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Governance in a time of culture wars

On 22 March this year, the legislature in Florida passed a law, HB 1, nicknamed the STOP W.O.K.E. Act, which stands for ‘Stop The Wrongs to Our Kids and Employees’. The Act entails some restrictions that employers and education providers would have to adhere to in their mandatory diversity and race-related training. It provides that it would be discriminatory on the part of an employer to subject their employees to training which endorses concepts such as superiority or guilt by virtue of belonging to a particular race, gender or national origin. Among other things, terms such as white privilege and male privilege must be referred to in a ‘non-objective’ manner.

On the surface, the Act seeks to prevent imposition of ideologies without a person’s consent but in effect it will drastically impact how workplaces are able to discuss race and gender. It also takes an aim at the instruction of critical race theory. This theory has its roots in the Marxist interpretations of law and proclaims that oppression of certain groups of people is embedded within legal systems to favour the ruling elite.¹ The theory also sees race as a social construct, rather than stemming from individual beliefs. The Act was met by a flurry of lawsuits which allege that the Act violates the First Amendment (freedom from government restrictions on free speech). At the time of writing, the federal court has issued a preliminary injunction and has blocked parts of the Act from coming into force.²

The perceived threat of woke culture

The Act was passed by a Republican-led legislature and signed by Ron DeSantis, the Governor of Florida. It was a part of a broad plan to counter woke movements and ESG movements, which DeSantis deems as ‘ideological corporate power’. His views of criticising woke culture and cancel culture are pervasive across many conservative governments around the world. For instance, in the run-up to the 2022 Conservative Party leadership election in the UK, Rishi Sunak pledged he would eliminate ‘woke nonsense’.

The term ‘staying woke’ was used for those who were self-aware and willing to challenge dominant paradigms.³ It crept into common parlance in the mid 2010s and later became entwined with the Black Lives Matter movement. Initially, woke culture came to be seen as an awareness of social injustices, demanding answers to historical wrongs and calling for greater accountability. Woke capitalism also originated whereby corporations made symbolic gestures to appeal to the millennials who relatively hold more socially liberal views.

More recently, a narrative has emerged that what was once integral to social justice has now gone too far so that now ‘people are becoming frightened of saying the wrong thing, using the wrong language about a pretty wide range of opinion’.⁴ According to a recent study, more people perceived the word ‘woke’ as an insult now compared to just one year ago.⁵ For most people, being woke now paints a picture of statue destroyers, aggressive tweeters and ‘snowflakes’. Academia also became a breeding ground for ‘cancel culture’, where universities were quick to side with their student bodies and dissociate from faculty or guest speakers that made remarks even remotely close to sexism, racism and countless other -isms.⁶

The clash of cultures

Increasingly, more people began speaking against the threats of this leftist illiberalism: ‘We’ve become a timid, mute, fearful society in which everyone must walk on constant eggshells for fear that they will be next for the social media pile-on and politically correct execution’.⁷ Unsurprisingly, conservative governments could sense the dangers as woke movements raised the question of how far governments should go in correcting historical wrongs, such as the slave trade. The growth of far-right populist movements around the world also highlighted the political polarisation in societies. Far-right actors are becoming increasingly known for making statements that are far from politically correct and would not have been acceptable years ago. This political

polarisation is endemic throughout the state and media and it is what drives the culture wars agenda.⁸ Additionally, the word 'woke' and its negative connotations are now used as a weapon by far right movements for discrediting social justice progress.⁹

Going forward

Even if the culture wars in the UK were to subside as their novelty fades eventually,¹⁰ how corporations and states react will increasingly come under scrutiny. Firms need to look at whether their diversity-related training actively targets structural problems or is merely a superficial tick-box exercise. The Florida law raises concerns of how far the state can go in curtailing freedom of speech. Governments need to be careful not to tread the line between being democracies and being autocratic states, which suppress dissent under the pretext of defending their history.¹¹ Similarly, a democratic society which champions free speech must actively seek out ways to support those who exercise this right rather than policing and punishing needlessly.¹²

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Notes

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What can we learn from the case for prison abolition? A pragmatic conversation on injustice and mass incarceration in the US

Ammar
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Introduction

For 1.9 million people in the United States, the criminal justice system (CJS) has chosen incarceration as the form that justice should take for their violations of the criminal law. Yet

entrapped within that form of justice is Marissa Alexander, who was abused by her husband and convicted of aggravated assault with a lethal weapon after firing a warning shot, receiving a 20-year prison sentence. When 'serious' offences are not committed,

the misdemeanour system will be sure to trap innocents such as Tyrone Tomlin, who did not have the resources to pay bail but was incarcerated and severely beaten as he awaited trial.

