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SPECIAL ISSUE

UNIVERSITY OF LEICESTER

NOTE FROM THE EDITOR-IN-CHIEF

The Leicester Student Law Review (LSLR) was established ten years ago to serve as a dynamic platform where students can explore and engage with legal scholarship beyond the confines of their formal curriculum. It aims to inspire meaningful contributions to academic discourse, enabling students to delve into topics that ignite their personal interests while amplifying their distinct perspectives. As Editor-in-Chief, I am deeply committed to fostering an environment where the creativity, curiosity, and intellectual passions of our student body are both nurtured and celebrated within the Leicester Student Law Review

This special edition of the journal highlights the fantastic research of the postgraduate law students from various jurisdictions and universities, who presented their papers during the 2024 University of Leicester Law Postgraduate Research Conference.

This venture would not have been made possible without the support of our amazing faculty. I am grateful to Kasandra Silcott, Ruijue Gu, Xin Wang, Ewa Karolina Garbarz, and Mandeep Singh. for their commitment to this special issue in volunteering their time to editing the submissions on top of their PhD studies.

It is with great pleasure that I present this special edition of the Leicester Student Law Review.

Mary Adeniyi
Editor-in-Chief, LSLR 2024-2025

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University of Leicester Law School Postgraduate Research Conference

Law in Times of Change: Global Trends in Justice

(27 June 2024)

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About the Conference

The Leicester Law School Postgraduate Research Conference 2024 took place on 27 June 2024 bringing together a distinguished mix of emerging and established voices in the legal academic community. The conference aimed to create a platform for postgraduate students to present their ongoing research, exchange innovative ideas, and foster connections with fellow researchers.

The broad theme of the conference, "Law in Times of Change: Global Trends in Justice", is intended to reflect the evolving landscape of legal challenges and innovations in an increasingly interconnected and dynamic world. It served as a platform to explore how shifting global paradigms impact justice systems, legal practices, and societal norms. Many responses were received for the call for abstracts from researchers with international backgrounds.

The conference featured a total of 12 panel sessions in 3 parallel streams on topics such as Sustainability and Environmental Law, Digital Law and AI, and the Rule of Law. A standout moment was the keynote speech delivered by Dr. Iris Lightfoote, CEO of The Race Equality Centre, who captivated the audience with an insightful address on social justice and the critical importance of anti-racism work. We thank all the researchers for becoming part of our community and congratulate them for sharing their research with rigour and passion.

Exploring the Nexus of Parent Company Liability: A Comprehensive Review of Theoretical Perspectives and Legal Doctrines

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Abstract

The question of whether parent companies should be held liable for the actions of their subsidiaries stands as a central concern within corporate law, encompassing legal, ethical, and economic dimensions. The interconnectedness between parent and subsidiary entities, facilitated by ownership, control, and financial ties, complicates the allocation of accountability when subsidiaries are implicated in torts. This multifaceted question prompts reflection on whether parent companies should bear liability, even in the absence of direct involvement or endorsement, or if the principle of separate legal personality shields them from responsibility. Considering the diverse contexts, spanning from multinational corporations to local subsidiaries, adds complexity to this matter, requiring a critical analysis to establish liability. Drawing on case law, such as *Vedanta Resources Plc v Lungowe*[1], and catastrophic events like the Bhopal gas tragedy[2], sheds light on the evolving legal landscape and emphasizes the importance of holding parent companies accountable for subsidiary actions. Through a thorough examination of theoretical frameworks such as, corporate governance, economic theory; legal doctrines such as, separate legal personality, piercing the corporate veil, agency theory, tortious control, vicarious liability, and corporate social responsibility (CSR), this research seeks to deepen our understanding of corporate accountability in contemporary legal discourse. By delving into these intricacies, the aim to contribute to a deeper understanding of corporate accountability within the contemporary legal landscape.

Introduction

In recent years, there has been a notable surge in the proliferation of corporations, marked not only by an increase in their numbers but also by a significant growth in their size and international influence. This expansion has fundamentally reshaped the corporate landscape, resulting in the emergence of powerful corporate conglomerates that exert considerable influence across national boundaries.[3] However, this rapid growth has also sparked increasing concerns about the accountability and liability of parent companies for wrongful actions committed by their subsidiaries. The question of how to

[1] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.
[2] Upendra Baxi, 'Human rights responsibility of multinational corporations, political ecology of injustice: learning from Bhopal Thirty Plus?' (2016) 1 Business and Human Rights Journal 21.
[3] Yanping Wang, Shitian Yang, Weizheng Tang and Li Wei, 'Government GDP targets and corporate capacity expansion- Empirical evidence based on A-share listed companies' (2024) 91 International Review of Financial Analysis 102048. Alice De Jonge, *Simon Baughen, human rights and corporate wrongs: Closing the governance gap. Corporations, globalisation and the law* (Cheltenham: Edward Elgar, 2015). Maureen T Duffy, 'Opening the door a crack: possible domestic liability for North-American multinational corporations for human rights violations by subsidiaries overseas' (2015) 66 Northern Ireland Legal Quarterly 23.

hold these parent corporations responsible for the tortious activities of their subsidiaries has become a pressing issue, highlighting the need for enhanced regulatory frameworks and legal scrutiny to ensure corporate responsibility in a globalized economy.

Furthermore, the occurrence of tortious actions by corporations has become increasingly frequent, causing significant harm and suffering to individuals and communities alike. Notable examples include healthcare malpractice by Johnson & Johnson[4], workplace safety violations at the Rana Plaza factory in Bangladesh[5], and data breaches involving Facebook[6], among others. In these instances, numerous lawsuits were filed alleging that the companies were aware of the risks but failed to adequately warn consumers. However, obtaining proper remedies for the victims of these corporate torts is a challenging endeavour.[7]

Therefore, the difficulty in securing justice for these victims underscores the importance of existing theoretical perspectives and legal doctrines within this area of law. These frameworks influence whether victims can successfully hold corporations accountable and obtain compensation for the harm suffered. That is, the ability of involuntary creditors to access remedies is crucial in ensuring corporate accountability and maintaining public trust in the legal system. Thus, there is a pressing need for a robust legal and regulatory framework that can effectively address and mitigate the challenges faced by victims of corporate torts, thereby ensuring that corporations are held liable for their actions.

This paper undertakes a critical exploration and analysis of the key theoretical perspectives and legal doctrines that form the foundation of the research area concerning parent company liability. It aims to assess the applicability of these theories and doctrines in attributing the liability for torts committed by subsidiaries to their parent companies. The chapter begins with an in-depth discussion of two fundamental theoretical perspectives which are corporate governance and economic theory, so as to reveal the underlying principles and conceptual frameworks that shape the

[4] Tiffany Hsu, 'Johnson & Johnson sued over baby powder by New Mexico' *New York times* (New York, 3 January 2020). Johnson & Johnson was accused of deceiving consumers, especially children, black, and Hispanic women, about the safety of its talc products.

[5] Rebecca Prentice, 'Labour rights from labour wrongs? Transnational compensation and the spatial politics of labour rights after Bangladesh's Rana Plaza garment factory collapse' (2021) 53 Antipode 1767. Muhammad Azizul Islam, Craig Deegan and Shamima Haque, 'Corporate human rights performance and moral power: a study of retail MNCs' supply chains in Bangladesh' (2021) 74 Critical Perspectives on Accounting 102163.

[6] Emmanuel W Ayaburi and Daniel N Treku, 'Effect of penitence on social media trust and privacy concerns: The case of Facebook' (2020) 50 International Journal of Information Management 171. Young B Choi, 'Organizational cyber data breach analysis of Facebook, Equifax and Uber cases' (2021) 3 International Journal of Cyber Research and Education 58.

[7] Pinchas Huberman, 'Tort law, corrective justice and the problem of autonomous- machine caused harm' (2021) 34 The Canadian Journal of Law and Jurisprudence 105. Alan Franklin, 'Corporate liability under customary international law: is the tail wagging the dog?" (2019) ISLSA Journal of International and Comparative law 301-327.

understanding and assessment of parent company liability. Following this theoretical discussion, this paper delves into significant legal doctrines including separate legal personality, piercing the corporate veil, agency theory, tortious control, enterprise liability, corporate social responsibility, and vicarious liability. Each doctrine is examined thoroughly to uncover the legal principles, precedents, and implications associated with parent company liability. The aim is to establish a comprehensive understanding of the legal landscape and to provide valuable insights for future scholars and practitioners in the field. By critically analysing these perspectives and doctrines, this paper seeks to contribute to the ongoing discourse on corporate liability and offer a clear view of how parent companies can be held accountable for the actions of their subsidiaries. This comprehensive approach ensures a detailed examination of both theoretical and practical aspects of parent company liability, enriching the body of knowledge in this important area of law.

Theoretical Perspectives

Exploring fundamental theoretical perspectives, such as economic theory and corporate governance, is essential for addressing the issue of parent company liability for torts committed by their subsidiaries. This analysis provides a deep understanding of the complex interactions and relationships within corporate structures. By examining these theoretical perspectives, we can uncover the underlying principles that govern corporate behaviour and decision-making processes, which are pivotal in determining the extent of a parent company's responsibility for the actions of its subsidiaries.

Economic Theory

Economic theory applies economic principles and concepts to analyse and understand the behaviour, structure, and performance of firms within the marketplace.[8] In the context of company law, this theory explores how firms make decisions about production, pricing, investment, and resource allocation, and how these decisions impact the economy.[9] It includes sub-theories such as agency theory and transaction cost economics (TCE), which explain the relationships between shareholders, managers, creditors, employees, and other stakeholders within a company. It is noteworthy that, the economic theory is context-specific and multifaceted, providing insights into the efficiency, costs, and benefits associated with different liability structures.

[8] Klaus Hopt, 'Corporate governance of banks and financial institutions: economic theory, supervisory practice, evidence and policy' (2021) 22 European Business Organisation Law Review 13.

[9] Alexander Styhre, 'The making of the shareholder primacy governance model: price theory, the law and economics school and corporate law retrenchment advocacy' (2018) 8 Accounting, Economics and Law 20160021. Birgitte Grogaard, Asmund Rygh and Gabriel Benito, 'Bringing corporate governance into internalisation theory: State ownership and foreign entry strategies' (2019) 50 Journal of International Business Studies 1310.

Nonetheless, the economic theory offers a comprehensive lens through which to evaluate the complex interplay of efficiency, costs, and benefits when determining the liability of parent companies for torts committed by their subsidiaries.[10] By promoting stricter regulations, penalties, and enforcement, economic theory aims to create an environment where corporations, their subsidiaries, and controlled supply chains find it difficult to engage in tortious actions. Thus, in the context of this paper, the economic theory focuses on understanding the incentives and mechanisms that drive corporate behaviour.

At its core, economic theory comprises five sub-theories: transaction cost economics (TCE), agency cost theory, efficient contracting theory, market for corporate control, and externalities and social costs. Each sub-theory provides valuable frameworks for understanding why liability should be attributed to parent companies for torts committed by their subsidiaries. A detailed exploration of these sub-theories is necessary to fully grasp the overall significance of economic theory in the allocation of liability.

Transaction Cost Economics (TCE)

TCE focuses on understanding the costs involved in organizing economic activities, which is pertinent when examining parent-subsidiary relationships.[11] Ronald Coase's work on social cost and firm behaviour highlights the importance of transaction costs in shaping economic actions and market outcomes. Coase argued that parties can negotiate and internalize externalities under certain conditions, leading to efficient outcomes regardless of the initial assignment of property rights.[12] Hence, applying TCE to parent company liability suggests that liability should be assigned to the party best suited to prevent harm at the lowest cost. This perspective is illustrated in the UK case of *Chandler v Cape plc*[13], where the court recognized the economic rationale for imposing liability on the parent company based on the practicalities of supervision and control within the corporate structure.

Agency Cost Theory

This theory examines conflicts of interest between principals (shareholders) and agents (managers) within a corporation.[14] In the context of liability for subsidiaries' torts, agency

[10] Itzhak Gilboa, Andrew Postlewaite and Larry Samuelson, 'Economic theory: economics, methods and methodology' (2022) Economic Review 898.

[11] Alain Verbeke and Liena Kano, 'The transaction cost economies (TCE) Theory of trading favours' (2013) Asia Pacific Journal of Management 411. Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The governance of global value chains' (2005) 12 Review of International Political Economy 78.

[12] Ronald Coase, *The firm, the market and the* law (University of Chicago Press 1988). Ronald Coase and Donald Wittman, *The problem of social cost* (Blackwell Publishing 2004). David Campbell, 'Ronald Coase's 'the problem of social cost' ' (2016) 35 University of Queensland Law Journal 75. Liudmyla Vozna, Anna Horodecka and Vitalii Travi, 'Uncertainty and the nature of the firm: from Frank Knight and Ronald Coase to an evolutionary approach' (2023) 33 Journal of Evolutionary Economics 1397.

[13] *Chandler v Cape plc* (2012) EWCA Civ 525.

[14] Riyad MSA Rooly, 'Impact of board diversity on agency costs in the context of agency theory approach: evidence from listed companies in Sri Lanka' (2021) 14 Indian Journal of Corporate Governance 135. Jongwook

cost theory proposes that holding parent companies accountable can align their interests with those of the shareholders. In addition, the previously mentioned case of *Chandler*[15] also demonstrates the relevance of agency cost theory. The court, in its judgment of this case[16], acknowledged the potential for an agency relationship between the parent and subsidiary, emphasising the need to evaluate the degree of control exercised by the parent over the subsidiary's operations.[17] Hence, the agency cost theory becomes relevant in such cases, as it underscores the importance of scrutinising the alignment of interests.[18] If the parent company is found to have maintained a significant level of control over the subsidiary's actions, the court may consider holding the parent company accountable for the subsidiary's tortious conduct. This approach aims to mitigate agency problems arising from the subsidiary's operational autonomy, emphasising the economic rationale that parent companies should bear the consequences when their interests are intertwined with those of the subsidiary.

Efficient Contracting Theory

This theory posits that legal arrangements, including liability structures, evolve as efficient solutions to contractual issues.[19] It suggests that liability should be allocated to minimize overall costs and maximize efficiency within the corporate structure. Moreover, the UK case of *Vedanta Resources Plc v. Lungowe*[20] exemplifies this theory. In this case the Supreme court addressed the issue of whether a UK parent company could be held liable for the environmental and human rights abuses committed by its subsidiary in Zambia. While the case primarily dealt with jurisdictional issues, it also touched upon the duty of care owed by the parent company to the local communities affected by the subsidiary's actions.[21] Therefore, it is argued that, the efficient contracting theory becomes relevant in cases like *Vedanta Resources Plc*[22], as it encourages a careful examination of the contractual relationships between the parent and subsidiary. If the legal arrangements efficiently allocate risks and responsibilities, it is likely to contribute to minimising overall costs and maximising efficiency within the corporate structure.[23].

Kim and Joseph T Mahoney, 'Property rights theory, transaction costs theory, and agency theory: an organisational economics approach to strategic management' (2005) 26 Managerial and Decision Economics 223.

[15] *Chandler* (n 13).

[16] *Chandler* (n 13) at [49].

[17] Julian Fulbrook, 'Chandler v Cape Plc: personal injury: liability: negligence' (2012) Journal of Personal Injury Law 135. Martin Petrin, 'Assumption of responsibility in corporate groups: Chandler v Cape plc' (2013) 76 Modern Law Review 603.

[18] Rashid Afzalur, 'Revisiting agency theory: evidence of board independence and agency cost from Bangladesh' (2015) Journal of Business Ethics 130 181.

[19] Kiran Patil, Vipul Garg, Janeth Gabaldon, Himali Patil, Suman Niranjan and Timothy Hawkins, 'Firm performance in digitally integrated supply chains: a combined perspective of transaction cost economics and relational exchange theory' (2023) Journal of Enterprise Information Management 1.

[20] *Vedanta Resources PLC* (n 1).

[21] Carrie Bradshaw, 'Corporate liability for toxic torts abroad: Vedanta v Lungowe in the Supreme Court' (2020) Journal of Environmental Law 139-150.

[22] *Vedanta Resources Plc* (n 1).

[23] Sam Foster Halabi, 'Efficient contracting between foreign investors and host states: evidence from stabilization clauses' (2011) 31 North-western Journal of International Law & Business 261.

Moreover, the efficient contracting theory highlights the necessity of closely examining the contractual framework to determine the most economically efficient allocation of liability.[24] If these contractual agreements are designed to minimize costs and maximize efficiency, they can significantly influence the court's decision on the extent of a parent company's liability for the torts committed by its subsidiary. This economic perspective, as demonstrated by UK case law, underscores the factors involved in determining parent company liability and the impact that efficient contracting can have on shaping legal outcomes.

Market for Corporate Control

This theory argues that the threat of takeovers acts as a disciplining mechanism for corporate managers, encouraging them to act in the best interests of shareholders and involuntary creditors.[25] By assigning liability to parent companies, this theory enhances market discipline, promoting better corporate governance practices. Additionally, the previously mentioned case of *Vedanta Resources Plc*[26] also reflects the principles of market for corporate control, where legal action and potential liability serve as market discipline mechanisms. Although this case was previously discussed in the context of agency cost theory, it is also relevant in the context of market discipline. The Supreme Court's decision indicated that a UK parent company might owe a duty of care to individuals affected by its overseas subsidiary's actions. Thus, the examination of the parent company's involvement in managing the subsidiary and the potential impact on its reputation aligns with the broader concept of market discipline influencing corporate behaviour.[27]

Furthermore, by assigning liability to parent companies for the torts committed by their subsidiaries, the economic theory underlying the market for corporate control acts as a mechanism to align the interests of shareholders and management.[28] It highlights the importance of market forces, including the threat of legal action, in ensuring that parent companies maintain effective control and oversight over their subsidiaries, thus promoting better corporate governance practices.

[24] Katri Nousiainen, 'General theory of legal design in law and economics framework of commercial contracting' (2021) 5 Journal of Strategic Contracting and Negotiation 247. Mark Wever, Petronella Maria Wognum, Jacques H Trienekens and Simon Willem Frederik Omta, 'Supply chain-wide consequences of transaction risks and their contractual solutions: towards an extended transaction cost economics framework' (2012) 48 The Journal of Supply Chain Management 73.

[25] Henry G Manne 'Mergers and the market for corporate control in corporate governance' (1965) 73 The Journal of Political Economy 110. Geoffrey A Manne, Samuel Bowman and Dirk Auer, 'Technology mergers and the market for corporate control' (2021) 86 Missouri Law Review 1047.

[26] *Vedanta Resources Plc* (n 1).

[27] Bradshaw (n 21) 139.

[28] Nopparat Wongsinhirun, Pattanapor Chatjuthamard, Pornsit Jiraporn and Piyachart Phiromswad, 'Do takeover threats influence corporate social responsibility? Evidence from hostile takeover' (2022) 29 Corporate Social Responsibility and Environmental Management 1203.

It is noteworthy that, although UK case law may not always explicitly reference this economic theory, its principles are evident in legal considerations regarding the liabilities of parent companies for the actions of their subsidiaries.

Externalities and Social Costs

Economic theory plays a crucial role in assessing externalities and social costs associated with corporate activities. If liability is solely placed on the subsidiary, there is a risk of externalizing costs to society. Assigning liability to parent companies ensures that they bear the true social costs of their activities, promoting responsible corporate behaviour.[29] Moreover, it is argued that this approach ensures that companies, bear the true social costs of their activities. By holding parent companies accountable for the actions of their subsidiaries, the legal system promotes a more thorough consideration of the societal impact of corporate operations. This aligns with the economic principle that entities should internalize the full costs, both economic and social, of their activities. This perspective fosters a more responsible and sustainable corporate governance framework, highlighting the interconnectedness of economic decisions and societal well-being.

Nevertheless, the economic theory provides a comprehensive framework for understanding and addressing parent company liability for torts committed by their subsidiaries. By considering factors such as efficiency, incentives, risk allocation, and the internalization of externalities, policymakers and legal practitioners can develop more effective legal remedies and regulatory measures. This approach not only enhances corporate accountability but also promotes sustainable and responsible corporate governance.

Corporate Governance

Corporate governance, essentially, involves the system and principles guiding the direction and control of corporations, encompassing relationships among stakeholders and facilitating the achievement of corporate objectives.[30] It emphasizes ethical conduct, accountability, and transparency. Therefore, in the UK, corporate governance is supported by legal principles and case law, notably demonstrated in *Regal (Hastings) Ltd v Gulliver*[31], which exemplifies the significance of corporate governance principles and established the fiduciary duty of directors to act in the company's best interests. This duty aligns with broader corporate governance principles, emphasizing responsible management.

