias towards the upholding of male power structures at a societal and individual level. The partial defence, therefore, must be reformed. Through analysis of the existing reforms elsewhere, the suggestions of the English and Welsh Law Commission's that were not followed in the reforms stand out as the best way to veer the provocation defence away from

¹¹³ Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan 2014) p.135

¹¹⁴ Law Commission, *Partial Defence to Murder* (Law Com, 2004) paras. 3.103

¹¹⁵ 1938 J.C.1; 1938 S.L.T

justifying anger-based reactions while taking into account the gender nature of the crimes.

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Critiquing the United Nations Convention on the Rights of the Child to Enhance Children's Rights and Align with Domestic Law

by Rhys Tydeman

Introduction

Adopted by the United Nations in 1989, the *United Nations Convention on the Rights of the Child* (UNCRC) was ratified by the United Kingdom in 1991, but never transitioned into the state's domestic law. In response, Scotland attempted to integrate the UNCRC into domestic law with the *UNCRC (Incorporation) (Scotland) Bill* (UNCRC Bill) in 2021. However, Scotland struggled to legally implement necessary judicial changes for ratifying the Bill due to conflicting powers reserved by the United Kingdom's Parliament, as demonstrated by the United Kingdom Supreme Court's assessment of Scottish devolved competence.¹¹⁶

Within the UNCRC Bill case and its assessment of Scotland's competence, the United Kingdom Supreme Court ruled against Scotland, concerned about how ratification would infringe competence bestowed by the Scotland Act 1998. Examples of violations identified by the United Kingdom Supreme Court include provisions in the Bill that instill Scottish courts with too much scrutinizing and interpretative power against the United Kingdom's parliament (violating s28(7) of the Scotland Act 1998), and a requirement for "reading down" the Bill to help provide legislative competence for the Scottish Parliament (violating s101(2) of the Scotland Act 1998 which requires for bills that are potentially outwith competence to be read as narrowly as possible). In their analysis however, the court intentionally avoids considering the potential impact of the UNCRC on child rights, strictly analyzing the Bill from a perspective of Scotland's legal competence.

¹¹⁶ Re: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42

Although integration of the UNCRC Bill into devolved domestic law is impossible without structural changes to be within competence, the Bill and Convention crucially demonstrate internal issues outside of the court's commentary. For Scotland and the United Kingdom to capitalize upon benefits of the UNCRC, vague provisions that instigate internal conflicts between domestic and convention law, cultural and philosophical practices inherently belittled by ambiguously applicable and exploitable provisions, and restrictions on parental rights and responsibilities catalyzed by children rights, should be addressed by the countries. By addressing these concerns, the UNCRC Bill will effectively integrate international convention into domestic law, dynamically strengthening the legal rights and protections of children in Scotland while paving strong guidelines for the United Kingdom to emulate. Through remedying these concerns, the UNCRC Bill will improve from a political and cultural perspective unaddressed by the court's legal analysis towards the effective implementation of the Bill. Furthermore, a combination of legal revision proposed by the court, alongside cultural and political modifications, will enhance the impact of the UNCRC on child rights to be optimal for ratification.

Brief Context

Emphasizing the importance of domestic integration as a significant incorporation procedure beyond ratification, the court asserts that domestic jurisdiction cannot adjudicate for international law in conflict with domestic law.² This restriction also applied to the European Convention on Human Rights (ECHR) before integrating into domestic law.³ Analyzing *Cheney v Conn*¹¹⁷ and *Attorney-General v Guardian Newspapers Ltd*¹¹⁸, ratifying international conventions can be persuasive in a decision, but not necessarily binding when

¹¹⁷ *Cheney v Conn* [1968] 1 WLR 242

¹¹⁸ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109

opposed to domestic law. Specifically, because parliamentary sovereignty supersedes international law without consent by the parliament, and because domestic courts cannot enforce international law, international law is less obligating than domestic law. As a result, further integration is crucial to ensure that convention rights are consistently applicable for supporting child rights.