The system of incarceration in its current form must be reformed monumentally to restore the respect for human rights and provide proper justice.

Justice means different things to different groups, but it can broadly be defined as the fair and equal treatment under the law. Practically, justice also refers to legal structures (such as the CJS) whose primary function will be to accord benefits or burdens after the law is applied to factual circumstances.² For too many people, the CJS is failing to perform its primary function. This is compounded by failures that are characterised by intersectionality. Black women, for example, have been imprisoned at over 1.7 times the rate of white women in the US, as recently as 2019.³ In Baltimore, where Black men are notoriously arrested for loitering, arrest forms are already filled out in the race and gender box, which reads 'BLACK MALE'.⁴ The phenomenon of mass incarceration can be traced to the 1970s and the rise of the New Right, and for some prison abolitionists, the system has become obsolete and a producer of injustice, and should therefore be dismantled in favour of communitarian and rehabilitative methodologies. The injustices produced from a system of mass incarceration can be broken down into two categories: social and economic injustice.

Rethinking economic justice

Beginning with latter, the economic injustice that comes with incarceration manifests in the form of profit for private companies and/or public authorities' budgets, and a grave loss for the incarcerated, regardless of the severity of the crime. While the majority of prisons in the US are public, the majority of operators (security, data and healthcare services) within the prison industrial complex are private. In 2019, Worth Rises exposed over 4,000 private companies that directly profited from the current system of incarceration (with an increase of 800 companies from previous year).⁵ The critical problem with the modern prison system is that it is a zero-sum game – when private vendors such as catering or electronic security businesses demand fees for their services,

the state shifts the cost of incarceration onto the incarcerated, who ultimately lose out. Contrary to fundamental principles, the free market as it concerns prisons will work best when people aren't free, because the influence of economic concerns for efficiency mean that a just system of incarceration is undesirable to a systematic process of mass incarceration. However, if economic injustice is rooted partly in prioritising concerns of efficiency, then it is wholly counterproductive to outsource prison services to the private sector, where market participants are looking to compete, decrease prices and maximise profit. This concern is not abstract either. With the zero-tolerance immigration policy announced by the previous administration in 2018, an increase in the immigration detention business benefitted two of the most prominent private prison operators, The GEO Group and CoreCivic.⁶

Further to this are the devastating consequences to the US economy that stem from increased incarceration. Incarcerated individuals – no matter how fleeting their experience in prison was – find it tremendously difficult to find a job following the production of a criminal record. Too many jobs will revoke offers or refuse an application after performing a background check, and thus the stigma surrounding former prisoners who remain attached to the label of criminality is estimated to have cost the US between \$78-87bn of output, as the employment rate of both women and men decline slightly due to mass incarceration.⁷ When innocent individuals – and those who are incarcerated for non-violent offences – spend extended periods in prisons, occupational skills are lost, alongside a loss of formal education and social networks, which can assist employment. All of which result in a proven effect on employment following prison experience.⁸

Prison abolition, however, focuses on the abolition of a system of social domination, which neglects humanity in various ways, which will be explored in depth in the social injustice section. The unfortunate result, therefore, is that the case for abolition does not make a direct argument for restoring economic justice and employment – it is the stigma and public policy which needs to change in order to recognise the value of 'criminals', especially those who have been caught by 'crimes of poverty'.⁹ Any sort of incarceration for being unable to afford vehicle insurance or outstanding traffic fines,



for example, are indeed regressive policies which cause those in poverty to fall deeper into financial struggle. Reforming prison to ensure that only crimes that seriously threaten the safety of communities result in incarceration can aid economic justice by reducing the business of private actors, and eliminating economic damage done to those currently incarcerated for non-violent or non-threatening crimes.

Fighting for social justice

In 2015, three days after 28-year-old Sandra Bland was arrested for a traffic violation, she was found hanged in her jail cell. In 2016, Shawna Lynda Jones died in the disturbing system of prison labour, fighting off a major fire against a steep hill for under \$2 an hour.¹⁰ These stories are not infrequent anecdotes. The rate of death for women in prisons rose to 16.1 per cent in 2018.¹¹ What is more frequently being exposed are the unjust conditions that the incarcerated are forced to submit to. The case for prison abolition argues, *inter alia*, that mass incarceration is a form of enslavement following the 13th amendment, which outlawed one form of slavery only to legitimate another.¹² There are numerous inequalities and injustices within prisons which prompt abolitionists to suggest that prisons are not the appropriate means of solving social problems. A critical difficulty with the abolitionist movement, however, is that it fails to define the meaning of 'other institutions and other means' that would replace incarceration.¹³ This does not mean that the case for abolition is shallow or without meaning – rather it suggests the need for a concrete and practical reality in which we can envisage a new social landscape where the criminal law is not a tool for repression.