[29] Livia Baciu and Andreea O Lacobuta, 'Once again on negative externalities: between regulation and liability' (2015) Procedia Economics and Finance 53.

[30] Rashid Zaman, Tanusree Jain, Georges Samara and Dima Jamali, 'Corporate governance meets corporate social responsibility: mapping the interface' (2022) 61 Business and Society 693. Nan Jia, Kenneth G Huang and Cyndi Man Zhang, 'Public governance, corporate governance and firm innovation: an examination of state-owned enterprises' (2019) 62 Academy of Management Journal 223.

[31] *Regal (Hastings) Ltd v Gulliver* (1942) UKHL 1.

Furthermore, legislation such as the Companies Act 2006, the UK Corporate Governance Code[32], and OECD Guidelines[33] provide frameworks for corporate governance, emphasizing the duty of directors' to consider various stakeholders' interests and prioritize the company's success. For example, S.172 of the Companies Act 2006 mandates directors to prioritize the company's success while considering various factors such as long-term consequences, employee welfare, and community and environmental impact.[34] This provision highlights the importance of corporate governance in addressing the interests of stakeholders. Similarly, the UK Corporate Governance Code offers principles for listed companies, emphasizing directors' duty to act in good faith, and evaluate decisions' long-term effects.[35] This underscores directors' accountability in ensuring corporate actions align with stakeholders' best interests. Despite its non-binding nature, adherence to the Code is crucial for maintaining investor confidence, transparency, and accountability, especially regarding parent company liability management in the absence of comprehensive legislation governing corporate groups in the UK. Additionally, the OECD Guidelines advocate for responsible business conduct, including governance structures ensuring accountability and transparency within corporate groups.[36] These guidelines play a key role in promoting ethical behaviour among multinational enterprises, enhancing reputation and reducing legal liabilities.

Moreover, in addressing parent company liability for subsidiaries' actions, these frameworks advocate for robust governance structures to mitigate risks and ensure compliance with legal and ethical standards. Illustratively, recent scandals such as the Volkswagen emissions scandal[37] and the Global Financial Crisis underscore the significance of corporate governance in liability issues. As such, governance failures within companies like Volkswagen resulted in legal and financial consequences, highlighting the need for effective governance structures to prevent misconduct and ensure accountability.[38]

[32] Financial Reporting Council, The UK Corporate Governance Code (Financial Reporting Council 2018).
[33] OECD, OECD Guidelines for Multinational Enterprises (OECD 2011).
[34] Companies Act 2006 (CA 2006) s 172.
[35] Financial Reporting Council, The UK Corporate Governance Code (Financial Reporting Council 2018).
[36] OECD, OECD Guidelines for Multinational Enterprises (OECD 2011). Tamar Meshel, 'International arbitration: the new frontier of business and human rights dispute resolution' (2021) 44 Dalhousie Law Journal 101. Ashley L Santner, 'A soft law mechanism for corporate responsibility: how the updated OECD Guidelines for Multinational Enterprises promote business for the future' (2011) 43 The George Washington International Law Review 375.
[37] Raymonde Crete, 'The Volkswagen scandal from the viewpoint of corporate governance' (2016) 7 European Journal of Risk Regulation 26.
[38] Radoslaw Mieszala, 'Impact of the collapse of the Lehman Brothers bank and the 2008 financial crisis on global economic security' (2019) 191 Scientific Journal of the Military University of Land Forces 149. Similarly, the BP oil spill revealed the environmental and social consequences of governance lapses, emphasizing the importance of comprehensive risk management and compliance within corporate groups. Additionally, Halliburton and Transocean also faced legal scrutiny and liability issues due to the actions of their subsidiaries and subcontractors. In the Deepwater Horizon oil spill of 2010, both Halliburton and Transocean, alongside BP, faced legal repercussions for their involvement. Halliburton's subsidiary, Halliburton Energy Services, was responsible for the cementing of the well, which failed and caused the explosion. Despite Halliburton's claims of indirect responsibility, it faced lawsuits for negligence, resulting in significant financial and reputational damage.

Therefore, corporate governance serves as the backbone for responsible corporate management by ensuring that companies effectively balance the interests of all stakeholders. It promotes transparency, guiding ethical decision-making processes, and fosters accountability within organizations. By doing so, corporate governance contributes to the sustained success of companies over the long term while also safeguarding the broader societal interests impacted by their operations.

Legal Doctrines

The liability of parent companies for torts committed by their subsidiaries presents a multifaceted legal challenge that requires the application of various legal doctrines.[39] Hence, legal doctrines such as separate legal personality, piercing the corporate veil, agency theory, tortious control, vicarious liability and corporate social responsibility play a crucial role in guiding courts to assess parent company responsibility for subsidiary actions. These doctrines provide a comprehensive framework for evaluating liability and enable courts to determine whether the legal separation between parent and subsidiary should be disregarded. The evolving nature of these doctrines reflects ongoing efforts to adapt legal frameworks to the challenges posed by modern global corporations, ensuring a fair and equitable allocation of liability in cases of subsidiary torts.

Separate Legal Personality

The concept of separate legal personality is fundamental in this area of research. This legal principle dates back to the Joint Stock Companies Act 1844[40] and was reinforced in the landmark case of *Salomon v. Salomon & Co Ltd*[41]. As such, this principle establishes that a company is a distinct legal entity independent of its shareholders and directors.[42] In other words, separate legal personality shields parent companies from direct legal responsibility for subsidiary actions, treating each entity within a corporate group as separate legal persons. Consequently, debts and liabilities incurred by subsidiaries are not automatically attributed to the parent company, providing autonomy in their legal dealings and safeguarding their assets and interests.

Similarly, Transocean, the rig's owner and operator, was held liable for failing to maintain safety standards, leading to legal claims alleging negligence. Despite contractual agreements with BP, both companies were held accountable for the actions of their subsidiaries and subcontractors. These cases emphasize the importance of robust oversight and risk management by parent companies to mitigate potential legal and financial risks associated with their affiliates' actions. Mark S Schwartz, 'Beyond petroleum of bottom-line profits only? An ethical analysis of BP and the Gulf oil spill' (2020) 125 Business and Society Review 71.

[39] Helen Anderson, 'Challenging the limited liability of parent companies: a reform agenda for piercing the corporate veil' (2012) 22 Australian Accounting Review 129.

[40] Joint Stock Companies Act 1844 (JSC 1844) s 735.

[41] *Salomon v A Salomon & Co Ltd* [1897] AC 22.

[42] Daisuke Ikuta, 'The legal measures against the abuse of separate corporate personality and limited liability by corporate groups: the scope of Chandler v Cape Plc and Thompson v Renwick Group Plc' (2017) UCL Journal of Law and Jurisprudence 61. Sneha Mohanty and Vrinda Bhandari, 'The evolution of the separate legal personality doctrine and its exceptions: a comparative analysis' (2011) 32 Company Lawyer 198.

It's noteworthy that, the principle of separate legal personality is not absolute, allowing for situations where the corporate veil may be pierced. Although the concept of piercing the corporate veil will be discussed in detail later, UK courts have acknowledged its applicability in certain scenarios. This legal concept involves courts looking beyond formal entity separation to uncover economic and practical realities within a corporate group.[43] Thus, if there is evidence that shows misuse or manipulation of the corporate structure, such as for fraud or injustice, courts may disregard separate legal personalities and hold the parent company directly liable for subsidiary actions. Likewise, factors like fraud, improper conduct, or subsidiary being a mere "puppet" or extension of the parent company are considered. This ensures justice for victims and acknowledges the economic reality of corporate groups, promoting accountability, deterrence, and incentivizing greater oversight.

Nonetheless, while highlighting the significance of separate legal personality in parent company liability, it's crucial to note its promotion of corporate autonomy and limited liability. This principle acknowledges that, in rare cases, the corporate veil may be lifted to hold parent companies accountable for subsidiary wrongdoings. Balancing the protection of corporate entities with the pursuit of justice, this doctrine mirrors the dynamic nature of corporate law and evolving standards in complex business relationships.

Piercing the corporate veil

The "corporate veil" metaphor signifies the separation between a company's assets and its legal identity, limiting liability for both the company and its owners.[44] Therefore, the term piercing the corporate veil refers to a legal principle where a court disregards this separation, treating the company's actions and liabilities as belonging to its shareholders or closely associated entities.[45] While not explicitly defined in statutes, this concept has evolved through UK judicial decisions and case law. It allows courts to set aside the separation between a company and its owners in cases of misuse, impropriety, or attempts to manipulate the corporate structure. However, unlike in some legal systems like the USA, where piercing the corporate veil is common, the approach in the UK involves a case-by-case assessment.[46] For example, in *Daimler Co v Continental Tyre and Rubber*

[43] Rishi Shroff and Shwetank Ginodia, 'A corporate governance perspective on lifting the veil in group companies in India and. The United Kingdom' (2014) 25 International Company and Commercial Law Review 424.

[44] Pawel Stup, 'Piercing the corporate veil- a common pattern' (2019) 24 Comparative Law Review 291. Jannick Damgaard, Thomas Elkjaer and Niels Johannesen, 'Piercing the corporate veil' (2018) 55 Finance and Development 50. Los Watkins and Hamiisi J Nsubuga, 'The road to Prest v Petrodel: an analysis of the UK judicial approach to the corporate veil- Part 1' (2020) 31 International Company and Commercial Law Review 547.

[45] Stephan HC Lo, 'Piercing the corporate veil for evasion of tort obligations' (2017) 46 Common Law World Review 42. Gregory Allan, 'To pierce or not to pierce? A doctrinal reappraisal of judicial responses to improper exploitation of the corporate form' (2018) 7 Journal of Business Law 559.

[46] Darota Galeza, 'Enterprise law- is the UK flowing against the international current?' (2021) 32 International Company and Commercial Law Review 339.

Co[47], the court acknowledged the need to pierce the corporate veil during crises like war, illustrating a context-specific aspect of this legal principle.

Furthermore, it is argued that, veil piercing decisions often result from the merging of disparate cases and this is evidenced in the *Prest v Petrodel Resources Ltd*[48] case. In this case, the Supreme Court acknowledged limited circumstances for veil piercing, citing clear impropriety as necessary. Hence, *Prest*[49] provides valuable guidance on the circumstances under which the corporate veil may be pierced, shedding light on the limited exceptions to the general rule of separate legal personality in corporate law. Likewise, it's noteworthy that, the decision to pierce the corporate veil remains discretionary and fact-specific, and each case evaluated based on its individual merits.[50]

Law of Agency

In recent years, supply chain structures have become increasingly complex, with companies strategically outsourcing activities to external partners to gain competitive advantages. This shift involves various relationships, from buyer-supplier interactions to strategic alliances and distribution channels. Therefore, agency theory is often used to analyse these dynamics, focusing on the relationships between principals (like parent companies) and agents (such as subsidiaries or external partners), exploring authority, control, and responsibility.[51]

Even so, in terms of corporate liability, the law of agency revolves around the agency relationship, where the parent company acts as the principal, delegating tasks to its subsidiaries as agents.[52] This delegation spans operational areas like manufacturing and decision-making. However, it also creates intricate accountability structures, where subsidiaries operate on behalf of the parent company, leading to a complex web of responsibility.

Moreover, the law of agency can be employed to argue that by designating the subsidiary as an agent of the parent company, courts could circumvent the principles set forth in Salomon's case and impose liability on the parent company for the torts committed by the subsidiary. In other words, the law of agency suggests that if there is substantial evidence of an agency relationship characterized by control and authority, the actions of a

[47] *Daimler co v Continental Tyre and Rubber co* [1916] 2 AC 307.
[48] *Prest v Petrodel Resources Ltd* [2013] 2 AC 415.
[49] *Prest* (n 48).
[50] Pawel (n 46) 291.
[51] Juri Matinheikki, Katri Kauppi, Alistair Brandon-Jones and Erik M Van Raaij, 'Making agency theory work for supply chain relationships: a systematic review across four disciplines' (2022) 42 International Journal of Operations and Production Management 301.
[52] Murali Chari, Parthiban David, Augustine Duru and Yijang Zhao, 'Bowman's risk-return paradox: an agency theory perspective' (2019) 95 Journal of Business Research 359. Sylvia Rich, 'Moral entanglement in group decision making: explaining an odd rule in corporate criminal liability' (2024) 18 Criminal Law and Philosophy 1.

subsidiary may be imputed to the parent company.[53] As such, courts are likely to closely examine the level of control exerted by the parent company over its subsidiary, treating the subsidiary as an extension of the parent. If the subsidiary is deemed to be acting on behalf of the parent as an agent, it provides a basis for holding the parent company responsible for any wrongful acts committed by the subsidiary.

This is illustrated in the landmark case of *Adams*[54], which demonstrates how courts scrutinize the degree of control exercised by the parent company over its subsidiary. By recognizing the subsidiary as an agent representing the parent, courts may establish grounds for holding the parent company accountable for the subsidiary's misconduct. This approach underscores the idea that when a parent company exercises significant control over its subsidiary's operations, it should bear the consequences of those operations, including any harm caused by the subsidiary's actions. The principles outlined in the *Adams*[55] case are consistent with the fundamentals of law of agency. Therefore, the court's acknowledgment of the agency relationship emphasized that the corporate veil could be pierced when subsidiaries acted as agents of the parent and when there was a level of control akin to a single economic entity.

In essence, the significance of the law of agency concerning tort liability is substantial, as it offers a theoretical structure for comprehending the distribution of responsibility within corporate frameworks. It highlights the idea that entrusting tasks to subsidiaries encompasses not just operational effectiveness but also legal ramifications, particularly when confronting matters of misconduct or tortious behaviour.[56] When confronted with such situations, courts might turn to the principles of the law of agency to evaluate the level of control and ascertain whether the parent company ought to be accountable for its subsidiary's actions.

Tortious Control

"Tortious control" refers to a legal principle where a parent company exercises enough influence and supervision over its subsidiary to justify holding the parent responsible for any wrongful acts committed by the subsidiary.[57] This concept is crucial in legal discussions as it deals with assigning liability to parent companies for the misconduct of

[53] Emil Velinov and Andreas M Hilger, 'Control and its perception in CEE parent companies and their developed market subsidiaries' (2023) 28 Journal for East European Management Studies 243. Yao-Sheng Liao, 'Human resource management control system and firm performance: a contingency model of corporate control' (2006) 17 International Journal of Human Resource Management 716. Margarida Rodrigues, Maria Alves, Cidalia Oliveira, Amelia Ferreira da Silva and Rui Silva, 'Is it possible for leading companies to affect the control system of their subsidiaries' (2023) 10 Cogent Business and Management 1.

[54] *Adams v Cape Industries Plc* [1989] QB 643.

[55] *Adams* (n 54).

[56] Jonas Puck, Markus K Hodl, Igor Filatotchev, Hans-Georg Wolf and Benjamin Bader, 'Ownership mode, cultural distance and the extent of parent firms' strategic control over subsidiaries in the PTC' (2016) 33 Asia Pacific Journal of Management 1080.

[57] Jonathan Crowe, 'Does control make a difference? The moral foundations of shareholder liability for corporate wrongs' (2012) 75 Modern Law Review 159.

their subsidiaries. It is often discussed within the broader framework of agency law and corporate liability. Furthermore, when a subsidiary engages in a tort, it is primarily responsible for its actions. However, in certain circumstances, courts may examine the relationship between the parent and subsidiary to determine if the parent's level of control is significant enough to warrant direct liability for the subsidiary's wrongful conduct.

It is noteworthy that, though there are no explicit statutory definitions, the concept of tortious control has evolved through case law. Hence, courts typically consider various factors to assess the extent of control exerted by the parent company.[58] These factors include the parent's involvement in decision-making, financial control, operational directives, shared directors or officers, and whether there is a unity of purpose between the parent and subsidiary.

Additionally, tortious control serves as a crucial concept in corporate liability, enabling courts to evaluate the level of influence exerted by parent companies over their subsidiaries. As such, implementing strategies like piercing the corporate veil, enhancing transparency, strengthening regulatory oversight, and providing alternative dispute resolution mechanisms can enhance victims' access to remedy for tortious acts by corporate groups. These considerations offer a comprehensive framework for assessing the relationship's nature and determining whether holding the parent company directly liable for the subsidiary's tortious conduct is fair and just.

Vicarious Liability

Vicarious liability imposes joint responsibility on one party (A) for the wrongful actions committed by another (B), even if A did not engage in any wrongdoing personally. As such, this legal doctrine, often applied to employers for the actions of their employees, holds that A stands in the shoes of B, the wrongdoer. For this liability to apply, there must be a substantial relationship between A and B, as well as a clear connection between the tort and that relationship. Nonetheless, in the context of parent companies and subsidiaries, vicarious liability allows creditors to seek compensation from financially viable parent companies for torts committed by their subsidiaries.[59] The parent company can be held liable regardless of its intent, knowledge, or preventive measures, establishing accountability beyond the specifics of its involvement or awareness.

Additionally, establishing vicarious liability involves two stages: confirming the relationship between A and B, and determining the relevance of the connection between the tort and that relationship. This doctrine ensures that parties responsible for tortious

[58] Steven Russel Lovett, Liliana Perez-Nordtvedt and Abdul A Rasheed, 'Parental Control: A study of U.S. subsidiaries in Mexico' (2009) 18 International Business Review 481.

[59] Philip Morgan, Vicarious liability for group companies: the final frontier of vicarious liability' (2015) 31 Tottel's Journal of Professional Negligence 278. Karl Hofstetter, 'Parent responsibility for subsidiary corporations: Evaluating European trends' (1990) 39 The international and Comparative Law Quarterly 576.

actions are held accountable, offering a legal pathway for victims to seek redress, particularly from solvent defendants.[60] An example illustrating this concept is the case of *Bellman v Northampton Recruitment Ltd*[61], where a parent company was found vicariously liable for an assault committed by its managing director during a work-related event, despite occurring outside official work hours.

Therefore, vicarious liability reinforces a consistent standard of accountability for parent companies, emphasizing their responsibility for the actions of their subsidiaries, irrespective of specific circumstances. This doctrine provides a robust legal framework to address the liability of parent companies for the torts committed by their subsidiaries, ensuring accountability and compensation for victims.

Corporate Social Responsibility (CSR)

Corporate Social Responsibility (CSR) encompasses a corporation's commitment to ethical behaviour, social causes, and environmental sustainability, surpassing legal obligations and becoming integral to modern business practices. Carroll's CSR pyramid delineates economic, legal, ethical, and philanthropic responsibilities, highlighting corporations' ethical and legal obligations.[62] Thus, economic and legal responsibilities prioritize profitability and legal compliance, while ethical responsibilities extend to fair treatment of employees and environmental sustainability, emphasizing moral considerations. On the other hand, philanthropic responsibilities, at the pyramid's apex, demonstrate a commitment to societal well-being.

Furthermore, CSR significantly shapes perceptions and evaluations of parent companies regarding liability for subsidiary torts. While not a direct legal framework, CSR principles influence a parent company's image and ethical standing, impacting legal assessments and outcomes.[63] Hence, embracing CSR practices can enhance a parent company's reputation, mitigating punitive damages or reputational harm in legal proceedings. Furthermore, courts and regulatory bodies may consider a parent company's adherence to CSR principles as indicative of its commitment to preventing and addressing potential torts by subsidiaries, extending beyond public opinion to legal considerations of liability.

Additionally, CSR principles can influence a parent company's duty of care, as they are responsible for supervising and controlling their subsidiaries' activities to prevent harm

[60] Bruce Wardhaugh, 'Punishing parents for the sins of their child: extending EU competition liability in groups and to subcontractors' (2017) 5 Journal of Antitrust Enforcement 22.

[61] *Bellman v Northampton Recruitment Ltd* (2018) EWCA Civ 2214.

[62] Archie B Carroll, 'The pyramid of corporate social responsibility: toward the moral management of organisational stakeholders' (1991) 34 Business Horizons 39. Archie B Carroll, 'Carroll's Pyramid of CSR: taking another look' (2016) 1 International Journal of Corporate Social Responsibility 1

[63] Laura J Spence, 'Small business social responsibility: expanding core CSR theory' (2016) 55 Business and Society 23.

to third parties.[64] Hence, by prioritizing risk management, regulatory compliance, and ethical conduct, parent companies demonstrate a proactive approach to fulfilling their duty of care. Nonetheless, recent legal trends in the UK emphasize the pivotal role of parent companies in upholding responsible business practices, especially concerning liability for tortious actions committed by subsidiaries. This is evident in courts scrutinizing parent companies' duty of care, particularly in cases involving environmental and human rights issues, highlighting the interplay between CSR and liability. Although specific legal rulings are lacking, cases like *Vedanta Resources plc*[65] underscore the growing importance of CSR in corporate governance and accountability, especially in cross-border contexts. Thus, the evolving legal discourse on CSR reflects increasing expectations for parent companies to ensure ethical conduct across corporate groups, indicating a broader societal shift towards holding corporations accountable for subsidiary operations' impact on communities and the environment. Additionally, CSR initiatives can function as a risk management strategy for parent companies, reducing the likelihood of legal disputes arising from subsidiaries' actions by prioritizing product safety, quality control, and ethical supply chain management.

