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# IBA Interns' Newsletter

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# Robot-supported justice? Artificial intelligence and the implications for evidence in court proceedings

## Introduction

As already observed in many other sectors, such as healthcare, farming or transportation, the legal profession is not unaffected by the impact of artificial intelligence (AI). Across jurisdictions, AI applications have become increasingly pervasive, especially for the execution of repetitive and time-consuming tasks, for example, case management, legal research or contract analysis.<sup>1</sup>

While the replacement of a judge by AI remains – at least in substantial case matters with far-reaching impact for the parties and criminally accused persons<sup>2</sup> – a ‘distant prospect’,<sup>3</sup> the use of AI for evidence may affect the outcome of a court procedure equally. Against the background of a significant impact on the rule of law, particularly the right to a fair trial, the independence of the judiciary, and human rights, this article sheds light on both the potentials and risks of AI being used for evidence in court proceedings.<sup>4</sup>

## How is AI beneficial in court?

The possibility of AI application for evidence arises in various ways. AI is already being used to assess the credibility of statements,<sup>5</sup> to ensure the veracity of documentary evidence,<sup>6</sup> or to replace an expert opinion.<sup>7</sup> Potentially, the use of AI can shorten proceedings and make them more objective, especially in the case of expert witnesses or when assessing the credibility of statements. Therefore, AI can contribute to an increased trust in the justice system.

The underlying assumption is that a judge without prejudice is a utopia, and subjective suppositions about defendants and witnesses may already arise when reading the police files in preparation for a case.<sup>8</sup> Furthermore, statements in court are often short, made under time pressure and limited to the


subject of the evidence. Accordingly, it is particularly easy for the presiding judge to be deceived under these conditions.<sup>9</sup> The assessment of a person may be also distorted by the ‘halo effect’, which means that salient, known impressions of a person may influence the attribution of other unknown characteristics.<sup>10</sup> Attractive and well-dressed defendants, for example, may have a higher chance of being perceived as honest than unattractive ones, or eyewitnesses who have a poor command of the court language may be assessed as less reliable.<sup>11</sup>

Along similar lines and with regard to potential racial bias, the Stanford Computational Policy Lab developed a system that algorithmically filters race-related information from case reports and investigation files and redacts them with neutral wording.<sup>12</sup> This software is provided free of charge to US agencies to automatically anonymise written police investigation files and is already being used by the San Francisco District Attorney’s Office.<sup>13</sup> Undoubtedly, this software contributes to a fairer procedure. In another case, computer-generated animation (CGA) proved the implausibility of a stated self-defence by the defendant in a murder case.<sup>14</sup>

## Risks

However, since software is only as good as its developers, an AI algorithm is at risk of being error prone. AI may, just as humans do, underly bias. This can originate from the bias embedded in the data that the system learnt from, but can also occur as a consequence of the algorithm’s design and functionality, thus reflecting the values of its designer.<sup>15</sup>

Moreover, when it comes to the analysis of emotions for assessing the credibility of statements, there are well-grounded concerns that AI might disregard cultural differences of facial expressions, and hence discriminate



persons with a different cultural background in their reactions and assumed emotions.<sup>16</sup>

The UK Parliament is currently reviewing the legal status of automatic computer-based decisions. This debate was triggered by a prior criminal law case with detrimental effects for the defendants. Between 2000 and 2014, 736 sub-postmasters and sub-postmistresses of the UK Post Office were prosecuted on the basis of information from an automated computer system called Horizon. The system indicated false accounting by the sub-postmasters and sub-postmistresses, and although Horizon had priorly recorded wrong shortfalls, the system record was taken as evidence to prosecute and convict the employees of theft. The decision has been repealed for at least 39 employees. Still, the wide-ranging implications of blind trust in AI have become apparent.<sup>17</sup> The parliamentary debate emphasised that the legal presumption of an error-free computer is 'liable to cause significant harm and injustice'.<sup>18</sup>

Moreover, with regard to facial recognition systems, several cases proved the opposite of AI's potential for being cost-efficient for court proceedings and leading to greater justice. Facial recognition technology on UK streets alerted the police to people that the system recognised as matches to wanted persons. A study conducted by the non-profit organisation 'Big Brother Watch' found that 98% of these matches had in fact been incorrectly identifying an innocent person as a wanted person.<sup>19</sup> More than 2,400 people were misidentified, while the trials based on the false matches accumulated more than £200,000.<sup>20</sup>

In the European Union, AI 'real-time remote biometric identification' will be categorised as a high-risk system if it is used by law enforcement and in publicly accessible spaces once the EU Artificial Intelligence Act<sup>21</sup> is approved. The use of such a system will be generally prohibited and only under strict prerequisites, such as investigation or law enforcement for listed serious crimes exempted (Article 5(1) (d) of the draft proposal).<sup>22</sup> With respect to court proceedings, it is likely that evidence obtained against the prohibition and without exemption will not be admissible to remove every incentive for circumvention by law enforcement. Nevertheless, it remains possible to identify people after the data has been already collected (eg, through Clearview AI databases<sup>23</sup>).

## Conclusion

Given the risks to human rights and considering the negative case examples, legislators must guarantee that everyone who is subject to an AI decision has the right to an appeal and to be heard before a judge.<sup>24</sup> With more reason, this applies to criminal law cases, where AI evidence immediately affects the fundamental rights of an individual.

To review an AI decision, the underlying algorithm must be disclosed and accessible. This reveals not only a challenge regarding the interests of private developers to protect their intellectual property, but also concerning the understandability of codes for reviewers and explainability of AI decisions. It is arguable in how far it is in fact feasible to explain AI decisions, particularly with regard to 'black box' concepts in machine learning.<sup>25</sup> Increased vigilance is further required when a system that was designed for an entirely different purpose is used as evidence.<sup>26</sup> If AI decisions cannot be reviewed, it must never be assumed 'in dubio pro AI software' (in doubt for the error- and bias-free algorithm) as the UK Post Office case or the use of facial recognition technology terrifyingly demonstrated. Relying entirely on a system that has been developed by a private company would infringe the independence of the judiciary. Last but not least, a continuous review of the legal requirements for admitting AI as evidence is particularly important considering that AI is a learning and evolving phenomenon. In this respect, legal and judicial systems must have guidance in place to understand the technology: Tech competency for the legal profession is the need of the hour.

## Notes

1. See for an overview of AI developments in the legal profession in 12 countries (Argentina, Canada, England and Wales, France, Germany, Hong Kong, India, Italy, Japan, Sweden, China and USA): IBA, 'Guidelines and Regulations to Provide Insights on Public Policies to Ensure Artificial Intelligence's Beneficial Use as a Professional Tool' September 2020 [www.ibanet.org/MediaHandler?id=f5099a33-1e70-4a32-839d-589236b7568d](http://www.ibanet.org/MediaHandler?id=f5099a33-1e70-4a32-839d-589236b7568d) accessed 27 May 2021.
2. Initiatives for the use of AI as a judge or mediator in low-value civil law claims can be found for instance in Estonia, China and Canada. In early 2019, the Estonian Ministry of Justice developed and piloted an artificial intelligence software that decides civil law cases with a dispute value of up to €7,000 by analysing the documents uploaded by the parties and decides on the claims on this basis. The parties can appeal before a human judge.: Joshua Park, 'Your Honor, AI' (2020) Harvard International Review <https://hir.harvard.edu/your-honor-ai> accessed 25 May 2021. In British Columbia, Canada the online dispute resolution (ODR) tool 'Smartsettle ONE' is proposed as