It is indeed this conversation that the abolition movement allows us to engage with, as the current system of jurisprudence does not. As Dylan Rodriguez ponders:

'Why are some lives considered more disposable than others under the weight of police policy and criminal law?'¹⁴

Quite simply, the answer lies in the political and economic systems of capitalism which entrench current models of incarceration and formulate a subjective devaluation of the humanity of some criminals and not others. For this reason, we see within the feminist carceral movement – calling upon harsher punitive and carceral measures to tackle sexual violence – a disregard for

the consideration of intersectional issues of class and race, for example. Even taking the extremely problematic assumption that the individuals of these marginalised communities are committing higher levels of crime than the white population, the justice system still manages to produce astounding results. As mentioned above, Marissa Alexander was unjustly incarcerated for two years. In the same year in which her sentence of 20 years was passed, George Zimmerman, a white male, was acquitted of manslaughter charges after he shot and killed Trayvon Martin, an unarmed teenager.

The inconsistent treatment of different marginalised groups, alongside the criminalisation of a wide range of actions (which may be taken out of desperation or self-defence) result in the incarcerated population representing a systematic removal of certain groups from civil society. It is here where legal systems must be far more considerate of the importance of intersectionality. Race, class, gender and numerous other factors must be considered when reforming the institutions which deprive people of their rights, but more importantly it is criminalisation that should be dealt with more directly to ensure that incarceration does not become a common by-product of minor infractions. The case for abolition can help us better understand the need to recognise social factors and the humanity of those who do not commit acts which threaten the safety of their community.

In many instances, criminalisation and the threat of incarceration have especially hindered, as opposed to advanced, the protection of women. Dual arrest and mandatory arrest laws have seen women arrested unjustly. Despite studies indicating that men and women were arrested at equal rates, they did not highlight those in which women were assaulting a partner in self-defence.¹⁵ In using criminalisation to tackle sexual violence, the state inadvertently discouraged women from protecting themselves in abusive situations, with the result being that 18.3 per cent of women had been raped in their lifetime in the US by 2010, in comparison to 1.4 per cent of men.¹⁶

Many abolitionists have supported 'deinstitutionalisation' as an alternative to asylums and other institutions which incarcerate those with mental illnesses. This refers to the 'the transition of people with psychiatric and intellectual or developmental disabilities from state institutions and

hospitals into community living'.¹⁷ The justice system's interference with those suffering mental-health difficulties is often extremely negative, with little care or attention given to their conditions. A mainstream argument has been that the removal of patients from hospitals onto the streets has resulted in increased crime, given that they are left unrestrained in society. This oversimplification ignores too many factors, not least of which those who are jailed are five times as likely as the average population to have a severe mental illness. History has proven that mental institutions did not provide a better solution to jail and were in fact of a similar nature of incarceration, in addition to the physical abuse of patients.¹⁸ The case for abolition teaches us that prisons are not adequate to deal with this social problem either – to the contrary, prisons are criticised for having a 'maddening' and 'disabling' effect on the incarcerated.¹⁹

Once again, however, deinstitutionalisation has only taken people out of state institutions and trapped them within the CJS, which is an arguably worse fate for many than hospitals with medical supplies. The abolitionist movement takes small victories but should focus on reshaping incarceration as opposed to abolishing its existence altogether. Evidence of such small victories can be seen even within the jurisprudence itself, such as in *Brown v Plata*.²⁰ Here the Supreme Court ruled that a court-mandated prison population limit was ancillary to the protection of the 8th amendment, which prohibits 'cruel and unusual punishment'. The case was a federal class action civil rights lawsuit which centred around the inadequate medical services provided by the California Department of Corrections and Rehabilitation (CDCR), which involved a list of distressing situations described by Justice Anthony Kennedy, including 54 prisoners sharing a single toilet. Abolitionism, unfortunately, centres around radical and incremental change, which makes its achievement difficult for legislators to shape or envisage.

Future vision

The case for prison abolition above all exposes the gruelling and violating nature of incarceration and the overlooked problem of social injustice when punishing individuals using the CJS. Despite the highly positive aspects of a social and legal landscape that

does not involve prisons, there are too many questions that are left unanswered by the abolition movement regarding what systems can replace prisons. It is precisely for this reason that abolitionists should take more of an incremental view that will tend towards radical reformation – not abolition – of incarceration. The matter should not be viewed as a binary between oppressive incarceration and complete abolition in favour of communal methods. Instead, compromise must be had between capitalist interests and maintaining respect for human rights when punishment is inflicted on serious offenders.