In conclusion, this paper has conducted a comprehensive examination of the intricate challenges concerning the accountability of parent companies for the actions of their subsidiaries. Through an exploration of theoretical frameworks such as corporate governance and economic theory, along with a detailed analysis of pivotal legal doctrines including separate legal personality, piercing the corporate veil, agency theory, tortious control, vicarious liability, and corporate social responsibility (CSR), the aim has been to provide a thorough understanding of the dynamics within this legal domain.

However, it is essential to acknowledge the limitations and ambiguities that persist despite these efforts. Despite striving to provide clarity and insight, certain areas within this subject remain underdeveloped or contested. For instance, the doctrine of piercing the corporate veil continues to pose challenges in its application, and debates surrounding the extent of parent company liability remain unsettled. Moreover, the tension between economic imperatives and ethical considerations in determining corporate accountability presents a complex dilemma that warrants further examination and critical reflection.

Moving forward, it is essential to continue interrogating and refining the understanding of these issues through ongoing research and discourse. By addressing existing gaps in knowledge and engaging in constructive dialogue, work towards enhancing legal frameworks and corporate practices to ensure greater transparency, responsibility, and fairness in the relationship between parent companies and their subsidiaries. This process demands a collaborative effort involving scholars, practitioners, policymakers,

[64] Junsong Bian, Yi Liao, Yao-Yu Wang and Feng Tao, 'Analysis of firm CSR strategies' (2021) 290 European Journal of Operational Research 914.
[65] *Vedanta Resources Plc* (n 1).

and stakeholders to navigate the intricate terrain of corporate accountability and foster meaningful progress towards more equitable and sustainable business practices.

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How to identify mistakes in algorithm contracts – Legal Response from China

Simin Wang*

Abstract

The B2C2 case has raised questions about how traditional mistake laws apply to algorithmic contracts. In Singapore common law, the unilateral mistake rule requires that the non-mistaken party must be culpable subjectively when concluding the contract. However, it is nearly impossible to presume subjective culpability in algorithmic contracts, rendering the unilateral mistake rule almost inapplicable. In Chinese law, the longstanding debate between monism (treating all mistakes equally) and dualism (distinguishing between mistakes in motive and mistakes in expression) becomes meaningless with the large-scale use of algorithm contract. In terms of mistake identification and remedy, as dualism has lost its legal basis in such contracts—ensuring the security of commercial transactions, the answer of Chinese law might be adopting the monism. Namely, both mistakes in expression caused by the algorithm itself and mistakes in motivation caused by the third-party can be categorized under the scope of serious misunderstanding as stipulated in Article 147 of the *China Civil Code*. Therefore, as long as the algorithm's output significantly exceeds what a reasonable person would predict, the algorithm users can obtain remedies for the mistake based on serious misunderstanding, regardless of the type of mistake.

Introduction

With the rapid development of artificial intelligence, automated trading platforms like Trend Spider, Trade Ideas are gradually emerging, leading to a certain degree of humans' marginalization. In these automated systems, users rely on computer algorithms to analyze financial news sources, identify patterns, and make investment decisions without direct human intervention. [1]As a result, users often lack detailed knowledge of contract specifics, formation times, and specific terms during all the trading process. Particularly when utilizing algorithms categorized as "non-deterministic", the decisions made by these algorithms may completely exceed the users' prediction scope. Such AI-driven automated transactions pose a legal issue: as algorithms, rather than humans, gradually dominate all transaction stages, should any intention (or decision) expressed by the algorithm be attributed to the uninformed users, even if such intentions (or decisions), viewed from the perspective of a rational person, are clearly erroneous? If so, is it possible for the users claim remedies based on the contract mistake rules (applying in traditional contracts) in such AI driven contracts (so-called algorithmic contracts, hereinafter the algorithm contracts), thereby exempting or mitigating their contractual liabilities? Considering that the complexity of the algorithms (such as the deterministic algorithm and the non-deterministic algorithm) may differ the answer, this paper argues that non-deterministic algorithm contracts and deterministic algorithm contracts should be discussed separately. However, due to space limitations, this article would only discuss deterministic algorithm contracts there. This paper would take the landmark case of algorithmic

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[1] See Donald MacKenzie, *How Algorithms Interact: Goffman's 'Interaction Order' in Automated Trading,* Theory, Culture & Society, Vol 36:2, p.39 (2019).

contracts mistakes - the *B2C2 v. Quoine* case - as a sample, clarifying the dilemma of applying mistake rules of common law in such automated contracts, which is that the goodwill or malice subjectively cannot be inferred from the outcome. In addition, this paper provides a possible answer in terms of how mistake rules applied in algorithm contracts from the perspective of Chinese civil law.

The Landmark Case – *B2C2 v. Quoine*

Case Summary

The final ruling in March 2020 judged by the Singapore International Commercial Court (SICC) in the case of *B2C2 v. Quoine* raised questions about how traditional legal rules apply to automated algorithmic contracts. In this case, the defendant Quoine is the operator of a cryptocurrency trading platform (called QUOINExchange) and the platform's primary market maker. The plaintiff B2C2 is also a market maker in this platform, engaging in Ethereum-to-Bitcoin trades. The platform operates through typical algorithmic trading, wherein all transactions are autonomously established and executed by algorithms, with no direct human involvement throughout the process.[2] From April 13th to April 17th, 2017, due to technical errors on the QUOINExchange, its quoting program (Quoter-program) was unable to access external cryptocurrency exchange data, preventing Quoine from generating new orders. As the primary market maker, Quoine accounted for approximately 98% of the platform's total trading volume. Therefore, its cessation of order generation resulted in a gradual decrease in order transactions across the entire platform, which further led to two consequences. Firstly, the "deep price" procedure pre-programmed by B2C2 was triggered (because of the lack of orders), causing B2C2 to begin selling Ethereum for Bitcoin at its alternate price, which is one Ethereum for ten Bitcoins. Secondly, the price of Bitcoin on the platform dropped, triggering multiple users on the platform to automatically sell Bitcoin (to gain Ethereum) on the exchange "at the best available price on the platform", namely, the price offered by B2C2. Ultimately, B2C2 purchased millions of dollars worth of Bitcoin at a price 250 times lower than the market price, yielding excess profits that would be almost impossible under normal trading conditions. However, all counterparties trading with B2C2 suffered significant losses.

Since this transaction was concluded and executed through algorithm, none of the parties noticed this abnormal transaction results immediately. Until after several days a trading operator of the platform discovered this anomaly and he manually reversed the transaction, citing it as a manifest error. Afterwards, the B2C2 filed a lawsuit in court, asserting the reversed transactions are valid.[3]

The "deep price" program deployed by B2C2 refers to a pre-set price mechanism in automated algorithmic trading, applicable when there is an abnormal order volume on the platform. Generally, B2C2's trading prices are determined by its trading software based on the order prices on the Quoine platform. However, when there is insufficient order data on the platform, the pre-set program by B2C2 called "deep price" will be triggered. The ratio of "deep price" is fixed, which is 10 BTC for 1 ETH. Such "deep price" program is a form of deterministic

[2] See [2020] SGCA(I) 02, page 2.

[3] The contract between Quoine and B2C2 explicitly stipulated that Quoine (as the operator) had no right to cancel transactions on the platform. Quoine argued that due to an error in the transaction, it was invalid regardless of whether they canceled it. The court in this case made a judgment on the validity of the transaction.

algorithm, characterized by its behavior being determined in advance according to the instructions set in the program and constrained by parameters set by the programmer. For example, with unchanged parameters, the output will not vary given the same input. In other words, for B2C2, it could anticipate that when the order volume falls to a certain level of insufficiency, it would buy Bitcoin at a rate of 10 Bitcoins for 1 Ether.

The Court's Judge

According to the Singapore common law, if a party makes a unilateral mistake when entering into a contract and the other party is aware of and attempts to exploit this mistake, the contract is void. In the case *B2C2 v. Quoine*, the court firstly examine whether the unilateral mistake existed. Specifically, whether the B2C2 (as the non-mistaken party) have known the mistaken party's mistake at the time of contract conclusion. As the algorithm deployed by B2C2 is a deterministic algorithm, the court believes that it can only be seen as a tool used by the algorithm's user.[4] Therefore, it is essential to investigate the algorithm' user - B2C2, clarifying B2C2's knowledge (and subjective intent) at the time of contract formation. Secondly, the court examine the subjective state of B2C2 and the programmers who coded B2C2's algorithm. By confirming that there was no malice in the coding, the court ultimately denied the argument of unilateral mistake and upheld the validity of the contract.

The court's logic is easy understandable. As it considering the deterministic algorithm as a tool, which is only used for users' intention transmission, it is the users' intention that matters when judging whether the unilateral mistake establishment. [5]However, in such automatic trading platform, the intention of the user relies on the algorithm to materialize it into a concrete expression of intent. That is, when the algorithm issues the intent to conclude a contract, the user does not actually "express" anything, it is the algorithm that actually issue the concrete expression of intent. Considering that an algorithm error may directly lead to a mistaken expressed intent and the algorithm is created by programmers, it is also necessary to examine the knowledge (and the subjective intention) of the programmer.

The Breakdown of Applying the Unilateral Mistake Rule in Algorithm Contract

The Analysation of Court's Judge

According to Singapore common law, a unilateral mistake can only be established if the mistake occurred at the time of contract conclusion. Therefore, determining the moment of contract formation becomes a prerequisite for assessing the subjective state of the users (and the programmers). According to the court's explanation—the pure tool theory—there might be two possible answers when analyzing the moment of contract formation. The first answer is that a separate contract is formed each time the algorithm executes a transaction: since the algorithm is merely a tool that express the user's intention, each instance of the algorithm executing a transaction can be considered as the algorithm user simultaneously expressing the intent to

[4] The details about pure tool theory can be seen from Anna Beckers and Gunther Teubner, *Three liability regimes for artificial intelligence: algorithmic actants, hybrids, crowds*, Bloomsbury Publishing Press, 2021, p.49; see also Mik Eliza, *AI in Negotiating and Entering into Contracts*, in Larry A. DiMatteo, Cristina Poncibò & Michel Cannarsa eds., The Cambridge Handbook of Artificial Intelligence – Global perspectives on Law and Ethnics, Cambridge University Press, 2022.

[5] See [2020] SGCA(I) 02, paragraph 206.

conclude the corresponding transaction. Consequently, users can retrospectively review the transactions and claim that there was a unilateral mistake at the time of formation in the past one (or several) transactions. The second answer is proposed by Matthew. He believes that when the algorithm user makes decisions deploying the algorithm, they are making a "public offer", giving others the right to enter into a legally binding contract with them as offerees, with the content of the contract determined by the algorithm in the future. In other words, any subsequent transactions determined by the algorithm must be regarded as the true intent expressed by the algorithm user, and in principle, they cannot trace the transactions and claim mistakes. According to such interpretation, when making a public offer, the algorithm user simultaneously assumes any legal consequences arising from the subsequent actions of the algorithm, and in principle, cannot claim mistake remedies. [6]

In the case of *B2C2 v. Quoine*, the court did not deny the right of the mistaken party to claim mistakes in the transactions, instead, the court made a judgment on whether the unilateral mistake was established. It can be seen that the court clearly adopted the first answer, namely, the contract is formed when the algorithm executes specific instructions to conclude a transaction. Every timing when the contract concluded, the automatic transaction executed respectively.

The Dilemma in Common Law

Given that under Singapore common law, proving unilateral mistake requires demonstrating that the counterparty knew and exploited the mistaken party's mistake, the court's reasoning is questionable. Firstly, it is practically impossible for the programmers of B2C2 to know that the mistaken party would make a mistake in the future. Therefore, attempting to attribute "knowledge of the future trading mistake" to past programmers is unrealistic. Secondly, the court also realized that such attribution is unrealistic, even ridiculous. Therefore, the court concerned more on the subjective malice instead of the knowledge lacking when examined the intent of B2C2 programmers. But in this way, the judgment on unilateral mistake is narrowed down to the discussion of fraud. [7] Lastly, and most critically, the court's reasoning might lead to a violation of the principle of technological neutrality: when the algorithm autonomously enters into contracts, it's users unable to know that their trading counterparty will make a mistake at the time of contract conclusion, thus they can claim no acknowledge and free from the impact of being claimed unilateral mistakes. However, when the role is reversed, humans, as the non-mistake party, would be presumed to know or should have known about the mistake because the transaction price clearly deviates from common sense. This would place algorithm users at an advantage over human counterpartys: algorithm users can claim legal remedies for unilateral mistakes against their trading partners, but humans cannot claim unilateral mistake remedies against algorithm users. A famous example verifying such condition is the case of *Chwee Kin Keong v. Digilandmall.com Pte Ltd*, which was decided by the Singapore Court of Appeal in 2005.[8]

[6] See Matthew Oliver, *Contracting by Artificial Intelligence: Open Offers, Unilateral Mistakes, and Why Algorithms Are Not Agents,* ANU Journal of Law and Technology, Vol 2:1, p.77-78 (2021).

[7] See Low Kelvin F.K. and Mik Eliza, *Lost in Transmission: Unilateral Mistakes in Automated Contracts*, Law Quarterly Review, Vol 136:4, p.563 (2020).

[8] See *Chwee Kin Keong v. Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502. In this case, the defendant erroneously advertised a laser printer priced at 3,854 SGD for 66 SGD on their website. It wasn't until after the plaintiff had ordered hundreds of these laser printers that the defendant realized this mistake. The defendant then sent an email to the plaintiff stating that they would not fulfill the order. As a result, the plaintiff filed a lawsuit against the defendant,

This article argues that, in the case of *B2C2 v. Quoine*, it is nearly impossible for the mistaken party to obtain relief by invoking the rule of unilateral mistake. Indeed, the rule of unilateral mistake almost loses its applicability in algorithmic contracts. The reason is that when applying the unilateral mistake rule, common law requires the non-mistaken party at least to have a non-bona fide subjective state (at the time the mistake occurs). Specifically, regardless of whether the non-mistaken party exploits the mistake of the mistaken party, facilitates its mistake, or merely know the occurrence of mistake, it essentially requires that at the time the mistaken party commits the mistake, the non-mistaken party was not acting in good faith, or at least was negligent. In other words, the non-mistaken party should be blameworthy or culpable. However, in the algorithm contract, in which all steps are achieved by the algorithm instead of its user, how can we blame the user? Some argue that by applying the doctrine of imputed notice, it can be presumed that the non-mistaken party is aware of the mistake.[9] However, such argument may be untenable: firstly, when the algorithm user is practically unable to know that their counterparty made a mistake at the time of contract formation, can the doctrine of imputed notice still apply? Secondly, in terms of outcome, is it justifiable for an algorithm user, who acts without any malice or even negligence, to bear the consequences of a contract failure caused by the counterparty's mistake?

How Can We Deal with this Problem: Response from China

Introduction of Mistake in China Civil law

The concept of mistake is different between civil law and common law systems. In common law system, mistakes are not limited to those caused solely by the expressing party itself; they also encompass those caused by others. For instance, because of the statements, implications, or concealment by the counterparty, the expressing party misunderstand the facts of the contract.[10] Different from the common law system, in civil law, the mistakes are distinct. For instance, in the *Chinese Civil Code*, according to the causes of the mistake, different types of mistakes will be regulated by different provisions. Mistakes (named as serious misunderstanding) are limited to those caused by the expressing party itself. For mistakes which caused by the others, they are regulated by rules such as fraud (Article 148,149), duress (Article 150) and unconscionability (Article 151).[11] As the B2C2 (and the programmer deploying "deep price" algorithm) clearly did not engage in intentional fraud and did not cause the mistaken counterparty to fall into a mistaken belief, only the Article 147 - the provision regulating serious misunderstandings – should be considered if applying the *Chinese Civil Code* to the case of *B2C2 v. Quoine*.

asserting that the contract was valid, and the defendant should fulfill their contractual obligations. The court found that since the defendant, who utilized automated technology, was the party responsible for the mistake in this case, it can be reasonably inferred that the human counterpart was aware that the "unbelievably low" pricing was a result of the defendant's mistake. Consequently, the court ultimately concluded that the unilateral mistake existed, and the defendant had the right to rescind the contract.

[9] See Loke, Alexander. *Mistakes in algorithmic trading of cryptocurrencies*, The Modern Law Review Vol 83:6, p.1346 (2020).

[10] See Bingsheng Zhang, *Research on mistakes in contracts, from a comparative law perspective*, China Legal Science, Vol 5, p.103 (2005).

[11] Articles 147 to 151 of Chinese Civil Code stipulate the reasons for contract revocation, which are serious misunderstanding (Article 147), fraud by the counterparty (Article 148), fraud by a third party(Article 149), coercion(Article 150) and unconscionability (Article 151) See the Civil Code of the People's Republic of China (English Version), retrieved from: http://en.npc.gov.cn.cdurl.cn/pdf/civilcodeofthepeoplesrepublicofchina.pdf

Similarly, we need to consider the moment of contract formation, because only if the expressing party made mistake at the time of contract formation can such mistake constitute a serious misunderstanding. According to the two interpretations proposed earlier, if it is acknowledged that the mistaken party has the right to claim serious misunderstandings after the specific transaction, it should be interpreted as that the algorithm was taken as the mere tool for the users and each instance of the algorithm executing a transaction can be considered as the user simultaneously expressing the intent to conclude the corresponding transaction.[12] In other words, i.e., these contracts were concluded by algorithm users when they use the algorithm tool to make transactions. Thus, users have the right to claim serious misunderstandings for specific transactions afterward. Adopting this conclusion and applying the Article 147 of *Chinese Civil Code* to analyze the B2C2 case, the issue shifts to exploring whether the counterparty of B2C2 was under a serious misunderstanding at the time of the problematic transaction's conclusion.

The Article 147 specifies the legal consequence of serious misunderstanding – the mistaken party could claim contract revocation. However, it does not clear the constitute elements for a serious misunderstanding. According to "*Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the General Principles of the Civil Code of the People's Republic of China*", a serious misunderstanding consists of at least two elements: firstly, the party holds a mistaken understanding regarding certain objects, including (but not limited) to the nature of the act, the counterparty, the type, quality, specifications, price, quantity, etc.; secondly, according to the usual understanding, if the party did not make the mistaken understanding, they would not have expressed such mistake intent. The phrase "usual understanding" implies the mistaken party should be treated as a rational person, thereby any possible argument based on specific subjective emotions or superstitions would be excluded.[13] Therefore, we may conclude that if the mistaken party has a mistake understanding regarding the price of the (object), and according to a rational person, the party would not enter into the contract if he/she did not misconceive the price, then the party' expressed intent - concluding the contract - can be regarded as made based on a serious misunderstanding. Applying such conclusion to the B2C2 case, the rational party may believe that the B2C2's counterparty had a serious misunderstanding regarding the price of the object (1 Ether for 10 Bitcoin) as the exchange price is obviously outrageous. However, the conclusion - the B2C2'counterparty has serious misunderstanding - reached because of the ignorance of an important fact: the counterparty (or say, it's algorithm) explicitly "knew" that B2C2 made the exchange ratio of 1 Ether for 10 Bitcoin and executed the transaction based on such ratio. That is to say, in terms of

[12] Gerald Spindler, Friedrich Schuster, Recht der elektronischen Medien, C H Beck, 3 Aufl. Munich, 2015, comments to §§ 116 ff BGB Rn 6. Cited in Eliza Mik, *From Automation to Autonomy: Some Non-existent Problems in Contract Law*. Journal of Contract Law, p.14 (2020).

[13] Article 19 (1): if a party forms a mistaken understanding regarding the nature of an act, the other party, or the type, quality, specifications, price, quantity,etc., of the subject matter, and it can be determined by the People's Court that, absent such mistaken understanding, the party would not have made the corresponding expression of intention, the court may deem it a serious misunderstanding as provided in Article 147 of the *Civil Code*.