- mediation AI to move disputing parties towards a settlement by employing algorithms that learn the bidding tactics and priorities of the parties: Tara Vasdani, 'From Estonian AI judges to robot mediators in Canada, U.K.' (2019) *The Lawyer's Daily*, LexisNexis Canada [www.thelawyersdaily.ca/articles/12997/from-estonian-ai-judges-to-robot-mediators-in-canada-u-k-](http://www.thelawyersdaily.ca/articles/12997/from-estonian-ai-judges-to-robot-mediators-in-canada-u-k-) accessed 25 May 2021. China uses 'Internet Courts' with AI-judges through a mobile application already since 2017 for disputes involving intellectual property, e-commerce, financial disputes related to online conduct, loans acquired or performed online, domain name issues, property and civil rights cases: Tara Vasdani, 'From Estonian AI judges to robot mediators in Canada, U.K.' (2019) *The Lawyer's Daily*, LexisNexis Canada [www.thelawyersdaily.ca/articles/17741/robot-justice-china-s-use-of-internet-courts](http://www.thelawyersdaily.ca/articles/17741/robot-justice-china-s-use-of-internet-courts) accessed 25 May 2021.
3. Tim Wu, 'Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems' (2019) Columbia Public Law Research Paper No. 14-649 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3492846](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492846) and <https://columbialawreview.org/content/will-artificial-intelligence-eat-the-law-the-rise-of-hybrid-social-ordering-systems> accessed 25 May 2021.
  4. For the procedural challenges of AI in the courtroom see Sabine Gleiss, 'AI in the Courtroom: A Comparative Analysis Of Machine Evidence In Criminal Trials' (2020) *Georgetown Journal of International Law* Vol.51 [https://ius.unibas.ch/fileadmin/user\\_upload/ius/09\\_Upload\\_Personenprofile/01\\_Professuren/Gless\\_Sabine/AI\\_in\\_the\\_courtroom\\_GT-GJIL2020.pdf](https://ius.unibas.ch/fileadmin/user_upload/ius/09_Upload_Personenprofile/01_Professuren/Gless_Sabine/AI_in_the_courtroom_GT-GJIL2020.pdf) accessed 2 Jun 2021.
  5. For instance, the first AI lie detector 'Silent Talker': Patrick Kennedy, 'Artificial intelligence lie detector developed by Imperial alumnus' (2014) *Imperial College London News* [www.imperial.ac.uk/news/144486/artificial-intelligence-detector-developed-imperial-alumnus](http://www.imperial.ac.uk/news/144486/artificial-intelligence-detector-developed-imperial-alumnus) accessed 4 Jun 2021; or the later 'iBorderCtrl', a European Union-funded research initiative that tested the system on volunteers at borders in Greece, Hungary, and Latvia: [www.iborderctrl.eu](http://www.iborderctrl.eu). The use was, however, limited to trials and is not admissible before court, so far. The beneficial impact of these two examples is meanwhile highly disputed: Jake Bittle, 'Lie detectors have always been suspect. AI has made the problem worse' (2020) *MIT Technology Review* [www.technologyreview.com/2020/03/13/905323/ai-lie-detectors-polygraph-silent-talker-iborderctrl-converus-neuroid](http://www.technologyreview.com/2020/03/13/905323/ai-lie-detectors-polygraph-silent-talker-iborderctrl-converus-neuroid) accessed 4 Jun 2021.
  6. In Brazil, AI software is used to verify electronic documents as there is still a distrust of the reliability and authenticity of such documents in society: Daniel Willian Granado, 'Artificial Intelligence applied to the legal proceedings: The Brazilian Experience' (2019) *Les Éditions de l'IMODEV* Vol. 5 <https://ojs.imodev.org/index.php/RIDDN/article/view/304/495> accessed 4 Jun 2021.
  7. For instance, AI is used to assess vehicle damage in accidents: Mark Gardiner, 'A Car Insurance Claim Estimate Before the Tow Truck Is Called' (2020) *New York Times* [www.nytimes.com/2020/09/17/business/car-insurance-claim-estimate-artificial-intelligence.html](http://www.nytimes.com/2020/09/17/business/car-insurance-claim-estimate-artificial-intelligence.html) accessed 4 Jun 2021.
  8. Cf. Robert Häcker, in Rolf Bender, Robert Häcker and Volker Schwarz (eds), *Tatsachenfeststellung vor Gericht* ('Fact-finding in court'), 5th ed. (C.H.Beck 2021) p. 32 recital 133, cf. also p. 193, recital 802, p. 190 recital 786.
  9. Petrus Van Duyne, 'Simple Decision Making', in Donald C. Pennington and Sally Lloyd-Bostock (eds), *The Psychology of Sentencing*, (Oxford University Press 1987), p. 266, 151 f.
  10. *Ibid.*, p. 32/33, recital 134.
  11. *Ibid.*, p. 194, recital 809 (often also referred to as 'facial appearance heuristic'), cf. also p.32/33 recital 134/135 and p. 190 recital 789.
  12. Alex Cholas-Wood, Joe Nudel, Keniel Yao, (Jerry) Zhiyuan Lin, Julian Nyarko and Sharad Goel, 'Blind Justice: Algorithmically Masking Race in Charging Decisions' (2021) in *Charging Decisions*, In *Proceedings of the 2021 AAAI/ACM Conference on AI, Ethics, and Society (AIES '21)*, May 19–21, 2021, *Virtual Event, USA*. ACM, New York, NY, USA <https://5harad.com/papers/blind-charging.pdf> accessed 26 May 2021; Stanford Computational Policy Lab, *Blind Charging - Mitigating bias in charging decisions with automated race redaction* <https://policylab.stanford.edu/projects/blind-charging.html> accessed 27 May 2021.
  13. Stanford Computational Policy Lab, 'Blind Charging - Mitigating bias in charging decisions with automated race redaction' (2021) <https://policylab.stanford.edu/projects/blind-charging.html> accessed 27 May 2021.
  14. Before the Court of Common Pleas of Lackawanna County, Pennsylvania USA, CGA demonstrated that the defendant tampered with the crime scene to stage a self-defence setting by showing the position of the victim and the defendant, and the sequence, path, trajectory, and impact sites of bullets. The decision including the admission of CGA was confirmed by the Superior Court of Pennsylvania and by the Supreme Court of Pennsylvania: *Commonwealth v. Serge* [2006] 586 Pa. 671 <https://caselaw.findlaw.com/pa-supreme-court/1435842.html> accessed 31 May 2021. The Supreme Court, however, clarified that a jury must not assign undue weight to artificial intelligence applications and that must be regarded as 'graphic representation of biased testimony of one party and not a product of neutral infallible artificial intelligence': *Commonwealth v. Serge* [2006] 586 Pa. 671, Footnote 1.
  15. Brent Daniel Mittelstadt, Patrick Allo, Mariarosaria Taddeo, Sandra Wachter and Luciano Floridi, 'The Ethics of Algorithms: Mapping the Debate.' (2016) <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679> accessed 28 May 2021; see also Meredith Broussard, *Artificial Unintelligence* (The MIT Press 2018); Joy Boulamwini, 'How I'm fighting bias in algorithms' TED Talk November 2016 [www.ted.com/talks/joy\\_boulamwini\\_how\\_i\\_m\\_fighting\\_bias\\_in\\_algorithms?language=en](http://www.ted.com/talks/joy_boulamwini_how_i_m_fighting_bias_in_algorithms?language=en) accessed 31 May 2021. Critics in terms of biases have also been raised against the software 'Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)' that assists a judge in defining the sentence for a criminal defendant. The software evaluates, based on 137 factors including age, gender and previous criminal history - but not race - the risk score of recidivism on a scale from one (very unlikely) to 10 (very likely): Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, 'Machine Bias: There's Software Used across the Country to Predict Future Criminals. And It's Biased against Blacks' (2016) *ProPublica*, 3 [www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing](http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing) accessed 28 May 2021; Jasper Ulenaers, 'The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge?' (2020) *Asian Journal of Law and Economics* 11(2), 7.
  16. Mark Purdy, John Zealley and Omaro Maseli, 'The Risks of Using AI to Interpret Human Emotions' (2019) *Harvard Business Review* <https://hbr.org/2019/11/the-risks-of-using-ai-to-interpret-human-emotions> accessed 26 May 2021; but so can humans/traditional judges: cf. Robert Häcker in Rolf Bender, Robert Häcker and Volker Schwarz (eds), *Tatsachenfeststellung vor Gericht* ('Fact-finding in court'), 5th ed. (C.H.Beck 2021), 5th ed., p. 65, recital 266.
  17. *Alan Bates & ors v Post Office Ltd* [2019] EWHC 606 (QB) [www.judiciary.uk/wp-content/uploads/2019/12/bates-v-post-office-judgment.pdf](http://www.judiciary.uk/wp-content/uploads/2019/12/bates-v-post-office-judgment.pdf); see also Kevin Peachey, 'Post





- Office scandal: What the Horizon saga is all about' (2021) BBC [www.bbc.com/news/business-56718036](http://www.bbc.com/news/business-56718036) and *ibid*, 'Convicted Post Office workers have names cleared' (2021) BBC [www.bbc.com/news/business-56859357](http://www.bbc.com/news/business-56859357) accessed 28 May 2021.
18. Member of Parliament of the United Kingdom Darren Jones in the debate on 'Automatic Computer-based Decisions: Legal Status' Volume 690 on Wednesday 10 March 2021 <https://hansard.parliament.uk/commons/2021-03-10/debates/B735CCE6-164E-42E1-98A1-1D3DDDEEF4CF/AutomaticComputer-BasedDecisionsLegalStatus> accessed 31 May 2021.
  19. Big Brother Watch, 'Face Off Report' (2018) <https://bigbrotherwatch.org.uk/campaigns/stop-facial-recognition/report/> accessed 31 May 2021.
  20. Lizzie Dearden, 'UK's largest police force spends over £200,000 on facial recognition trials that resulted in no arrests' (2019) Independent [www.independent.co.uk/news/uk/home-news/facial-recognition-uk-police-met-arrests-london-cost-false-positives-accuracy-a8723756.html](http://www.independent.co.uk/news/uk/home-news/facial-recognition-uk-police-met-arrests-london-cost-false-positives-accuracy-a8723756.html) accessed 31 May 2021 and *ibid*, 'Facial recognition wrongly identifies public as potential criminals 96% of time, figures reveal' (2019) Independent [www.independent.co.uk/news/uk/home-news/facial-recognition-london-inaccurate-met-police-trials-a8898946.html](http://www.independent.co.uk/news/uk/home-news/facial-recognition-london-inaccurate-met-police-trials-a8898946.html) accessed 31 May 2021.
  21. Article 5 no 1d) of the European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts – COM(2021) 206 final, available at: <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence> accessed 31 May 2021.
  22. Criminal offences as listed under Article 2(2) of Council Framework Decision 2002/584/JHA and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least three years. Further exemptions under the Artificial Intelligence Act will include the targeted search for specific potential victims of crime, including missing children and the prevention of a specific, substantial and imminent threat to the life or physical safety of natural persons or of a terrorist attack.
  23. Kashmir Hill, 'The Secretive Company That Might End Privacy as We Know It' (2020/2021) The New York Times [www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html](http://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html) accessed 31 May 2021.
  24. European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment' (2018) <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> accessed on 5 Jun 2021, p. 57, recital 145.
  25. Octavio Loyola-González, 'Black-Box vs. White-Box: Understanding Their Advantages and Weaknesses From a Practical Point of View' (2019) IEEE Access Vol.7 <https://ieeexplore.ieee.org/document/8882211> accessed 2 Jun 2021.
  26. For instance, AI that was designed for products and customers: Sabine Gleiss, 'AI in the Courtroom: A Comparative Analysis Of Machine Evidence In Criminal Trials' (2020) Georgetown Journal of International Law Vol.51, 198 [https://ius.unibas.ch/fileadmin/user\\_upload/ius/09\\_Upload\\_Personenprofile/01\\_Professuren/Gleiss\\_Sabine/AI\\_in\\_the\\_courtroom\\_GT-GJIL2020.pdf](https://ius.unibas.ch/fileadmin/user_upload/ius/09_Upload_Personenprofile/01_Professuren/Gleiss_Sabine/AI_in_the_courtroom_GT-GJIL2020.pdf) accessed 2 Jun 2021.