Notes

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Can England and Wales' public interest standing caselaw solve the ECtHR's problem of climate litigation standing in *KlimaSeniorinnen*?

Climate litigation is problematic within a system of standing based upon 'victim status' due to the climate crisis' non-specific victims.

KlimaSeniorinnen is one of four cases currently pending before the ECtHR aiming to resolve this issue.¹ The applicants, a group of Swiss elderly women, submit that global warming has negatively impacted their living conditions and health, with Switzerland failing to fulfil its positive obligations under Article 2 and Article 8.² The claim hence implicates the question of whether the group can bring such a claim. This article argues that England and Wales' approach to public interest standing can provide a cogent solution.

ECtHR standing caselaw and *KlimaSeniorinnen*

ECtHR caselaw currently prohibits *actiones populares*, adopting the restrictive standing requirement of 'victim status'.³ To establish standing, one must have been 'directly affected' by the purported violation, manifesting in the requirement in climate cases that 'environmental damage' has 'directly affect[ed one's] personal well-being'.^{4, 5, 6} Importantly, this negates the potential for both public interest standing, and associational/representative standing.⁷ Moreover, an NGO cannot claim victim status via the infringement of its members' Convention rights.⁸ Thus, the ECtHR's interpretation of 'victim status' precludes public interest and associational/representative standing, both generally and within climate litigation.

The claim in *KlimaSeniorinnen*, thus, relies upon a liberalisation of ECtHR standing requirements. As the Swiss Appellate Court noted, the 'group of women over 75 years' are not a particularly affected group, since

all are affected by climate change'.⁹ Indeed, Reich et al note the distinction between that claim and prior claims where environmental degradation led to an applicant's family member's death.¹⁰ Importantly, the procedural treatment of *KlimaSeniorinnen* by the ECHR Chamber indicates that liberalisation may occur. The Chamber used its discretion to 'relinquish jurisdiction in favour of the Grand Chamber' under Article 30 ECHR.¹¹ Under Rules 72(1) and 72(2) of the Rules of Court, this can be utilised where a case 'raises a serious question affecting the interpretation of the Convention', or where it 'might have a result inconsistent with the Court's case-law'.¹² Heri notes the capacity for the latter to be fulfilled by arguments that 'the applicant organisation should be granted representative standing'.¹³ Hence, it is possible that the ECtHR may recognise representative standing in *KlimaSeniorinnen*. Due to its evident dislike of *actiones populares*, however, this evokes the question – where do we draw the line?

Public interest standing in England and Wales

Public interest standing caselaw in England and Wales provides an astute example of liberal standing requirements maintaining limits. This prevents its degradation into an *actio popularis*. Cane and Harlow both suggest that *Greenpeace* can be interpreted as a public interest standing case, despite it being pleaded as associational standing.^{14, 15, 16} This is supported by the notion of public interest standing being ill-developed in 1994.¹⁷ Indeed, Otton J. permitted 'genuine concern[s] for the environment' to confer standing upon Greenpeace.¹⁸ This reflects the 'communitarian' model of standing outlined by Miles, whereby legal issues implicating the public interest in a case

confers standing upon a body bringing a claim regarding those issues.¹⁹ Notably, this deference to communitarian norms would abate the concerns of the Swiss Appellate Court regarding individualised harm and victim status in *KlimaSeniorinnen*. Cane furthers this argument through interpreting *Equal Opportunities Commission* as conferring standing through the public interest of the ‘lawful exercise of Parliament’s legislative powers’, regarding the UK legislating consistently with its EU obligations.²⁰

²¹ Further still, Miles notes that Salem permits academic public law issues to be the subject of litigation, especially where the case involves statutory construction which won’t immediately impact the *lis* before the court, but may be of broader impact.²²

²³ This is especially important regarding *KlimaSeniorinnen*, since the applicants may not suffer direct harm from climate change (Keller and Heri).²⁴

The United Nations General Assembly’s adoption of Resolution 76/300, recognising the human right to a clean, healthy and sustainable environment, reinforces this.²⁵ The Resolution incorporates the right to participate in governance and seek effective remedies within the universal human right, directly implicating the conduct of administrative bodies which impact the environment, and the capacity of citizens to bring claims against this.^{26, 27} While not directly binding upon states or other bodies, the Resolution may influence the ECtHR’s reasoning directly in *KlimaSeniorinnen*, or indirectly through influencing state practice.²⁸ This is especially so regarding the context of *Equal Opportunities Commission* as a case conferring standing due to the public interest in the legislature’s compliance with international obligations. Climate litigation is hence an issue falling squarely within the public interest.