The judicial interpretations issued by the Supreme People's Court have a similar legal effect in the Chinese legal system. Judicial interpretations provide specific rules for interpreting and applying legal provisions, and sometimes fill in gaps in legislation or provide explanations of legal provisions. Although judicial interpretations are not formulated by the legislative body, they hold considerable authority in judicial practice. Courts typically refer to and adhere to judicial interpretations issued by the Supreme People's Court when adjudicating cases.

the exchange price provided by the B2C2, the B2C2's counterparty had no misconception during the transaction! At most, it can be said that the B2C2' counterparty, due to the malfunction of in the pricing mechanism, had a mistake understanding of the value of the Ether and Bitcoin. However, according to the mainstream view in civil law, the mistake in understanding the price and the mistake in understanding the value may lead to different legal consequences.

Arguments Between Monism and Dualism in Mistake Theory in China

For a long time, there has been a divergence in Chinese law between the monism (treating all mistakes equally) and dualism (distinguishing between mistakes in motive and mistakes in expression) regarding the contract mistake identification and thereby remedies. According to the dualism, mistakes can be divided into two types based on the timing of mistake occurrence: the first type is mistakes that occur during the expression phase, where the party's true intent is correct, but a mistake in expression leads to a discrepancy between intent and expression, known as expression mistake; the second type is mistakes that occur during the formation of intent, where mistakes in the motivation prompt the party to make a corresponding expression based on the mistaken intent, known as motivation mistakes.[14] Supporters of dualism believe that the legal consequence of expression mistake and motivation mistake should be distinct. The expression mistake belongs to serious misunderstanding. Therefore, the mistaken party with expression mistake could claim for contract revocation according to the Article 147 of *China Civil Code*. However, mistaken party with motivation mistakes, as the motivation mistake does not constitute the serious misunderstanding, could not ask for mistake remedy in principle. Dualists argue that the party with expression mistakes can revoke the contract is not because of its' mistake, but because there is no intention corresponding to the expression, while the intention is necessary to constitute an enforceable contract. As for the party with motivation mistake, there is an actual intention corresponding to their expression, thereby constituting a valid agreement, at least from an objective perspective.[15] Therefore, the non-mistaken party should not be responsible for the internal motivative mistakes of the party. Otherwise, it would be unfair to the innocent counterparty and would increase instability in transactions over time. For example, Lily booked the Room A of a hotel to relive her youth with her boyfriend, thinking that room A was where they first stayed together, but it was actually room B. Asking the hotel for a refund based on such mistake would undoubtedly be rejected. Compared to the dualism, the legal effect appears more unified in monism. According to the monists, all mistakes should not be distinguished and applied to a unified revocation rule. [16]

[14] Karl Larenz proposed the concept of mistake in motivation. According to him, mistake in motivation refers to a misconception by the actor regarding facts that have a significant influence on the decision to make a certain expression of intention. If the actor had a correct understanding of these facts, they would not have made the same decision. Mistake in motivation does not occur at the time of making the expression of intention but rather during the process of forming the actor's intention. See Karl Larenz, *General Part of German Civil Law (Volume II)*, translated by Wang Xiaoye et al., Law Press, page 514. 2003.

[15] See Zhai Yuanjian, T*he System and Normative Application of Serious Misunderstanding*, Journal of Comparative Law, Vol 4, p163 (2022).

[16] Articles supporting monism can be seen: Han shiyuan: *An Outline of Interpretation of serious misunderstanding*, Peking University Law Journal, Issue 3, p667-684. (2017) ; see also Sunpeng, *On the Theory of Civil Law Motivation mistake*—From Typology to Essential, Modern Law Science, Issue 4, p107-113.(2005);see also Li xiaoyang, *The Evolution of the Paradigm of Serious Misunderstanding—From Mistake Theory to Attribution Theory*, Peking University Law Journal, Issue 5, p1342-1362. (2022)

When analyzing the B2C2 case from the dualism perspective, we may conclude that the mistake made by B2C2's trading counterparty belongs to the motivation mistake. More specifically, it is due to the third-party (pricing mechanism malfunction) that led to the B2C2's counterparties misunderstood the value of the object and based on such misunderstanding, they (or say, their algorithm) executed the exchange of Bitcoin for Ether at a ratio of 10:1. As mentioned earlier, the mistake in pricing and the mistake in value may lead to different legal consequences. The former one falls within the realm of serious misunderstandings, under which both parties have not actually reached an agreement on the transaction price (because the price expressed by the expressing party is not its true intention), typical examples include mistakes in writing, speaking, or calculation. [17] As for the mistake in motivation, it is not protected under the serious misunderstanding regime, as the aim of this regime is to protect the flawless expression of the expressing party's intention. [18]In other words, as long as there is no interference during the process of expressing intent, and the person expressing the intent determines the price based on free will, then a contract is established with this price as its content, and it is enforceable. Mistakes made during the process of intent formation are not within the scope of legal protection.

The Dilemma of Applying Dualism in Algorithm Contract

At first glance, the dualism analysis appears unproblematic. However, if we place this analysis within the specific context of algorithm contracts, we will find many aspects worthy of further exploration.

In algorithm contracts, "mistake" is deduced from abnormal output results. Generally, the abnormal output results of algorithm can be attributed to two situations. Firstly, they might be caused by programmers, such as programmers were malicious in coding or they lacked professional competence. Secondly, the code itself might have inherent flaws or bugs. Both situations can lead to the abnormal output results, ultimately manifesting as a discrepancy between the expressed intention and the true intention of the parties involved. When we insist that an algorithm is merely a tool, the algorithm user and the algorithm itself assume two distinct roles in the process of intention expression: the intention is still formed by the algorithm user, while the algorithm is responsible for representing the user's intention. If mistakes in the tool itself (whether due to programmers or bugs) lead to abnormal output results, there is actually no problem in the formation stage of intention. Therefore, the intention of the algorithm users should be presumed correct (or in line with the decisions of a generally rational person), and it is the algorithm that made mistakes in representing this intention externally. According to the monism theory, regardless of when the mistake arises, as long as the final output significantly deviates from what a rational person would predict, the user deploying the algorithm with abnormal outputs can claim to have a serious misunderstanding and is presumed to be in mistake. However, when applying dualism to analyze the mistake, since the legal effectiveness may differ depending on its occurrence timing, the court must

[17] See the case of *Chen Xueqiong v. Long Guiquan*, case number: (2023)01− 8037. In this case, after reviewing the buyer's calculation paper, the court confirmed that the final transaction price mistake was due to a calculation mistake rather than mistake in motivation. Consequently, the court deemed it a serious misunderstanding and revoked the contract.。

[18] See Feng Jieyu, *Constructing a Public-Private Law Coordinated System for Adjusting Individualized Pricing*, Chinese Journal of Law, Issue 6, pages 125-126. (2023)

initially trace back to when the mistake arose.

As it is meaningless to explore the algorithm users' real intention (since the users know nothing during the algorithm decision-making process), their intention should be inferred based on the algorithm's behavior: when abnormal output results are caused by faults within the algorithm itself (bugs or malfunctions), users are deemed to have made a mistake in expression, thus constituting the serious misunderstanding. However, if the abnormal results are caused by the third parties beforehand, such as inputting abnormal parameters, then users can only be presumed to have made a mistake during their intention forming process. Although the users did make a mistake, their expression corresponded to their intention. That is to say, under such condition, the users' mistake would be presumed to be a mistake in motivation, and they could not claim remedies. However, is this conclusion reasonable? After all, the conclusion drawn from the dualism analysis seems somewhat absurd: if the abnormal result is due to an algorithm malfunction, the algorithm user can claim serious misunderstanding and obtain remedies; but if the abnormal result is not due to an algorithm malfunction, the user cannot obtain remedies. Despite the user's subjective state being the same in both situations — remaining unaware of the transaction.

In addition, in the algorithm contract, the legal foundation of dualism is also shaken. Compared to the monism theory, the core argument of dualism is to maintain the security of transactions. According to dualists, although mistakes in motivation may significantly impact the interests of the expressing party, these mistakes only exist in the internal mind of the expressing party and do not constitute part of the expression of intention, making them undetectable by the counterparty. Therefore, from the perspective of risk distribution and fairness, forcing an unmistaken counterparty to bear the costs of a careless or irrational declarant's mistake would overprotect the declarant. [19] The underlying logic behind the dualism is clear: the declarant is blameworthy, as he/she indeed makes mistake. However, the counterparty is innocent. Since the party's mistake occurred in his/her internal mind, the counterparty cannot perceive the and he/she trusts on the mistake party. Therefore, it is extremely unfair to force the kind-hearted and honest counterparty to bear the consequence of the mistake.

Such logic might be persuasive in the traditional contract, but it fails in the context of algorithmic contracts: the algorithm user (as the declarant) does not possess any mistake or irrational subjective states when the algorithm makes decisions, and the algorithm user (as the counterparty) does not have trust in the declarant's decision-making. When both parties are completely unaware of the transaction, any reliance they have is at most placed on the algorithms they have deployed. Therefore, examining at what stage the mistake occurred, that is, applying the dualism analysis method, has lost its original function of risk distribution or interest balancing in algorithmic contracts.

The Possible Answer: the Adoption of Monism

Considering the incompatibility of dualism with algorithmic contracts, this article posits that monism might be the answer in mistake identification in algorithmic contracts. When adopting the monism, users can claim serious misunderstanding as long as the abnormal outputs results are far beyond the prediction of a rational person, regardless of how such outputs occurred. As

[19] See supra note 15, p163.

for the reason to abandon dualism, it is not because (as some scholars have said) it is difficult to identify the specific stage of mistake occurrence in algorithmic contracts, but because there is no need to do that.[20] For both parties who use algorithms to make transactions, no matter the types of the mistake, their subjective states and awareness of the transaction are the same: users themselves are not malicious, nor are they aware of the details of transaction. Clarifying this point is necessary, as it reveals the substantive difference between transactions deployed by human and algorithms. In the former one, the judges can attribute liabilities (or risks) between the parties by exploring the subjective state of the mistaken party as well as the counterparty at the time of mistake occurrence. However, in the latter transactions, as transactions are completely decided by the algorithm, it is only possible to presume that a mistake occurred (based on the abnormal output results), but it is impossible to presume that the user of this algorithm is aware of the mistake or even plays a positive role in the mistake occurrence, or say, the user is malicious.

Additionally, from the perspective of liability allocation, if the party with a mistake in motivation can also claim a serious misunderstanding, the risk of algorithmic mistakes is actually distributed relatively evenly among three parties: the mistaken party does not suffer huge losses; the counterparty party cannot reap huge benefits; the party causing the mistake, its ultimate compensation scope is limited to the contractual fault liability. The amount is equivalent to that the mistaken party needs to compensate the counterparty for the loss of reliance interest caused by the failure of the contract, far less than the significant losses after fulfilling the transaction. According to such arrangement, generally there will not be extreme consequences that intuitively violate contract justice and appear grossly unfair.

Conclusion

The article examines how traditional mistake law rules apply to automated algorithm contracts. Since considering the subjective state (good faith or bad faith) of algorithm users is no longer meaningful in the context of algorithmic automated decision-making, the rule of unilateral mistake essentially loses its applicability under Singapore common law. The appropriate answer to this issue provided by the *Chinese Civil Code* might be adopting a monistic approach to mistake identification: as long as the algorithm output significantly exceeds the expectation range of a rational person, the algorithm user can claim contract revocation based on a serious misunderstanding, without considering the abnormal result is directly caused by algorithm code bug, or indirectly caused by a motive mistake triggered by a third party.

[20] See Wang huiling: *The Remedies for Pricing Mistakes of Online Retailers*, People's Judiciary, Issue13, p88, (2023). According to the author, due to the difficulty in distinguishing the specific stage of mistake occurrence in the context of electronic expressions of intent, mistakes should be uniformly considered. That is, as long as there is a pricing mistake, it should be deemed that the algorithm user has made a serious misunderstanding and has the right to revocate the contract.
However, for deterministic algorithms, it is not difficult to ascertain at which stage the mistake occurred. Generally, based on abnormal output results, by reviewing the source code, professionals can determine whether the abnormal result is caused by a coding error by the programmer, a bug in the program itself, or other factors.

Navigating the Intersectionality of LGBT Rights: Perspectives from Gender, Race, and Socioeconomic Status in India

Ishan Atrey*

Introduction

LGBTQ people are referred to as SOGI because they are in social categories determined by their regional and international classification of sexual orientation and gender identity. Although sodomy laws have been Null and void in India whenever an attempt has been made to decriminalise consensual same-sex relations, the community has always faced discrimination. Socio-legal perspective historical laws including Sec: 36-A of KPA 'Karnataka Police Act', 1963 and the CTA 'Criminal Tribes Act', 1871 have always demonised eunuchs and Hijras. This discrimination continues to be manifested in ways that are easily identifiable by the public, however, mistreatment in other sectors such as the prison is relatively hidden[1]. Detention centres which traditionally ridicule or deny human rights to detainees tend to further compound the risks for prisoners especially those in the sexual minority group. However, the Prisons Act still follows binary-solicitation procedures and regressive practices that are even painful for transgenders. For instance, concerning the physical searches required by the Act that the 2016 Model Prison Manual outlines, an absence of additional provisions for sexual minorities fosters the risk of exploitation based on perceived sex characteristics. Following the passage of the prison reform, superintendents and medical officers of the prison had to make sure that prisoners were treated humanely. Policy measures and consciousness need to be adopted to address and safeguard the rights and worth of participants that are transgenders because the current processes lead to infringing on their constitutional rights within Art: 14, 15, and 21 of the Constitution. The state must propose policies and practices within prisons in reference of the NALSA judgment and any other constitutional provision that seeks to protect the rights of sexual minorities[2].

The study provides how gender, socioeconomic status and race affect young Transgender's understanding of their rights and experiences of discrimination in India. This study will be conducted using mixed methods research design with qualitative interviews and a quantitative survey being done together. It seeks to explore the challenges and opportunities experienced by these individuals, especially on issues regarding health care, education, employment opportunities, etc. This research will help us gain more insights into some of the already mentioned nuances which help us develop better approaches towards promoting Trans rights in India. Even though Art: 14 of the Constitution guarantees equality before the law, the LGBTQ community continues to experience discrimination. It does not have the right to marry, adopt or inherit even after the decriminalization of homosexuality in 2018[3].

[1] Gursimran k. Bakshi, 'Identities Denied: The Double Marginality of Trans Persons in Indian Prisons' (The Wire, 2 October 2021) <https://thewire.in/lgbtqia/identities-denied-the-double-marginality-of-trans-persons-in-indian-prisons> accessed 27 May 2024

[2] Arijeet Ghosh and Sai Bourothu, 'Project 39A Equal Justice Equal Oppurtunity' (Criminal Law Blog Existing beyond constitutional rights: transgender persons in Indian prisons, 10 February 2021) <https://p39ablog.com/2021/02/existing-beyond-constitutional-rights-transgender-persons-in-indian-prisons/> accessed 23 May 2024

[3] Rights of LGBTQ in India and the Struggle for Societal Acceptance' (International Journal of Law Management & Humanities) <https://ijlmh.com/paper/rights-of-lgbtq-in-india-and-the-struggle-for-societal-acceptance/> accessed 17 May 2024

This often leads to social isolation in this community due to family rejection and is worsened by negative media images. LGBTQ rights have been advanced globally by social movements leading to the non-penalise of same-sex relationships and the legalization of marriage between homogenous partners in many countries today. Many countries have legalized same-sex marriage and decriminalized same-sex partnerships, marking significant advancements in the recent few decades in the recognition of LGBT rights. However, despite these advancements, there are still many barriers standing in the way of total equality, particularly for those who manage many marginalized identities within the LGBT community. As a theoretical framework, intersectionality recognizes that people encounter privilege and oppression in complex ways that are influenced by the intersections of many social identities, including class, gender, sexual orientation, and race[4].

The Social Reality: Discrimination and Stigma

In India, despite legal progressiveness, there is a common stigma against Transgenders. Numerous incidents result in prejudice and hostility among people due to societal attitudes and cultural traditions witnessed in the society therefore making them victims of social isolation, verbal insults, physical abuse and limited career or educational opportunities. Such rights as equal treatment before the law for homosexuals will go unrecognized thereby further denying them certain human rights enjoyed by heterosexuals. These range from overt violent crimes to subtle biases and exclusions reinforcing negative stereotypes and imbalances in society[5].

Violence and harassment are significant problems with gender identity hate crimes being common as well as homophobia that is not addressed by the police or other law enforcement agencies. Generally, violence rates are higher for the Trans community which results in fear circles around them thus limiting their chances of living openly. In addition to this physical abuse, there still exists systematic discrimination against housing facility access, employment opportunities education system inequalities healthcare services create more economic disparities between different sections of LGBT communities leaving gaps on how their health status should be handled. Legal protections that could help mitigate such challenges do not exist meaning that members of this community remain unprotected from bias and maltreatment[6].

Due to pervasive stigma and persecution, social isolation and stigmatization are major factors in feelings of guilt, loneliness, and internalized homophobia. Many people also experience mental health problems like despair, anxiety, and suicidality. November 20, Transgender Day of Remembrance, initiated in 1999 by activist Gwendolyn Ann Smith, honours those killed by transphobia, emphasizing the ongoing struggle for transgender rights and ending violence and discrimination[7].

[4] Associates AL&, 'The Evolution of LGBTQ+ Rights in India: A Journey towards Equality' (A.K. Legal & Associates, 6 June 2023) <https://aklegal.in/the-evolution-of-lgbtq-rights-in-india-a-journey-towards-equality/> accessed 17 May 2024

[5] B. S, 'LGBTQ RIGHTS IN INDIA- A COMPREHENSIVE ANALYSIS ' (2024) 12 International Journal of Creative Research Thoughts 485 <https://ijcrt.org/papers/IJCRT2401651.pdf>

[6] 'Love Is a Human Right' (Amnesty International) <https://www.amnesty.org/en/what-we-do/discrimination/lgbti-rights/> accessed 17 May 2024

[7] Bhaskar Choudhary and Karun Sanjaya, 'The Status of LGBT People in India: A Socio-Legal Examination' (2022) 3 Indian Journal of Law and Legal Research 3 <https://www.researchgate.net/publication/357687243_The_Status_of_LGBT_People_in_India_A_Socio-Legal_Examination>

What is Homosexuality

In legal terms, the term "homo" denotes "same," while "sexuality" refers to an individual's sexual orientation or behaviour. A homosexual individual is characterized by attraction to individuals of the same sex, encompassing both men attracted to other men and women attracted to other women. The acronym "LGBTQ" encompasses the categories of Lesbians, Gays, Bisexuals, Transgenders & Queers(*table 1.1*).

Lesbian/Gay	Relationship between same sex or gender identity.
Bisexual	Bisexuality include sexual feelings towards both males and females, as well as feelings of romantic interest with people of any sex or gender identity.
Transgenders	whose appearance and characteristics are perceived as gender-atypical and whose sense of their gender is different from the sex that they were assigned at birth
Queer	umbrella term for people who are not heterosexual, its an umbrella term for LGBT.

Table 1.1

But legally, homosexuality is defined as a type of sexual attraction to same-sex persons, not a disease; and prevailing myths foster prejudice and discrimination against the gay and lesbian population. Research has explored how people perceive homosexuality in the context of sociological, psychological, anthropological and religious research studies research finds that the more attitudes that view the origin of sexual orientation as chosen by a person, the less welcoming the society is to gays and lesbian people, and that attitudes that are more accepting of the natural-born identity of homosexuality are associated with higher acceptance of homosexuality[8].

History of LGBT Community

The history of homosexuality as well as gender ambiguity is chronicled across the world with ancient societies acknowledging and accepting these identities. While homosexuality has been treated with shame, stigma and marginalization for centuries, it has gained acceptance in recent years. In Asian culture, the Hijras play a vital role in showing a third-gender identity. The Kamasutra in Hinduism reveals that this Indian book was about sexual behaviour while it was spread all over the subcontinent.

India's culture thrives on its LGBT community which shapes it. It is thus important to embrace cultural changes which will still uphold our core values; an aspect that promotes respect and acceptance for all communities. Today the LGBT Community, which accounts for approximately

[8] 'Problems Encountered by LGBT Youth in India' The Times of India <https://timesofindia.indiatimes.com/readersblog/aashank-dwivedi/problems-encountered-by-lgbt-youth-in-india-44851/> accessed 17 May 2024

8% of the population, encourages diversity and tolerance among people. For instance, in Ancient India various forms of sex were allowed according to texts such as the Kamasutra or Rigveda which are inclusive indicating social acceptance at that time in Indian society. But such manifestations of medieval homophobia co-existed with some degree of toleration without serious marginalization either. Examples from the upper crust like Babur who founded the Mughal Dynasty and Khalji's son Mubarak also show historical gay relationships[9]. Sec: 377 of Code 'IPC', outlawed "unnatural" sexual activity due to laws influenced by Catholic views during the colonial era. Advocates for LGBTQ acceptance began to emerge; Shakuntala Devi's 1977 study serves as an example. Significant rulings resulting from legal disputes include the 2009 Delhi High Court decision invalidating Section 377 and the 2014 and 2018 Supreme Court decisions advancing LGBTQ rights. Later on the Apex Court's 2014 recognition of LGBT as the third gender, the Transgender Persons (Protection of Rights) Bill of 2019 and its 2020 amendments sought to safeguard transgender rights. Legal advancements notwithstanding, attitudes in society need to change to one of tolerance and respect for individuality. Laws establish the framework for equality, but true acceptance necessitates appreciating the intrinsic worth of every individual[10].