With ratification, integration of the UNCRC in crucial aspects of children like the right to life.¹¹⁹ and general protection of welfare,¹²⁰ become legally binding and directly applicable in domestic courts. Additionally, the political and cultural impact of integration is significant based on the codification of international law, as well the ratified content.. For example, the University College of London's Department of Political Science published an article which outlines that codifying documents into domestic law binds the United Kingdom legally and politically to respect their content.¹²¹ As a result, this obliges the United Kingdom to respect the cultural and social dynamic of the population in demands that are publicly well received; however, some aspects of the UNCRC should be reformed to align with public and political demand towards strong reception and support, such as concerns regarding legal capacity, cultural relativism, child welfare, child maturity, and right to family and private life. By addressing these legal, political, and cultural concerns, the UNCRC will more impactfully enhance the rights of children with greater transparency and support by the population. Moreover, I will be focusing on additional cultural, political, and legal concerns rather than the competence issues addressed by the court to outline where the UNCRC can continue to improve to be optimized for ratification.

¹¹⁹ United Nations Convention on the Rights of the Child (Article 6)(1)

¹²⁰ United Nations Convention on the Rights of the Child (Article 36)

¹²¹ James Melton, Christine Stuart and Daniel Helen, 'To Codify or Not To Codify?' (2015)

The Constitution Unit UCL < <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/162.pdf> > accessed 9 June 2022

Article 6 and Legal Capacity

Outlining a contentious area of the UNCRC, the Convention upholds that states must recognize children's inherent right to life alongside the survival and development of the child.¹²² Within Scotland, to instill legal capacity for children when conducting medical decisions, a child can consent to receiving medical procedures if they are deemed competent by a practitioner.¹²³ As a result of intersecting interests, a situation has arisen where this contentious provision conflicts with other provisions. Notably, an English case has occurred within which the court argued that a 15-year-old girl, despite suffering throughout her life being prolonged by medicine, holding an informed opinion on the impact of her surgery, and wanting to die, could not deny life preserving medical treatment.¹²⁴

Within the non-binding context of Scotland, this case directly conflicts with the Age of Legal Capacity (Scotland) Act 1991 Section 2(4) by denying the child medical autonomy, and the Children (Scotland) Act 1995 which elevates UNCRC child rights from a "primary consideration" to a "paramount consideration," so that a child's views are considered above factors like the preservation of life. In implementing the UNCRC Bill, a child could hold intersecting rights that defy each other based on conversion issues between the convention and domestic law. Within the aforementioned example of *Re M*, denying medical treatment contradicts the right to survival, so although the court is required to prioritize the child's medically informed demand, the court will also have a role to uphold the UNCRC's requirement for a right to life. As a result, both the United Kingdom and Scotland, with dense amounts of domestic law, will struggle to ratify international conventions where

¹²² United Nations Convention on the Rights of the Child (Article 6)

¹²³ Age of Legal Capacity (Scotland) Act 1991 s. 2(4)

¹²⁴ *Re M (A Child: Refusal of Medical Treatment)* [1999] 2 FLR 1097

legislation intersects.¹²⁵

Paraphrasing Lord Mance's view, domestic and international law operate on "different planes" in legal and political aspects. However, Lord Mance then emphasizes that the relationship between international law and domestic law changes upon ratification, but that intersecting constructs of the law are difficult to address when transitioning. Moreover, as a product of overlapping rights, the UNCRC may unintentionally deprive children of legal defenses if two rights contradict, such as right to life and child medical autonomy. Resolving this adversity, Scotland's UNCRC Bill and proposition for domestic integration to the United Kingdom need to specifically address areas where rights conflict so that courts are interpretively efficient and adaptive.

Cultural Relativism and Children's Rights

Outside of legal cohesion, the UNCRC exhibits integration conflicts when applied to varying cultures and demographics in the United Kingdom, underscoring a potential socio-cultural conflict which may arise from improper ratification. For instance, Westminster's parliamentary Joint Committee on Human Rights commented on the Family Education Trust's misuse of the UNCRC to "advance their political agendas" by misinterpreting cultural values and childrens' rights.¹²⁶ Within the Joint Committee on Human Rights' memorandum for the United Kingdom, the committee remarked that provisions in the UNCRC may "undermine the role and responsibilities of parents by failing to acknowledge family autonomy," inhibiting family cultural practices that do not comply with the UNCRC. The memorandum does not expressly mention what cultural practices would be undermined, but