How, hence, to limit claims? England and Wales, it is submitted, does so through implicitly recognising a ‘functionalist’ approach to public interest standing, whereby bodies best able to present legal argument (often NGOs like Greenpeace) are granted standing. In *Equal Opportunities Commission*, standing was granted to the EOC but not to an individual worker.²⁹ Similarly, in *Greenpeace*, Otton J. noted Greenpeace’s ability to finance a judicial review claim and satisfy potential costs.³⁰ Public interest standing is hence prevented from becoming an *actio popularis*, since only those bodies

able to satisfactorily bring claims, legally and financially, are granted standing.

Application to *KlimaSeniorinnen*

This approach would permit standing in *KlimaSeniorinnen*. The case is brought by ‘a Swiss association’, of which the elderly women are members, evidently holding the expertise to bring such a claim.³¹ Similarly, it would confer standing upon the two organisations bringing claims against the Norwegian government in *Greenpeace Nordic*.³² By contrast, it would deny public interest standing in *Duarte Agostinho*, due to the claim being brought by Portuguese children, and in *X v Austria*, if the case is brought by one man on behalf of those suffering with his medical condition.^{33, 34}

Conclusion

The approach to public interest standing adopted by England and Wales would hence successfully demarcate between pending climate litigation before the ECtHR, which should and should not be granted standing. It is hoped, hence, that the Grand Chamber in *KlimaSeniorinnen* will move beyond strict adherence to victim status, towards a system of standing which is both communitarian and functionalist.

Notes

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- ³ Council of Europe / Conseil De L’Europe, Guide to the Case-Law of the European Court of Human Rights: Environment. 30 April 2022, p.75.
- ⁴ *Ibid.* pp.75-6.
- ⁵ *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015.
- ⁶ *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012.
- ⁷ *Maatschap Smits and Others v. Netherlands* (dec.), nos. 39032/97 and 5 others, 3 May 2001.
- ⁸ *Besseau and Others v. France* (dec.), no. 58432/00, 7 February 2006.
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- ¹¹ Relinquishment in favor of the Grand Chamber of the case *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* ECHR 142 (2022), p.1.
- ¹² www.echr.coe.int/documents/rules_court_eng.pdf.
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 - 19 Miles, p.150.
 - 20 *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 A.C. 1; [1994] 2 W.L.R. 409.
 - 21 Cane, pp.284-5.
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 - 23 Miles, p.158.
 - 24 Helen Keller & Corina Heri (2022): 'The Future is Now: Climate Cases Before the ECtHR', Nordic Journal of Human Rights, DOI: 10.1080/18918131.2022.2064074, p.4.
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 - 26 Ibid.
 - 27 Ibid., p.1.
 - 28 <https://powersingh.africa/2022/08/02/un-resolution-right-to-sustainable-environment/#:~:text=On%2028%20July%202022%2C%20the,RES%2F76%2F300>.
 - 29 Miles, pp.153-4.
 - 30 Cane, p.282.
 - 31 Relinquishment in favor of the Grand Chamber of the case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ECHR 142 (2022), pp.1.
 - 32 *Greenpeace Nordic and Others v Norway App no 34068/21* (ECHR, Communicated Case, 16 December 2021); Keller & Heri, p.4.
 - 33 *Duarte Agostinho and Others v Portugal and Others App no 39371/20* (ECHR, Communicated Case, 13 November 2020); Keller & Heri, p.3.
 - 34 *X v Austria*; Keller & Heri, pp.3-4.

The thought-terminating cliché: an anti-democracy tool

On every continent, democracy is in retreat, according to Freedom House's 2022 report.¹ As autocratic movements emerge and strengthen, we must seek to understand the tools these leaders may use. One such tool is loaded language. Loaded language consists of words or phrases that take on additional meanings to the original.² The importance of these secondary meanings comes in the newly established connotations, which often invoke moral and ideological underpinnings dictated by the individuals or groups that wield them.³ One form of this loaded language is what is sometimes referred to as the 'thought-terminating cliché'. This is anti-democratic rhetoric in which a cliché – an overused phrase characterisation⁴ – is repurposed to halt critical thinking and quell discussion.