Personal Laws & LGBT Rights

Hinduism has differing views on same-sex relationships; nevertheless, certain writings do acknowledge that same-sex marriages are possible[11]. Islam, inspired by the Quran and the teachings of Muhammad, upholds the criminalization of homosexuality, mirroring Muhammad's contempt for both effeminate males and manly women[12]. Though it generally condemns, Christians cannot agree on what should be done about homosexuality. Although some adhere to Zoroastrianism, or Parsis, which fiercely opposes homosexuality, they support tolerance when it comes to the idea of "good thought, good word, and good deed"[13]. Buddhism allows consensual, loving, and harm-free sexual activity, including same-sex relationships[14], but Jainism forbids non-reproductive sexual practices, including homosexuality. Sikh temples are devoid of same-sex unions since Sikhism says nothing about them[15]. Every religion has a different position on homosexuality, which is shaped by its teachings, scriptures, and cultural perceptions.

Objectives

- To investigate the factors contributing to LGBTQ individuals, with a focus on discrimination and societal stigma.
- To examine the lacunas in the personal laws faced by LGBTQ individuals in India.

[9] 'A Brief History of LGBTQ+ in India – The CBS Post' <https://newsletter.sscbs.du.ac.in/a-brief-history-of-lgbtq-in-india/> accessed 17 May 2024

[10] Sankhyan A and Hussain SS, 'Rights Of LGBTQ In India and The Struggle for Societal Acceptance' (2022) 6 Journal of Positive School Psychology 9903 <https://journalppw.com/index.php/jpsp/article/view/5528> accessed 22 May 2024

[11] 'Stances of Faiths on LGBTQ+ Issues: Hinduism' (Human Rights Campaign) <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-hinduism> accessed 09 May 2024

[12] Jonathan AC Brown, 'Muslim Scholar on How Islam Really Views Homosexuality' (Variety, 30 June 2015) <https://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047/> accessed 12 May 2024

[13] Foundation EI, 'Welcome to Encyclopaedia Iranica' <https://iranicaonline.org> accessed 12 May 2024

[14] 'Buddhism and Sexual Orientation', , Wikipedia (2024) <https://en.wikipedia.org/w/index.php?title=Buddhism_and_sexual_orientation&oldid=1219028778> accessed 31 May 2024

[15] 'Same Sex Unions' (SikhNet, 2 March 2011) <http://www.sikhnet.com/news/same-sex-unions> accessed 16 May 2024

- To examine challenges faced by Transgenders.
- To propose recommendations for policymakers and support organizations to improve the overall well-being of LGBTQ+ individuals in India.

Statement of Problem

Transgender people still battle in their families, homes, and educational institutions to be accepted for who they are and to express their gender preferences, despite the fact that more Indian youngsters may be supportive of homosexuality and queer identities is not present. Moreover, despite such educational advancement, statutory development and contributions from various Judicial precedents, the position of Transgenders is not that much uplifted. While gay men are more accepted in metropolitan settings thanks to social media and business activities supporting LGBT rights, transgender people and lesbian women face more obstacles. Even if the experiences of urban LGBT people are being heard more widely thanks to a variety of channels, they only account for a small portion of the larger problems that the community faces. There is still a lot of discrimination against the LGBT population, especially against transgender people. Prejudices exacerbate issues like crime, unemployment, poverty, and access to healthcare by creating unfavourable opinions and impeding public acceptance. Such biases are a reflection of ignorance and immaturity.

Statutes & Judiciary

Judiciary v. LGBT Rights

⇒ Once in Indian history, Judicial review of Sec: 377 of the Code was examined in the case[16] of the *Naz Foundation*. Due to its violations of Articles 14 and 15, the Delhi High Court ruled Sect: 377 to be unconstitutional. Unfortunately, the 2013 case[17] of *Suresh Kumar* by the Apex Court impeded the rights of LGBTQ+ people by reintroducing the criminality of homosexuality. This setback was short-lived, however, since transgender rights in India saw a breakthrough in 2014 when the case[18] of the NALSA acknowledged LGBT as the third gender and required anti-discrimination laws and governmental protection, The Court further stated that psychological traits rather than biological characteristics should be the basis for gender identity.

⇒ The Puttaswamy verdict[19], which established the 'right to privacy' as a crucial component of fundamental rights, is a highly influential legal case. In the light of the 'right to life and liberty', as guaranteed by Art:21 of the Constitution of India, has been interpreted that privacy is an inalienable right, protecting their freedom to choose who they choose to be with. As so, this ruling in conjunction with the NALSA decision established the foundation for Section 377's subsequent legalization in 2018.

[16] Naz Foundation v Government of NCT Of Delhi [2009] High Court of Delhi 2009 (6) SCC 712, 6 Supreme Court Cases

[17] Suresh Kumar Koushal v Naz Foundation [2013] Supreme Court of India (2014) 1 SCC 1, 1 Supreme Court Cases

[18] NALSA v Union of India & Others [2013] High court of Delhi Writ Petition (civil) No. 604 of 2013, Supreme Court Cases

[19] Justice KS Puttaswamy(Retd.) v Union Of India [2019] Supreme Court of India 2019 (1) SCC 1, 1 Supreme Court Cases

⇒ Consensual same-sex relationships were decriminalized in India as a result of the historic decision. This ruling[20] marked the conclusion of several Public Interest Litigations that LGBTQ+ individuals had started to upheld Sec: 377's provisions regarding non-consensual activities involving children or animals but rejected the portion of the law that penalises consensual same-sex relationships. The Court recognized that everyone has the 'right to live in dignity, autonomy, and personal freedom without interference from any third person, regardless of their sexual orientation or identity as it is inconsistent to Art: 14, 15, and 19(1)(a) of Indian Constitution.

⇒ The Madras court's case[21] is significant since it includes transwomen under the definition of brides under the HMA 'Hindu Marriage Act' of 1955. This decision permits people to establish their gender identity and is consistent with the idea of self-acknowledgement brought up in the Third Gender case. This precedent supports inclusivity and improves marriage rights within the LGBTQ+ community by acknowledging transwomen's fundamental right to marry.

⇒ In the present case[22], Meenakshi's family put pressure on her as well as Madhu Bala, both were in a voluntary same-sex relationship since 2016. Same-sex intercourse is allowed, according to the Uttarakhand High Court, which made this decision after Madhu Bala filed a writ of habeas corpus petition. The court ruled that consenting same-sex relationships are a personal liberty that is unrestricted by law, emphasizing that individuals have the freedom to choose their partners and live together.

Judicial Interpretation of LGBT Rights:

The Supreme Court ruled on October 17, 2023, in the case[23] of *Supriyo Chakraborty*, the Apex Court ruled the following:

⇒ *Competency of Court*- On the part of the Union Government, it contended that the decision of the court on same-sex marriage encroaches into the powers of the legislative branch. Chief Justice D Y Chandrachud upheld the jurisdiction of judicial review while Justice Bhat cautioned against overstepping constitutional limits, noting the court cannot create a separate legal system for same-sex marriage without legislative authority despite its discriminatory impact.

⇒ *Is Marriage a Fundamental Right*- The court decided in a majority decision that marriage is not a fundamental right. Chief Justice Chandrachud emphasized that state legislatures can change marriage laws, stating that the Constitution does not specifically recognize it. Judges Bhat and Narasimha emphasized that marriage is a fundamental freedom rather than a legal entitlement.

⇒ *Do Queer Couple have Right to Marry*- The Supreme Court decided against allowing same-sex couples to legally marry in a 3:2 split ruling. Justices Bhat, Narasimha, and Hima Kohli comprised the majority, with Justices S.K. Kaul and DY Chandrachud supporting same-sex

[20] Navtej Singh Johar and others v Union of India [2018] Supreme Court of India AIR 2018 SUPREME COURT 4321, All India Reporter

[21] Arun Kumar v Inspector General of Registration, Tamil Nadu [2019] High Court of Tamil Nadu AIR 2019 MADRAS 265, All India Reporter

[22] Shukla S, 'Madhu Bala v. State of Uttarakhand and Others Habeas Corpus Petition No. 8 of 2020' (Law and Sexuality, 10 July 2020) <https://lawandsexuality.com/2020/07/10/madhu-bala-v-state-of-uttarakhand-and-others-habeas-corpus-petition-no-8-of-2020/> accessed 17 May 2024

[23] Supriyo @ Supriya Chakraborty & Anr v Union of India [2023] Supreme Court of India W.P.(C) No. 1011/2022

couples' rights. LGBTQ+ people have the fundamental right to form partnerships, select partners, cohabitate, and share a house, according to Justice Bhat. He put out a new set of rules for civil unions that included provisions for alimony, age restrictions, and other restrictions in addition to qualifying requirements and divorce procedures. The Chief Justice emphasized that any modifications to the law would be a breach of the separation of powers and stressed the necessity for a "workability model" within the current legal framework.

⇒ *Adoption Rights of Queer Couples*- The Central Adoption Resource Authority (CARA) Guidelines and the JJ Act 'Juvenile Justice (Care and Protection of Children)Act', 2015 provide the legal framework for adopting a child in India. The petitioners challenged Regulation 5(3) of the CARA Guidelines and Section 57(2) of the JJ Act, which restricts adoption eligibility to single people and married couples. In a divided verdict, the five-judge panel decided against permitting same-sex couples to adopt, emphasizing that marriage is expressly required by the JJ Act before adoption can take place. The decision highlights the need for legislative reforms to ensure equality in rights as well as opportunities for all prospective adoptive parents, without considering their sexual orientation or marital status.

⇒ *Right to Marriage to Transgender People*- In a historic ruling, the Indian Supreme Court ruled that, under the current legal system, a transgender person in a heterosexual relationship is legally permitted to marry. According to the Chief Justice's view, this entitlement is predicated on a concordant reading of the Transgender Persons Act and the existing legislation governing marriage. According to him, marriage relationships are defined by legal frameworks like the Special Marriage Act and other personal laws as those between a "man" and a "woman," a "husband" and a "wife," or a "bride" and a "bridegroom." Limiting these alliances would violate the Transgender Persons Act's prohibition on discriminating against transgender individuals.

⇒ *Whether Special Marriage Act Unconstitutional*- Citing the significance of the SMA 'Special Marriage Act' in contemporary India, Chief Justice Chandrachud issued a warning against its repeal. He contended that nullifying the SMA would return India to a caste system and religiously enforced matrimonial prohibitions. Justice Bhat said that since same-sex relationships were prohibited at the time the law was passed, the SMA was primarily intended to support interfaith weddings rather than same-sex unions. He underlined the context of the law and issued a warning against retroactively questioning its intent.

Overview of Transgender Protection Act 2019 [24]

- **Transgender-** a person who identifies as a gender opposite to the sex they were assigned at birth, but not limited to trans-men and trans-women, some experience surgery, hormone therapy, laser therapy, or some treatment similar to these. The term transgender however is inclusive of those marginalized from the binary of man and woman such as kinner, hijra, aravani; jogta, intersex people and genderqueer people.

- **Prohibit Discrimination-** No individual shall be refused service or subjected to unfair treatment in matters relating to education, employment, healthcare, access to and enjoyment of public goods, facilities, and opportunities, the right to movement, the right to reside, rent, or otherwise occupy property, the opportunity to hold public or private office, or access to

[24] The Transgender Persons (Protection Of Rights) Act, 2019

government or private establishments responsible for the care or custody of a transgender person[25].

- **Recognition & Identity-** Transgender identity is recognized by the Act, which enables applicants to apply to the Executive Magistrate for an identification certificate. This document attests to their transsexual status and allows them certain rights, such as the freedom to identify as they see fit. Gender identity surgery enables formal documentation and the certificate to be updated.

- **Medical Care-** In relation to transgender people, the relevant government is required to take certain actions, such as: setting up HIV zero-surveillance centres in compliance with National AIDS Control Organization guidelines; guaranteeing the availability of medical care, including hormone therapy and sex reassignment surgery; providing pre- and post-surgery counseling; creating a Health Manual based on the World Professional Association for Transgender Health's guidelines regarding sex reassignment surgery; updating medical education to include transgender health issues; guaranteeing transgender people's access to healthcare facilities; and incorporating medical costs, such as surgeries and therapies, within comprehensive insurance plans.

- **Council for Transgenders-** It shall be established by the Union Government through notification to carry out the duties and execute the authority as per the Act. The members include the Secretary to the Social Justice and Empowerment, Government of India; the Chairperson will be the Minister of Social Justice and Empowerment, Government of India; the Minister of State for Social Justice and Empowerment will be Vice-Chairperson; representatives from ministries as mentioned above; representatives from the NHRC (National Commission of human rights) and NCW (National Commission for Women); State Governments and Union territories representatives; also members of the transgender community; experts from NGO's or associations working for transgender community welfare; and the Joint Secretary to the Social Justice and Empowerment of Govt. of India shall be dealing with transgender will be Member Secretary. Non-ex officio Members shall serve a term of three years from their nomination date.

- **Penalties-**Anyone found guilty of any of the following acts will be punished with up to two years in prison and a fine: forcing a transgender person into forced or bonded labor, excluding government-mandated forced labor; refusing them access to public places; forcing them to leave their residence; abusing, harming, or endangering them.

Statistical Data

Trans Murder Monitoring data shows that between 2008 and 2021, 102 killings of transgender people were reported in India. In 2021, there were only 236 recorded crimes against transgender individuals, suggesting a significant underreporting of their offences and insufficient documenting of their lives and passing. Tragic events, such as Deepika Bonam's murder in 2022, demonstrate how vulnerable transgender people are to assault, which is frequently made worse

[25] Bhattacharya S, Ghosh D and Purkayastha B, '"Transgender Persons (Protection of Rights) Act" of India: An Analysis of Substantive Access to Rights of a Transgender Community' (2022) 14 Journal of Human Rights Practice 676

by structural problems[26]. The Transgender Act, 2019 enshrines the right to self-identification, which was granted to transgender individuals under the Indian Constitution by the historic NALSA verdict of 2014. However, there are procedural obstacles in the way of implementing these rights, making transgender lives and deaths inconspicuous in official statistics.

Although the official Census of India, which counts transgender people, reported 4.8 million in 2011, activists and experts believe this number is lower. Furthermore, a 2017 parliamentary research estimates that there are roughly 1.9 million eunuchs in India. According to the article, eunuchs are people who pursue a lifestyle that reflects their identity as something other than typical male or female gender norms. Only 15,504 identity cards have been granted by the National Portal for Transgender Persons based on self-perceived identity; over 3000 applications are still outstanding[27]. This suggests that only 3% of transgender people who are legally acknowledged have formal paperwork.

Data Analysis

A survey of 300 transgenders has been done from the Northern region of India to analyse the societal challenges faced by these people, out of 300 trans people, 283 have responded. Data was collected through the Google survey and Interviews. Around 19 % of respondents pointed out that one of the prominent factors violating the rights of transgender is illiteracy. After illiteracy, 17% stated that poverty also plays a significant role in the violation of the rights of Transgenders. Around 39% of the respondents stated that the social boycott from the family members is the prima facie reason why Transgenders feel neglected. 25%of the respondents responded that poverty, illiteracy and social boycotts are the factors that undermine their rights.

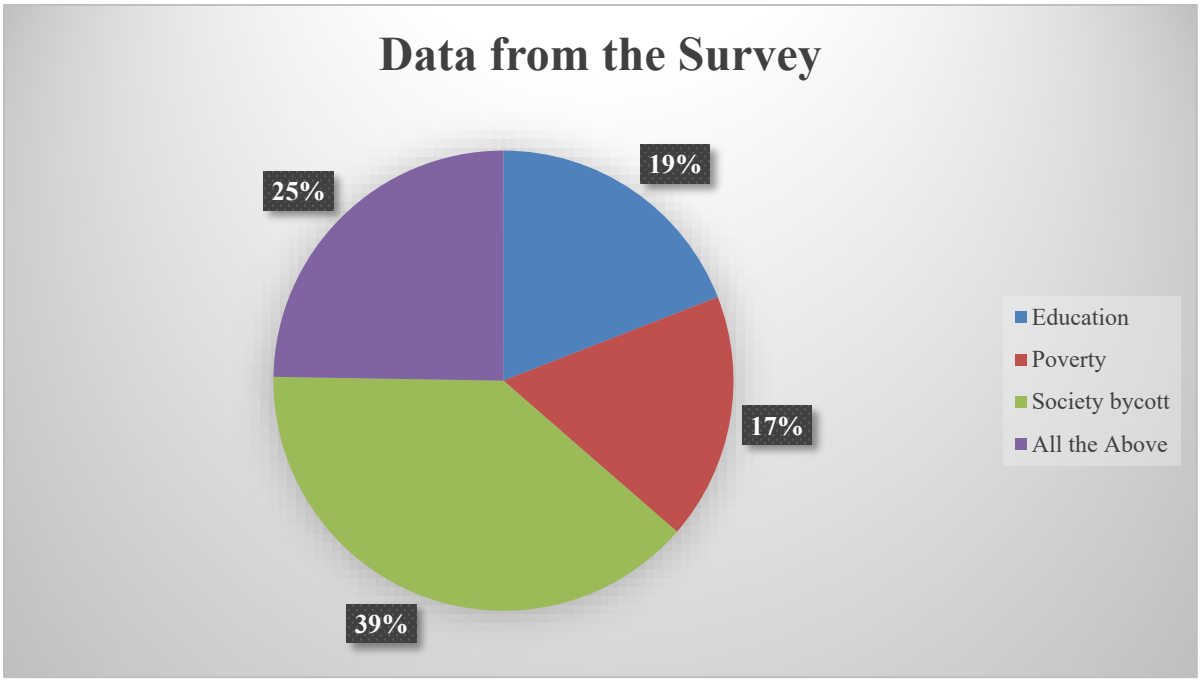

Fig1.1

[26] Pal S, 'Why Lives And Deaths Of Trans Persons Remain Underreported, Undocumented' (BehanBox, 20 November 2023) <https://behanbox.com/2023/11/20/why-lives-and-deaths-of-trans-persons-remain-underreported-undocumented/> accessed 17 May 2024

[27] Arvind A and others, 'Social Strain, Distress, and Gender Dysphoria among Transgender Women and Hijra in Vadodara, India' 23 International Journal of Transgender Health 149 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8986285/> accessed 14 May 2024

Suggestions

1. LGBT individuals are entitled to basic human rights just like heterosexuals since they are the social and biological outcome of genes and natural processes beyond their control. These individuals are entitled to rights and privileges as guaranteed by the Constitution and the DPSP (Directive Principles of State Policy). Denying constitutional rights to LGBT individuals is a breach of their birthright and injurious to their constitutionally protected interests. No person has a legal right to deprive anyone of their entitlements and benefits under these provisions.
2. To enhance the education ratio, the state should make reservations in government jobs for transgender persons. The marginalized LGBT community needs to get the same rights and opportunities as others in terms of education and employment since their sexual orientation or gender identity has placed them in a position in which society is not ready to accept them. Through this decision, transgenders would surely feel that they are not left out in anything granting them equal treatment as well as benefits.
3. In India there are. various communities who are not much uplifted due to social and educationally backwardness and for them government has set up various commission that contributes in every manner to uplift the backward community. The same provision can be made for the Trans Community also, as they are one who faced discrimination for thousands of years and still, they are facing
4. The right to live with dignity includes to live healthy. The state must ensure that quality, affordable, and gender-affirming comprehensive medical services, such as hormone therapy and gender reassignment surgery.
5. To protect the Trans community, parliament has enacted Transgender Protection Act, of 2019, so that they should have equality in education, employment and the right to reside. The duty lies upon the state to aware society of the rights and privileges given to trans people under this act. This awareness will improve the implementation of the provisions of this Act and also destigmatization, and social acceptance of the transgender community in India to address the deep-rooted societal biases and prejudices.