## Circle sentencing: where court meets culture

'Australia is now facing an Indigenous incarceration epidemic.'<sup>1</sup>

These words spoken in 2015 by former Australian Prime Minister, Kevin Rudd, ring even truer today.

Six years later, Indigenous Australians are still the most incarcerated peoples in the world, with an incarceration rate of 2,373 per 100,000 First Nations adults,<sup>2</sup> climbing to 4,195 per 100,000 for Indigenous men.<sup>3</sup> The figure for non-Indigenous Australians sits at around 146 per 100,000 adults.<sup>4</sup>

Despite comprising only 3.3 per cent of the Australian population,<sup>5</sup> as of 30 June 2020, Aboriginal and Torres Strait Islander adults made up 29 per cent of the Australian prison population,<sup>6</sup> with that figure rising to 84 per cent in the Northern Territory where Indigenous people account for 30.3 per cent of the general population.<sup>7</sup> Aboriginal and Torres Strait Islander people have been consistently overrepresented in the Australian criminal justice system. This

overrepresentation extends to Aboriginal and Torres Strait Islander children and teenagers, who are 24 times more likely to be incarcerated than their non-Indigenous counterparts.<sup>8</sup>

The incarceration of Indigenous individuals has a ripple effect within already struggling and under-resourced communities. It can lead to, or further exacerbate, fraught relationships and financial difficulties, as well as the placement of the children of Indigenous inmates into foster care, from which it is notoriously difficult to regain custody. Unsurprisingly, recidivism rates among Indigenous adults are also high<sup>9</sup> – calling into question the efficacy of the rehabilitative model used to justify incarceration.

While the incarceration rates of non-Indigenous Australians have fallen steadily over the years, the same cannot be said for Indigenous Australians. Attorney-General for the Australian state of New South

Binta Yade



Wales (NSW), Mark Speakman, notes, ‘the overrepresentation of Aboriginal people in the criminal justice system is a national tragedy for which there is no simple solution’.<sup>10</sup> Of the attempts to combat this issue at many levels throughout the country, judicial initiatives such as the circle sentencing program in NSW have been particularly effective.

### **What is circle sentencing?**

Circle sentencing is an alternative sentencing practice in which an Indigenous offenders’ sentence is determined by means of a discussion with local community elders, family members and, at times, the victim. Established in First Nations communities in North Canada, the practice made its way to Australia in 2002, where it is now practiced in 12 local courts in NSW that serve areas with large Indigenous communities.<sup>11</sup>

Operating as a legitimate limb of the courts, circle sentencing possesses the full sentencing power of a traditional court and results in convictions and criminal records, although to benefit from circle sentencing a guilty plea must be entered. Serious indictable offences, such as murder and sexual assault, are ineligible. While magistrates, police and prosecutors are involved in the consultation, their roles are less central than in traditional courtrooms.

Unlike mainstream court practices, circle sentencing consultations heavily emphasise the contextualisation of the offence. Through in-depth and holistic discussion addressing the background of the offender and the effect of their crime(s), appropriate sentences are collaboratively decided. Circle sentencing recognises that crimes lie on a spectrum of severity, and that while imprisonment may be an available punitive response to many illegal acts, it is not always the most appropriate, thereby promoting the sharing of responsibility between the community and the criminal justice system.

Another important element of circle sentencing is the setting in which the circle consultations take place – often an Aboriginal land council or community centre<sup>12</sup> – which provides for a more neutral and less intimidating environment for the offender. This, in turn, facilitates transparent discussions better suited to effectively inform a punishment. The practice transforms the hierarchical and Manichean dichotomy of good versus bad, often perpetuated in

mainstream courtrooms, into a more open, honest and collaborative forum where offenders ‘feel as if they are being treated seriously and having their culture respected’.<sup>13</sup>

While mainstream court sentencing has been criticised for engaging a retributive model of justice,<sup>14</sup> circle sentencing differs fundamentally in that it instead emphasises rehabilitation. Thus, sentences often involve community work and time in rehabilitation facilities.<sup>15</sup>

### **A perfect circle?**

Understandably, a strong distrust of, and disengagement with, the legal system by Indigenous people remains due to the former’s complicity in the long history of oppression and persecution of Indigenous Australians. Circle sentencing acts to collapse the boundary between an adversarial justice system and Indigenous community and culture, highlighting that the two are not mutually exclusive and can effect remarkable change when combined.

A study conducted in 2020 by the NSW Bureau of Crime Statistics and Research (BOCSAR) found that offenders sentenced through circle sentencing, as opposed to a traditional court setting, are more than half as likely to receive a prison sentence, 3.9 per cent less likely to re-offend and, if they do re-offend, take 55 days longer to do so.<sup>16</sup> The benefits of circle sentencing are not confined to the social sphere as NSW state budget savings from the reduced incarceration rate averaged approximately AU\$2.8 million a year.<sup>17</sup>

Circle sentencing works. It is proven to result in lower rates of incarceration as well as recidivism, the latter of which highlights the rehabilitative successes of the practice. It creates a clear social benefit not only for the offenders but also for their families and the wider communities they engage with.

That being said, circle sentencing is not for everyone. The practice demands a high-level of commitment from both the offender and participating community members. As noted by a former Victorian Attorney-General, Rob Hulls, the sessions can be ‘far more confronting than the mainstream courts’,<sup>18</sup> so a certain amount of mutual accountability is imperative. Local elders recognise that ‘sometimes it’s harder for the offenders to face his or her own people than to face a magistrate’,<sup>19</sup> not simply because of the emotional turmoil this may stir but also



because of the sentences themselves, which tend to sit at the medium to severe end of the punitive spectrum and often involve hands-on, intensive supervision of the offender.

### Completing the circle

At least one variation of circle sentencing has been implemented in each Australian state and territory (bar Tasmania), with varying degrees of success. However, despite the reported successes of circle sentencing in NSW, the low number of circle sentencing courts across the state has led to calls from Aboriginal elders, lawyers and politicians for an expansion of the program to, proverbially speaking, 'complete the circle'.

While these calls have not yet been heeded, there is hope that the BOSCAR findings will serve to propel the cultural-judicial hybrid program forward so as to truly and effectively combat the overrepresentation of Indigenous people in Australian prisons.

#### Notes

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- Koori Mail. 'Court Circle,' p.29.

# Protecting victims of human trafficking from prosecution through the non-punishment principle

## Introduction

The right to non-punishment has been called 'the beating heart' of victim's human rights protection in the context of human trafficking.<sup>1</sup> This principle is of paramount importance within the increasing global prevalence of human trafficking, with the latest data reporting more than 14,000 registered victims in the European Union alone.<sup>2</sup> The rationale for this principle is that while a trafficking victim may have committed

the offence, the reality is that trafficked persons often act without real autonomy. Consequently, victims are not responsible for the commission of the offence and should not be considered accountable for the unlawful acts committed.<sup>3</sup> This article will compare the non-punishment principle found in different instruments, and reflect on the recent decision *VCL and AN v. The United Kingdom* to see how the European Court of Human Rights contributed to the growing jurisprudence of non-punishment.<sup>4</sup>

Beryl Meng





## The principle of non-punishment in international law

The development of the non-punishment principle emerged from the United Nations Trafficking in Persons Protocol, the first international instrument to define the elements of human trafficking. While the Protocol does not explicitly reference the non-punishment principle, one of its purposes is to 'protect and assist victims of trafficking, with full respect for their human rights'.<sup>5</sup> In 2009, The UN Working Group on Trafficking in Persons clarified this principle and recommended 'States parties should [...] Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful act'.<sup>6</sup> As a legally binding norm recognised by states at the international level, the principle of non-punishment is primarily rooted in a human rights-based approach that recognises the vulnerability and dignity of trafficked persons.