Before discussing the impact of thought-terminating clichés, we must understand the importance of conversation to democracy. Democracy rests on deliberation, discussion and dissent. The very notion of democratic governance – a government run by the people – presumes that disagreement is inevitable. A glance at modern democracy informs us that the formation of opposing groups is a staple today, just as it always has been, and thus disagreement between groups will occur. This ability of a people to air their opinions and

express dissatisfaction with government is a virtue of democratic systems. It is no surprise, then, that autocrats seek to curtail people's ability to discuss and disagree. This is where thought-terminating clichés come into play.

First coined by Robert Jay Lifton, thought-terminating clichés are phrases designed to halt critical thinking in two ways. The first is by causing cognitive dissonance, which occurs when conversations of conflicting beliefs generate discomfort.⁵ The cliché dissuades one from further analysis of an idea, effectively ending discussion and shutting down sources of dispute. Secondly, thought-terminating clichés also suppress dissent by framing discussions as irrelevant and establishing social rejection as an outcome of disagreement.⁶ Those who believe the situation is unchangeable and fear the consequences of conflict are now inclined to end the discussion and avoid contentious debate.

Lifton explains that cults regularly deploy thought-terminating clichés to stem the tide of disagreement and keep victims in the leader's hold.⁷ For example, according to survivor Steven Hassan, the Unification Church used the phrase 'it's a Cain-Abel problem' to dissuade members from disagreeing with higher-ups.⁸ When a cult member (Cain) disagreed with a leader (Abel), they were meant to submit instead of

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arguing ('killing') Abel, hence the Cain-Abel allusion. This story is one example of cult leaders using thought-terminating clichés to maintain control. Therefore, it stands to reason that these rhetorical methods can permeate the political sphere and, if successful, undermine democracy.

Lifton indicates that 'the language of the totalist environment is characterised by the thought-terminating cliché. The most far-reaching and complex of human problems are compressed into brief, highly reductive, definitive-sounding phrases, easily memorised and easily expressed. These become the start and finish of any ideological analysis'.⁹ In addition to historical uses,¹⁰ a recent example is the phrase 'fake news,' popularised by former US President Trump. He used the phrase to undermine his opposition, but 'fake news' has also permeated autocratic rhetoric internationally.¹¹ This phrase creates enough cognitive discomfort that supporters would rather avoid conversation than face confrontation or re-examine their political views. For Trump supporters, facing evidence that the president they supported was spreading lies and disinformation could undoubtedly cause unease, so believing in 'fake news' provided a path back to stable ground. Further, this rhetoric was a precursor to anti-democratic events in such established democracies as the United States. In his speech before the 6 January insurrection, former President Trump stated that 'the American people do not believe the corrupt, fake news anymore'.¹² While not the only factor, this type of language certainly played a role in leading to such a blatant attack on a central institution of American democracy, the US Capitol.

Ultimately, avoiding discussion and disagreement is inherently dangerous to democracy, a concept that depends on collaboration and compromise between pluralistic groups. Public awareness of how leaders may use these simple rhetorical devices, whether consciously or unconsciously, strengthens the pillars of democracy and shrinks the opening for aspiring autocrats to manipulate the population with language.

Notes

- 1 'The Global Expansion of Authoritarian Rule.' Freedom House, February 2022. Freedom House. https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf
- 2 Salao, Cole. 'Loaded Language: Definition and Examples.' TCK Publishing, 2021. www.tckpublishing.com/loaded-language.
- 3 Culver, Leland. 'Symposium: The Thought-Terminating Cliché.' The Amherst Student, February 23, 2021. <https://amherststudent.com/article/symposium-the-thought-terminating-cliche>.
- 4 'Cliché Definition & Meaning.' Merriam-Webster, 2022. www.merriam-webster.com/dictionary/clich%C3%A9.
- 5 Cherry, Kendra. 'Cognitive Dissonance and Ways to Resolve It.' Verywell Mind, February 8, 2022. www.verywellmind.com/what-is-cognitive-dissonance-2795012.
- 6 Miranda-Wolff, Alida. 'How Cultish Language Shuts down Conversation in DEIB.' Alida Miranda-Wolff, June 30, 2021. <https://alidamirandawolff.com/how-cultish-language-shuts-down-conversation-in-deib/#:~:text=Common%20examples%20of%20thought%2Dterminating,all%20share%20traits%20in%20common>.
- 7 Shaw, Daniel. 'Authoritarianism and the Cultic Dynamic.' Public Seminar, June 8, 2018. <https://publicseminar.org/2018/06/authoritarianism-and-the-cultic-dynamic>.
- 8 Hassan, Steven. *Combating Cult Mind Control: The #1 Best-Selling Guide to Protection, Rescue, and Recovery from Destructive Cults*. Newton, MA: Freedom of Mind Press, 2018.
- 9 Lifton, Robert Jay. 'Ideological Totalism: Loading the Language.' Chapter. In *Thought Reform and the Psychology of Totalism: the Study of Brainwashing in China*. New York, NY: W.W. Norton & Co., 1961.
- 10 See examples: the National Fascist Party used the phrase *Il Duce ha sempre ragione* ('the Duce is always right') in which Mussolini was the Duce ('leader'); during Stalin's reign, parents told their kids that 'the walls have ears' and 'you'll get in trouble for your tongue' in order to keep them from listening and talking about the regime; and Fascists in Italy repeated the phrase 'a good Italian's duty now is to have no opinions' in everyday life to remind dissenters of their place.
- 11 See POLITICO examples: President Bashar Assad of Syria claimed, 'we are living in a fake news era' in 2017; the Chinese Communist Party's de facto state media, the People's Daily, used the headline 'Trump is right, fake news is the enemy;' and Brazilian President Jair Bolsonaro indicated that 'Brazil and the United States stand side-by-side...against fake news.'
- 12 'Transcript of Trump's Speech at Rally Before US Capitol Riot.' AP NEWS. Associated Press, January 13, 2021. <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27>.