Conclusion

After examining the legal ramifications of homosexuality, including the challenges Trans people encounter and the judiciary's function, it is clear that the courts have played a major part in advancing LGBT people's equality. But merely ruling discriminatory clauses unlawful or making same-sex partnerships legal doesn't offer a complete answer. It is imperative to erase the societal prejudice towards homosexuality. The nation will progress when society accepts LGBT people without prejudice. Trans communities suffer from widespread rejection from society, which affects their mental health. Society must see homosexuality as a natural sexual inclination rather than a disease or a choice. As a result, just as acceptance of those attracted to the same sex should become commonplace, so too should the opposite sex. This necessitates a shift away from outdated stereotypes. Since they are not accepted in most cultural and social settings, most LGBT individuals experience complicated mental and physical well-being since they receive no support from family. This gives them loneliness and societal pressure making them suffer from depression, feel like committing suicide, and develop psychosomatic diseases. Quite, many are compelled to migrate with a view of fleeing from such pressures. On the one hand, even rather accepting families might come with certain expectations concerning certain modes of behaviour or clothing. Therefore, social media and other online forms exist to provide support for the custodians when they do not receive it from their families. Moreover, LGBT people should be

entitled to our Constitution's equal rights and dignity. Cultivate a system of job reservation, recognized entities of support commissions, access to trans-sensitive healthcare, and education about the Transgender Protection Act for social inclusion and identification. The survey with 283 responses, revealed key challenges that social boycott from the family is the most prominent factor that violates the rights of individuals after illiteracy and poverty. To protect the rights of Transgenders legislature had already made the statute, now it's the duty of the citizens of the nation to assist them where ever they want the assistance and make them feel that they are not only part citizen of this country but also part of our society.

The Legalisation of the Chinese Communist Party's Personnel Power in State-owned Enterprises

Mengyuan Hao*

Introduction

Given the significant role of State-Owned Enterprises (SOEs) at home and abroad,[1] effective control methods are crucial. Many governments use control of personnel power as the primary means of governing SOEs. This is because controlling SOE leaders can control the SOEs.[2] Specifically, SOE leaders can decide whether and how to react to state directives. They also can change internal personnel hierarchies and reallocate resources, shaping corporate structure. Therefore, if the government or the state decides the personnel arrangements of SOE leaders, then the management and activities of SOEs are in the hands of the government.

In the Chinese context, controlling personnel power is also an essential means for the Chinese Communist Party (CCP) to govern SOEs. The control of SOEs is of great significance to the ruling status of the CCP, given that SOEs are the economic and political foundation of the CCP.[3] To maintain its leadership, the CCP thus has many mechanisms to control SOEs, including state ownership,[4] personnel arrangement control, the decision-making process and intra-party supervision.[5] However, the most important is the personnel control mechanism, such as the Nomenklatura System and the principle of "two-way entry and cross-appointment". Because all the mechanisms of the CCP are run by people, control over these people determines the efficiency of the mechanisms' operation, which in turn affects the effectiveness of control over SOEs. Section II talks about the CCP's mechanisms of personnel authority in SOEs.

Recently, the mechanisms of CCP's personnel control over SOEs have given legal implications in the context of the Party-building reform. This reform requires that all SOEs provide Party Organisations[6] with legal status in corporate governance by writing relevant provisions into

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[1] State-owned companies make up about 25% of the businesses listed on the 2018 Fortune Global 500. In both developed and emerging nations with capitalist systems, SOEs are among the biggest businesses. Calculations by the authors using the Fortune 2018 Global 500 list. OECD, 'The Size and Sectoral Distribution of State-Owned Enterprises' (2017) <https://www.oecd.org/publications/the-size-and-sectoral-distribution-of-state-owned-enterprises-9789264280663-en.htm> accessed 1 April 2024. World Bank, *Corporate Governance of State-Owned Enterprises: A Toolkit* (Washington, DC: World Bank 2014).

[2] Wendy Leutert and Samantha A Vortherms, 'Personnel Power: Governing State-Owned Enterprises' (2021) 23 Cambridge University Press 419.

[3] Xiankun Jin and others, 'Political Governance in China's State-Owned Enterprises' (2022) 15 China Journal of Accounting Research 100236.

[4] The state ownership is the CCP's political foundation to SOEs. The state, under the CCP's leadership, gains control of SOEs through legal ownership.

[5] Xiankun Jin and others (n 3). P 2

[6] The Party Organisation is composed of all Party members in China, forming an Organisational System of the CCP. This system is divided into three levels from top to bottom, including the Central Organization of the Party, Party Local Organizations and Grassroots Party Organizations. SOEs' Party Organizations belong to the Grassroots Party Organization, the third level of the Party Organizational System. National People's

their corporate charters.[7] Accordingly, many mechanisms that the CCP used to control SOEs must be written into SOE charters, including the mechanisms of personnel control.[8] Therefore, the CCP's personnel power will be legalised if the SOE adopts the relevant personnel provisions. Section III discusses the detailed charter provisions of CCP's personnel power over SOEs.

However, adopting the provisions of CCP's personnel control over SOEs has not achieved the desired effect, although all SOEs have completed the amendment of incorporating the Party-building provisions into their corporate charters on the surface.[9] SOEs, especially those listed overseas, are less likely to adopt personnel provisions. The approval rate of minority and foreign shareholders on Party-building provisions is much lower than the overall rate, at 77.16% and 52.95 %, respectively.[10] Section III discusses the provisions of the CCP's personnel control mechanism and the proportion in which it is adopted.

The reasons why non-state shareholders resist the party's personnel clauses, or even the Party-building provisions, reflect SOEs' dilemma under the party-building reform[11] and mixed-ownership reform[12]. The plight of SOEs is caused by the contradiction between the more prominent political constraints—the strengthening of the Party's leadership over SOEs—and market freedom—the deepening process of marketisation. The Party-building reform is bundled with the mixed-ownership reform.[13] The latter aims to introduce private capital in SOEs to deepen marketisation. At the same time, the Party-building reform aims to strengthen the leadership of the CCP and counterbalance the impact of private capital on the state sectors.[14]

Representative Meeting, 'Constitution of the Communist Party of China ((中国共产党章程)' (*Communist Party of China Network*, 22 October 2022) <https://www.12371.cn/special/zggcdzc/zggcdzcqw/> accessed 18 March 2024. Central Committee of the Communist Party of China, 'Regulations on the Work of Grassroots Organizations of State-Owned Enterprises of the Communist Party of China (中共中央印发《中国共产党国有企业基层组织工作条例（试行)' (*Central People's Government of the People's Republic of China*, 30 December 2019) <https://www.gov.cn/zhengce/2020-01/05/content_5466687.htm> accessed 24 January 2024.

[7] the Central Committee of Communist Party of China and the State Council, 'Guiding Opinions of the Communist Party of China Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises(中共中央、国务院关于深化国有企业改革的指导意见)' <https://www.gov.cn/zhengce/2015-09/13/content_2930440.htm>.

[8] Lauren Yu-Hsin Lin and Curtis J Milhaupt, 'Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance' (2021) 50 The Journal of Legal Studies 187. P 188

[9] John Zhuang Liu and Angela Huyue Zhang, 'Ownership and Political Control: Evidence from Charter Amendments' (2019) 60 International Review of Law and Economics. Lauren Yu-Hsin Lin, 'Institutionalizing Political Influence in Business: Party-Building and Insider Control in Chinese State-Owned Enterprises' (2021) 45 Vermont Law Review.

[10] Lauren Yu-Hsin Lin (n 9) 444.

[11] the Central Committee of Communist Party of China and the State Council (n 7).

[12] State Council, 'State Council's Opinions on the Development of Mixed Ownership Economy by State-Owned Enterprises (国务院关于国有企业发展混合所有制经济的意见)' (2015) <https://www.gov.cn/zhengce/content/2015-09/24/content_10177.htm> accessed 8 January 2024.

[13] Lauren Yu-Hsin Lin (n 9).

[14] Lauren Yu-Hsin Lin (n 9). P 450 the Central Committee of Communist Party of China and the State Council (n 7). CCP (Chinese Communist Party) Central Committee, 'Several Opinions on Adhering to Party Leadership and Strengthening Party Building in Deepening the Reform of State-Owned Enterprises (中共中央办公厅印发《关于在深化国有企业改革中坚持党的领导加强党的建设的若干意见》)'

The CCP believes that strengthening its leadership is a necessary prerequisite for introducing private equity into SOEs.[15] Therefore, under Xi Jinping's administration, although the new round of reforms was announced to be market-oriented and improve the market competitiveness of SOEs, the CCP is trying to take back control of the state-owned economy and allow SOEs to continue to dominate important strategic industries.[16] Therefore, SOEs are caught between becoming more market-oriented and facing increased Party leadership and control over them.

As a result, external investors adopt a wait-and-see approach to party-building provisions, despite encouragement from authorities to invest in SOEs. Firstly, an unprecedented policy gives the ruling party a legitimate position in SOE corporate governance, which is not seen in any other modern corporate practice.[17] Therefore, foreign investors who are more familiar with the traditional corporate governance model are reluctant to support the ruling party's legal position in the corporate governance of SOEs. Secondly, personnel appointments are crucial to business operations. Legalising the CCP's personnel power into a clause will significantly affect the interests of small shareholders, especially foreign institutional shareholders who value corporate governance and profit maximisation. They are worried that companies will be forced to make decisions to please the political party and sacrifice firm profitability after adopting party-building provisions.[18] Thirdly, although non-state shareholders can vote against the Party-building provisions, their voting rights are restricted due to the state-owned shareholding position in SOEs.[19]

Given the complexity of the Party-building provisions, the article raises the question: Does the legalisation of CCP's personnel authority in SOEs hinder the attraction of private capital or China's market-oriented path?

The article argues that external resistance is temporary, and the legalisation of the Party personnel power reflects China's deepening market-oriented path rather than the regression of marketisation. Writing the CCP's personnel power mechanisms into charter provisions can increase the transparency of SOE personnel appointments, making such personnel power controlled by the CCP understandable and transparent to external entities. The increased transparency is conducive to attracting external shareholders and promoting enterprises to take the market-oriented path.

Therefore, this paper first illustrates the CCP's control mechanisms for personnel appointments in SOEs and how these mechanisms enable the CCP to control SOEs effectively. Secondly, this paper demonstrates the party-building policy, particularly the personnel appointment provisions and the relations between these provisions and the CCP's control mechanism of personnel power over SOEs. Additionally, this paper analyses the resistance of the Party's personnel authority's legalisation. Finally, section IV discusses the legal impact of such legalisation on the mixed-ownership reform and the Party's legal position in SOEs to enhance its

<https://www.gov.cn/zhengce/2015-09/20/content_2935714.htm> accessed 8 March 2024.

[15] Lauren Yu-Hsin Lin (n 9) 450.

[16] Hong Yu, 'Reform of State-Owned Enterprises in China: The Chinese Communist Party Strikes Back' (2019) 43 Asian Studies Review 332.

[17] Lauren Yu-Hsin Lin and Curtis J Milhaupt (n 8). P 188

[18] Lauren Yu-Hsin Lin (n 9) 457.

[19] Lauren Yu-Hsin Lin (n 9) 441.

leadership.

What are the CCP's Personnel Control Mechanisms over State-Owned Enterprises?

The CCP has the personnel authority of business leaders to control China's SOEs through many mechanisms.[20] These mechanisms apply to SOEs from the group company level to the subsidiaries or the listed SOEs. The following discusses the CPC's personnel control mechanisms over SOEs and how these mechanisms are applied to SOEs through the business group structure.[21]

The Nomenklatura System

The most important one is the *Nomenklatura System.* [22] This system enables the CCP to control Chinese society by controlling the selection and appointment of leaders in the most critical positions, such as government, industry, finance, and education.[23] Similarly, the leadership positions in the essential SOEs, which dominate in strategically important sectors, are also controlled by the CCP's Nomenklatura System. Precisely, the Central Organizational Department (COD)[24], one of the lists of the Nomenklatura System, controls the appointment, promotion and removal of leadership positions[25] at the 49 Core Central SOEs,[26] which are strategically important sectors, such as electricity generation, nuclear power, oil and gas, etc.[27] Furthermore, regarding ownership, the personnel appointment power of SOE shareholders is overshadowed by the CCP's Nomenklatura System.[28] As SOEs' controlling shareholder, the State-owned Assets Supervision and Administration Commission of the State Council (SASAC)[29]

[20] Xiankun Jin and others (n 3).

[21] Li-Wen Lin and Curtis J Milhaupt, 'We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China' (2013) 40 Revista chilena de derecho 801.

[22] The classic definition of *Nomenklatura* is "a list containing those leading officials directly appointed by the Party as well as those officials about whom recommendations for appointment, release or transfer may be made by other bodies, but which require the Party's approval." Kjeld Erik Brødsgaard, *Hainan-State, Society, and Business in a Chinese Province* (Routledge 2008). Bohdan Harasymiw, 'Nomenklatura: The Soviet Communist Party's Leadership Recruitment System' (1969) 2 Canadian Journal of Political Science/Revue canadienne de science politique 493.

[23] Kjeld Erik Brødsgaard, 'Politics and Business Group Formation in China: The Party in Control?', *Critical Readings on the Communist Party of China*, vol 4 (Brill 2017). Chen Li, 'Holding "China Inc." Together: The CCP and The Rise of China's Yangqi' (2016) 228 The China Quarterly 927.

[24] The nomenklatura list comprises two lists. One of these is handled solely by the Central Organizational Department (COD) at the Party centre, and the other involves management by other state and Party organs. The Party Centre mainly focuses on the former list but also has the authority to exercise veto power over the latter. Moreover, the nomenklatura system includes lists of personnel recommended for future appointments.

[25] The leadership positions in the 49 Core Central SOEs include Party committee secretary, general manager or president, and board of directors chairman if one exists. Chen Li (n 23).

[26] The Chinese SOEs can be classified into 96 Central SOEs governed by the government and Local SOEs governed by various local governments according to the government administrative level. Additionally, at the central government level, the 96 Central SOEs can be categorised into 49 Core Central SOEs and 47 Non-core Central SOEs based on the strategic importance of different industries. 'The Latest List of 96 Central Enterprises (96家央企最新名单)' *So Hu* (11 September 2019) <https://www.sohu.com/a/340492975_99901684> accessed 24 November 2023.

[27] The strategically important industrial sectors of 49 Core Central SOEs include electricity generation, nuclear power, oil and gas, chemicals, iron and steel, machinery, metals, aviation, aerospace, electronics, telecommunications, automobiles, shipping and shipbuilding, transportation and logistics, construction material, food and foodstuff, and weapons. Kjeld Erik Brødsgaard (n 23). P 521

[28] Li-Wen Lin and Curtis J Milhaupt (n 21).

[29] Li-Wen Lin and Curtis J Milhaupt (n 21).

cannot fully exercise its personnel appointment right. Still, the COD ultimately controls SOEs' top leadership positions.

Regarding the appointment of top executives in SOEs, the Nomenklatura plays a vital role despite the existence of the SASAC on behalf of state shareholders of SOEs. More specifically, for the 49 Core Central SOEs, the COD has the authority to appoint and evaluate the top managers, including the board chairman, CEOs, and the secretary of the Party Committee. SASAC only assists the COD in managing these positions. [30] The 49 Core Central SOEs' deputy positions are appointed by the Party Building Bureau of SASAC, the Party's Organization department within SASAC.[31] Additionally, this appointment process is assisted by the First Bureau for the Administration of Corporate Executives, which is a separate division of SASAC. Finally, regarding the remaining Central SOEs, their top executives' appointments and evaluations are made by the Second Bureau for the Administration of Corporate Executives, which is another division of SASAC.[32] Figure 1 shows the personnel authority of CCP in SOEs based on the Nomenklatura System.

Figure 1: the Authority of Appointment of Top Executives within Central SOEs

Types of Central SOEs	Executives' Positions	Status	Appointment Process	The Body Having Decision Rights of Appointment
49 Core Central SOEs	• Chairman of the board of directors. • CEOs. • The secretary of the Party Committee.	• Core Leadership • Top executives	• COD has the appointment power. • SASAC: Assisting COD to appointment.	• COD (the Party)
	• Deputy general manager • Group vice-president	• Deputy Positions	• the Party Building Bureau of SASAC has the power of appointment. • The First Bureau assists the appointment process for the	• The Party Building Bureau (the Party)

[30] Chen Li (n 23).

[31] *China State-Owned Assets Supervision and Administration Yearbook: 2004 (中国国有资产监督管理年鉴: 2004)* (China Economic Press\ 2004) <https://books.google.co.uk/books?id=uas6wgEACAAJ>.

[32] Agency Services Administration, 'Main Functions and Responsibilities of SASAC (国资委主要职能)' (*State-owned Assets Supervision and Administration Commission Network*, 18 July 2013) <http://www.sasac.gov.cn/n1180/n15066072/n15434910/n15434925/15435337.html> accessed 26 March 2024.

Figure 1: the Authority of Appointment of Top Executives within Central SOEs

Types of Central SOEs	Executives' Positions	Status	Appointment Process	The Body Having Decision Rights of Appointment
			Administration of Corporate Executives of SASAC	
Other Central SOEs	• Chairman of the board of directors. • CEOs. The secretary of the Party Committee.	• Core Leadership • Top executives	• the Second Bureau for the Administration of Corporate Executives of SASAC	• the SASAC (Government)

Two-way Entry and Cross-appointment

An instrument of control associated with the nomenklatura system is the so-called "two-way entry and cross-appointment". Party committee members serve as directors or supervisors, participating in corporate decision-making.[33] For example, the board's chairman and the Party committee's secretary are held by the same individual.[34] This principle ensures that SOEs' operation is aligned with political objectives.

According to the Regulations on the Work of Party Groups of the Communist Party of China[35], Article 14 stipulates that the Party Group secretary of an SOE shall be determined according to the internal governance structure of the enterprise. The chairman shall generally serve as the Party Group Secretary if a board of directors is established.[36] Suppose a board of directors needs to be established. In that case, the general manager shall generally serve that.[37] Party member leaders who join the board of directors, board of supervisors, and managers and leaders of the discipline inspection and supervision team (leaders of the discipline inspection and supervision team assigned to the company) serve as other members of the party group,

[33] Xiankun Jin and others (n 3).

[34] The principle of "bidirectional entry and cross-appointment" includes the following. Firstly, the head of the board and the Party committee secretary are held by the same individual. In addition, the enterprise Party committee must include seats for the general manager, the supervisory board chairman, and the head of the discipline inspection team, the secretary of the discipline inspection office. Finally, the Party Committee should additionally include one or two additional managerial deputies, such as the head accountant. Central Committee of the CCP, 'Opinion about Upholding Party Leadership and Strengthening Party-Building While Deepening Reform of SOEs (中共中央办公厅印发《关于在深化国有企业改革中坚持党的领导加强党的建设的若干意见)' (2015) <https://www.gov.cn/zhengce/2015-09/20/content_2935714.htm> accessed 30 March 2024.

[35] Central Committee of the Communist Party of China, 'Regulations on the Work of Party Groups of the Communist Party of China (中国共产党党组工作条例)' (*Central People's Government of the People's Republic of China*, June 2015) <https://www.gov.cn/zhengce/2019-04/15/content_5383062.htm> accessed 24 January 2024.

[36] Central Committee of the Communist Party of China (n 35).

[37] Central Committee of the Communist Party of China (n 35).

according to work needs.[38]

Additionally, "Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening the Reform of State-owned Enterprises"[39], issued in August 2015, further cleared the Two-way entry and cross-appointment leadership system in SOEs. This opinion ensured that qualified members of the leadership team of party organisations could enter the board of directors, supervisors, and managers through legal procedures.[40] Qualified party members among the board of directors, board of supervisors, and management members can join the leadership team of the party organisation according to relevant regulations and procedures.[41] Members of the management team and members of the leadership team of the party organisation have moderately cross-term positions.[42] In principle, the chairman of the board and the general manager are separated. One person generally holds the secretary and chairman of the party organisation.

Therefore, it is not that one person takes one position, but an individual holds one or more top executive positions simultaneously.[43] There are four possible types of joint appointments combining the top three executive positions: general manager–Party secretary, board chairman–Party secretary, general manager–board chairman, and general manager–Party secretary–board chairman.