Similarly, Principle 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking states 'Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons'.<sup>7</sup> The scope of Principle 7 is broad, including all unlawful activity that is a direct consequence of the trafficking situation and explicitly addresses the detention, charge and prosecution of victims. It is important to note that OHCHR Principles are considered soft law and do not give rise to legal obligations.

Regionally, this principle appears as a positive obligation on certain States to adopt legislative or procedural measures specifically dealing with non-liability. Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings states that 'Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'.<sup>8</sup> The EU Anti-Trafficking Directive 2011/36 establishes an express obligation 'not to prosecute or

impose penalties' on victims of trafficking compelled to commit criminal activities.<sup>9</sup> The disparity between the EU Directive and the Anti-trafficking Convention provisions lies in the type of conduct protected; the Convention looks to all 'unlawful activities', unlike the Directive, which only concerns 'criminal activities'. The latter position is insufficient if the core of the principle is based upon the fact that the trafficked person was not a free agent. The UN Special Rapporteur advocates for the inclusion of civil, administrative or immigration offences as 'even an unpenalized conviction is in fact a punishment'.<sup>10</sup>

The Anti-Trafficking Convention and the EU Directive imposes a clear obligation on states to provide for the possibility of non-punishment, allowing states a degree of discretion regarding the implementation.<sup>11</sup> The Explanatory Report to the Council of Europe Convention specifies that states can comply with this duty either by providing for 'a substantive criminal or procedural criminal law provision or adopt any other measure', which enables non-punishment.<sup>12</sup> In terms of the implementation of the principle, the UN Working Group, OHCHR Principles and the UN Special Rapporteur all advocate for the prevention of prosecution as well as arrest and detention of trafficking victims. The Anti-Trafficking Convention provides for discretionary implementation of penalties and does not suggest whether prosecution is included. The EU Directive, while providing for the possibility of non-prosecution, does not confer an enforceable right on a victim of trafficking not to be prosecuted. Accordingly, the EU and the Council of Europe places the state, rather than the trafficked persons, at the heart of the provisions, leaving a gap in the obligations for victim's rights protection.

### *VCL and AN v. The United Kingdom*

On 16 February 2021, the European Court of Human Rights (the 'Court') delivered the decision considering whether the prosecution of potential victims of trafficking could engage state responsibility under the European Convention on Human Rights ('ECHR').<sup>13</sup> Although the Court's jurisdiction is limited to the ECHR, it refers to the Anti-Trafficking Convention and the Palermo Protocol to interpret Article 4 of the ECHR, clarifying the legal framework on the implementation of the non-punishment principle during prosecution.



The Court, while acknowledging that there is ‘no general prohibition on the prosecution of victims of trafficking’ explains that the prosecution of victims may interfere with the state’s duty to take operational measures to protect them.<sup>14</sup> Here, the Court introduced a victim-centered purposive reading of the duty to take operational measures, writing that it serves two principle aims: ‘to protect the victim of trafficking from further harm; and to facilitate his or her recovery’.<sup>15</sup> Even through a strictly operational lens, the Court’s reasoning is aligned with the victim-centric approach, acknowledging that prosecution would leave victims vulnerable to being re-trafficked in the future, and ‘could create an obstacle to their subsequent integration into society’.<sup>16</sup> On the contents of the operational measures, the Court states that any decision to prosecute a potential victim of trafficking should only be taken once a trafficking assessment has been made.<sup>17</sup> A prosecutor is not bound by a trafficking assessment, but must give clear reasons if departing from it.<sup>18</sup> These procedural steps must be followed to guarantee that any consequent prosecution of potential trafficking victims will be compliant with Article 4.

## Conclusion

The result of this judgment contributed significantly to the development of the non-punishment principle in two ways. First, where international and regional instruments lack clarity, the Court fills the gaps on how the non-punishment principle applies to prosecution of potential trafficking victims. Second, the Court acknowledges that while there is no blanket immunity for trafficking victims, prosecution must still be justified in a manner that is consistent with international standards. With this interpretation, the Court shifts the implementation of the non-punishment principle to the human rights centric model envisioned by the UN Special Rapporteur and the Palermo Protocol, bringing the focus back to the dignity of human trafficking victims.

## Notes

1. Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, ‘The importance of implementing the non-punishment provision: the obligation to protect victims’ (2020) para 9 [www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf](http://www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf).

2. Number of registered victims within the European Union between the years 2017 and 2018. The actual number is likely significantly higher as many victims remain undetected. European Commission, Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021-2025 (2021).
3. OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (2013).
4. *V.C.L. and A.N. v The United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021).
5. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003), art 2(b) (Palermo Protocol).
6. United Nations, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009 (21 April 2009).
7. Office of the High Commissioner for Human Rights, Principles and Guidelines for Human Rights and Human Trafficking (2002), Principle 7 (OHCHR Principles).
8. Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 5 May 2005), CETS No. 197 (entered into force 1 February 2008), art 26 (Anti-Trafficking Convention).
9. European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (entered into force 5 April 2011), art 8 (EU Directive).
10. Giammarinaro, para 18.
11. It would be an incorrect interpretation of the duty to say that article 26 only refers to the possibility of not imposing penalties, rather the provision must be implemented in appropriate cases, the discretion lies in how the state fulfils that obligation. See Ryszard Piotrowicz, ‘Article 26: Non-punishment provision’ in Julia Planitzer and Helmut Sax (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020).
12. Council of Europe Committee of Ministers, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005).
13. It is already established that States’ positive obligation under Article 4 of the European Convention on Human Rights, prohibition of slavery and forced labour, includes conduct that amounts to human trafficking under the Palermo Protocol and Anti-Trafficking Convention. See, *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020).
14. *V.C.L. and A.N.*, paras 158, 159.
15. *Ibid.*, para 159.
16. *Ibid.*
17. *Ibid.*, para 161.
18. *Ibid.*, para 162.



# General Practice Data for Planning and Research (GPDPR): legal issues surrounding ownership and privatisation of England's GP patient data

*Note: This article was written in May and June 2021, prior to the government decision to delay the creation of the GPDPR database following the legal threat of an injunction.*

NHS Digital, founded as an executive non-departmental public body in 2013, serves as the national provider for vital data relating to the provision of health and social care across England. Yet a recent discreet notice, issued on the digital.nhs.uk website, stating that personal data amassed through GP practices would be irrevocably distributed to third parties through a centralised programme if individuals did not opt out by the 23 June deadline, raises questions of lawfulness.<sup>1</sup> The Finnish government's provision of consistent information bolstered existing trust in national leadership during the pandemic, however many early errors contributed to accusations of deceit and strategic handholding for corporate gain. The OECD ranked public trust in the UK government at only 34.7 per cent.<sup>2</sup>

Crucially, the government decision to sell the records of 60.79 million patients to the private sector calls into question who possesses the rights to individual patient data.<sup>3</sup> Under the Access to Health Records Act 1990, patients can access their medical records, but ownership remains in the hands of Trusts under the authority of the Health Secretary.<sup>4</sup> However, the global digitisation of healthcare, accelerated by Covid-19, has made this increasingly unclear, allowing multiple stakeholders to 'own' aspects of patient data. While patients may serve as data subjects, the doctor assessing them has rights to their diagnosis, and Healthtech companies can hold claim to the data they generate through applications and medical devices.<sup>5</sup>

Such distribution creates a convoluted web of data 'ownership', and reflects the complexity surrounding patients maintaining control of their personal health records.

Confidentiality of medical records has always been integral to the patient-doctor relationship, and the ethics and efficiency of the NHS.<sup>6</sup> Understandably, the potential to identify individuals from distributed data is of primary concern to care providers and individuals alike. Such commercial confidentiality concerns successfully opposed the Care.data programme in 2013, also intent on centralising and selling GP records, and led to the creation of the National Data Guardian's and updated Caldicott principles relating to professional standards and good practice.<sup>7</sup> Opponents of GPDPR argue the directive does not comply with these principles, instead giving individuals a tight timeframe to opt out and very little publicity as to the existence of the initiative itself, with the consequences being an irreversible inclusion of pseudonymised patient data.<sup>8</sup>

Pseudonymisation involves removing blatant identifiers such as names and addresses, instead assigning individual patients with unique identifying numbers.<sup>9</sup> Unlike anonymisation, following which re-identification is impossible, pseudonymisation bridges the gap between personal and anonymous data by requiring organisations to store the information needed to reconnect the data and individual separately and securely. As with GPDPR, pseudonymisation is generally used when organisations may need to identify personal data for specific purposes. Crucially, however, this permits a controller<sup>10</sup> or third parties powers of reidentification, and therefore, should arguably be considered information on an identifiable natural person



and within the scope of GDPR.<sup>11</sup> This is problematic due to ambiguity as to where the dataset may end up, with the NHS Digital data release register citing over 5,000 organisations provided with patient information this March alone. Considering pseudonymised data can be unencrypted, this exposes patients to reidentification by researchers and commercial controllers, but also by processors and unidentified companies beyond the initial purchasers, including multinational corporations with the ability to transfer data beyond jurisdictions.