Climate refugees and human rights law in Ordinance No. 5022 of the Italian Corte di Cassazione

In February 2021 in Ordinance No. 5022, the Italian Corte di Cassazione (CSC) issued a striking decision which expanded the usual requirements for the granting of refugee status. The case concerned the right of an applicant from Nigeria to humanitarian protection in Italy. The CSC found that humanitarian protection ought to be granted when the right to life is severely compromised by environmental degradation in the applicant's home region, the Niger Delta.¹ This article explores the ways in which Ordinance No. 5022 develops several themes emerging in the jurisprudence surrounding climate migration, refugee status and human rights law.

To begin by illustrating the logic deployed by the CSC in this case, the awarding of humanitarian protection arose because the court decided such protection did not just depend on the demonstration of a threat to right to life, but also of a threat to the right to life with dignity. This widened definition of a 'right to life' was adopted notably in 2018 by the UNHRC in General Comment No. 36, which stated that 'environmental degradation [...] constitute[s] some of the most pressing and serious threats to [...] right to life [...] in particular life with dignity'.² While undoubtedly General Comment No. 36 was in the background of the court's reasoning, to make the same point, the CSC drew upon Italian jurisprudence by citing its landmark Ordinance No. 4455 of February 2018, a domestic case in which the CSC had defined the threshold when right to life with dignity is impinged. Ordinance No. 4455 dictated that humanitarian protection should be granted if repatriation threatened the 'ineradicable core constituting the foundation of personal dignity'.³

In Ordinance No. 5022, the CSC used Ordinance No. 4455 to define the point at which environmental degradation is so severe as to impede the right to life with dignity and therefore prevent Italy extraditing the

applicant to Nigeria. The court found that the situation in the Niger Delta would indeed inhibit the 'ineradicable core' of personal dignity. This is because a situation exists in the Niger Delta which, according to the CSC, 'seriously jeopardises the survival of the individual', meaning that 'decent living conditions are not recognisable'.⁴ Exploited since 1956 as a source of crude oil, pollution in the Niger Delta has been extensive. A 2006 UNDP report found that 6,817 oil spills occurred between 1976 and 2001, with a loss amounting to three million barrels.⁵ Oil has contaminated water courses, farmland and acidified the soil of mangrove forests, such that, as one of the Akassa people described in 2019, 'the whole place is barren [...] All our children see is crude oil flowing into the creeks and farms and rivers'.⁶ The CSC ruled that if the applicant was returned to Nigeria, his right to life with dignity would be 'cancelled', thus preventing repatriation by the Italian government.

Although the applicant in Ordinance No. 5022 fell into the category commonly referred to by media commentary as 'climate refugees', it is noteworthy that the CSC did not depend in this case on protection from the 1951 refugee convention. This serves to illustrate both the difficulty climate refugees face in demonstrating that they cannot return 'owing to fear of persecution', and the lack of political will to extend the definition of refugees to encompass climate related causes.⁷ Instead, and as the CSC found, international human rights law is more amenable to applicants fleeing environmental degradation. Here, the non-refoulement principle requires that the destination country cannot repatriate an applicant if that act would result in exposure to a 'real risk' of torture, inhuman or degrading treatment or an arbitrary deprivation of life upon expulsion.⁸ A recent landmark opinion of the United Nations Human Rights Committee in *Teitiota v New Zealand*, related particularly

to questions concerning climate migration, also opined that ‘the obligation not to extradite [...] pursuant to article 6 of the [International Covenant on Civil and Political Rights] may be broader than the scope of [...] international refugee law’.⁹ *Teitiota* found that the Covenant articles could indeed be extended to cases of severe environmental degradation in the applicant’s home country: ‘the effects of climate change [...] may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states’.¹⁰