¹²⁵ Lord Mance, "International Law in the UK Supreme Court" (2017) Lecture at King's College London <<https://www.supremecourt.uk/docs/speech-170213.pdf>> accessed 10 June 2022

¹²⁶ Memorandum from the Family Education Trust (2003)

states that the power to decide would be better instilled within the families themselves, rather than the government to impromptly declare. I agree that preserving the cultural autonomy of families is important, and that enabling any government with unlimited power to declare acts as inappropriate with the UNCRC as justification may undermine cultural practices. As a result, focusing on what the UNCRC does definitively declare, and emphasizing those specific areas such as banning child marriages and reasonable chastisement as a defense, will be crucial towards the UNCRC's success. To enable courts to be interpretatively efficient, and for legislators to not be abusive, limiting areas of the UNCRC that grant vague and exploitable power may be a strong option to limit concerns alluded to by the memorandum.

Expanding upon cultural relativism, the memorandum condemns the UNCRC as a leverage for radical provisions that may bestow government overwhelming authority when ideologically assessing children's rights, tying into the inherent vagueness of the Convention. In response to issues like reasonable chastisement, which may be practiced in some cultures, Scotland bans specifically demeaning instances of chastisement where the punishment inflicted attributes to assault.¹²⁷ Similarly, to balance the rights and responsibilities of the parents and the child with cultural disputes, the United Kingdom and Scotland's governments should limit subjective interpretation by strictly asserting when certain provisions become unreasonable. When asked what specific cultural concerns the memorandum is addressing, the writer notes that they may span across social, cultural, religious and philosophical factors, but should not be left to the government to determine or limit. I agree that families should have autonomy over their cultural conduct, but some specific instances that generally violate appropriate practices in Scotland and the United Kingdom, like child marriages and reasonable chastisement, should be explicitly mentioned by the Bill as illegal. Addressing the concerns of the memorandum, drawing a distinct line between where actions are unacceptable

¹²⁷ Children (Equal Protection from Assault) (Scotland) Act 2019 Section 1 bans the legal defense of reasonable chastisement where the chastisement is perceived as excessive (most instances)

will be crucial to ensure that policymakers are not instilled with a capacity to limitlessly ban practices with vague areas of the UNCRC as justification.

Outlining how tighter thresholds for government interaction with the UNCRC will influence court decisions, the European Court of Justice declared under Article 3 of the ECHR that general punishment inflicted against a child by a school is not considered “degrading” enough to be inhuman treatment.¹²⁸ As this was an old case, a modern decision may be decided differently; however, the fairly recent memorandum mentions banning reasonable chastisement as a “slippery slope,” so there is opposition to the limitation of chastisement even within a modern connotation. Although the UNCRC includes the same restriction against inhuman treatment,¹²⁹ the Convention also includes a provision for the pursuit of “educational measures to protect the child from all forms of physical or mental violence.”¹³⁰ This suggests that the UNCRC would inhibit a defense of reasonable chastisement from schools attempting to justify violent discipline, as in the *Campbell and Cosans* case in which the child experienced “striking [of their] hand with a leather strap.”¹³¹ To prevent cultural misrepresentation, a definitive borderline limiting vagueness should limit the convention from being misinterpreted, thereby explicitly removing inappropriate disruptions like mistreatment by schools from the lives of children, but not instilling legislators with power to invade family lives as warned by the memorandum. As a result, the Scottish and United Kingdom’s Parliaments should consider adding guidelines to vague areas of the UNCRC Bill that specifically underscore when children’s’ rights are violated so that government ministers cannot subjectively interpret what provisions indicate, balancing when the wellbeing of the child becomes more significant than cultural practice.