Equally, if an individual has an intricate medical record, this increases their risk of reidentification in the case of breach. Using simple code such as SQL, databases can answer complex queries based on designated qualities, and a process of elimination can leave individuals vulnerable to reidentification, particularly as the pandemic has increased data breaches across the public and private sector.<sup>12</sup>

UK and US official trade meetings demonstrate the US drug industry's desire to obtain access to NHS data, with the commercial value attached to the NHS dataset estimated by EY at £9.6bn per annum prior to the pandemic.<sup>13</sup> As exposed by a FOI request, in 2019 the government contracted with Amazon to allow them access to patient healthcare information<sup>14</sup> to develop and sell products through Alexa. Similarly in 2017, the sale of 1.6 million patient records to develop Google's DeepMind programme was deemed to be on an 'inappropriate legal basis' due to use of information beyond any reasonable expectation of Royal Free London patients.<sup>15</sup> With their respective capitalised values currently at \$1.617tn and \$1.63tn,<sup>16</sup> Amazon and Google are archetypes of 'big tech'<sup>17</sup> with the financial prowess to purchase and utilise NHS data to develop innovative products capable of global healthcare benefit. Claims of unethical data use and antitrust often plague such corporations, and if NHS data is also monopolised by big tech, the resulting products could be sold back to the public sector at vast expense, demonstrating a lack of long-term strategic oversight that could threaten the NHS and counter government claims that GDPR will 'support vital healthcare and planning'.

There is also a distinct lack of transparency over who the dataset will be sold to. Once amassed, it can be transferred to 'academic researchers and commercial third parties', but how can patients give informed consent

to distribution among such a vague pool of recipients? As demonstrated when PPE contracts were awarded to 'friends' of the Health Secretary without competitive tender, the government has acted unlawfully and without accountability.<sup>18</sup> Despite claims that data release will be subject to 'robust rules relating to privacy, security and confidentiality', the risk for GPs is that the absence of public trust will be transposed onto the doctor-patient relationship.

As reflected in the open letter written by a coalition including the Doctors Association UK, many GPs perceive themselves as trustees of their patients' data. While they have control of medical records, it is the responsibility of doctors to act on this information in the best interest of their patients and this has led several surgeries to state they will withhold information from the database.<sup>19</sup> The concept of a 'data trust' is promoted by certain privacy groups, however defining GPs as trustees reduces patients' rights and places doctors in a difficult situation – essentially asking GPs to balance the potential long-term benefits of contributing patient data against their fiduciary duties to their patients.

Innovative technology has an undeniably important function in improving NHS efficiency. IBM estimates that 70 per cent of companies fail to realise value from the data they collect, subsequently losing the advantages of comprehensive analysis, and the NHS is no different. Without technology to transform datasets into practical information, they serve little purpose to policymakers and corporations alike. The value held in NHS data is derived from advanced processing tools, and the capitalist forces driving this can achieve positive results for a health service under immense strain.<sup>20</sup> However, this involves the controversial privatisation of a public service, increasing risk of personal data leaks and potentially contributing to the breakdown of confidentiality so central to effective patient-doctor relations. To increase public confidence in GDPR and ensure its legality, greater government transparency and accountability is necessitated.

#### Notes

1. This data collective is referred to as the General Practice Data for Planning and Research (GPDPR): <https://digital.nhs.uk/data-and-information/data-collections-and-data-sets/data-collections/general-practice-data-for-planning-and-research>
2. According to the OECD trust in government data ranking generated by a sample of the national population aged



- over 15, the latest available data indicates the UK trust in government is at the lowest end of the spectrum. In contrast, Finland achieved 80.9% public trust: <https://data.oecd.org/gga/trust-in-government.htm>; [www.oecd.org/gov/understanding-the-drivers-of-trust-in-government-institutions-in-finland-52600c9e-en.htm](http://www.oecd.org/gov/understanding-the-drivers-of-trust-in-government-institutions-in-finland-52600c9e-en.htm)
3. Bourke, G., Bourke, A. 'Who owns patient data? The answer is not that simple' August 6, 2020 <https://blogs.bmj.com/bmj/2020/08/06/who-owns-patient-data-the-answer-is-not-that-simple/>
  4. Citation from Health Records Act 1990.
  5. For example, Abbott produces the Freestyle Libre, a Bluetooth continuous blood glucose monitoring device, and Babylon Health is an 'online doctor' service, contracted by the government to outsource primary care using AI.
  6. Patient-confidentiality is a common law duty, brought into statute by the Data Protection Act 2018. It is also codified in the 'Confidentiality: NHS Code of Practice.' [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/200146/Confidentiality\\_-\\_NHS\\_Code\\_of\\_Practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/200146/Confidentiality_-_NHS_Code_of_Practice.pdf)
  7. *Information: to share or not to share? The Information Governance Review*. The government response to the Caldicott Review by the National Data Guardian: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/192572/2900774\\_InfoGovernance\\_accv2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192572/2900774_InfoGovernance_accv2.pdf)
  8. Opponents include the Foxglove and MedConfidential groups campaigning against the misuse of digital technology by big tech and governments.
  9. Pseudonymisation is defined in Article 4(b) GDPR as 'the processing of personal data in such a way that the data can no longer be attributed to a specific data subject without the use of additional information, as long as such additional information is kept separately and subject to technical and organizational measures to ensure non-attribution to an identified or identifiable individual.'
  10. A controller is defined under Article 4(7) of GDPR as a person who determines the purpose or manner in which personal data is processed. Note, this is different to the processor, who has different obligations under GDPR.
  11. Recital 26 of the GDPR provides that 'Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person.' See also 'Are 'pseudonymised' data always personal data? Implications of the GDPR for administrative data research in the UK?' <https://doi.org/10.1016/j.clsr.2018.01.002> and 'They who must not be identified—distinguishing personal from non-personal data under the GDPR', *International Data Privacy Law*, Volume 10, February 2020, <https://doi.org/10.1093/idpl/ipz026> for alternative arguments.
  12. As set out in the ICO's data security trends, there have been 2425 seventh data protection principle or personal data breaches reported in Q4 2020-21.
  13. Note, this figure was obtained prior to the exponential growth in health and technological investment as a result of the COVID-19 pandemic, in 2019: [www.ey.com/en\\_gl/life-sciences/how-we-can-place-a-value-on-health-care-data](http://www.ey.com/en_gl/life-sciences/how-we-can-place-a-value-on-health-care-data)
  14. This information excluded patient data.
  15. Martin AJ. Google received 1.6 million NHS patients' data on an 'inappropriate legal basis.' Accessed at <http://news.sky.com/story/google-received-16-million-nhs-patients-data-on-an-inappropriate-legal-basis-10879142>
  16. Alphabet Inc (Google) and Amazon.com Inc as listed on the NASDAQ Index on the 4h June 2021.
  17. These are largely multinational corporations, with the term referring to the most dominant and largest tech companies operating in various sectors.
  18. *R on the application of Good Law Project Limited and others v Secretary of State for Health and Social Care*. 2021 [www.bailii.org/ew/cases/EWHC/Admin/2021/346.html](http://www.bailii.org/ew/cases/EWHC/Admin/2021/346.html).
  19. Kamlana, A., 2021. *Your medical records are about to be given away. As GPs, we're fighting back* | Ameen Kamlana. [online] the Guardian. Accessed at: [www.theguardian.com/commentisfree/2021/jun/03/gp-nhs-digital-data-patients-records-england](http://www.theguardian.com/commentisfree/2021/jun/03/gp-nhs-digital-data-patients-records-england)
  20. EY estimates that private contracts to sell data could bring in £5bn for the NHS annually. See note 15.

Fitry Nabilah Hamidah



## Twenty five years for Ongwen: no excuse for an ex-child soldier

### Introduction

After more than four years of trial proceedings, the International Criminal Court (ICC) finally arrived at the decision in its case against Dominic Ongwen. As a Commander of Lord's Resistance Army (LRA), the ICC found that Ongwen is responsible for the atrocities he committed in Northern Uganda between 1 July 2002 and 31 December 2005.<sup>1</sup> On 6 May 2021, the ICC sentenced Ongwen to a total of 25 years' imprisonment.<sup>2</sup>

### Ongwen's abduction by the LRA

During his childhood, Ongwen was abducted by the LRA at the age of nine while he was on his way to primary school.<sup>3</sup> He was then subsequently trained and beaten in the LRA. A fellow abductee testified that together they witnessed the murder of a recaptured escapee and were told that whoever wanted to escape the LRA would be killed.<sup>4</sup> Despite rough early years in the LRA, Ongwen managed to climb the ranks and eventually became a commander of the group.<sup>5</sup>



## Sentencing in the International Criminal Court

According to the principle of *Nulla poena sine lege*, a convicted person before the ICC could only be punished in accordance with the Rome Statute,<sup>6</sup> which provides that the convict may receive penalties of imprisonment with a maximum of 30 years, or a life imprisonment,<sup>7</sup> and an additional fine or forfeiture of proceeds, property and assets derived from the crime.<sup>8</sup>

To determine the sentence, the ICC shall take into consideration the gravity of the crime and the convict's individual circumstances,<sup>9</sup> then the extent of damage caused by the crime, specifically the harm caused to the victim and their families, means used to execute the crime, degree of participation and intent of the convict.<sup>10</sup> Additionally, the ICC shall take into account the mitigating and aggravating factors for sentence determination pursuant to the Rules of Procedure and Evidence,<sup>11</sup> then weigh and balance all the relevant factors to arrive at the determination.<sup>12</sup>