SOE: the Business Group Structure

The business group form of SOEs facilitates the CCP's control over SOEs through the personnel power of core group companies. Each large SOE is organised into a business group, including a core group company, called a holding company, and any other subsidiaries below the group company.[44] The core group company controls its subsidiaries through equity ownership and group chart. Every core group company's leading group is in the hands of CCP. Thus, the CCP can control the SOEs through its personnel authority over the holding company.[45] As some Chinese commentators note, 'The state can control the nationally important industries and key areas to lead the economy simply by grasping a few hundred large state-owned holding companies or business groups.'[46]

CCP's Personnel Control Provisions in SOE Charter

The above CCP's mechanisms to control personnel power in SOEs are discussed in the context of political governance. Still, the current Party-building reform since 2013 has given legal access to such personnel authority in corporate governance. To strengthen the Party's leadership over

[38] Central Committee of the Communist Party of China (n 35).
[39] the Central Committee of Communist Party of China and the State Council (n 7).
[40] the Central Committee of Communist Party of China and the State Council (n 7).
[41] the Central Committee of Communist Party of China and the State Council (n 7).
[42] the Central Committee of Communist Party of China and the State Council (n 7).
[43] Wendy Leutert, 'Firm Control. Governing the State-Owned Economy Under Xi Jinping' (2018) 2018 China Perspectives 27.
[44] Li-Wen Lin and Curtis J Milhaupt (n 21).
[45] Li-Wen Lin and Curtis J Milhaupt (n 21).
[46] Zheng Haihang, Qi Yudong, and Wu Dongmei, 'Management of State-Owned Assets and State Controlled Companies(国有资产管理体制与国有控股公司研究)' [2010] Economic Management Press(经济管理出版社).

SOEs in China, the party-building reform requires all of them to amend their corporate charters to give the Party Organisation a legal status in the corporate governance of SOEs.[47] A template of corporate charter amendments was thus currently published by the SASAC.[48] This template outlines two main mechanisms through which the CCP exerts decisive influence over SOEs, including the ex-ante procedure by Party Organisation[49] and the mechanism of personnel control.[50]

The CCP's personnel authority in the corporate charter amendment includes the following provisions. Firstly, the CCP has the power to nominate directors and managers, which is the Nomenklatura System. The provisions regulate the leadership structure, personnel composition, and funding sources of the party organisations in SOEs.

Secondly, there is a dual appointment system, where top executives serve both in the firm and as representatives in the party committee, known as Two-way Entry and Cross-appointment. This provision requires the cross-appointment of members in the Party Organisations and the board of directors.[51] The greater the degree of overlap in the membership of the two corporate organs, the less likely it is for them to make conflicting decisions and the stronger the rationale for the party organisation to participate in business decision-making under modern corporate law.[52]

Finally, the chairperson and party secretary roles are combined, with one individual holding both positions, called the one-shoulder provision. This provision requires that the leadership position of the two organs should be taken by the same person. This means that the Party secretary in the Party Organisation and the Board of Directors chairperson should be the same

[47] the Central Committee of Communist Party of China and the State Council (n 7). CCP (Chinese Communist Party) Central Committee (n 14). Christopher Chao-hung Chen, Re-Jin Guo, and Lauren Yu-Hsin Lin, 'The Effect of Political Influence on Corporate Valuation: Evidence from Party-Building Reform in China' (2023) 73 International Review of Law and Economics <https://www.sciencedirect.com/science/article/pii/S014481882200076X>.

[48] The template contains a series of purely symbolic to highly substantive provisions. For example, the symbolic provisions include following the constitution of the CCP, establishing an internal party committee and providing financial support for party activities. Additionally, the decision-making provisions and personnel authority provisions are more substantive. Lauren Yu-Hsin Lin and Curtis J Milhaupt (n 8). P 188

[49] The ex-ante procedure by the Party Organisation requires that the board of directors should consult the Party Organisation before making substantial decisions.

[50] To be more specific, the Party-building provisions can be divided into five categories: (1) the arrangement of Party Organisation in SOEs, such as its leadership position, its composition, and the working expenses; (2) the two-way entry and cross-appointment system; (3) the ex-ante procedure; (4) the rights and obligations of Party Organisations in SOEs, such as leading the ideological and political work, supervising the implementation of the Party's policies, and serving as a gatekeeper in personnel management; (5) the rights and obligations of the Commission for Discipline Inspection, such as enforcing Party discipline, supervising the exercise of power by cadres, coordinating anti-corruption work, and addressing violations of Party discipline. John Zhuang Liu and Angela Huyue Zhang (n 9). P 9 Xiankun Jin and others (n 3).

[51] COD of the CCP and d the Party Committee of the central SASAC, 'Notice of COD and SASAC of the State Council on the Requirement for Strongly Promoting the Writing of Party-Building Work of SOEs into the Enterprise Articles of Association(中共中央组织部国务院国资委党委关于扎实推动国有企业党建工作要求写入公司章程的通知）' <http://temp.pkulaw.cn:8117/chl/344554.html> accessed 17 November 2023.

[52] Lauren Yu-Hsin Lin (n 9) 455.

person.[53]

The adoption of the Party-building provisions shows a significant difference among SOEs, particularly the personnel provisions. All SOEs have amended their corporate charters to give the legal status of Party Organisations in corporate governance. However, only 59.4% of SOEs adopted two-way entry and cross-appointment provisions.[54]

Unveiling the Veil of the CCP's Personnel Power in SOEs Step-by-Step

Writing the Party's personnel control into the corporate charter in the form of provisions can increase the transparency of the Party's personnel control mechanisms. Although such transparency is limited at present, this reflects the CCP's willingness to improve its internal personnel control mechanisms, especially those over SOEs, in accordance with the law rather than relying solely on the Party's internal rules.

This is not to say that the Law, specifically the Company Law, is better than the Party's internal rules, but is adhering to modern corporate practice. Making the Party's internal rules into provisions stipulated in the corporate charter based on Company Law is more understandable to external entities, who are more familiar with the written legal rules than the undisclosed CCP's internal rules. At this point, legalising the Party's personnel arrangement rules into provisions can encourage non-state investors and other external entities to participate in SOEs' operations.

The Personnel Arrangement in SOEs

As members listed in the Nomenklatura System, SOE executives are selected, trained, disciplined and appointed by the COD, as mentioned in Section III.[55] The public only knows the results from the published documents and does not know the specific operations, which leaves great discretion for political interference and causes distrust from non-state shareholders.

However, the Party-building reform changes this situation. The personnel provisions have made the personnel arrangements of senior managers no longer utterly dependent on the CCP's control mechanisms. In contrast, market participation increases the transparency in personnel appointments under the reform. Specifically, the market-oriented selection of senior executives of state-owned enterprises has been tried since 2003 and further promoted since 2013, including the selection system, the market recruitment system and the professional manager system.[56] The selection system for SOE leaders to incorporate market mechanisms reflects the CCP's desire to combine personnel control mechanisms with the statutory role of the board of directors. Consequently, the party's personnel control mechanism is restricted by the personnel

[53] COD of the CCP and d the Party Committee of the central SASAC (n 51). 'Implement "One Shoulder" to Be a Good "Master", （落实"一肩挑" 当好"掌门人"）' (*People's Daily Online*, 27 June 2017) <http://dangjian.people.com.cn/n1/2017/0627/c117092-29364554.html> accessed 6 June 2024.

[54] Xiankun Jin and others (n 3).

[55] Shangkun Liang and others, 'Political Ranks, Incentives and Firm Performance' (2015) 3 China Journal of Accounting Studies 87. Li Chen, 'China's Central State Corporatism: The Party and the Governance of Centrally Controlled Businesses', *The Chinese Communist Party in Action* (Routledge 2019).

[56] The selection system since 2003 refers to executives who are selected from the labour market or through internal competitions for posts. The COD were responsible for such appointments. The final decisions were made by Party Organisations in SOEs. The market recruitment system since 2013 refers to managers retaining jobs as nonexecutive employees if they perform poorly. The professional manager's system since 2013 refers to that managers can be dismissed from their jobs for incompetence. Xiankun Jin and others (n 3).

provisions on the one hand, while more open and transparent mechanisms based on the market and law are increasingly intervening in the appointment process of senior executives of SOEs on the other hand.

A Clear Role of the Party Organisation in SOEs

The legal status of Party Organisations in SOEs' corporate governance is closely related to the personnel provisions. The corporate charter legalises the CCP's personnel authority, making the power of Party Organisations in SOEs clear.

Before the Party-building reform, the Party Organisations had long existed in SOEs but were almost invisible in the formal corporate governance system.[57] Little was known about their actual operations and influence on SOEs.

However, given the Party-building reform, Xi said it was necessary to clarify the legal status of Party Organisations in SOEs.[58] Specifically, SOEs must clarify Party Organisations' power, responsibilities, and working procedures in decision-making and supervision and define the boundaries between Party Organisations and other corporate governance bodies, including the board of directors, shareholders, and senior management.[59] Consequently, the distribution of personnel powers between the Party organisation and other corporate organs standardises the authority of the Party organisation and grants other groups the right to clearly know the scope of the Party's personnel appointment authority.

A Great Progress for the Relations Between the Party's Internal Rules and the Modern Company Law

The CCP directly controls not only the personnel arrangement but also, in some cases, the operations of SOEs, bypassing the legal governance structure consisting of the board of directors and management.[60] In addition, in China's SOEs, informal and non-legal Party rules operate secretly and prevail over legal rules.[61]

However, the party-building reform also allows company law to legalise some matters previously stipulated in the Party's internal rules and regulations. For example, the single-shoulder provision of evidence legitimises the practice of party organisations in SOEs. In fact,

[57] Curtis J Milhaupt and Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm' (2015) 103 Georgetown Law Journal. Curtis J. Milhaupt, *The Beijing Consensus?: How China Has Changed Western Ideas of Law and Economic Development* (Weitseng Chen ed, Cambridge University Press 2017).

[58] 'Xi Stresses CCP Leadership of State-Owned Enterprises (习近平在全国国有企业党的建设工作会议上强调坚持党对国企的领导不动摇）' *Xinhua News Agency* (11 October 2016) <http://www.xinhuanet.com//politics/2016-10/11/c_1119697415.htm> accessed 12 March 2024.

[59] Party Organisation of CCP and Party Committee and SASAC, 'Implementing Key Tasks and Spirit of the Party-Building Working Conference of SOEs (国企党建工作的30项重点任务)' (*Communist Party Member Website*, 31 October 2016) <https://wenda.12371.cn/liebiao.php?mod=viewthread&tid=576719> accessed 6 June 2024.

[60] 'Party Sets Course for next Decade' *China Daily* (16 November 2013) <https://www.chinadaily.com.cn/china/2013cpctps/2013-11/16/content_17109648.htm> accessed 23 May 2024.

[61] Jiangyu Wang, 'The Political Logic of Corporate Governance in China's State-Owned Enterprises' (2014) 47 Cornell Int'l LJ 631.

even if there is no personnel exchange between the two organs, the board of directors cannot make a decision that goes against the opinions of the party organisation. However, the single-shoulder provision with a legal basis does provide a more substantial justification for the party's participation in the management process in modern corporate practice, which ensures effective "policy-channelling" in SOEs.[62]

Conclusion

The Party's control mechanism over SOEs was stipulated in the Party's internal rules and regulations, which the public did not know until the Party building reform. At this time, the party-building reform has allowed the public to see the operation and process of these mechanisms of the CCP. Regarding the CCP's personnel power in SOEs, the personnel provisions in the Party-building reform also let the public know clearly about personnel appointments. The increased transparency will enhance external investors' understanding of the personnel appointment process of SOEs, thereby enhancing their investment confidence. Therefore, writing personnel mechanisms into provisions can help SOEs move towards marketisation and, at the same time, consolidate CCP's leadership over SOEs.

[62] Curtis J. Milhaupt and Mariana Pargendler, 'Related Party Transactions in State-Owned Enterprises: Tunnelling, Propping, and Policy Channeling' [2019] The Law and Finance of Related Party Transactions.

Theories of Consent and Their Application to Marriage

Kelsey Lee*

INTRODUCTION

While there is no one unified definition across the US, the general consensus by academics and lawmakers is that forced marriage is a "marriage without the consent of both parties." The natural next questions arise: what is consent? What is necessary to give valid consent? What makes consent authentic?

Consent, in its most basic conceptualization, is the expression of a person's freedom.[175] In his work on the concept of personhood, Frankfurt describes the "freedom of action" as the freedom to do what one wants to do, while the "freedom of will" is the freedom to want what one wants to want.[176] This distinction, while subtle, is critical in separating the outward performance of consent from the mental processes and emotional boundaries that affect our ability to 'want what we want.' As summarized by Miller and Wertheimer, consent and consent transactions serve the twin values of prioritizing the well-being and interests of consent-givers and maximizing the autonomy and self-determination of individuals.[177]

The focus on individual consent, while integral to our current understandings of ethics and legal theory, is surprisingly new in its popularity. According to Daniel Johnston, "In the earliest writings in the Western tradition, consent plays a limited role in shaping relations among individual persons, and when it does play a role it is often cast in a negative light."[178] In a societal model that emphasizes the collective, rather than the individual, as was the case for much of early Western history, the consent of individuals to actions was of far less importance than the will of the community. It is perhaps unsurprising then that consent of the spouses was not historically evaluated in great depth, as marriage served a larger communal purpose of bringing together different families and creating offspring.

However, the burgeoning of democracy and a growing emphasis on individualism throughout the last several centuries has shifted the discussion of choice-ethics from one of collective decision-making to one more focused on the autonomy of the person. Despite the growing emphasis on individual decision making, there is shockingly little discourse on the issue of consent in the field of marital law. We must therefore turn to theories of consent more broadly, namely in ethics and contracts, in an attempt to define what constitutes valid consent to marry.

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[175] *See generally* HM Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121 at 125 ("it must be the case that to consent is to exercise free will.")

[176] HG Frankfurt, 'Freedom of the Will and the Concept of a Person' 127.

[177] *See* FG Miller and A Wertheimer, 'Preface to a Theory of Contract Transactions: Beyond Valid Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 83.

[178] D Johnston, 'A History of Consent in Western Thought' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 35.

1. CONSENT IN ETHICS

The first and most predominant theory of consent in ethics is the concept of "permissive consent." Permissive consent is broadly understood as consent that serves as a waiver to an act that would otherwise be forbidden.[179] This understanding of consent is rooted in the ancient legal maxim of *volenti non fit injuris*, or 'to a willing person, it is not a wrong.' Under this theory, a person who knowingly and voluntarily assents to an action cannot then claim injury or moral repugnance at the result of the action. This form of consent "transforms an impermissible act into a permissible one."[180]

Permissive consent lines up with the "Gate Opener" model, as supported by Richard Healey and John Kleineg, whereby consent's main function is to "serve the power-holder's interest in having control over whether other people can act in certain ways."[181] The "lock-and-key" model described by Miller and Wertheimer also describes a permissive consent theory, whereby the consent provides the "key" to unlock the moral permissiveness of an action.[182] Whether described as a gate opening or unlocking key, permissive consent assumes the existence of an action by one party towards another, and deals specifically with the normative nature of that action based on the exchange of consent.

While permissive consent is the most widely-discussed theory in consent ethics, it does not neatly apply to all situations where consent is exchanged. Where permissive consent may morally *allow* an exchange between parties, there is another form of consent that *creates* an exchange that could not exist without the mutual giving of consent. Schaber distinguishes between permissive consent and this separate form of consent that is "used in the sense of agreeing to do something."[183] Manson broadly refers to this idea as "consent as agreement"[184] and O'Shea more concretely names it "originating consent."[185] Originating consent involves "introducing, altering and endorsing certain actions."[186]

This model is in line with Healey's "Relational model" where consent creates a mode of interaction between the parties. The Relational model "aims to make vivid the significance of how this control is realized—through the giving and receiving of consent."[187] Healey's theory corresponds with an understanding of autonomy rooted in the relationship between parties: relational autonomy. Relational autonomy aims at evaluating the complex influence of relationships on our decision-making processes.[188] Herring explains that relational autonomy is

[179] *See eg.* NC Manson, 'Permissive Consent: A Robust Reason-Changing Account' (2016) 173 Philosophical Studies 3317 at 3318; *see also* T O'Shea, 'Consent in History, Theory, and Practice' [2011] Essex Autonomy Project at 2.
[180] P Schaber, 'How Permissive Consent Works' (2020) 33 Wiley 117 at 118.
[181] R Healey, 'Consent, Interaction, and the Value of Shared Understanding' (2022) 28 Legal Theory 35 at 36; J Kleinig, 'The Nature of Consent' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 4 ("Consent can sometimes function like a proprietary gate that opens to allow another's access, access that would be impermissible absent the act of voluntarily opening the gate.")
[182] Miller and Wertheimer (n. 5) at 80.
[183] Schaber (n 7) at 118.
[184] NC Manson, 'Permissive Consent: A Robust Reason-Changing Account' (2016) 173 Philosophical Studies 3317 at 2.
[185] O'Shea (n 6).
[186] *Id*. at 2.
[187] Healey (n 8) at 37.
[188] *See* S Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements'

an understanding that autonomy does not mean being isolated or free of our social responsibilities, but instead to be in a network of relationships and responsibilities.[189] Thompson argues that relational autonomy is a particularly useful framework in which to understand consent in family relations, where she posits "it would be fair to ask if individuals ever make completely voluntary rational choices."[190]

With this understanding of permissive/Gate Opener v. originating/relational consent, how then do we determine when consent has been given? Several models propose how to make this determination. The mentalism view proscribes that an appropriate mental act is necessary and sufficient to create normative change in the character of an action.[191] Thereby the consent-giver, through a change in their mental state, permits an action, which is then made morally permissible. Manson elaborates on the mentalism view by describing the "completeness thesis", where a change in normative status "distinctive of consent— rendering another's actions morally permissible—is completed by an act within the consenter's mind."[192] With its focus on the mindset of the consent-giver, the mentalism view does not accept that every outward expression of acquiescence expresses legitimate consent.

An alternative to mentalism is the performative view, where the normative condition of an action is primarily changed through the consent-giver's outward expression of consent.[193] Manson identifies this view as a more "robust" interpretation of consent, whereby the will of the consent-giver is manifested through their instruction, such as in the giving of commands or direct requests.[194] O'Shea similarly describes consent as an "illocutionary act", requiring a communicative action to accomplish the goal of expressing the will of the consent-giver.[195] Kleinig and Dougherty likewise support a performative view of consent, and finds that consent requires an act of communication.[196] This view certainly makes the work of determining the giving of consent more straightforward, as we focus the assessment on the outward actions of the consent-giver. However, it runs the risk of dismissing a range of mental factors that can affect our outward performance of consent. As Hurd argues, "to equate consent only to observable acts leads to morally unacceptable results."[197]

Miller and Wertheimer expand on the performative view of consent with their "fair transaction model", which proscribes that a consent-receiver can morally proceed with an action if she has treated the consent-giver fairly and responded in a reasonable manner to the consent-giver's "token or expression of consent."[198] In ascertaining this expression of consent, they recommend

(2018) 45 at 11.
[189] *See* J Herring, 'Relational Autonomy and Family Law' in J Wallbank, S Choudhry and J Herring, *Rights Gender and Family Law* (Routledge-Cavendish 2010).
[190] Thompson (n 16) at 11.
[191] *See Hurd (n 2)*; *see also* L Alexander, 'The Moral Magic of Consent (II)' (1996) 2 Legal Theory 165.
[192] Manson (n 12) at 3323.
[193] ibid at 3325.
[194] ibid. at 3325-3330.
[195] O'Shea (n 6) at 30.
[196] *See* Kleinig (n 8) at 5 ("I argue for a view that consent is centrally and most appropriately a communicative act"); *see also* T Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43 Philosophy & Public Affairs 224 at 229.
[197] Hurd (n 2) at 136.
[198] Miller and Wertheimer (n 5) at 81.

a "behavioral view", whereby consent is assumed by a communicative act.[199]

Taking a step further, beyond simply determining if consent is given, how can we determine if that consent is authentic? Beauchamp discusses the need for authentic consent to arise from autonomous persons through autonomous action.[200] An autonomous person is one that has the capacity, as well as the liberty and agency to consent to actions independently.[201] Beauchamp contends that autonomous action requires "normal choosers who act 1) intentionally 2) with understanding, and 3) without controlling influence."[202]

O'Shea, similarly, finds that decisions are authentic if they "spring from authentic motivations, which are motivations properly integrated into our psyche in a way in which we are not alienated from them."[203] In determining these motivations, O'Shea argues for a holistic evaluation of the mental state of the consent-giver, including outside influences on her decision-making. In particular, he points out the effect that can be made by third parties in influencing the mental processes of the consent-giver. He emphasizes that the "context and relationship of the parties is essential" in determining if the influence of an outside party overrides the mental state of the consent-giver, so as to invalidate her consent.[204] This influence of outside factors will be discussed in greater detail in our discussion of consent to contract.