¹²⁸ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR

¹²⁹ United Nations Convention on the Rights of the Child (Article 37)

¹³⁰ United Nations Convention on the Rights of the Child (Article 19)

¹³¹ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR [13]

Conversely, an argument may be proposed that limiting the scope of the UNCRC would consequently limit the rights of children and that defying family autonomy would violate provisions like Article 8 of the ratified ECHR (right to private family and home life).¹³² However, as demonstrated by the aforementioned interpretation of the *Re: M* case, a wider range of rights do not always convey stronger legal protections, and can sometimes facilitate a disruptive overlap for courts to interpret. By striking a balance between cultural protection, eliminating disruptive activity against children, and limiting vague provisions in the UNCRC, truncating the scope of the UNCRC will not damage the effective range of rights that children possess.

Vague Understanding of Child Welfare

Qualifying how tightening parliamentary interpretation of provisions will strengthen children's' rights, the United Kingdom parliament is scrutinizing vague ramifications within the UNCRC. For example, the UNCRC mentions welfare safeguarding against prejudice, but does not explicitly define what welfare indicates for children.¹³³ As conventions are intentionally vague for countries to interpret, Scotland would need to alter the UNCRC to more specifically define welfare. Addressing this lack of clarity, English statute constructs a checklist for the welfare of the child, providing relevant criteria that cannot be misappropriated by parliament;¹³⁴ and, addressing a concern exhibited by the Joint Committee on Human Rights, preserves unique characteristics of childhood.¹³⁵ As a result, the *Children Act 1989* expands upon the definition of welfare by detailing necessities like physical,

¹³²Hasanali Aliyev and Others v Azerbaijan 42858/11 – ECHR condemns the Azerbaijani government for disrupting the family life of Hasanli Aliyev under Article 8 of the European Convention on Human Rights

¹³³ United Nations Convention on the Rights of the Child (Article 36)

¹³⁴ Children Act 1989, s. 1(3)

¹³⁵ Memorandum from the Family Education Trust (2003) [3]

emotional and educational development,¹³⁶ and the child's feelings and wishes.¹³⁷ Though a provision limiting uncertain welfare allocation may damage the versatility of children's rights, constructs like a welfare checklist are designed to preserve necessities to the child in a manner that cannot be exploited per the Joint Committee on Human Rights' concerns, and enables courts to non-exhaustively adjudicate where children's' welfare is important even if the checklist does not account for such circumstances.¹³⁸ Stricter parliamentary interpretation through provisions like the welfare checklist strengthen the rights of children while limiting potential exploitations of overly vague legislation.

Legal Subjectivity Regarding Child Maturity

Committee on Human Rights' memorandum, the UNCRC risks depriving Referencing the Joint parents of rights and responsibilities to protect children, inadvertently harming the wellbeing of the child. To qualify this claim, the memorandum cites Lord Fraser who comments that "certainly I do not doubt, that in the overwhelming majority of cases the best judges of a child's welfare are his or her parents,"²⁴ and questions the UNCRC by suggesting that "children develop at different rates and no two children face exactly the same decisions. It is therefore not possible to dictate at what age a child should be able to decide X or Y." This comment concerns the evolving legal capacity of children, and relates to the UNCRC in areas such as Article 12, which deals with the court's role to determine if a child is mature enough to be legally capable, Article 31 which recommends that states assign ages appropriate for recreational activities, and Article 40 which advises for states to administer legal punishment in accordance to the child's age. Although children develop at different rates, differences may

¹³⁶ Children Act 1989, (s. 1(3)(a))

¹³⁷ Children Act 1989, (s. 1(3)(g))

¹³⁸ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

stem from irresponsible parenting, and lacking parental authority may prevent children from developing qualified perspectives. In such instances, the child's expansion of relevant views is crucial for their wellbeing, even if it defies the interests of the parent and age norms proposed by their parents. With influence stemming from Article 12 of the UNCRC (emphasizing the child's right to form their own views) this has culminated in Scotland as children consulting with lawyers,¹³⁹ and medical practitioners,¹⁴⁰ to grasp specific knowledge that their parents may not be capable of conveying. Consequently, Lord Fraser's statement fails to address circumstances that are disruptive and abundant in the lives of children when attempting to value family autonomy.