When a person is convicted of more than one crime, the ICC shall decide on the individual sentence for each crime, then a joint sentence for the total period of imprisonment, with a maximum of 30 years or a sentence of life imprisonment.<sup>13</sup> Most importantly, the totality of any sentence imposed must reflect the culpability of the convict.<sup>14</sup>

## Sentencing in Ongwen's case

Pertaining to the sentence, the Prosecutor recommended a minimum 20 years' imprisonment. The Prosecutor submitted that the extreme gravity of Ongwen's crimes, numerous aggravating factors and his role in it would normally warrant the highest sentence under the Rome Statute,<sup>15</sup> but Ongwen's abduction and experience as a child and adolescent in the LRA are relevant to the sentencing determination and warrant reduction. Notwithstanding that, the Prosecutor submitted that such circumstances do not diminish his responsibility and the ICC must balance any sympathy for Ongwen with his victims.<sup>16</sup>

The Defence requested the ICC to consider Ongwen's individual circumstances and issue a sentence of time served. Alternatively, the Defence recommended the sentence of a maximum 10 years' imprisonment.<sup>17</sup> It

further submitted that Ongwen's time in 'captivity' with the LRA since his abduction should be considered as a 'serious mitigating factor' and argued that he would not have committed the crimes if not for his individual circumstances.<sup>18</sup> Meanwhile, the legal representatives of the victims suggested life imprisonment.<sup>19</sup>

In its determination, the ICC had to 'strike a difficult balance between the conflicting considerations'.<sup>20</sup> The ICC accepted the fact that Ongwen suffered for years following his abduction and conscription as a child into the LRA. However, they also noted that many other children were abducted by, or born into, the LRA through abducted women, but very few 'made such a steep and purposeful rise in the LRA hierarchy as Ongwen did'. Moreover, the ICC found no basis to conclude that Ongwen was forced to commit the crimes he was convicted of. He was found ordering the commission of the crimes after carefully planning and evaluating each attack, and staying with the LRA when he had the possibility to do otherwise.<sup>21</sup> These considerations forced the ICC to face its previous position that child soldiers are inculpable victims who suffer from long term consequences of experiencing acts of violence.<sup>22</sup> Taking the middle ground, the ICC considered Ongwen's abduction and experience as a child soldier as a mitigating factor in its determination of his sentence.<sup>23</sup>

For of the 61 counts of crimes that Ongwen was convicted of, including murder, torture, sexual and gender-based crimes and conscription and use of children under the age of fifteen in hostilities,<sup>24</sup> the ICC came to the individual sentences of 8 years for 6 counts, 14 years for 24 counts, and 20 years for 31 counts.<sup>25</sup> Considering the extreme gravity of the crimes and the aggravating factors, the ICC would have given a joint sentence of life imprisonment, but decided that it would be excessive when balanced with his individual circumstances. However, the ICC emphasised that being a victim of a crime does not justify the commission of crimes,<sup>26</sup> especially when committed as a fully responsible adult.<sup>27</sup> Therefore, the ICC sentenced Ongwen to 25 years of imprisonment, as a 'total term of imprisonment shorter than 25 years would be incapable of reflecting the totality of Dominic Ongwen's culpability' and it is deemed appropriate for his individual circumstances.<sup>28</sup>

## Impact on international criminal justice jurisprudence

Sentencing in international criminal justice has always been treated as an ‘afterthought’ and spared little attention.<sup>29</sup> However, it deserves more attention as it may be considered to be the most important part in the trial.<sup>30</sup> If previously the ICC depicted child soldiers solely as vulnerable victims of conflicts, through Ongwen’s sentence, the ICC left a legacy to the international criminal justice jurisprudence and a clear message: that childhood trauma does not justify, nor excuse, the commission of atrocities in adulthood, and the perpetrator of such actions will be held accountable and face serious consequences.

### Notes

1. Trial Judgment, *The Prosecutor v. Dominic Ongwen* (IICC-02/04-01/15-1762-Red) Trial Chamber IX, 4 February 2021.
2. Sentence, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-1819-Red) Trial Chamber IX, 6 May 2021.
3. Sentence, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-1819-Red) Trial Chamber IX, 6 May 2021, p. 26, para. 65.
4. Sentence, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-1819-Red) Trial Chamber IX, 6 May 2021, p. 29, paras. 72-73; Transcript, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-T-193-ENG) Trial Chamber IX, 8 November 2018, p. 6-8, 20; Transcript, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-T-261-ENG) Trial Chamber IX, 15 April 2021, pp. 4-5.
5. Trial Judgment, *The Prosecutor v. Dominic Ongwen* (IICC-02/04-01/15-1762-Red) Trial Chamber IX, 4 February 2021, para. 134.
6. *Rome Statute of the International Criminal Court*, Article 23.
7. *Rome Statute of the International Criminal Court*, Article 77(1).
8. *Rome Statute of the International Criminal Court*, Article 77(2).
9. *Rome Statute of the International Criminal Court*, Article 78(1).
10. *Rules of Procedure and Evidence of the International Criminal Court*, Rule 145(1)(c).
11. *Rules of Procedure and Evidence of the International Criminal Court*, Rule 145(2).
12. *Rules of Procedure and Evidence of the International Criminal Court*, Rule 145(1)(b).
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# Refugee protection in Kenya: Kenya's decision to close its refugee camps

Ivy Shiechelo



## Background

Kenya is reportedly the second largest refugee hosting country in Africa, with over 500,000 refugees living in the Daadab and Kakuma camps.<sup>1</sup> The Daadab and Kakuma refugee camps are the largest refugee camps in Kenya. Daadab hosts approximately 218,837 refugees, predominantly of Somali origin.<sup>2</sup> The camp was established in 1991 following the outbreak of war in Somalia while the Kakuma camp was established in 1992 following the Sudanese War. The camp has a population of over 190,000 refugees.<sup>3</sup>

On 24 March 2021, the Minister of Interior announced that the Kenyan government intends to close the Daadab and Kakuma refugee camps.<sup>4</sup> The United Nations High Commission for Refugees (UNHCR) was given two weeks to come up with a plan for the definite closure.<sup>5</sup> On 25 March 2021, the Minister of Interior held virtual talks with 25 heads of mission and development partners from the United Nations, the IMF and the World Bank on the refugee issue and Kenya's plan to close the camps.<sup>6</sup> A Constitutional Petition No. E102 of 2021 was filed in the High Court of Kenya by Peter Solomon Gachira (a former presidential aspirant).<sup>7</sup> On 8 April 2021, the court issued a 30 day conservancy order staying the application and enforcement of the executive order, in relation to the closure of the Daadab and Kakuma refugee camps.<sup>8</sup>

Similarly, in 2016, the Kenyan government sought to have both refugee camps closed following a terrorist attack. The Constitutional and Human Rights Division of the High Court of Kenya at Nairobi rendered the government's decision unconstitutional.<sup>9</sup> The High Court stated that the revocation of refugees' refugee status and their repatriation was an outright violation of the principle of non-refoulement.

## The principle of non-refoulement

The 1951 Convention Relating to the Status of Refugees ('the Refugee Convention') is the governing international instrument on refugees' rights and state obligations towards refugees. Article 33 of the Refugee Convention prohibits contracting states from expelling a refugee to territories where their *'life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'*.<sup>10</sup>

The government of Kenya attributes its decision to the fact that refugee camps are not a permanent solution to displacement. As a result, alternative solutions ought to be found to tackle the issue. The government, together with the UNHCR, plans to create and implement a road map on the repatriation mechanism, ensuring that said mechanisms are in accordance with international human rights policies.

Failing to which, the repatriation of refugees back to Somalia and South Sudan shall expose the refugees to harm, possible loss of life, torture and psychological trauma. The government alludes to the situation in Somalia and Sudan being stable and having improved.<sup>11</sup> However, this is not an accurate depiction of the situation, as both countries continue to be riddled with conflict.

In 2018, UN member states came together and agreed to enact the Global Compact on Refugees that seeks to: *'(i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity'*.<sup>12</sup> Globally, most refugees are hosted by developing countries.<sup>13</sup> The Global Compact on Refugees is a step in the right direction, particularly, in accordance with refugee host states, such as Kenya, in the equitable distribution of refugees in the region.



## Conclusion

The High Court of Kenya is likely to render this decision by the Kenyan government unconstitutional once again. However, the state may invoke public policy and national security concerns to implement its decision. The Constitution of Kenya's Bill of Rights is applicable to all persons, hence, both nationals and non-nationals are to be granted the rights provided for in the Bill of Rights.<sup>14</sup> It is therefore paramount that Kenya reevaluates its decision to close the Daadab and Kakuma camp to avoid violating its international law obligations relating to refugees.

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## Khoa Doan



# Legal assistance and the independence of the legal profession in China

Legal assistance on criminal cases is a relatively new phenomenon in China.<sup>1</sup> It has played an invaluable role in addressing social inequalities and new relationships, guaranteeing the balance between prosecution and defence and maintaining the rule of law and human rights values in the society. However, are the Chinese lawyers who use the criminal legal assistance and represent clients provided sufficient independence owing to international standards?