The logic of *Teitiota* sits at the heart of the CSC’s Ordinance No. 5022. It is *Teitiota* which has largely set the precedent for the crossover between the rights of refugees and environmental conditions seen in Ordinance No. 5022. *Teitiota* supports the CSC’s bringing together of the right to life, the right to life with dignity and environmental degradation, and thus the court’s opinion that ‘states have the obligation to ensure and guarantee the right to life of people’ which extends to ‘potentially lethal situation [or] a substantial worsening of the conditions of existence, including environmental degradation’.¹¹ Notably, in *Teitiota* the UNHRC found in favour of New Zealand, since the applicant could not demonstrate subjective conditions of vulnerability, and because Ioane Teitiota’s home nation, the Republic of Kiribati, was attempting to tackle climate change. However, the UNHRC did specify a second case not of personal risk to life but of ‘general conditions [...] in the most extreme cases [of] irreparable harm’.¹²

Ordinance 5022 seems to follow *Teitiota* here, describing a context of ‘exclusion of entire segments of the population’ from their enjoyment of natural resources, and an ‘irreversible alteration of the equilibrium of an ecosystem’ in the Niger Delta.¹³ Armed conflict, as the CSC recognises, is a normal scenario in which repatriation would be prevented by a state’s non-refoulement obligations. Yet in dramatic language, the CSC argued that environmental degradation falls into this category as well: ‘war [...] represents the most striking manifestation of man’s self-destructive action, but does not exhaust the range of behaviours capable of compromising the dignified living conditions of the individual’.¹⁴ Just as a general situation of armed conflict precludes repatriation, so – following *Teitiota* – a general situation of severe ecological destruction also erodes an

applicant’s right to life with dignity, thereby prohibiting extradition.

As we have seen, this case sits at the cutting edge of developments in climate migration law. It involves the extension of the right to life and right to life with dignity to include environmental conditions. It relies on *Teitiota*, but builds on the UNHRC’s reasoning by finding a case where a general situation of degradation, regardless of the applicant’s subjective vulnerability, can initiate non-refoulement obligations. By making relevant the environmental conditions from which individuals flee to their rights as refugees, Ordinance No. 5022 ‘greatly extends the scope of protection for so-called “environmental refugees”’. We will see if, as numbers of such individuals will inevitably rise, other jurisdictions follow Italy’s lead in evolving human rights, migration, and refugee jurisprudence in this direction.

Notes

- 1 *I.L. v Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, Corte di Cassazione (24 February 2021) No. 5022 (hereafter Ord. 5022). Humanitarian protection is considered the ‘last resort’ to gain protection in Italy, which is well explained in Fabrizio Vona, ‘Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy?’ (2021) 1 *The Italian Review of International and Comparative Law* 149.
- 2 UNHRC, ‘General Comment on Right to Life No. 36’ (2018), UN Doc CCPR/C/GC/36.
- 3 *Ministry of the Interior v. Yarbo Musa*, Corte di Cassazione (23 February 2018) No. 4455
- 4 Ord. 5022, p. 6.
- 5 UNDP, ‘Niger Delta Human Development Report’ (2006) UN Doc DP(058)/H81/NGA/2006 p. 76.
- 6 Bayelsa State Oil and Environmental Commission, ‘Interim Report’ (November 2019) p. 5 www.bayelsacommission.org/wp-content/uploads/2019/11/BSOEC-Public-Interim-Report-ONLINE-VERSION-29.10.19.pdf accessed 24 March 2022.
- 7 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1.
- 8 Spyridoula Katsoni & Jan-Phillip Graf, ‘The Future of “Climate Refugees” in International Law’ (*Völkerrechtsblog*, 5 June 2021) <https://voelkerrechtsblog.org/the-future-of-climate-refugees-in-international-law> accessed 16 August 2022.
- 9 *Ioane Teitiota v. New Zealand*, UNHRC (7 January 2020), Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, at 9.3 (hereafter *Teitiota*).
- 10 *Teitiota*, at 9.11. Article 6 protects the right to life, and article 7 the right not to be subjected to torture or to cruel, inhuman or degrading treatment.
- 11 Ord. 5022, p. 4.
- 12 *Teitiota* 9.3.
- 13 *Teitiota* 9.12; Ord. 5022, p.7.
- 14 Ord. 5022, p. 6.