Regarding medical information, the High Court of Justice demonstrates an instance in which a borderline needs to distinguish the child's views from their parent and why, to establish that distinction, consulting with professionals to construct qualified views is important, for example in areas like vaccination.¹⁴¹ Within *F v F*, it was held that limiting the parents' rights is essential towards developing childrens' objective comprehension. Thus, the UNCRC should be considered from a perspective that balances the right of parents to a private life with the safety of the child, and provisions within the UNCRC Bill may need to pre-emptively balance instances where parental rights must be restricted for the benefit of the child's development. Although the UNCRC does not explicitly seek to disrupt the private lives of families, elements of the Convention such as Article 12 which seek to instill children with significant rights offset the rights and responsibilities of parents perceived in court, which may be interpreted as disruptive. However, in instances like *F v F*, in which the parent's perspective denies the child valuable resources like vaccines, family autonomy should be sacrificed for the wellbeing of the child.

¹³⁹ *Shields v Shields* (2002) SLT 579

¹⁴⁰ Age of Legal Capacity (Scotland) Act 1991, s. 2(4)

¹⁴¹ *F v F* [2013] EWHC 2683 (Fam)

Right to Private and Family Life

Demonstrating how parental rights and responsibilities may be balanced with children rights in the UNCRC Bill, policies of non-intervention are integrated within the UNCRC Article 16, which states that the government should refrain from intervening within family lives as much as possible. Article 16 of the UNCRC has exerted influence over legislation in the United Kingdom and Scotland, such as within the *Children Act 1989* welfare checklist which encourages non-intervention.¹⁴² Additionally, Scottish legislation emphasizes minimal intervention of the government in children's lives,¹⁴³ and underscores that the government should refrain from displacing children from their homes.¹⁴⁴ However, to ensure optimal execution of non-intervention, a family's right of private life should only be limited in dire circumstances. Though less government intervention preserves family rights to private life, the restriction of intervention may harm a child's wellbeing in specific cases.¹⁴⁵ For example, within *MCB v NMF*, the court refrained from intervening within a 5-year-old child's current residence despite the separating mother's argument that the country she was moving to had better childcare support than the United Kingdom could offer. As the child could not comment on the matter, and because the court prioritized non-intervention, the child may have been deprived of more beneficial living conditions in a new country.

Within conventions, provisions are often left vague for countries to adjust with their domestic law. To adjust non-intervention when integrated with the UNCRC Bill, the Scottish court case *SM v CM* provides an exception to non-intervention with specific conditions. Within the case, the court places a burden on the pursuer that movement of residence must be

¹⁴² Children Act 1989, s. 1(3)(c)

¹⁴³ Children (Scotland) Act 1995, s. 16(3)

¹⁴⁴ Children (Scotland) Act 1995, s. 22(1)(b)

¹⁴⁵ *MCB v NMF* [2018] CSOH 2

proven to be within the best interest of the child, and that making a specific issue order for moving residence is better than making no order at all.¹⁴⁶ As a result, placing conditions on non-intervention in Article 16 of the UNCRC and similar convention legislation will enable the government to intervene when assisting the lives of children, rather than primarily neglecting responsibility to avoid disrupting family lives.

Conclusion

In conclusion, the UNCRC offers comprehensive benefits upon ratification in Scotland, and the prospective success of the ratification could be noteworthy to the United Kingdom to emulate, but the Convention also exhibits conflicts that should be remedied for smoother and more effective domestic integration. In addition to the commentary provided by the court advising Scotland to adjust the ratification to act within devolved competence, the UNCRC Bill should also adjust the Convention provisions structurally. Notable concerns that require modifications include the innate vagueness of the Convention which manifests within issues like allocating child rights that conflict with pre-existing domestic or UNCRC law, ambiguous provisions in the UNCRC which could instill legislators with too much power to interpret private and cultural family practices, and an unclear understanding of welfare that should be specified in a manner similar to the United Kingdom's Children Act 1989. In addition to the vagueness of the UNCRC, balances between parental rights and responsibilities as well as child rights and government intervention need to be established to ensure that family autonomy is only infringed when necessary for the sustainability of the child. By addressing these issues, the UNCRC Bill will more effectively integrate into Scotland in unity with the nation's domestic law, which will enable Scotland to successfully empower

¹⁴⁶ *SM v CM* [2012] S.L.T. 428

children and families in balance with the Scottish parliament and courts.

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