## Development of legal assistance on criminal cases in China

The 1996 Criminal Procedure Code<sup>2</sup> (CPC) officially recognised and granted full support to legal assistance on criminal matters.<sup>3</sup> The Lawyers' Law<sup>4</sup> states that legal assistance

should be provided to citizens on civil or criminal cases on account of financial reasons and that all lawyers had a duty to advise those in need.<sup>5</sup> The 2003 Provision of Legal Aid<sup>6</sup> provided general system regulation of the legal aid in criminal cases.<sup>7</sup> In 2012, the Government introduced a revision of the CPC<sup>8</sup> and corresponding 'Clarification of the People's Court on the application of the CPC'<sup>9</sup> to improve the legal regulation, including the scope and the forms of legal assistance in criminal matters.

## Independence of the legal profession in China

The Basic Principles on the Role of Lawyers<sup>10</sup> notes that the independence allows the lawyers to carry their professional functions, including fostering the administration



of justice, protecting the clients' rights and upholding the rule of law and the advancement of human rights.<sup>11</sup> The Chinese government recognises the right to counsel, the principle of equality before the courts, the right to a fair and public hearing by an independent court established by law, stated in the International Covenant on Civil and Political Rights<sup>12</sup> and Basic Principles on the Role of Lawyers<sup>13</sup>. However, these rights have not been incorporated into domestic law.<sup>14</sup>

The 1980 Interim Regulation on Lawyers<sup>15</sup> defined Chinese lawyers as 'state legal workers',<sup>16</sup> so their jobs were primarily to serve the state's interests.<sup>17</sup> The CPC<sup>18</sup> made 'lawyer's perjury' a crime and allowed the procuracy to file against those who introduced evidence that contradicted the police. Consequently, they usually face a 'daily diet of disillusionment and danger'.<sup>19</sup> Jerome Cohen, NYU Law Professor, concurred: 'If their defense efforts offend the police or the procuracy, the risk criminal prosecution, either for tax evasion or corruption, leaking state secrets, or worst of all, for perjury'.<sup>20</sup> The 2007 amendments to the Lawyers' Law<sup>21</sup> provided a broader scope of independence for lawyers. They can present their opinions in the courts without being prosecuted, except 'speeches compromising state security, defaming others, or seriously disrupting court order'.<sup>22</sup> Teng Biao, a Chinese human rights activists and lawyer, noted, '[T]he most dangerous and open-ended exception is "endangering state security"'.<sup>23</sup>

Moreover, bar associations' independence must be safeguarded to guarantee the independence and integrity of the legal profession as UN Secretary General António Guterres emphasised.<sup>24</sup> All-China Lawyers Association (ACLA) and the local lawyers' associations are defined as 'self-disciplinary organisations of lawyers'<sup>25</sup> with a duty to 'formulate codes of conduct and disciplinary rules'.<sup>26</sup> Yet, ACLA is state controlled.<sup>27</sup> In 2006, the organisation issued its 'Guiding Opinions on Lawyers Handling Mass Cases'<sup>28</sup> to instruct all lawyers to seek 'supervision and guidance'<sup>29</sup> from judicial bureaus when providing legal assistance or handling class actions or aggregate cases. The 2007 amendments<sup>30</sup> granted the judicial bureaus the power to supervise and control all lawyers.<sup>31</sup> They could impose disciplinary penalties on lawyers if they did not follow the guidance.

In the Gongmeng Group case, it was fined RMB 1.42 million for 'tax evasion' and

closed down.<sup>32</sup> The licenses of 53 lawyers were cancelled.<sup>33</sup> The Group did not follow the warnings issued by the Beijing judicial bureau when representing the parents who filed against Sanlu Group, a large dairy company, over tainted milk that led to children becoming ill and dying across China in 2008.<sup>34</sup> They went further by providing legal assistance to Tibetans who were arrested in the 2009 Xinjiang riots, which could be related to a state security issue.<sup>35</sup> 'The higher the political stakes and more powerful the state agency involved, the less likely their support is to be effective'.<sup>36</sup>

## Other challenges

### *Limited quantity*

The Chinese lawyers who undertake legal assistance receive disproportionate payment for their time and effort.<sup>37</sup> This leads to a limited number of lawyers engaged in criminal matters.<sup>38</sup> In 2011, 14,150 lawyers provided legal assistance for 113,717 criminal cases, which increased to 240,480 cases in 2014.<sup>39</sup> While the number of lawyers remained unchanged.<sup>40</sup>

### **Insufficient funding**

Between 2011 and 2015, the total funding for legal aid received from the Chinese government increased up to 15.2 per cent.<sup>41</sup> Other criminal legal assistance relied entirely on overseas sponsorship. State funding may bring greater supervision owing to vague regulations,<sup>42</sup> while overseas funding may raise the government's awareness. In 2019, Changsha Funeng, an anti-discrimination legal aid institute for disabled people, was shut down.<sup>43</sup> Cheng Yuan, Liu Dazhi and Wu Gejianxiong were detained for about seven months and later formally arrested for 'subversion of state power'.<sup>44</sup> It is one of the few Chinese institutes that received foreign funding.

### **Narrow sphere**

Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems notes that authorities must guarantee the presence of lawyers to support the defendants to ensure the right to a fair trial. However, the 2012 CPC<sup>45</sup> regarding rendering legal assistance for criminal lawsuits is narrow. Chinese legal assistance is provided only to children<sup>46</sup> and

those involved in death penalty<sup>47</sup> or disability cases.<sup>48</sup>

## Conclusion

Criminal legal assistance fills the gaps in awareness of, and commitment to, public interest work and legal services for those without access to the justice system in China. However, the assistance requires further capacity building to realise their full potential owing to the insufficient independence of lawyers while providing support. Many are not sufficiently funded by government or philanthropic resources and lack autonomy. They remain vulnerable to the political climate and narrow scopes and regulations.

## Notes

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# Unhappy bedfellows: religious freedom and liberalism in Europe

Phoebe Cook



**R**eligious persecution has occurred throughout European – and indeed, world – history. However, the human rights project has failed to effectively secure individuals' right to religious freedom, as well as the right to live without majority religious values inhibiting the exercise of other fundamental rights. Liberal democracies have failed to respect the demarcation between the role of the state and the private sphere envisaged by liberalism. It should not be forgotten that many liberal thinkers were motivated by poor treatment of religious non-conformists, and strongly believed people should receive the same treatment by the state, regardless of their faith, which was considered private.<sup>1</sup> This essay will outline two trends in Europe that demonstrate how these inter-connected principles are weaponised and used to project majoritarian values, rather than allowing for the peaceful co-existence of a plurality of worldviews. These trends appear diametrically opposed, but ultimately reflect the motivation of those in power to dictate the values and rights that people – usually women – should live by and enjoy.

The first major religious freedom case to be decided by the European Court of Human Rights was *Kokkinakis v. Greece* in 1993,<sup>2</sup> in which it was held that minority religions may require differential treatment for adherents'

Article 9 rights be protected. This reflects a common and practical approach in human rights and anti-discrimination law, yet later cases failed to uphold this standard and ended up reinforcing majoritarian beliefs.

The Grand Chamber's ruling in *S.A.S. v. France* in 2014 represents a low point in the Court's treatment of religious freedom claims, as derogation from Article 9 was considered to be justified by the French government's articulation of a vague value not found in the closed list of legitimate interests that allow for derogation.<sup>3</sup> The ban on full-faced veils, which indirectly but obviously discriminates against Muslim women, was deemed necessary in order to meet the goal of 'living together',<sup>4</sup> suggesting that the government did not think the manifestation of Islamic faith would fit in with the majority. The Court ignored the explicit requirements of the Convention and gave the state such a wide margin of appreciation that the protective purpose of the right was defeated.

Janis insightfully comments that, '[e]ven the European Court of Human Rights, usually a staunch protector of many other international human rights, gives unusual and undue weight to the protection of the religious sensibilities of a state's majoritarian religion, rather than to protecting minority faiths. This turns the European Convention on Human Rights,



ordinarily employed to shelter the strong against the weak, on its head'.<sup>5</sup> According to Ratna Kapur, these repressive policies are justified on the basis that women are being saved from oppression and suffer from false consciousness, unable to determine what is in their best interests without benevolent liberal intervention.<sup>6</sup> It is painfully ironic that liberalism is wielded as a basis for the violation of Muslim's rights, as many liberal thinkers were early advocates for the protection of persecuted faith groups. It is surely no coincidence that discriminatory practices have been upheld by the Court in the war on terror era, as fear and ignorance became strong policy motivations. Further marginalisation of such a vulnerable community, however, will not make 'living together' any easier.

Cases such as these, where discriminatory bans on face coverings are upheld, are even more troubling considering the ease with which this right can be secured. Facilitating the right to manifest one's beliefs via religious dress is a classic example of negative liberty.<sup>7</sup> It does not require investment in social welfare or educational infrastructure, it merely requires governments to refrain from acting. The introduction and upholding of these bans demonstrates active, rather than passive, intolerance.