O'Shea's holistic model of authenticity assessment corresponds to a mentalism view supported by Hurd and Alexander, where me must enter into the mind of the consent-giver in order to determine the authenticity of consent.[205] Hurd argues that in order for consent to be legitimate, there must be a correlation between the mental state of the consent-giver and the actual actions of the consent-receiver, stating that "consent to another's act is to desire that he perform it."[206] Alexander expands on this argument of the relationship between mental desire and performed act, and argues that this disconnect may constitute a "false belief" that invalidates consent.[207] In this view, consent may indeed be given for *an* action, but it is not authentic if in reality it is not *the* action that was desired by the consent-giver. In this way, authenticity cannot simply be determined at the moment that consent is given, but must be evaluated throughout the parties' exchange.

The theories outlined above are instructive, but ultimately rooted in ethics, which informs, but is of course not synonymous with, legality. Indeed, much of the forgoing theories have been most frequently applied to the issue of "informed consent" in bioethics, which creates a useful, but imperfect, example of consent that we might apply to marriage. As Miller and Wertheimer note, the emphasis on the morally transformative impact of informed consent is quite unique to

[199] *Id*. at 84.
[200] *See* Beauchamp (n 10) at 61.
[201] *Id* (defining liberty as "the sense of independence from controlling influences" and agency as a "sense of intentional action"); *See also* infra Part 2: Capacity to Consent to Marriage.
[202] *Id*. at 65. *See also* infra Part 3: Conditions of Marital Consent.
[203] O'Shea (n 6) at 30.
[204] *Id*. at 28.
[205] *See* Hurd (n 2) at 125.
[206] *Id.* at 126.
[207] Alexander (n 19) at 167-168.

the world of medical ethics.[208]

We therefore turn to a more direct application of consent theory by looking at the theories of consent to contract. It is critical to note that any theories related to the freedom to contract must be tempered in our application of these concepts to marital law, as in reality the parties to a marriage are not free to negotiate their own terms.[209] Even with this distinction, an examination of the theories of consent to contract is instructive in the attempt to uncover the broader meaning of consent in marriage.

2. CONSENT IN CONTRACT

The consent theory of contracts, pioneered by Randy Barnett, has become a cornerstone of our understanding of contractual law. This theory defines consent as the "moral prerequisite to contractual obligation."[210] Barnett argues that contract enforcement is justified because the consent-giver has performed acts conveying the intention to create an "enforceable obligation by transferring alienable rights."[211] He contrasts this theory to will theory, which emphasizes the will of the parties in creating the contractual relationship. He contends that consent theory is a superior model, as it is "able to account for the normal objective-subjective relationship in contract law." [212]

From this theory, Barnett argues for an objective view of contracts, where consent must be manifested in order to invoke the institution of contract.[213] This objective analysis aligns with the performative view of consent, where the giving of consent requires an act of communication. While Barnett does acknowledge that the subjective mental state of the consent-giver is important, he argues that objectively manifested conduct "usually reflects subjective intent".[214] He ultimately concludes that "only a general reliance on the objectively ascertainable assertive conduct" will create a stable basis for contractual obligation.[215]

From the objective perspective of his consent theory, Barnett discusses the role of "default rules". These default rules create uniformity across contract law, and under consent theory are to be viewed in the same objective manner in which we view contracts themselves. By consenting to contract, parties are also consenting to be governed by the default contract rules, even if subjectively they were not aware of these rules. In this way, Barnett argues that there is a potential for a court to infer the manifestation of consent from a party's silence stating: "Silence in the face of default rules can constitute an indirect consent to courts using these default rules when a gap exists in the parties' expressions of consent."[216] Daniel Johnston likewise supports the imposition of default, or standardized, terms in contract relations as a way to guarantee efficiencies that "commonly result in increases in the extent to which social

[208] *See* Miller and Wertheimer (n 5) at 80.
[209] Spouses are of course able negotiate prenuptial agreements that will apply in the event of the dissolution of their marriage. However, I am speaking here of the actual marriage contract, which unchangeable document with the terms specified by the State.
[210] RE Barnett, 'A Consent Theory of Contract' (1986) 86 Columbia Law Review 269 at 297.
[211] *Id.* at 300.
[212] *Id.*
[213] *Id.* at 302 and 305.
[214] Barnett (n 38) at 304.
[215] *Id.* at 303.
[216] RE Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 Virginia Law Review 821 at 856-866.

relations are based on individual consent."[217]

Barnett's consent theory, and accompanying views on the application of default rules, ideally create a clear understanding of the creation of enforceable contractual relationships. As with the broader ethical model of performative consent, the consent theory of contracts does not require us to delve into the mind of the consent-giver, but rather to assess their assent via outwardly manifested actions. It also presupposes that default consent rules are known, or at least are knowable, to the parties, so that application of these default rules is legally justifiable.[218] The clarity and uniformity of Barnett's model has led to the consent theory becoming the most predominantly applied theory of contractual analysis by courts.[219]

However, despite its wide-spread acceptance, there are vocal detractors from the consent theory and its reliance on default rules. Opponents highlight the limitations of this objective model in assessing the validity of consent, particularly in the face of outward influences and power dynamics. Prevalent amongst these critics is Lawrence Kalevitch, who advocates for a will theory of contracts over a consent-based model.[220] Kalevitch argues that will theory helps us to better examine the validity of a party's consent by looking at their actual assent to the contract, rather than just their outward manifestations of consent.[221] Bix likewise rejects the wholesale assumption that parties' consent to the default terms of a contract if they are unknown at the time of signing, describing such a scenario in fact as "an absence of consent in the robust sense."[222]

Chunlin Leonhard provides an alternative framework for how we might perform a subjective evaluation of contract with his "totality of the circumstances" test.[223] Leonhard expands on Kalevitch's argument for a subjective view of consent to include not just the mental state of the consent-giver, but the influences manipulating that mental state.[224] He highlights the role of outside influences on the psyche of consent-givers, acknowledging the effect that obligations to family, friends, superiors, and various affiliated groups have on our subjective state[225] (what Frankfurt might describe as our ability to "want what we want to want." [226]) Leonard argues that courts will inevitably "use coercive power of the state to favor the more powerful party in an economic relationship"[227] and that the courts' current focus on consent theory will "often result in enforcing an agreement where there is no consent."[228] To combat this, he proposes that we look at the totality of the circumstances surrounding an individual's consent to assess their subjective position, as well as the conditions that influenced that consent to determine if those

[217] Johnston (n 4) at 42.
[218] *See* L Kalevitch, 'Gaps in Contracts: A Critique of Consent Theory' (1993) 54 Montana Law Review at 191.
[219] *See eg.* Alexander (n 19) at 71.
[220] *See* Kalevitch (n 46).
[221] *Id.* at 183.
[222] B Bix, 'Contracts' in FG Miller and A Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010) at 251.
[223] C Leonhard, 'The Unbearable Lightness of Consent in Contract Law' (2012) 63 Case Western Law Review 57.
[224] *Id.* at 62.
[225] *Id.* at 65.
[226] HG Frankfurt, 'Freedom of the Will and the Concept of a Person' 127 at 15.
[227] Leonhard (n 53) at 62.
[228] *Id.* at 79.

factors could potentially override the free will of the consent-giver.[229]

In order to appropriately evaluate the totality of circumstances surrounding the consent to contract, we must begin to acknowledge the various relationships that influence our sense of autonomy. Traditional notions of autonomy have prioritized the individual, where we assume that private actors make private decisions to maximize their own well-being. This model can be useful in evaluating exchanges where no relationship exists between the parties beyond the "simple exchange of goods"[230] but seems fundamentally unable to encapsulate the complicated social and interpersonal factors that influence our decisions more broadly. Feminist scholars, in particular, have emphasized the need to reject an "each man is an island" mentality and instead prioritize the interdependence of actors.[231] In the words of Allan Johnson, the cultural insistence that we as individuals are separate and autonomous is patriarchy's "Great Lie."[232]

To better understand how relationships influence our consent to enter agreements, we look to "relational contract theory", developed by Ian MacNeil, which recommends that we evaluate first the relationships of the parties to a contract before looking at the transaction itself.[233] MacNeil identifies several criteria that hallmark relational contracts including "commencement, duration, and termination; measurement and specificity; planning; sharing versus dividing benefits and burdens; interdependence, future co-operation, and solidarity; personal relations among, and numbers of, participants; and power."[234] It is neatly summarized by Eisenberg, who states that relational contract involves "not merely an exchange, but also a relationship, between the parties."[235]

Relational contract theory requires a broad assessment of personal, economic, and social influences on the parties of a contract. According to Macneil, relational contract theory is particularly useful in dealing with "presentiation", where a long-term contract deals with the future as if it were the present.[236] Unlike economic agreements where performance can be measured concretely and immediately, presentiation agreements require a far-sighted view of contracts, where the relationship between the parties will inevitably change and evolve through the exchange. Macneil contends that relational contract theory provides a useful framework for evaluating such contracts, [237] where consent theory can only focus on the moment of contract formation, rather than the ongoing consequences of the contractual relationship. Lecky applies this thinking to the contract of marriage, where "the letter of [the marriage contract's] obligations and exchanges cannot be set out completely at the beginning, or at least it is inefficient to attempt to do so, and the commitments made initially do not, except in a vague,

[229] *Id.* at 85-89.
[230] IR Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980) at 10.
[231] Herring (n 17).
[232] A Johnson, *Gender Knot* (Temple University Press 1997) at 30.
[233] IR Macneil, *Contracts: Exchange Transactions and Relations, Cases and Materials* (2001).
[234] IR Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus' (1981) 75 Northwestern University Law Review 1018 at 1025.
[235] MA Eisenberg, 'Relational Contracts' in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (Clarendon Press 1995) at 296.
[236] Macneil, *Contracts: Exchange Transactions and Relations, Cases and Materials* (n 65); *See also*, Thompson (n 16) at 16.
[237] *See generally* Macneil, *Contracts: Exchange Transactions and Relations, Cases and Materials* (n 65).

hortatory way, exhaust everything the parties expect to occur within the relationship."[238] Unlike a short-lived contract for an exchange of goods, marital contracts are by their nature intended to last 'until death do they part', making it perhaps the most extreme example of presentiation, whereby parties enter into one agreement that shall dictate their behavior to a set standard for life.

Relational contract theory, as the name suggests, is particularly suited to "relational contracts" such as marriage, which Cohen describes as a "relational contract that could appreciate a range of investments specific to the intimate relationship."[239] Lecky supports the view of marriage as a relational contract to be evaluated by relational contract theory, as marriage is an agreement that expands beyond economic interests to encompass "non-economic and emotional support".[240] He goes on to contend that the relational contract model better accounts for the incremental changes in obligations between parties that occur throughout a marriage.[241]

Sharon Thompson has expanded on relational contract theory to include an explicitly feminist lens of contract interpretation, which she calls "Feminist Relational Contract Theory" (FRCT).[242] FRCT patently rejects a gender-neutral view of contracts and argues for the recognition of the unequal and gendered structures of society when interpreting the validity of a contract. Thompson applies her theory to the concept of nuptial agreements in heteronormative marriages, where she argues that women often have significantly less socioeconomic standing, and therefore bargaining power, in the relationship.[243] From her perspective, FRCT presents a new understanding of the consent of parties to contract which "does not view choice as simply saying 'yes' or 'no' to bad agreements and argues instead that is possible to follow a third route: negotiation that is beneficial for both parties."[244]

Thompson proposes that in order to apply FRCT, courts must take a more expansive view of undue influences on parties when evaluating contractual agreements. She suggests that courts distinguish between "normal and abnormal pressure according to the experiences of individual couples."[245] FRCT represents the opposite end of the spectrum from the objective lens of consent theory, and instead argues that courts should take into account a wealth of subjective information about the relationship between the parties, outside influences, and social factors (namely patriarchy) when evaluating contracts. This theory is supported by Grossi, who argues that "objectivity is a mask for power and that aspects of our identity and social context influence our legal decision making and impact upon the ways in which we interpret legal facts and principles."[246] Compelled by this reasoning, Grossi argues for the application of a broader understanding of contextual factors in consent transactions, from sexual relations to contract negotiations.[247]

[238] R Leckey, 'Relational Contract and Other Models of Marriage' (2002) 40 Osgoode Hall Law Journal 1 at 8.
[239] L Cohen, 'Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life"' (1987) 16 The Journal of Legal Studies 267.
[240] Leckey (n 70) at 8.
[241] *Id* at 18.
[242] Thompson (n 16).
[243] *See generally id*.
[244] *Id.* at 22.
[245] *Id.* at 23.
[246] Grossi (n 51) at 263.
[247] *Id*.

3. APPLICATION TO MARITAL CONSENT

We turn to the question of what theories of consent are applied, or should be applied, to marital consent. Surprisingly little discourse has been dedicated to this question throughout the literature, and what does exist does little to clarify our fundamental understandings of marital consent. For example, while Miller and Wertheimer dedicate extensive review to a variety of social and legal scenarios in their expansive writing on consent transactions, they dedicate only a few short lines to the discussion of consent to marry, concluding simply "the standards of morally transformative consent [in marriage] are not particularly high."[248] This lack of discourse is perhaps best explained by Herring in his conclusion that "family law, at least until recently, has placed relatively little weight on the idea of autonomy and it is easy to see why."[249] As discussed in the previous chapter, marriage throughout history was primarily seen as a tool to integrate families and to build community relations, rather than to advance the happiness of individuals, particularly in the case of wives.[250] Not until the Victorian era's growing emphasis on romantic love did the autonomous will of spouses to consent to a marriage gain more importance in society. Even in the subsequent decades, few legal scholars have deeply examined how marital consent has evolved. This thesis must therefore 'start at the beginning' in its evaluation of marital consent.

As discussed above, under the traditional model of permissive consent, the consent-giver essentially "opens the door" for an action to occur that would otherwise violate their individual rights. It is possible to imagine applying this model to marital consent, whereby the consent-giving spouse, by virtue of assent, allows the marriage to take place at the behest of the consent-receiving spouse.

However, when one thinks critically about the institution of marriage, the permissive model does not provide an appropriate framework. As discussed, permissive consent presumes that an action will occur, and the normative and/or legal character of that action is changed by the giving of consent. It does not account for situations where consent is a necessary element for the action to exist at all, such as the mutual agreement to marriage contract. In this way, marriage more clearly resembles the "consent as agreement" model, corresponding to originating consent theory. Marriage also seems best suited to a view of consent under Healy's Relational model and the theory of relational autonomy, where consent of the spouses is based on a kaleidoscope of various influences between the parties and from outside factors, such as their family and social backgrounds.

These views of consent also better encapsulate marriage as an ongoing relationship, rather than a one-time exchange. When applied to marriage, the theory of permissive consent can only look at the moment of consent to marry, where one party "opens the gate" for marriage to legally occur. However, the instance of consent to marry is fleeting when compared to the duration of the entire marriage. Through a lens of permissive consent, we cannot look into the ultimate marital relationship to determine if the parties "got what they agreed to" in terms of their

[248] Miller and Wertheimer (n 5) at 91.
[249] Herring (n 17) at 259.
[250] *See supra* [History chapter].

satisfaction with the marriage, nor can we determine the will of the parties to remain married. In contrast, the originating/relational models would allow us to determine the consent of the parties not just at the moment of consent to marry, but throughout the relationship. As Grossi contends, "If we understand agreement as an ongoing and evolving concept then it is not only the relationship that is important but also the context, expectations and impact of the agreement."[251] As will be discussed in a later chapter, consent to remain in a marriage is an overlooked, but critical, concept that can best be understood through the lens of originating consent.[252]

In addition, while purely economic contracts may fit more aptly under a model of individual autonomy, whereby actors seeking to advance their private financial interests, it is argued that marriage seems more appropriately rooted in the relational autonomy model, as discussed in overview of relational theorists such as Lecky, Thompson, and Herring above. This view is supported by Fineman, who argues that unlike purely private arenas, "the family is contained within the larger society, and its contours are defined as an institution by law. Far from being separate and private, the family interacts with and is acted upon by other societal institutions."[253]

When we view consent to marry under the narrower perspective of contract law, we again see the limitations of the current legal system. As stated above, the predominant theory of contracts throughout US courts is Barnett's consent theory of contracts. As we will discuss in later chapters, this theory has indeed been applied in family courts in the interpretation of marriage contracts.[254] The consent theory calls for an objective view of the consent of parties to contract, what ethical theory describes as a performative lens, taking their outward manifestations of consent as a reflection of their subjective mental state of assent. Courts have broadly adopted this model as an interpretative method for evaluating the validity of a party's consent to contract, and correspondingly have imposed default rules on contracts to which the parties are assumed to have agreed to by virtue of their consent to contract.[255]

However, as critics of consent theory have made clear, this model fails to prioritize the myriad of influences that can lead a party to outwardly manifest consent, while lacking valid mental assent. Marriage in particular is a decision that is affected by a host of outside influences, including families, religion, social norms, and biological pressures such as parenthood. In addition, as noted by Thompson, marriages that include a dimension of gender disparity cannot be understood as stand-alone agreements; they must be viewed within the reality of systemic inequality that affects both the mental state of a female consent-giver in a marriage and indeed the patriarchal roots of the legal system itself.[256] In these cases, a mentalism view of consent, where we attempt to ascertain the true will of the consenting party beyond her outward manifestations to consent, would seem indispensable in determining the authenticity of consent to marry.

[251] Grossi (n 51) at 273.
[252] *See infra* [Withdrawal of Consent Chapter].
[253] M Fineman, *The Autonomy Myth* (New Press 2004) at xviii.
[254] *See infra* [Part 3].
[255] *See eg*. Barnett (n 38).
[256] *See* Thompson (n 16).

Consent theory's advocation for the application of default rules is also troublesome in relation to the marriage contract, as the parties of a marriage cannot create their own contract terms; they are bound by the specifics of the contract laid out by the State. Marriage, perhaps uniquely amongst all contracts is one of total adhesion, dictated by entirely mandatory terms, which are "not grounded on parties' shared preferences, but instead based on legislative or judicial judgement of fairness, policy, or efficiency".[257] Where a general contract of adhesion involves the drafting of terms by only one party that are not modifiable by the other,[258] a marriage contract is neither drafted nor modifiable by either of the parties that enter the contract. Instead, it is the State that determines the terms by which the parties must adhere. In this way, the State becomes an invisible quasi-party to the contract in a way that is not often well understood by the parties to be married.

Furthermore, unlike discrete economic contracts, marriage affects the status of the parties in a variety of matters that are likely unknown to them at the time of marital contract (for example medical rights, taxes, social benefits, etc.) In fact, an assessment by the US Government Accountability Office determined that there are over 1000 federal statutory provisions and benefits related to marital status.[259] Under the consent theory of contract, the parties are viewed as implicitly agreeing to be bound by the default rules applying to married parties, not just under family law, but in a host of other laws that treat a married person differently than a non-married person. Is it in fact reasonable that we assume the parties can comprehend the myriad of legal implications of marriage at the moment of signing? Consent theory says that as this information is hypothetically *knowable* by the parties, application of default legal rules to married parties is just, despite the actual knowledge of the parties at the time of consent.

Having established the superiority of originating and relational understandings of consent as applied to marriage, perhaps it now becomes evident why consent and marriage are such a fraught topic within US law. The current legal framework appears to be based firmly in a model of permissive consent, which fundamentally cannot encapsulate the relational aspects of a marital agreement. A stark example comes from the phenomenon of child marriage in the US, which will also be examined in a later chapter.[260] Most US states allow for the marriage of a minor under 18 with the consent of her parent.[261] Under a theory of originating consent, the law is illogical. It prevents an individual under the age of majority from independently providing the requisite consent to create the marital relationship. Under an originating consent theory, without the independent consent of the minor, the agreement itself cannot exist. State exceptions allowing for parental consent are instead rooted in a permissive model, whereby the marriage without the parent's consent would be invalid but is made valid by the parent's consent. We cannot evaluate the consent of the parties through a lens of originating/relational theory because the parent is a mere substituted consent-giver at the moment of agreement to marry, separate from the child who is still part of the marital relationship going forward.

Family courts throughout history have been reluctant to apply a subjective standard when determining the validity of marital consent and have instead clung fast to an objective standard

[257] Bix (n 52) at 261.
[258] *See generally Id.* at 254 (for discussion of contracts of adhesion.)
[259] U.S. General Accounting Office, 'Report on Marriage Rights' (1997).
[260] *See infra* [Child Marriage Chapter].
[261] *Id*.

in line with the consent theory of contract. This is understandable in one sense, as the role of courts is to try to apply the rule of law as justly and uniformly as possible. However, the adherence to the theories of permissive consent and objective interpretation of marital contracts has led to a matrimonial law system riddled with contradiction, confusion, and ultimately, injustice.