In other European states, it is religious freedom that is used as a justification by those with power and privilege to cement their ideology and erode the fundamental rights of others. For example, the near-total ban on abortion implemented in Poland this year<sup>8</sup> reflects the direct translation of conservative Catholicism into state policy, based on a successful argument that religious rights are violated when the non-religious practices it condemns are allowed.<sup>9</sup> Debates on abortion and other policies affecting women and the LGBTQ+ community in conservative states often see the scope of the public and the private disfigured. A woman receiving a safe abortion has no effect on a religious person's ability to practice their faith, nor are they required to partake in activities they morally disagree with. On the other hand, privileging religious ideology above a woman's right to choose has real and devastating consequences and substitutes her autonomy for the will of the powerful.

Similarly, many states in Eastern Europe are considering withdrawal from the Istanbul Convention after Turkey did so earlier this year, on the basis that its gender-sensitive

aspects are a threat to traditional values, including the traditional institution of the family.<sup>10</sup> Again, a society that recognises families come in many forms does not prevent someone from practicing their faith, and any discomfort from conservative thinkers is vastly outweighed by the ability of people with diverse SOGI to live flourishing lives.

In Europe, religious freedom and liberalism are often seen as being in tension, but they are functionally similar as both are seized upon by majorities to increase their ideological reach at the expense of individual rights, with women often in the firing line. This is absurd considering liberal values were borne from a movement which, in part, aimed to ensure non-conformists were not discriminated against and understood governments to be legitimate where they were limited. Pluralism is theoretically possible, but it requires a renewed understanding of the limits of the state's interference in private life. It is the vulnerable who require the protection of the state in exercising their autonomy, whether that is a Muslim woman in Marseille, or a woman seeking an abortion in Kraków. Religious freedom and liberalism can only be reconciled when they are no longer misused as justifications for the curtailment of individual rights, and instead recognised as their best guarantee.

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7. See Isaiah Berlin 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford, England: Oxford University Press, 1969) 118-172.
8. BBC News 'Poland enforces controversial near-total abortion ban', *BBC*, 28 January 2021. Available at: [www.bbc.co.uk/news/world-europe-55838210](http://www.bbc.co.uk/news/world-europe-55838210) [accessed 5 June 2021].
9. See the involvement of the conservative, religious Ordo Iuris Institute for Legal Culture in drafting and promoting this legislation at: Neil Datta 'Four reasons why Poland's war on abortion should care you', *Open Democracy*, 3 February 2021. Available at: [www.opendemocracy.net/en/5050/four-reasons-why-polands-war-on-abortion-should-scare-you](http://www.opendemocracy.net/en/5050/four-reasons-why-polands-war-on-abortion-should-scare-you) [accessed 5 June 2021].
10. See Human Rights Watch 'Europe: Redouble Efforts to End Violence Against Women', Human Rights Watch, 10 May 2021. Available at: [www.hrw.org/news/2021/05/10/europe-redouble-efforts-end-violence-against-women](http://www.hrw.org/news/2021/05/10/europe-redouble-efforts-end-violence-against-women) [accessed 5 June 2021] and zlem Altan-Olcay and Bertil

Edmund Crawley



# Should rights be extended to rivers?

**A**lthough there have undoubtedly been improvements in the preservation of the UK's rivers in the previous few decades (eg ammonia and phosphate levels are down by 70 per cent and 60 per cent respectively since 1995),<sup>1</sup> the overarching picture remains dire. The Environment Agency's (EA) Water Framework Directive Classification Status found in 2020 that 100 per cent of the rivers they tested were in the 'bad' category for chemical pollutants, meaning that the overall classification of every river tested was below that of 'good'.<sup>2</sup> Dr Rob Collins, Head of Policy at the Rivers Trust, described the present scenario as 'a chemical timebomb we have detonated for the next generation'.<sup>3</sup> Clearly, the present system of regulation is not sufficient, and in light of this there having been growing calls for the extension of rights to rivers as a means of guaranteeing their future protection.

As novel as the idea may sound, it is by no means a new one. Christopher Stone is credited with giving the idea academic credibility in his 1972 article 'Should Trees Have Standing?'. Here, he pointed out that we have already crossed the line of accepting that non-sentient entities might have legal standing (eg companies).<sup>4</sup> As with these non-sentient entities, legal standing could be implemented by a 'guardian' taking control of any relevant legal proceedings. Whenever a river-right (eg right to protection) is breached, the guardian would be obliged to take action and seek a remedy for the benefit of the river.

The argument is simple: rights carry a greater legal weight than third party regulation and riparian owner property rights, and may therefore bring about a better system of conservation for UK rivers. A right represents a stricter system of legal boundaries with more clearly defined rules and consequences. Under the EA's present

system of Enforcement Undertakings, for example, criminal prosecution can be averted by the polluter implementing appropriate remedies. Regardless of the short-term benefits this may provide post-incident, it sets a standard in which criminal liability and all its consequences and embarrassing connotations can be mitigated, despite the fact that a criminal act has occurred. A rights-based system could usher in a stricter form of liability, in which polluters could not go back-and-forth across points of no return.

As well as these general arguments, there are also concrete examples of rights being used as an effective means of protecting rivers. The Whanganui River in New Zealand has, for example, benefitted from legal personhood since 2017.<sup>5</sup> Columbia's Atrato river basin has also been greatly improved since it was given legal personhood by Columbia's Constitutional Court in 2016. In both examples, legal guardianship with an obligation to act on behalf of the river was established, and in the case of the Atrato, this required the government (as one of its guardians) to immediately take long-awaited action against polluters. It would seem, therefore, that the extension of rights can be an effective means of protecting rivers.

There are, however, several issues with this argument that make its conclusions questionable. Firstly, the granting of legal personhood equally entails the establishment of legal liability. This quickly becomes problematic: who is responsible for damage caused by the river during a flood? And who is responsible if someone drowns in the river? It was these concerns, among others, that led the Indian Supreme Court to overturn a decision by the High Court of Uttarakhand to bestow rights upon the Ganges in 2017.

Equally, Stone is perhaps overly optimistic about the possibility of finding willing guardians. In New Zealand, the Te Pou Tupua people were spiritually bound to protect the Whanganui River, and in Columbia the

situation was so dire that government action was needed urgently anyway. It is not clear that outside of a spiritual connection or an impending emergency it would always be possible to find guardians willing to bear the costs of legal responsibility. This issue was also evidenced in the Indian Supreme Court case, in which the guardians themselves sought to overturn the High Court ruling.

Finally, it is not apparent that similar results could not be achieved via more conventional methods, such as better and stricter regulation. Jens Kursten argues that those who reject rights for nature do so because they 'want to own, use, pollute, or destroy Nature without noteworthy obstacles'.<sup>6</sup> But this is an oversimplification that fails to acknowledge that there may be practical arguments against such a possibility. More funding for the EA and a stricter system of rules might well be enough to improve the UK's rivers without having to engage in unnecessary philosophical debate about the extension of rights to natural objects. On that point, it is worth noting that a large amount of the literature in favour of rights for rivers attempts to bolster pragmatic arguments with unconvincing calls for the restrictions of anthropocentrism. Stone, for example, backs up his arguments with the claim that anthropocentrism needs curbing, and then avoids having to defend this statement by appealing to the Wittgensteinian notion that pure ethics cannot be expressed (and thereby conveniently ends the debate).<sup>7</sup>

Similar claims can be found in the writings of Craig Kauffman.<sup>8</sup> The danger with this is that a debate that should be about practicalities becomes a larger and unnecessary debate about value. Wolfgang

Huber, on this problem, argues that frank anthropocentrism is necessary to give environmental laws meaning, and, rather than wasting time opposing this, time should be spent cultivating attitudes of stewardship within it: 'protection of nature, preservation of the countryside and wild animals, a sparing use of resources—all this can be derived from an anthropocentric perspective'.<sup>9</sup>

To conclude, while urgent action is undoubtedly required to address the state of the UK's rivers, bestowing natural rights is unlikely to be a satisfactory solution, and a substantial improvement of existing systems is likely to be more effective and less philosophically troublesome than the radical shift in law and perspective demanded from rights of nature.

#### Notes

1. James Bevan, *The State of our Waters: The Facts*, in 'Environmental Agency Blog', last read 26 May 2021, <https://environmentagency.blog.gov.uk/2020/10/02/the-state-of-our-waters-the-facts>
2. Rebecca Duncan, *New EA Water Quality Statistics Show Failure on a National Scale*, in 'The River Trust', [www.therivertrust.org/2020/09/18/new-ea-water-quality-statistics-show-failure-at-a-national-scale](http://www.therivertrust.org/2020/09/18/new-ea-water-quality-statistics-show-failure-at-a-national-scale)
3. Ibid.
4. Christopher D. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects', in *Southern Carolina Law Review*, 45 (1972), pp.450-501, p.464.
5. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, pt 2, s 14 (N.Z.)
6. Jens Kersten, 'Who Needs Rights of Nature?', *RCC Perspectives*, No. 6.: *Legal and Political Insights* (2017), pp. 9-14, p.10.
7. Stone, 'Should Trees Have Standing?', p.490.
8. Craig M. Kauffman and Pamela L. Martin, 'How Courts are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia and India', in *Vermont Journal of Environmental Law*, Vol 20, 2019,
9. Wolfgang Huber, 'Rights of Nature or Dignity of Nature?', in *The Annual of the Society of Christian Ethics*, 1991, Vol.11, pp.43 – 60, p.49.